HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

NEWS LIMITED & ORS APPELLANTS

AND

SOUTH SYDNEY DISTRICT RUGBY LEAGUE
FOOTBALL CLUB LIMITED & ORS RESPONDENTS

News Limited v South Sydney District Rugby League Football Club Limited
[2003] HCA 45
13 August 2003
S34/2002

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Federal Court made on 6 July 2001 and, in lieu thereof, order that the appeal to that Court be dismissed.*

On appeal from the Federal Court of Australia

Representation:

A J Meagher SC with M J Leeming for the appellants (instructed by Allens Arthur Robinson)

D F Jackson QC with S A Glacken for the first respondent (instructed by Nicholas G Pappas & Company)

No appearance for the second to twentieth respondents

Intervener:

N J Young QC with M H O'Bryan intervening on behalf of the Australian Competition and Consumer Commission (instructed by Australian Government Solicitor)

CATCHWORDS

News Limited v South Sydney District Rugby League Football Club Limited

Trade practices – Exclusionary provisions – Merger of competing sporting competitions – Provision that no more than a certain number of teams participate in new competition – Whether provision included for purpose of preventing, restricting or limiting supply of goods or services to, or acquisition of goods or services from, particular persons or classes of persons – Test for determining purpose – *Trade Practices Act* 1974 (Cth), ss 4D, 45(2)(a)(i), 45(2)(b)(i).

Practice and procedure – Interveners – Whether intervener may advance on appeal argument not adopted by parties to appeal.

Words and phrases – "purpose", "particular persons or classes of persons", "preventing, restricting or limiting".

Trade Practices Act 1974 (Cth), ss 4D, 4F, 45(2)(a)(i), 45(2)(b)(i).

1 GLEESON CJ. This appeal concerns the operation of s 45(2) of the *Trade Practices Act* 1974 (Cth) ("the Act"), read in the light of s 4D, which defines an "exclusionary provision". The four members of the Federal Court who considered the case were evenly divided on the outcome[1]. The Australian Competition and Consumer Commission ("the ACCC"), intervening by leave, acknowledged that "[i]t may be that the application of s 4D to the somewhat unusual circumstances of this case produces an unexpected result". The ACCC put an argument about the construction of the Act which, it submitted, could avoid such a result. That argument was not embraced by the parties on either side of the appeal. However, the ACCC also made some submissions as to the proper approach to the Act which were within the scope of the issues as defined by the parties.

2 The facts are set out in the reasons for judgment of Callinan J. The litigation arises out of an agreement (to use a non-statutory term) made in 1997 between News Limited ("News") and Australian Rugby Football League Ltd ("ARL"). At the time of the agreement, News and ARL carried on competing businesses of conducting rugby league competitions. The reasons why conducting those sporting competitions was a business, and a very substantial business, are explained by Callinan J. It is unnecessary to expand upon them. It suffices to say that each business involved the supply and acquisition of valuable services. Each competition involved a certain number of clubs, which fielded teams. The activities of those clubs, in turn, involved commercial enterprises.

3 In 1997, there were 10 clubs participating in the News competition, and 12 clubs (including the first respondent ("Souths")) participating in the ARL competition. Like most sporting competitions, each of the competitions conducted by News and ARL respectively was, of its nature, exclusive, in the sense that it was not open to any club that wished to join in. Very few sporting competitions, especially those which aspire to excellence of performance, and which seek to attract large spectator interest, extensive media coverage, and commercial sponsorship, are open to all. Of its nature, a football competition can only be conducted between a limited number of participants. The 22 clubs which participated in the two competing News and ARL competitions in 1997 themselves represented only a small fraction of the rugby league clubs in Australia. The manner in which those 22 clubs came to participate in their respective competitions is not material. The point is that the organisation of each of those competitions involved a process which, by limiting the numbers of competitors, excluded other clubs. The competing businesses of News and ARL necessarily involved defining the nature and size of their respective competitions and, in that sense, and in consequence of that process of definition, selecting

---

1 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611; (2001) 111 FCR 456.

some, and excluding others, to or from whom services would be supplied or acquired.

4 On 19 December 1997, News and ARL entered into an understanding that they would merge their two competitions. For commercial reasons, each accepted the need for a united competition. What was involved, however, was more than a merger. They designed a new and different competition. It was to be national. It was envisaged (as occurred) that Melbourne would field a team for the first time. It needed to be smaller than the aggregate of the clubs in the two existing competitions. In particular, the number of Sydney teams had to be reduced.

5 The challenge to the legality of the 1997 understanding, and later agreements giving effect to it, was not based on s 45(2)(a)(ii) or s 45(2)(b)(ii) of the Act. It was not asserted that there was a contract, arrangement or understanding that had the purpose, or had or was likely to have the effect, of substantially lessening competition. It might have been thought that, in terms of competition law, the primary issue to be considered was whether the merger itself passed muster: it involved an agreement between two competing firms to cease their respective businesses and to create a new and different business which they (or related entities) would conduct jointly. If that involved a substantial lessening of competition in a market for goods or services then there would have been a contravention of s 45(2)(a)(ii) and s 45(2)(b)(ii). That was not alleged. Perhaps issues of market definition were thought to arise. Rugby league is only one form of sporting contest competing for the attention of the public. In fact, that is one of the reasons why the rivalry between the News and the ARL competitions was so damaging. Perhaps it was anticipated, as suggested in some of the evidence, that if there had been a continuation of the existing situation, before long the two rugby league competitions would have destroyed one another, and both would have gone out of existence.

6 The challenge was made on a narrower ground, based on s 45(2)(a)(i) and s 45(2)(b)(i). It was directed towards that aspect of the contract, arrangement or understanding that dealt with the number of clubs to participate in the new competition. Finn J, in the Federal Court, summarised the principal characteristics of the structure of the new competition as follows:

> "(a) a progression from no more than twenty, to no more than sixteen, to no more than fourteen teams in 1998, 1999 and 2000 respectively – the 1998 figure giving all of the by then continuing ARL and Super League clubs (two had already dropped out from the 1997 number) an equal opportunity to participate in the rationalisation process; (b) provision for the national character of the competition – this to be secured through the 8-6/6-8 split; (c) the positive incentives given for entering mergers and joint ventures; and (d) the priority order in the grant of franchises, this being merged clubs, regional clubs and 'stand alone' Sydney clubs."

7 The 8-6/6-8 split is a reference to the distribution of clubs in the competition between those based in Sydney and those based elsewhere. Finn J pointed out that the 8-6/6-8 split, and the 14 team limitation on team numbers for 2000, were defining characteristics of the new competition. The reference to "the grant of franchises" is to the choice of participating clubs.

8 Souths was a stand-alone Sydney club. It was ultimately excluded from the 2000 competition. That is what gave rise to the present litigation. There were elaborate criteria for inclusion or exclusion, but they are not presently material. It is not claimed in this appeal that they were discriminatory, or that they were misapplied. Souths challenged the 14 team limitation on the basis that it was an exclusionary provision, and therefore contravened s 45(2)(a)(i) and s 45(2)(b)(i), regardless of whether there was a substantial lessening of competition. An exclusionary provision is defined in s 4D of the Act as follows:

> "(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
>
> (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
>
> (b) the provision has the purpose of preventing, restricting or limiting:
>
> (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
>
> (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;
>
> by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.
>
> (2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or

> understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates."

9 The appeal was argued by the parties on the basis that, at the time of the 1997 understanding, News and ARL were in competition with each other in relation to the supply or acquisition of goods or services to which the 14 team term of the understanding related. That was disputed by the ACCC, but that dispute would have involved a widening of issues in a manner that was inappropriate, at this stage of the litigious process, at the instigation of an intervener.

10 The 14 team term, which was reflected in the written documents signed at various times, was described by Souths in its pleadings as follows:

> "In the 2000 season and thereafter the number of teams to participate in the NRL competition would be restricted to 14, with no more than eight and no fewer than six teams from Sydney."

11 It was not found, and is not suggested in this Court, that the purpose of the 14 team term was to exclude Souths, or any other particular club, from the competition in the 2000 season. Indeed, the process of merger, and the formation of joint ventures, intended to be fostered under the new arrangements, could have eliminated the need for active exclusion of any of the original 22 clubs. However, subject to that possibility, the consequence of the 14 team term was that no more than 14 clubs could compete in 2000, and, if more than 14 clubs wanted to compete, one or more would be excluded. So also, of course, would all the other rugby league clubs throughout Australia which, if they had wished, might have applied to join in the competition. As noted above, exclusivity is a necessary feature of such a competition, and unless, by coincidence or by force of other circumstances, the number of clubs wishing to compete was no greater than the number which those conducting the competition were willing to accept as participants, then exclusion was inevitable.

12 Finn J made the following point:

> "Clearly, at the time of the 19 December [1997] Understanding no club had any right to have its team participate in the new competition's 1998 season, though it was envisaged that all available clubs would be offered participation. Thereafter for the 1999 and 2000 seasons there was to be a selection process in which clubs could participate. No club was in December 1997 given, or intended to be given, a right to have its team

participate in 1999 and 2000 other than as a result of the admission process."

13 We are not concerned with any challenge to the admission process.

14 Finn J also found that a clear and intended effect of the 14 team term was that the (new) NRL partnership would not provide its competition-organising services to, or acquire team services from, a greater number of teams than the number so fixed. The real question was whether the term was included for the purpose, or for purposes that included the purpose, of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons. He answered that question in the negative. In the Full Court of the Federal Court, Heerey J agreed with Finn J. The majority (Moore and Merkel JJ) reached the opposite conclusion.

15 The 14 team term was one of a number of provisions that defined the shape and structure of the new competition. There had to be some such provisions. The competition could not be open to any rugby league club in Australia that wanted to join in. In that respect, it is worth considering what difference there was between Souths, or any other of the 22 clubs which participated in one or other of the 1997 competitions, on the one hand, and, on the other hand, some rugby league club that had not previously participated in either the News or the ARL competitions, but wanted to participate, in 2000, in the NRL competition. In fact, one such club, Melbourne, participated in the NRL competition. Obviously there was a practical difference, in that exclusion of one of the original 22 clubs would be more likely to be a cause of complaint. However, for the purposes of ss 45 and 4D of the Act, it appears that the only potentially material difference, if there is one, is in the particularity of the persons or class of persons said to be the object of the proscribed purpose.

16 Bearing in mind that it is not alleged that the 14 team term was aimed at excluding Souths, or any other particular club, it is necessary to examine the way Souths put its case on this point. The primary allegation, as summarised by Finn J, was that the designated persons or classes of persons that were the objects of ARL's and News' purpose of preventing the supply or acquisition of competition-organising, and team, services, were the clubs which had participated in the 1997 ARL and Super League competitions and which had not withdrawn from those competitions, other than the 14 clubs which would be selected to participate in the competition in the year 2000. That is rather different from the way in which the case for Souths was put in this Court. Here it was argued that "the particular persons or particular class of persons were the Clubs that had fielded teams in the 1997 competition".

17 Although the arguments of the parties, and the reasoning in the Federal Court, addressed sequentially the issues of purpose and particularity of objects in considering the application of s 4D, and although in some respects that is a

convenient method of analysis, it is to be remembered that what is involved is a compound concept: the purpose of preventing, restricting or limiting supply or acquisition of services to or from particular persons or classes of persons.

18 We are concerned with the purpose of a provision (here, the 14 team term), in the context of a definition section (s 4D) of the Act defining an expression used in another section (s 45) which distinguishes between purpose and effect. The distinction between purpose and effect is significant. In a case such as the present, it is the subjective purpose of News and ARL in including the 14 team term, that is to say, the end they had in view, that is to be determined[2]. Purpose is to be distinguished from motive. The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end. The appropriate description or characterisation of the end sought to be accomplished (purpose), as distinct from the reason for seeking that end (motive), may depend upon the legislative or other context in which the task is undertaken. Thus, for example, in describing, for the application of a law relating to tax avoidance, the purpose of an individual, or of an arrangement, it will be necessary to look at what is sought to be achieved that is of fiscal consequence, not at a more remote, but fiscally irrelevant, object, such as increasing a taxpayer's disposable income. Similarly, in the context of competition law, it is necessary to identify purpose by describing what is sought to be achieved by reference to what is relevant in market terms. The purpose of the 14 team term was the objective, in relation to the nature of their business arrangements, that News and ARL sought to achieve; not the reason why they sought to achieve that objective. They may have had different, and multiple, reasons for their conduct. The manifest effect of a provision in an agreement, in a given case, may be the clearest indication of its purpose. In other cases, it may be difficult, or even impossible, to determine the purpose (of a kind relevant to the operation of the Act) of a provision in a written contract merely by reading the document. And, of course, the legislation deals with contracts, arrangements or understandings.

19 While the use of the term "boycott" may be a convenient method of exposition of some aspects of the operation of s 4D, and may be a useful means of explaining part of what it was intended to achieve, that term itself does not have a precise meaning, and there is a danger that argument might be directed towards seeking to find the meaning of "boycott" rather than the proper task, which is finding the meaning of the statutory language[3].

---

2 *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 37-38; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 474-477. See also s 4F of the Act.

3 *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 55; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 17 [26].

20 The particularity of the persons or classes of persons who are the objects of the purpose defined by s 4D and proscribed by s 45 is essential to the concept of an exclusionary provision. Suppose two firms conduct, in competition with each other, restaurant businesses, and each restaurant can accommodate 50 customers. Suppose they agree to close down their existing businesses, and, in partnership, open a new restaurant that can accommodate 60 customers. The effect will be to reduce their combined capacity from 100 to 60. Agreeing on the size of the new restaurant would be a necessary aspect of defining the scope of their new business venture. On the bare facts stated, it could not be predicated that the purpose of limiting the size of the new restaurant to one that would cater for 60 customers related to reducing the facilities to be made available to any particular persons or classes of persons, although it would clearly have the effect of reducing the accommodation for diners generally. It would not make any difference if the reason for the agreement was that the two competitors considered that their future profitability depended on it.

21 In the present case, as in the example just given, specifying the number of clubs to be admitted to participation in the new competition was a necessary part of the definition of the new business venture to be undertaken by News and ARL (in effect) in partnership. It was not considered feasible to conduct a 22 club competition. It is not suggested that the method by which the 14 clubs were to be chosen for 2000 was discriminatory, or that the 14 team term, considered either alone or in the wider context of the whole plan, was aimed at Souths or at any other club. Bearing in mind that two clubs were to drop out anyway, any number less than 20, chosen as the number of participants in the 2000 competition, had the potential to require the exclusion of some of the clubs who competed in either the News or the ARL competitions in 1997. It is the fact that, when they were conducting two competitions, News and ARL, in aggregate, were supplying services to, and acquiring services from, 22 clubs (of which Souths was one), and that in 2000 their new joint business would only supply services to, and acquire services from, 14 clubs (not 14 of the same clubs, bearing in mind the geographical aspects of the new competition, the entry of Melbourne, and the possibilities of mergers and joint ventures), that must be said to make the difference.

22 There had to be some definition of the size, geographical spread, and other characteristics of the new competition. Since no case is made under s 45(2)(a)(ii) or s 45(2)(b)(ii), it is accepted that putting an end to the two former competitions, and establishing a new competition, was of itself not in contravention of the Act. The contravention is said to lie in defining the size of the new competition in such a way that would mean that, in 2000, only 14 clubs could participate in that new competition. The purpose of the 14 team term was to define the size of the competition, (something that, in the nature of the competition, had to be done), and to do so in such a way as to produce the result that, in 2000, only 14 clubs would participate.

23 Any limitation upon the size of the competition (even a limitation to 22 clubs) would have had the effect of potentially excluding some rugby league clubs in Australia that might have wanted to join the competition if given the opportunity. But exclusion of clubs of that kind would not have been the purpose of the provision, any more than designing a restaurant to accommodate 60 customers has the purpose of excluding people in excess of the number of 60 who turn up on a given occasion. In relation to such clubs, it cannot be said that, because the 14 team term had the effect of excluding them, it had that purpose. Exclusion of such teams was not the purpose; and there is no characteristic by reference to which they could be described as "particular" objects of any purpose at all. In any event, that is not the way Souths put its case in this Court.

24 In the case of the 22 clubs, they are readily identifiable as being, in some respects, in the contemplation of News and ARL at the time of the 1997 understanding. It is, perhaps, more plausible to suggest that News and ARL had a purpose relating to them. Once again, any limitation upon the size of the new competition to a number less than 22 (or 20) could have had the effect of excluding some of the original 22. But the purpose of the 14 team term was not to exclude any particular club or clubs. Nor was a purpose of the 14 team term to limit or restrict the supply of services to, or the acquisition of services from, any particular club or clubs.

25 If, as Souths argued in this Court, the particular persons said to be the object or objects of the proscribed purpose are the clubs that had fielded teams in the 1997 competitions, then there was no purpose of preventing supply to, or acquisition from, them. They were the aggregate of two groups of competitors in separate competitions. Most of them would continue to participate, and receive and supply services. Nor was there a purpose of restricting or limiting supply. There was no purpose of partial supply or acquisition of services to or from anyone. In the context of s 4D, restricting or limiting supply to one particular person must mean partial supply. The relationship between preventing, on the one hand, and restricting or limiting, on the other hand, is the same, whether the object is one person, or a number of persons. Although it does not cover the whole field of operation of s 4D, a paradigm case of an exclusionary provision would be one aimed at a particular person. Preventing supply to such a person would be a typical "boycott". But the legislation obviously had to cover something less than a complete boycott, and included restriction or limitation of supply as well as prevention. It appears to mean the same thing when applied to a number of particular persons, or a class. In the case of a number of persons, maintaining full supply to some, and preventing supply to others, would ordinarily be dealt with as a case of preventing supply to the second group. It may be that there are exceptional cases where it is appropriate to treat those who retain supply, and those who do not, as a single class to which supply is limited,

but it is not easy to fit that in with the scheme of the Act as to prevention of supply.

26 Even if it were possible to treat restriction or limitation of supply as covering, not merely partial supply, but also maintaining full supply to some and cutting off supply to others, then that would require both treating those who will continue to receive supply, and those who will no longer be supplied, as a single class, and treating the class as the object of the proscribed purpose. The clubs which participated in the 1997 competitions were not, either as a class, or as "particular persons", the object of a single purpose. There was to be a substantial re-structuring. The two competitions would become one. The geographical aspects would change. It was contemplated that some of the clubs would merge (as they did) between 1997 and 2000, and that at least one new club (Melbourne) would join the new competition. Merkel J expressed "some difficulty with the restriction or limitation case pleaded by Souths". It is a difficulty I share.

27 As Finn J pointed out, it is possible to think of circumstances in which the method of selection of the clubs to participate in the 2000 competition could have demonstrated a purpose of preventing, restricting or limiting supply or acquisition which had as its object a particular club or particular clubs. But that is not the present case. Having regard to the absence of any criticism of the method of choosing the 14 participants for the 2000 competition, the present case, in point of law, is no different from what it would have been if the 14 teams were to be chosen by drawing lots. It is accepted that the occasion to put an end to the two existing competitions, and to create a new single competition, was, of itself, lawful. The parties had to specify the size of the new competition. They had to state how many clubs would participate. They were under no legal obligation to accept any particular clubs as participants. Nor were they under any legal obligation to accept all of the 22 clubs from 1997 as participants. As soon as they selected a number less than 22 (or 20), the possibility of exclusion of some club or clubs arose. But they had no purpose of excluding any particular club or clubs. The 22 clubs which participated in 1997, considered individually or together, did not constitute particular persons in respect of whom there was a proscribed purpose.

28 The appeal should be allowed. The orders of the Full Court should be set aside. In place of those orders it should be ordered that the appeal to that Court be dismissed. The appellants seek no orders as to the costs of the proceedings before this Court or the Full Court of the Federal Court, and this Court was informed that the parties have agreed that, in the event that the appeal succeeds, the appellants will not enforce any of the costs orders of Finn J.

29 McHUGH J. The principal issue in this appeal is whether cl 7 of an agreement made between the News Limited ("News") and Australian Rugby Football League Limited ("ARL") parties is an "exclusionary provision" within the meaning of s 45 of the *Trade Practices Act* 1974 (Cth). The issue turns on whether those parties entered into cl 7 of the agreement for the purpose of "preventing, restricting or limiting" their services to South Sydney District Rugby League Football Club Limited or a "class of persons" which included Souths. If they did, they entered into an agreement containing an unenforceable exclusionary provision, as defined by s 4D of the Act.

30 Clause 7 was a fundamental term of an agreement entered into by News and ARL after they agreed to end their competing Rugby League competitions and to bring into existence a new competition that would be limited to 14 teams for the 2000 football season. Souths alleges that cl 7 was inserted with the object of preventing the supply of the services of News and ARL to particular persons or to a particular "class of persons" – the 22 clubs that had participated in the two separate competitions in 1997. Souths alleges that it was either one of those persons or one of those clubs. It points out that those clubs that did not meet the specified criteria for the awarding of franchises were to be excluded. If more than 14 clubs met the criteria, those clubs whose "order of priority" fell below 14 in the rankings were also to be excluded. For that reason, Souths contends that the purpose of cl 7 was to limit the number of clubs eligible to compete in the 2000 competition to 14 clubs and to deny the organising services of the News/ARL parties to the remaining eight clubs. Because it was one of the 22 clubs, it contends that cl 7 had the purpose of denying to it the services of News/ARL. And, as it was either a "particular person" or a member of a particular "class of persons" within the meaning of s 4D of the Act, cl 7 was an exclusionary provision.

31 As the judgment of Gummow J demonstrates, if the term "purpose" in s 4D means the subjective purpose of the News and ARL parties, the essential findings of the trial judge (Finn J) compel the conclusion that those parties did not have the purpose that Souths alleges. But does the term "purpose" in s 4D refer to the subjective purpose of the parties to the alleged exclusionary clause? Or is the purpose of the parties to be determined objectively without reference to their mental states?

32 For 17 years, Federal Court judges have accepted that the test of purpose in s 4D is a subjective test. In 1986 in *Hughes v Western Australian Cricket Association (Inc)*[4], Toohey J held that the purpose referred to in s 4D[5]:

---

4 (1986) 19 FCR 10.

5 (1986) 19 FCR 10 at 38.

> "is the subjective purpose of those engaging in the relevant conduct ... All other considerations aside, the use in s 45(2) of 'purpose' and 'effect' tends to suggest that a subjective approach is intended by the former expression. The application of a subjective test does not exclude a consideration of the circumstances surrounding the reaching of the understanding."

33 Four years later in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)*[6], the Full Court of the Federal Court approved the interpretation that Toohey J had given to the term "purpose" in s 4D. The Court acknowledged that there would necessarily be some difficulty in establishing a single subjective purpose given that there will be two or more parties to the contract, arrangement or understanding. The Full Court pointed out that a question may arise "[w]here not all the parties have the necessary subjective purpose, how is one to describe the contract they make as having a particular purpose in this sense?"[7] The Court also noted that s 260 of the *Income Tax Assessment Act* 1936 (Cth) (which, similarly to s 4D, speaks of contracts, agreements or arrangements which have a particular purpose) has generally been interpreted as requiring an objective test of purpose[8]. However, the Full Court thought that, as s 260 and s 45 concerned very different subject matters, the interpretation of s 260 did not necessarily support an objective construction of s 45.

34 In *Pont Data*[9], the Full Court thought that the critical factor was the wording of s 4F of the Act, which deems a provision to have a particular purpose in certain circumstances:

> "In its operation upon provisions stated to have a particular purpose, s 4F uses the words 'the provision was *included* in the contract ... for that purpose or for purposes that included or include that purpose'. This indicates that s 4F, in this operation, requires one to look to the purposes of the individuals by whom the provision was included in the contract, arrangement or understanding in question. It therefore directs attention to the 'subjective' purposes of those individuals."

35 From time to time, judges of the Federal Court have queried whether the term "purpose" in s 4D refers to the subjective purposes of those who made the

---

6 (1990) 27 FCR 460.

7 (1990) 27 FCR 460 at 475.

8 *Federal Commissioner of Taxation v Gulland* (1985) 160 CLR 55 at 94.

9 (1990) 27 FCR 460 at 476.

impugned provision[10]. But, so far as I am aware, no judge has ever applied an objective test to the term "purpose" in s 4D since *Hughes* was decided in 1986.

36 The problem courts have had in determining whether the "purpose" referred to in s 4D is subjective or objective derives from the contrasting wording of s 4D and s 4F. The terms of s 4D tend to suggest an objective purpose because it refers to the purpose of the provision. It does not refer to the purpose of those who actually made the provision. It tends to suggest that the purpose of the provision is to be determined by reference to the mind of a notional person who had drafted the provision. In that respect, it is different from s 4F(1)(b) which refers to "a person" and s 4F(1)(a) which refers to the purpose for which a provision *was included* in the contract, arrangement or understanding. These two clauses suggest that s 4F requires an inquiry into the actual purpose in the mind of those who made that contract, arrangement or understanding.

37 One way of harmonising the apparently different meanings of purpose in s 4D and s 4F would be to read s 4D as the leading provision and s 4F as extending its scope. On that view, s 4D would require the court to look to the intended object of the parties by reference to the background of the transaction and the terms of the alleged exclusionary provision, independently of their mental states. If, read against that background, the provision pointed to the parties having a proscribed purpose, it would be an exclusionary provision for the purposes of the Act. On the other hand, if the provision were capable of an explanation other than the parties having a proscribed purpose, the provision would not fall within s 4D. Nevertheless, it might fall within s 4F and be an exclusionary provision if those who made the agreement subjectively had a proscribed purpose.

38 An objective interpretation of s 4D is supported by the consequences that may flow from using a subjective test. Unless s 4D is read as requiring an objective test, then in some cases, it will be impossible to determine what was the purpose of a provision. If the parties have different subjective purposes[11] or have never turned their minds to the purpose of the provision, neither s 4D nor s 4F would have any operation. Moreover, an objective interpretation of s 4D seems more in accord with the Act's object of promoting competition, an object that is weakened if what is objectively anti-competitive conduct escapes proscription only because the parties did not in fact intend to achieve such a proscribed purpose.

---

10 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 264 [98].

11 As in *Carlton and United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd* (1987) 16 FCR 351 at 356. But see *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 477.

39 It is true that only persons can have a purpose, for the notion of purpose involves the intention of a person to achieve an object. That is to say, it involves an examination of the mental state of a person. Thus, in *Chandler v Director of Public Prosecutions*[12], Lord Devlin said:

> "A purpose must exist in the mind. It cannot exist anywhere else. The word can be used to designate either the main object which a man wants or hopes to achieve by the contemplated act, or it can be used to designate those objects which he knows will probably be achieved by the act, whether he wants them or not."

40 But in some cases – in the case of legislative purpose, for example – the tribunal of fact must attribute a purpose to an artificial or notional mind that is deemed responsible for some act or omission. In such contexts, the tribunal of fact deduces the purpose of the artificial or notional person from the background of the act or omission including relevant statements and what was done or not done. Similarly, when legislation refers to the purpose of a provision, it is not absurd to regard the legislature as referring to the purpose in the notional mind of those responsible for the provision. In such cases, the test must inevitably be an objective test.

41 If the interpretation of s 4D was being considered for the first time, I would prefer the view that, for the purposes of s 4D, the purpose of an alleged exclusionary provision is to be determined objectively without regard to the mental state of the parties who made the provision. But the subjective interpretation has stood for 17 years, been approved by the Full Court of the Federal Court and been followed on numerous occasions. Given the terms of s 4F, s 4D is clearly open to the construction that "purpose" in both sections means the subjective purpose of the makers of the provision. Certainly, it is impossible to hold that the subjective interpretation is plainly wrong.

42 Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. Frequently, there is simply no "right" answer to a question of construction. The interpretation of s 4D falls into that category.

43 For the above reasons, I would not overrule the subjective interpretation of the section.

44 Moreover in practice, in most cases it will probably make little difference whether the courts consider only the subjective purpose of the parties or the

---

12 [1964] AC 763 at 804-805.

subjective purpose and the objective purpose in the manner to which I have referred[13]. In *News Ltd v Australian Rugby Football League Ltd*[14], the Full Court of the Federal Court said that, on the facts of that case, it made no difference whether a subjective or objective test was used. Moreover, as Toohey J pointed out in *Hughes*[15], the application of a subjective test does not exclude a consideration of the circumstances surrounding the reaching of the understanding. By considering the surrounding circumstances, the court will be using objective considerations to determine whether the parties held the subjective purpose they claim. In *Dowling v Dalgety Australia Ltd*[16], Lockhart J said:

> "The effect of a contract is a relatively simple concept requiring examination of the results, but proof of purpose is more difficult. It will generally be inferred from the nature of the contract, the circumstances in which it was made and its likely effect."

45 Nor is it the case that the purpose of a provision has been examined objectively only where there is no evidence of subjective purpose. In *Eastern Express Pty Ltd v General Newspapers Pty Ltd*[17], the party alleged to have breached s 46 of the Act made an admission of its intention to restrict the market. Lockhart and Gummow JJ warned that these statements were not to be taken at face value – their "probative force ... must be determined with regard to the circumstances in which they were made"[18]. And, in another decision, their Honours made a similar point in relation to s 45D, noting that[19]:

> "Where purpose or other state of mind of an individual in relation to a given transaction is in issue, the statements of that person in the

---

13 Robertson, "The Primacy of 'Purpose' in Competition Law – Part 2", (2002) 10 *Competition and Consumer Law Journal* 42; McMahon, "Church Hospital Board or Board Room?: The Super League Decision and Proof of Purpose under Section 4D", (1997) 5 *Competition and Consumer Law Journal* 129.

14 (1996) 64 FCR 410 at 576.

15 (1986) 19 FCR 10 at 38.

16 (1992) 34 FCR 109 at 134.

17 (1992) 35 FCR 43.

18 (1992) 35 FCR 43 at 68-69.

19 *Australian Builders' Labourers' Federated Union of Workers (WA Branch) v J-Corp Pty Ltd* (1993) 42 FCR 452 at 467.

witness box, in a sense provide, the 'best evidence'. But the court may well take the view that these statements should be tested closely."

46 Given the findings of fact made by Finn J and applying a subjective test of purpose, the appeal must be allowed for the reasons in the judgment of Gummow J.

Order

47 The appeal should be allowed.

48 GUMMOW J. This appeal is brought from a decision of the Full Court of the Federal Court (Moore and Merkel JJ; Heerey J dissenting)[20] which allowed an appeal from a decision of Finn J[21]. The appellants in this Court are News Limited ("News"), a large media company, National Rugby League Investments Pty Limited ("Investments"), Australian Rugby Football League Limited ("ARL") and National Rugby League Limited ("NRL").

49 Finn J dismissed an application brought by the present first respondent, South Sydney District Rugby League Football Club Limited ("Souths") against News, Investments, ARL and NRL and others. There had also been an application by Souths for interlocutory injunctive relief which had been dismissed by Hely J[22].

50 The only grounds amongst those relied upon by Souths at trial which remain alive in this Court concern alleged contraventions of Pt IV of the *Trade Practices Act* 1974 (Cth) ("the Act"). The Full Court, after allowing the appeal by Souths, went on to grant declaratory and injunctive relief and remitted to the primary judge the assessment of damages recoverable under s 82 of the Act. In particular, declarations were made to the effect that, in entering into a Memorandum of Understanding on 18 February 1998 and into a Merger Agreement dated 14 May 1998, the appellants in this Court contravened pars (a)(i) and (b)(i) of s 45(2) of the Act. Those provisions are concerned respectively with the making of contracts or arrangements and the arrival of understandings containing an exclusionary provision within the meaning of s 4D of the Act, and the giving effect to such an exclusionary provision. The Full Court also enjoined the present appellants from giving effect to an exclusionary provision identified as the "14-team term", whereby in the 2000 season and thereafter the number of teams to participate in the NRL competition would be restricted to 14.

51 The appeal to this Court should be allowed, the orders of the Full Court set aside and, in place thereof, it should be ordered that the appeal to that Court be dismissed. The position respecting costs is explained in the reasons of the Chief Justice.

---

20 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456.

21 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611.

22 *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120.

52 The circumstances surrounding the entering into the Memorandum of Understanding and the Merger Agreement and the relevant factual findings are detailed by Callinan J. His Honour also analyses the reasons of the primary judge and of the members of the Full Court and what follows in this judgment should be read with that analysis in mind.

53 Like Callinan J, and subject to what follows, I am in general agreement with the approach to the issues of construction of the Act taken by Finn J and Heerey J.

Section 4D

54 The issues of construction primarily concern s 4D of the Act. This was inserted by s 6 of the *Trade Practices Amendment Act* 1977 (Cth) ("the Amendment Act"). It is convenient to begin with the text of s 4D. This defines an "exclusionary provision" as follows:

> "(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
>
> (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
>
> (b) the provision has the purpose of preventing, restricting or limiting:
>
> (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
>
> (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;
>
> by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate."

55 Section 4D is included in Pt I (ss 1-6AA) of the Act which is headed "Preliminary" and includes a number of definitions both in the usual sense (seen in s 4) and in the special sense exemplified in s 4D. Section 4D has no normative operation by itself. Rather, as the opening words of the section indicate (in particular, the phrase "shall be taken to be"), it operates upon those other substantive provisions which bear upon the criterion "exclusionary provision" and gives content to that criterion.

56 What are important for this appeal are the prohibitions imposed by pars (a)(i) and (b)(i) of s 45(2) of the Act. The first prohibition (par (a)(i)) is upon a corporation making a contract or arrangement, or arriving at an understanding, if it contains an exclusionary provision. The second (par (b)(i)) is upon a corporation giving effect to a provision of a contract, arrangement or understanding which is an exclusionary provision. These are *per se* prohibitions in the sense that they apply without the operation of a further criterion that the provision have the purpose or effect or likely effect of substantially lessening competition in any market.

57 In the present case, it is accepted by all parties that at all relevant times a contract, arrangement or understanding was in existence within the meaning of s 4D(1)(a). Section 4D(1) contains two relevant primary elements; the first concerns the character of the relevant actors and the second the purpose of the provision. Accordingly, there must exist a state of competition in relation to the supply or acquisition of the relevant goods or services between two or more parties to the contract, arrangement or understanding (s 4D(1)(a)); and, further, there must be the purpose of preventing, restricting or limiting the supply to, or acquisition of goods or services from, particular persons or classes of persons as spelt out in the precise terms of s 4D(1)(b).

58 Section 4D(2) gives further content to the phrase "are competitive with each other" in par (a) of s 4D(1). It does so by requiring the satisfaction ("if, and only if") of a condition respecting the first party which is said to be competitive with another for the purposes of par (a). The condition is that the first party or a related corporation be, be likely to be, or would be or would be likely to be, (in the circumstances detailed in s 4D(2)) in competition in a specified sense with the second party or a related corporation. That specified sense is competition in relation to the supply or acquisition of all or any of certain goods or services. These are the goods or services to which there relates the alleged exclusionary provision identified in the opening words of s 4D(1) ("a provision") and carried into par (b) of s 4D(1) ("the provision").

Purpose

59 Section 4D speaks of "the purpose" of the contract, arrangement or understanding, rather than any deleterious effect which it might have on competition. In so providing, the Parliament did not implement the

recommendations of the 1976 Trade Practices Act Review Committee Report which commented[23]:

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

"Purpose" is not defined in the Act. At trial, Finn J stated[24]:

> "While the purpose of a provision may be evidenced in the effects it produces, the purpose for its inclusion in a contract etc is not to be determined necessarily by, or simply by reference to, its effects[25]. What is to be ascertained is the reason (or reasons) for its inclusion. And that reason, or those reasons, can be determined by ascertaining the effect or effects the parties subjectively sought to achieve through the inclusion of the provision in the understanding, etc[26]."

It will be noted that Finn J focused on the subjective reasons of the parties to the contract in which the relevant provision is contained. At first glance, such an approach might appear to conflict with the terms of s 4D(1)(b), which speaks not of human or corporate actors but of the provision *itself* having the purpose of preventing, restricting or limiting the supply or acquisition of the relevant goods or services. A construction which fixes upon subjective intent also may be difficult to apply to a multipartite contract, arrangement or understanding. However, s 4F of the Act doubtless has a role to play in such circumstances.

---

23 Commonwealth, *Report to The Minister for Business and Consumer Affairs*, August 1976 at [4.116]. In 1993, the Independent Committee of Inquiry recommended against any change to the purpose element: Commonwealth, *National Competition Policy*, August 1993 at 46.

24 (2000) 177 ALR 611 at 659.

25 *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109.

26 cf *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 475.

60 Nevertheless, Finn J's construction is not without support[27] and was accepted as correct by each member of the Full Court[28]. Moreover, there are good reasons for a construction of s 4D which focuses upon the effect or effects the parties sought to achieve through the inclusion of the impugned provision in the contract, arrangement or understanding. Such a construction gives full effect to s 4F of the Act[29]. That section, which, with s 4D, is found in Pt I of the Act, is headed "References to purpose or reason". Like s 4D(2), s 4F uses the term "deemed". It does so, not to create a "statutory fiction", but for the definitional purpose identified by Windeyer J in *Hunter Douglas Australia Pty Ltd v Perma Blinds*, namely to "state the effect or meaning which some matter or thing has"[30].

61 Section 4F relevantly states:

> "(1) For the purposes of this Act:
>
> (a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:
>
> (i) the provision *was included* in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for *purposes that included* or *include that purpose*; and

---

27 *Hughes v WA Cricket Association (Inc)* (1986) 19 FCR 10 at 37-38; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 474-477; *Adamson v NSW Rugby League Ltd* (1991) 31 FCR 242 at 245, 261, 283; cf *Newton v Commissioner of Taxation (Cth)* [1958] AC 450 at 465 (in the context of s 260 of the *Income Tax and Social Services Contribution Assessment Act* 1936 (Cth)).

28 (2001) 111 FCR 456 at 472 per Heerey J, 487 per Moore J, 518 per Merkel J.

29 Inserted by s 6 of the Amendment Act.

30 (1970) 122 CLR 49 at 65. See also *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 308; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 320 [96].

(ii) that purpose was or is a *substantial purpose*". (emphasis added)

62 The operation of s 4F upon provisions stated to have a particular purpose is significant. The phrase "the provision *was included* in the contract … for that purpose or for purposes that included or include that purpose" suggests that s 4F requires examination of the purposes of the individuals by whom the provision was included in the contract, arrangement or understanding in question[31]. Moreover, s 4F contemplates that a provision may be included in a contract, arrangement or understanding for a plurality of purposes and, in such circumstances, directs that the relevant purpose must be "substantial". This is a further indication that the Act requires examination of the purposes of individuals, the inevitable multiplicity of which may be contrasted with an examination of the "objective" purpose of an impugned provision. In this way, the introduction of a "substantial purpose" test avoids difficulties in discerning the relevant purpose of multiple parties to a contract, arrangement or understanding.

63 Before this Court, the Australian Competition and Consumer Commission ("the ACCC"), as intervener, submits that both the subjective purpose of the parties to the relevant contract, arrangement or understanding and the objective purpose of the impugned provision are relevant when determining whether or not the provision falls within the purview of s 4D. However, a construction which, depending upon the facts of the case, may require examination of either the subjective purpose of the parties or the objective purpose of the provision, or both, is not the product of reasoned statutory interpretation and falls foul of the provisions in s 4F. In addition, there is a danger that an examination of the objective purpose of a provision will give undue significance to the substantive effect of the provision, as opposed to the effect that the parties *sought to achieve* through its inclusion. The consistent distinction drawn in the Act, particularly in s 45 when read with s 4D, between "purpose" and "effect" demonstrates the impermissibility of such an approach.

64 At trial, Finn J accepted the evidence of relevant actors that they believed that the participation in 2000 of only 14 teams could or would be achieved without the necessity of excluding any club. Finn J said[32]:

"I accept the evidence of Mr Whittaker that he believed the 14 teams for 2000 could be, and of Mr Frykberg that they would be, achieved

---

31 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 476.

32 (2000) 177 ALR 611 at 675.

> without resort to exclusion. And I consider the early and continuing significance they attributed to the formation of mergers and joint ventures as being consistent with the absence of a proscribed purpose. The significance so attributed to mergers, etc, evidenced a form of recognition of both the wish and the need to maintain some level of participation of the established clubs in a competition not designed to accommodate them all individually."

65 In the Full Court, one member of the majority, Merkel J, discerned error on the part of the trial judge. This was because Finn J had failed to determine whether the 14-team term had "a discrete purpose" and had looked more broadly at the Merger Agreement[33]. I agree with what is said by Callinan J in his reasons on this point. In particular, as his Honour points out, the discovery of the purpose of a provision is by no means necessarily to be gained by an examination of that provision divorced from an understanding of the contract, arrangement or understanding of which it forms part.

66 Finn J concluded that the 14-team term had not been included for the purpose of, among other things, preventing the supply of competition-organising services or of the acquisition of team services[34]. It followed that the 14-team term did not satisfy the second of the two primary elements in s 4D, that concerned with purpose. This conclusion, which should be accepted, is sufficient to require the upholding of the present appeal.

Particular classes of persons

67 However, Finn J went on to hold that the case made by Souths must fail for a related reason[35]. This was because those said to be prevented from supplying or requiring the relevant services did not constitute a "particular class of persons" for the purposes of s 4D(1).

68 There are dangers in splitting up the definition in s 4D by disjoining consideration of the purpose of preventing, restricting or limiting the supply or acquisition of the relevant services from the identification of those said to comprise the particular persons or classes of persons. The case pleaded by Souths had been that the 14-team term was an exclusionary provision because it had the purpose of preventing the acquisition of the services of teams to play in the NRL competition, the teams being all clubs willing and able to play in a top

---

33 (2001) 111 FCR 456 at 523.

34 (2000) 177 ALR 611 at 675.

35 (2000) 177 ALR 611 at 675.

level rugby league competition other than the 14 clubs (including therein merged clubs) selected to participate in the NRL competition from the year 2000.

69 Against that background, Finn J dealt with the purpose of the inclusion of the 14-team term and concluded that the evidence concerning its adoption was "bereft of any indication that its purpose was to prevent the supply of services to, or acquisition of services from, any person or class of persons"[36].

70 That conclusion, with respect correctly reached, foreclosed the need for any further inquiry as to whether, as a discrete step, it was necessary to consider whether the provision had been "aimed specifically" at particular clubs otherwise able and willing to compete with the objective of harming them[37].

71 His Honour did envisage[38]:

> "a size provision with its proposed ancillary criteria being designed with the substantial purpose in mind, not simply of limiting the size of the competition for reasons that are considered to be in the interests of the game and its stakeholders, but of specifically targeting a club or clubs that is or are anticipated to be applicants for selection".

But he concluded[39]:

> "There is a significant difference between being merely an unsuccessful contender for selection in a process not designed to preordain that particular outcome and being a target for exclusion in a selection process designed to that end. The latter, but not the former, if otherwise the product of a s 4D understanding, is capable of being found to be an exclusionary provision."

72 The earlier decision of the Full Court of the Federal Court in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* proceeded upon similar lines of reasoning which did not involve any breaking up of the second primary element in s 4D, being that concerned with the necessary purpose of the alleged exclusionary provision.

---

36 (2000) 177 ALR 611 at 675.

37 (2000) 177 ALR 611 at 675-676.

38 (2000) 177 ALR 611 at 675.

39 (2000) 177 ALR 611 at 675.

73 In *Pont Data*, ASX, by its subsidiary ASXO, provided information (known as Signal C) concerning stock transactions to, amongst others, Pont Data. That company in turn supplied the information to its own customers. ASXO competed with Pont Data in relation to the supply of such information in the downstream market. ASX and ASXO required Pont Data to enter into supply contracts obliging the latter to disclose to them the names of its customers. These customers in turn were required to enter tripartite agreements with ASXO and Pont Data pursuant to which the customers were prevented from reselling the information to third parties. Pont Data was also prevented by the supply contracts from selling information purchased from ASXO to any person other than a customer which had entered a tripartite agreement with Pont Data and ASXO. Pont Data and ASXO were both rivals and, at the same time, ASXO was the sole supplier to Pont Data and to the other subscribers of information essential to them if they were to continue to compete with ASXO in the services offered to third parties[40]. Pont Data alleged contravention of ss 45, 46 and 49 of the Act.

74 One issue was whether the supply contracts entered into by Pont Data contained an exclusionary provision attracting the operation of s 45. Thus it was necessary for the Full Court to determine whether it was an answer to the attraction of par (b) of s 4D(1) that persons who would not be supplied with the information unless they accepted and became bound by the restraints were not a "particular class". The Full Court said[41]:

> "It was said that the persons or classes excluded must still be 'identified' if s 4D is to apply. That may be conceded, but they are identified, in the present case, by the characteristic that they may not be supplied with the information in question, unless they accept and become bound by the restraints imposed by the Dynamic Agreement. Such persons come within a particular category or description defined by a collective formula[42]. They ordinarily would be treated as constituting a particular class, even though at any one time the identity of all the members of the class might not readily be ascertainable. What distinguishes the class and makes it particular is that its members are objects of an anti-competitive purpose, with which s 4D is concerned."

75 The Full Court in *Pont Data* considered[43] the circumstances in which the phrase "or classes of persons" had been added to s 4D after the words "particular

---

40 (1990) 27 FCR 460 at 466.

41 (1990) 27 FCR 460 at 488.

42 cf *Pearks v Moseley* (1880) 5 App Cas 714 at 723.

43 (1990) 27 FCR 460 at 488.

persons". The change was made by s 6 of the *Trade Practices Revision Act* 1986 (Cth) and appeared to respond to limitations upon the words "particular persons" which had been suggested in two cases. In *Bullock v Federated Furnishing Trades Society of Australasia (No 1)*[44], the Full Court of the Federal Court left open the question whether Gray J had been correct in limiting those words to "persons whose identity is known or can be ascertained". In *Trade Practices Commission v TNT Management Pty Ltd*[45], Franki J accepted that, because the arrangement or understanding proved was not limited to refusals to deal with Tradestock but extended to "a class of intermediaries", it did not satisfy the requirement in s 4D that it be one restricting dealing with "particular persons".

76 Against this background, the use by the Full Court in *Pont Data* of the term "objects" recognised the legislative goal of removing a limitation upon s 4D which required the precise identification of those sought to be prevented, restricted or limited in their conduct by the purpose of the exclusionary provision. The goal was not to require the infliction of damage or harm to those persons by reason of the operation of the purpose. An object may be one on, or about whom, something (here, the purpose) acts or operates.

77 In the present case, it appears to have been accepted (correctly in my view) that there may be a "particular class" notwithstanding that at any one time the identity of all of its members is not readily ascertainable. However, both Souths and the ACCC submit that the use of expressions in some of the later cases[46] such as "targeted" and "aimed at" places an unwarranted gloss upon s 4D and incorporates assumptions and requirements derived from case law concerning collective boycotts. These submissions correctly emphasise the need to construe the terms of the legislation free from notions of anti-competitive conduct which are not necessarily incorporated in s 4D[47].

78 It is clear that s 4D is not limited to situations in which the traditional concept of a collective boycott would apply, for example where two or more competitors exclude or restrict the supply of goods or services to a rival competitor. In the Full Court in the present case, Heerey J described a boycott as a means of inflicting some adverse consequences on a person or class[48]. But, to

---

44 (1985) 5 FCR 464 at 473.

45 (1985) 6 FCR 1 at 75-76.

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

47 *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 41-43, 51-52, 55, 58.

48 (2001) 111 FCR 456 at 477.

adapt a statement of Deane J made in *Devenish v Jewel Food Stores Pty Ltd*[49], when dealing with s 45D(1):

> "[T]he literal effect of the words of [s 4D] should not be confined in a way which would exclude from the scope of the section any conduct which does not satisfy some superimposed requirement ascertained by reference to a perception of the kinds of conduct with which the section is primarily concerned."

79 Nevertheless, the terms of s 4D take as a compound element the purpose of preventing, restricting or limiting the supply or acquisition of goods or services to or from particular persons or classes of persons. It is preferable to speak of the purpose of the provision being "directed toward" a particular class rather than "aimed at" or "targeted". This avoids the connotations of aggression or the inducement of harm, typically found in judicial discussions of boycotts, of which Souths and the ACCC rightly complain.

80 The critical point for the present case is not found in pondering such questions as the defining characteristics that make a class "particular". What is important for this case is the notion that any selection process with more applicants than positions available will necessarily result in "winners" and "losers". There was an absence in the evidence of indications that the purpose of the adoption of the 14-team term was to prevent the supply of services to or acquisition of services from those clubs which under the operation of the selection process would turn out to be among the "losers".

81 That brings me to the remaining issue of construction.

Preventing, restricting or limiting

82 In the Full Court, Moore J, one of the majority, considered[50]:

> "the question of whether competitors can have a purpose of restricting or limiting supply of services to particular persons and the acquisition of services from them if it is not known, when the exclusionary provision was agreed to, who of the particular persons would bear the burden of the restriction or limitation though it could be expected some of the particular people would not".

His Honour continued[51]:

---

49 (1991) 172 CLR 32 at 51-52.

50 (2001) 111 FCR 456 at 507.

51 (2001) 111 FCR 456 at 507-508.

> "Arrangements could be entered that were intended to have an apparently proscribed effect on some but not all of the competitors' suppliers or customers. That is, it was proposed that supply or acquisition of goods would be reduced, by operation of the arrangement, on some but not all of the suppliers or customers because of events that had not yet occurred. Those events may be influenced by the conduct of the suppliers or customers. However the fundamental or underlying purpose of the competitors would have been to limit or restrict supply to or acquisition from particular persons with the burden of the limitation or restriction being revealed as the exclusionary provision was given effect to by the colluding competitors."

Moore J then concluded[52]:

> "In my opinion, the fact that the 14-team term contemplated some of the 1997 clubs would continue to field their own teams in 2000 and following years does not remove the 14-team term from the scope of s 4D as enlivened by s 45(2)(a)(i)."

Thus, it was no answer to the operation of the provision that, whereas 22 teams had supplied or been supplied with services in 1997, from 2000 only 14 would be in that situation.

83 Heerey J pointed out that a case of this nature had not been pleaded or run at first instance[53]. His Honour also declared that it was too late to raise such an argument because it raised an infinite range of factual dispute. For that reason, this Court should decline to enter upon the matter.

Submissions by the ACCC

84 In its original submissions, the ACCC suggested, in effect, that any attack in respect of what had taken place should have been launched at an earlier stage and against the merger of the competitions. The ACCC questioned whether, as the litigation had been cast, the requirement contained in par (a) of s 4D(1), as further elucidated in s 4D(2), relating to the existence of a state of competition between two or more parties to the contract, arrangement or understanding, had been satisfied. Were the answer to that question in the negative, s 4D would not be engaged and the prohibition contained in par (b)(i) of s 45(2) would not apply.

---

52 (2001) 111 FCR 456 at 508.

53 (2001) 111 FCR 456 at 479.

85 The ACCC stressed the need to identify with particularity the services to which the relevant provision in this case, the 14-team term, relates. Those services were to be provided from December 1997 as essential elements of a single new competition established and provided by News and ARL in partnership through a joint venture company, NRL. It followed, in the ACCC's submission, that News and ARL could not be considered competitors in relation to the supply or acquisition of goods or services by NRL. This was because NRL came into existence as a result of the *cessation* of the rugby league competition businesses of News and ARL.

86 After the conclusion of the hearing, the appeal was relisted in order to allow each party to make further submissions concerning the proposition put by the ACCC. In further written submissions, News and the other appellants adopted the submissions of the ACCC. However, the appellants' subsequent written submissions, and their oral submissions during the further hearing, eschewed, and indeed sought to controvert, the ACCC's submissions.

87 Souths took a similar stance to the appellants. In particular, Souths submitted that the reasoning in *Re McBain; Ex parte Catholic Bishops*[54] indicated that it should not be open to a party in the position of the ACCC to seek to disturb the course taken by the litigation conducted by the parties at trial and on appeal.

88 The grant of leave to the ACCC to intervene, made on the first day of the hearing, was in general terms. Nevertheless, in the light of what has subsequently transpired, that general grant should not be construed as permitting the entertainment on the appeal of these further arguments.

Conclusion

89 Orders should be made as indicated earlier in these reasons.

---

54 (2002) 209 CLR 372 at 395 [23].

90 KIRBY J. Once again I disagree with the majority of this Court on the application of the *Trade Practices Act* 1974 (Cth) ("the Act"). Once again, the Court reverses a decision of the Full Court of the Federal Court of Australia and favours a more limited application of the Act than was adopted by that Court[55]. The Act's purpose is stated to be "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"[56]. Where the meaning of particular provisions is contested, the Act should be construed, so far as the words permit, to uphold these important economic and social objectives[57].

91 This appeal arises out of ongoing controversies within the code of rugby league football as played in Australia. The contest results from the attempt of those who took charge of the premiership competition to limit the number of participating teams. An earlier instance of a similar conflict, involving a challenge by the Western Suburbs District Rugby League Football Club, was rejected by this Court in *Wayde v New South Wales Rugby League Ltd*[58]. In that case different legislation was involved and distinct issues were decided[59]. In the present appeal, the dispute concerns South Sydney District Rugby League Football Club Limited ("Souths"), a decision to refuse it entry into the rugby league premiership competition for 2000 and whether such action involved a breach of the Act.

The proceedings in the Federal Court

92 *Proceedings at first instance*: Following its exclusion, Souths made application to the Federal Court for relief on a number of grounds. The only one of them still in issue concerns Souths' claim pursuant to s 45(2) of the Act. An initial application for an interlocutory injunction was dismissed by Hely J in

---

55 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623; 195 ALR 609; see also *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494.

56 The Act, s 2.

57 *Bropho v Western Australia* (1990) 171 CLR 1 at 20. See also *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44, 45.

58 (1985) 180 CLR 459 affirming *New South Wales Rugby League Ltd v Wayde* (1985) 1 NSWLR 86.

59 The case concerned the *Companies (New South Wales) Code*, s 320(2) and a claim of oppression of a minority. See Fridman, "Sport and the Law: The South Sydney Appeal", (2002) 24 *Sydney Law Review* 558.

December 1999[60]. His Honour found that there was a serious question to be tried as to whether what was described as "the 14-team term"[61], in a merger agreement designed to merge competing national rugby league premiership competitions, ("the merger agreement") constituted an "exclusionary provision" contrary to the Act. However, Hely J concluded that the balance of convenience did not favour the grant of an interlocutory injunction.

93 Nothing daunted, Souths sought final relief in the Federal Court in the form of injunctions, declarations and damages against News Limited ("News"), one of its subsidiaries, National Rugby League Investments Pty Ltd ("Investments"), Australian Rugby Football League Ltd ("ARL") and National Rugby League Ltd ("NRL"). NRL was jointly owned and controlled by Investments and ARL. The merger agreement provided for the conduct of a single national rugby league competition. Souths' proceedings sought relief as a result of its exclusion from the NRL competition for 2000. It claimed that such exclusion was a consequence of the making of, or giving effect to, the merger agreement and specifically the 14-team term with its provision for the funding of only those 14 teams selected to participate.

94 In the Federal Court, the primary judge, Finn J, in November 2000, after a lengthy hearing, rejected Souths' application for relief[62]. Relevantly to the claim based on the alleged breach of s 45 of the Act (read with ss 4D and 4F), the primary judge accepted that Souths' claim was enlivened by the language of the 14-team term. However, he decided that the claim failed primarily because the "purpose" of the impugned provision was not the impermissible exclusionary purpose alleged by Souths but a permissible purpose. This was variously described as a purpose to establish a financially viable and sustainable rugby league competition; to avoid damage to the game of rugby league football caused by competing national competitions; and to satisfy the pressures and demands of media companies interested to broadcast the games and therefore to support the code of rugby league financially[63].

---

60 *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120.

61 The relevant clause is set out in full in the reasons of Callinan J at [169]. See particularly cll 7.5 and 7.9.

62 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611.

63 (2000) 177 ALR 611 at 672 [270]. These were similar to the statement of objectives of the merger agreement: cl 2.

95 Secondly, as an alternative basis for rejecting the claim, the primary judge found that Souths had not established that a purpose of the impugned provision was to limit the supply or acquisition of services to or from "particular … classes of persons"[64] within the meaning of the Act[65].

96 Thirdly, the primary judge concluded that, even if Souths had made out its case based on s 45 of the Act, injunctive relief should be denied as inappropriate in the circumstances of the case, viewed as a whole[66].

97 *Proceedings on appeal*: Souths appealed to the Full Court of the Federal Court. By majority[67], that Court, in July 2001, upheld the appeal[68]. All members of the Full Court held that the 14-team term enlivened s 45(2) of the Act, being a provision of a contract or arrangement made between parties who were competitive with each other[69]. They rejected the argument of News that, to attract s 4D of the Act, it was necessary to show that the parties were competitive with each other at the time when the exclusionary provision took effect[70]. But the concurrence in the reasoning of the judges of the Full Court ended at that point. By different routes, the majority in the Full Court came to the conclusion that Souths had made out its case for relief from the effects of the 14-team term as an exclusionary provision; that damages were not an adequate remedy[71]; that injunctive relief should be granted to restrain News, Investments, ARL and NRL from giving (or continuing to give) effect to the 14-team term[72] and that, in

---

64 The Act, s 4D(1).

65 (2000) 177 ALR 611 at 675 [287].

66 (2000) 177 ALR 611 at 682 [327]-[328].

67 Moore and Merkel JJ; Heerey J dissenting.

68 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456.

69 (2001) 111 FCR 456 at 480-481 [110]-[116] per Heerey J, 508 [208] per Moore J, 516 [234] per Merkel J.

70 (2001) 111 FCR 456 at 480-481 [112]-[115] per Heerey J, 508 [208] per Moore J, 516 [234] per Merkel J.

71 (2001) 111 FCR 456 at 534 [304].

72 (2001) 111 FCR 456 at 508 [210] per Moore J, 532 [300] per Merkel J.

addition, Souths was entitled to damages, pursuant to s 82 of the Act. Such damages were ordered to be assessed[73].

98 The dissenting judge in the Full Court (Heerey J) substantially agreed with the reasoning of the primary judge. He rejected Souths' appeal. However, he concluded further that, if the construction of the Act by Souths were to succeed, an injunction should be withheld on discretionary grounds[74]. He added reasons to those given by the primary judge for limiting any remedies to which Souths was entitled to an award of damages.

99 *Proceedings in this Court*: Special leave to appeal was then granted by this Court. The issues in the appeal overlap, to some extent, others in an appeal which stands for judgment[75] and in another in respect of which special leave was later granted[76]. The Australian Competition and Consumer Commission ("the ACCC") sought and was granted leave to intervene in these proceedings. It provided written and oral argument. It drew attention to many cases, decided or pending, where the resolution of the issues raised in this appeal would be significant, or determinative.

100 For Souths, the case was remarkably simple. Before the merger agreement it was a foundation member of the rugby league competition and a continuous participant in its premiership competition. As a result of the implementation of the 14-team term, it was excluded from the competition by an agreement reached between others that affected it. Souths submitted that such exclusion had the effect, and was intended and likely to have the effect, of preventing, restricting or limiting its supply of services to, and acquisition of services from, a class of persons. It would be forced to exit the competition.

101 The basic argument on behalf of the appellants was that the 14-team term was not an exclusionary provision under the Act as it was not included in the merger agreement for the "purpose" of restricting the supply or acquisition of services. It was argued that its "purpose" was to further the game, to protect the

---

73 (2001) 111 FCR 456 at 508 [210] per Moore J, 534 [306] per Merkel J.

74 (2001) 111 FCR 456 at 484 [137].

75 *Visy Paper Pty Limited & Ors v Australian Competition and Consumer Commission* reserved by the Court on 3 December 2002.

76 *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236. See Rutgers, "Case Notes – *ACCC v Rural Press Limited*", (2001) 9 *Trade Practices Law Journal* 273; Griggs, "Exclusionary provisions: The Full Federal Court awaits High Court deliberations – but is the solution to be found elsewhere?", (2002) 10 *Competition and Consumer Law Journal* 218 at 225.

participants of the code of rugby league and to make the game both viable and sustainable. It was further argued that the 14-team term did not apply to a particular class of persons, as required by the Act.

102 Unfortunately, as many cases show, the Act is not always given effect according to its broad purposes, such as the provisions in Pt IV ("Restrictive trade practices") suggest should happen. The history of this litigation demonstrates that it is necessary to descend into the detailed provisions of the Act. They have a substantial decisional history. Nevertheless, that history and the words of the Act must be read holding the broad statutory objectives steadily in mind. Those objectives include preventing concerted action by competitors designed to restrict the supply or acquisition of services for the purpose of raising their own profitability or damaging other participants in the relevant market.

The emergence of sport as a major economic activity

103 The detailed facts are set out in other reasons[77]. There too may be found the 14-team term[78] as it was agreed between Super League Pty Ltd (backed by News and its interests) and ARL (which Souths had long supported before the merger). The essential provision states:

> "7.5 No more than 14 teams will participate in the 2000 NRL Competition on varying terms depending on the level of satisfaction of the franchise criteria.
>
> …
>
> 7.9 In a 14 team NRL Competition, there will be no less than six teams, and a maximum of eight teams, from Sydney. Conversely, there will be no less than six teams, and a maximum of eight teams, from regions outside Sydney."

104 The primary judge accepted that the relevant officers of News (Mr Whittaker and Mr Frykberg) subjectively expected that the 14 teams for 2000 could and would be found without resort to exclusion, that is, by a process of club mergers, helped along by financial inducements[79]. Yet, however much that may have been their belief, expectation, hope or prayer, the 14-team term was central to the merger agreement and understanding. No 14-team term and no implementation of the term by 2000, no NRL, no merged rugby league competition and no financial rewards such as the merged competition promised.

---

77 Reasons of Callinan J at [165]-[184].

78 Merger agreement, cl 7 set out in reasons of Callinan J at [169].

79 (2000) 177 ALR 611 at 675 [284]-[285].

105 The 14-team term was therefore not a mere aspiration or expectation to be procured, if possible, only by a happy consensus amongst all concerned. It was, at all times, a provision of a contract, arrangement or understanding binding on the parties to it and intended, if need be, to be enforced. Necessarily, if enforced, it had the foreseeable, and foreseen, consequence and objective that teams supernumerary to 14 would be excluded from the premiership competition. They would then be prevented from supplying their services to ARL and NRL. Similarly, they would be prevented from acquiring the competition-organising services of those bodies, conducting the Australian national rugby league premiership competition.

106 In 1908, when the New South Wales Rugby League began organising a competition in that State (in which Souths took part as a foundation team), any such purported exclusion from the supply and acquisition of services would have been fought out in suburban meetings of the unincorporated associations through which the game and individual teams were then organised[80]. By the 1980s the New South Wales Rugby League had become an incorporated body[81]. Thus, by that time such exclusions were contested in terms of the then applicable corporations law and its rules that prevented the oppression of minority members. However, by the 1990s, the game was one of several sports competing for huge national audiences on television, on radio and in the print media. As Callinan J points out, it had become a major commercial activity[82]. The "game" was a line of business participating in a market, annually worth millions of dollars, involving associated corporate bodies employing thousands of people competing for a share of very considerable revenues. The League and Souths were dressed in the raiments of football, surrounded by their cheering supporters. But, in truth, like all of the participants in this appeal, they were engaged in economic activity and in a business of great monetary value in a national and even international market.

107 Like other corporations that enter the Australian economic market, the corporate parties to the present appeal were bound in their agreements and their

---

80 cf (2001) 111 FCR 456 at 460 [1].

81 *Wayde* (1985) 180 CLR 459.

82 Reasons of Callinan J at [209]. There have been similar developments in connection with sporting bodies in the United States concerning the sale of television rights: *Smith v Pro Football Inc* 593 F 2d 1173 (1978) and *National Collegiate Athletic Association v Board of Regents of the University of Oklahoma* 468 US 85 (1984).

activities by the requirements of the Act[83]. No longer could their disputes be resolved amongst themselves at a local meeting or simply in accordance with corporations law. The mere fact that the office holders of the governing bodies of NRL, and anyone else, acted in what they regarded as being in the "best interests of the game" was no longer sufficient to throw a veil of immunity from the requirements of the Act over what they did. Henceforth, in making their merger agreement and in implementing the 14-team term, the participants to such arrangements had to expect that their conduct would be scrutinised against the standards of the Act.

108 This appears to have come as a surprise to some of the appellants. They seem to have thought that good intentions towards "the game" were enough to immure them from the statutory obligations. However, once national rugby league in Australia entered the big economic league, as an adjunct to media and other commercial interests, its submission to the disciplines of the Act was simply a matter of the application to it of the statutory prescriptions. In effect, it was the inevitable consequence of turning a sporting game into a multimillion dollar corporate business. Whatever the interests of "the game", as such, the sportsmen and their associates were tied up with the profit-making interests of those entities organising and supporting that game.

109 It follows that the key to the correct application of the Act to the present case is to be found in freeing the mind from devotion to a football code or loyalty to a particular club, team or players and applying the Act, according to its terms, neutrally, as one would to any other corporation. Unless this is done, there is a real risk that extraneous factors (such as evaluation of what is best for the rugby league code of football) will affect the decision maker's approach to the application of the Act. Those are considerations upon which a court, including this one, is unable to provide proper evaluation. If it were attempted, an erroneous precedent would be established with unfortunate consequences for other areas of the Act's operation. It is the duty of this Court, as it was of the Federal Court, to avoid such an error. In large part, it was to make this point that the ACCC intervened before this Court. I agree with that part of the ACCC's submissions.

The applicable legislation

110 The applicable provisions of the Act are also set out in other reasons[84]. I will not repeat the full provisions. However, in my view, it is possible to pare the

---

83 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

84 Reasons of Gummow J at [54] and [61]; reasons of Callinan J at [175]-[178].

crucial terms down to a very short compass. Thus, s 45(2) prohibits corporations (including the appellants that agreed to the 14-team term) as follows:

> "A corporation shall not:
>
> (a) make a contract or arrangement, or arrive at an understanding, if:
>
> (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or
>
> …
>
> (b) give effect to a provision of a contract, arrangement or understanding ... if that provision:
>
> (i) is an exclusionary provision ..."

111 By s 4D(1) of the Act, an "exclusionary provision" for this purpose is defined as follows:

> "A provision ... shall be taken to be an exclusionary provision ... if:
>
> (a) the contract or arrangement was made, or the understanding was arrived at ... between persons any 2 or more of whom are competitive with each other; and
>
> (b) the provision has the purpose of preventing, restricting or limiting:
>
> ...
>
> (ii) the supply of ... services to, or the acquisition of ... services from, particular persons or classes of persons in particular circumstances or on particular conditions;
>
> by all or any of the parties to the contract, arrangement or understanding ... or, if a party ... is a body corporate, by a body corporate that is related to the body corporate."

112 By s 4F of the Act a provision of a contract, arrangement or understanding is deemed to have had, or to have, a particular purpose if the provision in question was included in the contract, arrangement or understanding and that purpose "was or is a substantial purpose". A person is deemed to have engaged in conduct for a particular purpose or reason if the person engages in conduct for purposes that include that purpose and the purpose "was or is a substantial purpose".

The history of the Australian provisions

113 Competition law has traditionally looked with special disfavour upon agreements between competitors, and particularly such agreements as they relate to price or the level of output provided in the market. This is because of the tendency of such agreements, without more, to be anti-competitive and injurious to the public interest. The *per se*[85] prohibition on exclusionary provisions is a product of this suspicion. One sub-class of such exclusionary provisions is described as "collective boycotts". As will be seen, there is no reference in ss 45 or 4D of the Act to the word "boycott". In its ordinary connotation, that word carries a lot of baggage. Some of it, in my respectful view, burdened the approach of Heerey J in the Full Court.

114 Care should therefore be taken in using the word "boycott" in the context of s 45. As Toohey J noted in *Devenish v Jewel Food Stores Pty Ltd*[86], in construing s 45D (where at least the word is used in the section heading), "boycott" is an expression "that lack[s] precision and may carry pejorative overtones". Mason CJ, to similar effect, noted that the concepts of primary and secondary boycotts were not necessarily susceptible of ready definition and that there were, therefore, dangers in construing the section by reference to such concepts[87]. This is why Mason CJ concluded that s 45D would be given a meaning consistent with "the wide, remedial and protective ambit that section is clearly intended to have"[88]. He pointed out that the purpose and policy underlying Pt IV of the Act demanded "a broad construction of its constituent sections"[89] and required "strong reasons ... to justify an interpretation of the provision which would narrow the scope of the provision and exclude conduct falling within its literal terms"[90]. This Court should resist any temptation to introduce concepts extraneous to the statutory language or to introduce into s 45 notions that have an effect opposite to that expressed by the Parliament.

---

85 ie, by itself or of itself. If the facts attracting the application of the legislation are established, no inquiry is required as to whether the anti-competitive consequences have actually ensued: Pengilley, "Collective boycotts under the Australian Trade Practices Act: What our policy makers have failed to understand and what the Dawson Committee should do about it", (2002) 10 *Competition and Consumer Law Journal* 144 at 145 (hereafter Pengilley, "Collective Boycotts").

86 (1991) 172 CLR 32 at 55.

87 *Devenish* (1991) 172 CLR 32 at 38.

88 *Devenish* (1991) 172 CLR 32 at 43.

89 *Devenish* (1991) 172 CLR 32 at 44.

90 *Devenish* (1991) 172 CLR 32 at 45.

115 Under the Act, not all arrangements between competitors are treated as illegal *per se*. The reason for singling out exclusionary provisions for such treatment in Australia can be traced to United States anti-trust law. In that country the courts came to a conclusion that a *per se* prohibition of certain types of arrangements between participants in a market was warranted because of the predominantly anti-competitive consequences of such arrangements and because a *per se* prohibition had the advantage of avoiding the costs inherent in business uncertainty over the validity of particular agreements and the litigation necessary to elucidate the matter[91]. The imposition of *per se* prohibitions in United States anti-trust law has been regarded as exceptional because once the existence of such an arrangement is proved, no further inquiry needs to be undertaken, whether into the size or market position of the competitors involved, or the possible pro-competitive or other justifications for the impugned arrangement. Such an approach represents "the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score."[92]

116 At the time that the Australian prohibition on exclusionary provisions was introduced into the Act, reference was made in the Parliament to the foregoing approach of United States law. The Minister introducing the Bill to amend the Act (Mr Howard) described the business activities involved in exclusionary contracts as "generally undesirable conduct", requiring a "firm line" where the relevant exclusion had the purpose "of restricting or limiting the trade of particular persons"[93]. Such were the terms in which the prohibition on exclusionary provisions was first enacted. Subsequently, this reference was extended to "particular classes of persons", an extension which, on Souths' argument, was relevant to the facts of this appeal[94].

117 The strong stance which the Minister (and the Parliament) took in relation to exclusionary contractual provisions finds its immediate source in the 1976 recommendations of the Swanson Committee proposing reform of the Act as

---

91 *Arizona v Maricopa County Medical Society* 457 US 332 (1982); *Northwest Wholesale Stationers Inc v Pacific Stationery and Printing Co* 472 US 284 (1985).

92 Pengilley, "Collective Boycotts" at 146 citing *United States v Realty Multi-List Inc* 629 F 2d 1351 (1980).

93 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 May 1977 at 1476.

94 *Trade Practices Revision Act* 1986 (Cth), s 6 inserting "classes of persons". This is relevant to the difference between the respective approaches of Moore and Merkel JJ in the Full Court. See also *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 264 [100].

originally drafted. In its report, that Committee recommended that an agreement with the purpose of restricting the persons who may be dealt with should be precluded if it had "a *substantial adverse effect* on competition between the parties to the agreement or any of them or competition between those parties … and other persons"[95].

118 There were strongly arguable economic and social reasons to support the Swanson Committee's conclusion that the law in Australia should take a firm stand against "collective economic bullying"[96]. From an economic point of view, such exclusionary provisions diminish the potential of unilateral decisions by market players; impose on others the aggregation of power which individual players may lack; and tend to be introduced by powerful market entities exerting what is the antithesis of competition. Such activities are frequently engaged in to prevent innovative market entry and to permit powerful players to divide the market like the Popes of old divided the world, for their own convenience and advantage. In such circumstances, it was unsurprising that the Act should be amended to prohibit exclusionary provisions in contracts, arrangements and understandings subject to the Act. This Court should give full effect to those provisions. It should not whittle them down.

The omission of "substantial" impact

119 I have mentioned the foregoing legislative history for a purpose. The Swanson Committee recommended that the *per se* prohibition on exclusionary provisions be introduced into the Act subject to proof, in the particular case, of a "substantial adverse effect on competition". That last part of the Committee's recommendation was not enacted. The reasons for the omission are not entirely clear. It appears to have been a deliberate decision[97]. It may have been designed to provide a *per se* prohibition on arrangements between competitors related to restricting or sharing the output sold to consumers, which are, in substance, equivalent to arrangements fixing or tampering with prices, and are treated as *per se* illegal in United States jurisprudence.

---

95 Australia, Trade Practices Act Review Committee (T B Swanson, Chairman), *Report to The Minister for Business and Consumer Affairs*, (August 1976), pars 4.116-4.117 (emphasis added). The full passage is set out in the reasons of Gummow J at [59]. Note that the Independent Committee of Inquiry into National Competition Policy (1993) in its report, at 46, rejected proposals for change to the relevant provisions.

96 Pengilley, "Collective Boycotts" at 147; cf Clarke and Corones, *Competition Law and Policy* (1999) at 253.

97 Pengilley, "Collective Boycotts" at 158.

120 However that may be, the consequence was to sweep into the *per se* prohibition of s 4D of the Act certain unobjectionable arrangements where it may be argued that such a prohibition was unnecessary or even inappropriate on the basis solely of competition analysis. But where Parliament has, apparently deliberately, omitted to include the recommended rider concerning *substantial* anti-competitive effects, it would be impermissible for the courts, by techniques of statutory interpretation, to effect a repair of a perceived defect of the Act on that ground. Any such repair must be left to the Parliament[98]. The task of courts is to give effect to the Act according to its purpose as that purpose is expressed in the statutory language. This is a fundamental rule[99]. It derives from the very nature of legislation as written law. It is not qualified by the modern purposive approach to statutory construction[100].

121 This conclusion is further reinforced if regard is had to the way similar exclusionary provisions are dealt with under equivalent laws in other countries. Thus, in the United States, such provisions in agreements are judged by reference to the extent to which they tend to exclude competition from actual or potential competitors at the same level of the market[101]. Also in the United States, case law has developed obliging the courts to evaluate whether the arrangement impugned is so destructive of competition that it should be banned *per se*[102]. There are no such criteria in the Australian Act. On the contrary, the suggested qualification was not adopted in 1977. It has not been adopted since.

122 The point is made even more obvious by a comparison of the provisions of the Australian Act with the applicable law in New Zealand. The *Commerce Act* of that country initially copied the principles expressed in ss 45 and 4D of the Australian Act as they applied to exclusionary provisions. However, in 1990, the New Zealand Act was amended by the addition of s 29(1)(c). By that paragraph, *per se* breaches, in relation to exclusionary provisions, only arise where the impugned provision relates to a party in competition with one of the parties to the contract, arrangement or understanding. Arguably, Souths would fall outside

---

98 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [69]; 197 ALR 297 at 311.

99 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 148-150.

100 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

101 *Smith v Pro Football Inc* 593 F 2d 1173 (1978).

102 *United States v Socony-Vacuum Oil Co Inc* 310 US 150 (1940); see also Posner, *Antitrust Law*, 2nd ed (2001) at 230-232.

such a class if a similar amendment had been enacted in Australia. In any case, by further amendment to the *Commerce Act*, made in 2001, a provision was included exempting an "exclusionary provision" which is shown not to have the purpose or effect "of substantially lessening competition in a market"[103]. None of these qualifications applies in the Australian context. On the contrary, the Australian Act provides otherwise. It remains resolutely unchanged.

123 Commentators since the Swanson Committee's report have continued to urge that the Act, as it applies to exclusionary provisions, should be cut back as an over-zealous prohibition[104]. The perceived need for such amendments gives emphasis to the broad reach of the exclusionary provision sections of the Act, according to its present language. It is no part of the role of a court to deny the operation of the Act as its language commands.

124 The most that a court can normally do, where an Act such as the present appears to have an over-ample application, is to conserve the remedies proper to the breach to circumstances in which a sound exercise of the remedial power indicates that relief is appropriate and just. A number of the commentaries that were critical of the decision of the Full Court in the present case should, in my view, have been directed at the legislature for its failure to reduce the suggested statutory overreach rather than at the majority judges who simply gave effect to the purpose of the Parliament as disclosed in the words adopted[105]. The Act is certainly wide. Seemingly, it is deliberately so. It has no explicit competition rider. The majority judges were therefore right to construe it as they did.

---

103 *Commerce Act* 1986 (NZ), s 29(1A). In Canada the *Competition Act* 1985 (Can) prohibits agreements where they "otherwise restrain or injure competition *unduly*" (s 45(1)(d)). In the United Kingdom there is an exemption for such agreements where they are shown to cause "*substantial* public benefit": Heydon, *Trade Practices Law*, vol 1 at [1.110], [4.710]. The textual point is reinforced by the insertion in s 45(2) of sub-pars (a)(ii) and (b)(ii) referring to "substantially lessening competition". Although these sub-paragraphs were not directly in issue in the proceedings, they were referred to: see (2000) 177 ALR 611 at 630 [80].

104 eg Pengilley, "Collective Boycotts" at 165-166.

105 See eg Fridman, "Sport and the Law: The South Sydney Appeal", (2002) 24 *Sydney Law Review* 558; Oddie and McKeown, "Joint ventures and exclusionary provisions: Anti-competitive purpose or unintended effects?", (2002) 10 *Competition and Consumer Law Journal* 192; Pengilley, "Fifteen into fourteen will go: the Full Federal Court defies the laws of mathematics in the South Sydney case", (2001) 17 *Australian and New Zealand Trade Practices Law Bulletin* 25; cf Davies, "Case Note – *Souths v News Ltd*", (2001) 8 *James Cook University Law Review* 121.

The narrowing of the points of difference

125 *Objective vs subjective purpose*: Given the magnitude of this case, there are numerous legal and factual points that have been argued which, in other circumstances, would warrant close examination. However, as mine is a minority opinion, it is appropriate to put to one side a number of controversies that are inessential to the conclusions necessary to reach the orders that I favour.

126 First, a controversy has existed under the Act as to whether the "purpose" referred to in s 4D(1)(b) is the subjective purpose of the parties to the contract, arrangement or understanding ("arrangement") or is an objective construct, deduced by a court when obliged to characterise the "purpose" in question. Based on an analysis of the statutory language (including reference to s 4F(1)(a) of the Act and the history and purpose of the provisions), arguments can be found for both constructions.

127 The best textual argument for adopting an objective approach to the word "purpose" lies in the language of the Act itself. The relevant "purpose" is that of "the provision". It is not the purpose of identified persons. This strongly suggests a legal construct evoking a court's functions of characterisation. This view is reinforced by recognition that the "regulatory goals of the Act ... seem to be more readily achieved by provisions such as ss 45(2)(a)(ii) [and] (2)(b)(ii) ... which permit an objective characterisation of conduct … It is more difficult ... to understand how these regulatory goals are achieved by provisions which prohibit conduct which has an anti-competitive 'purpose' where 'purpose' has been invariably defined as involving the establishment of a 'subjective' purpose."[106] The "arrangements" mentioned in the Act[107] might involve multiple parties (and, in the case of corporations, multiple officers). They might have been made at different times, having slightly different subjective purposes that it would take many months of court hearings to unravel and then without any certainty of accurate ascertainment. Moreover, a subjective test might effectively allow parties an unwarranted escape from the provisions of the Act, defeating the attainment of its important national purposes. It would not make much sense to allow parties to enter anti-competitive "arrangements" and then to escape the consequences because their subjective purposes were something other than anti-

---

106 McMahon, "Church Hospital Board or Board Room?: The Super League Decision and Proof of Purpose under Section 4D", (1997) 5 *Competition and Consumer Law Journal* 129 at 130-131; Griggs, "Exclusionary provisions: The Full Federal Court awaits High Court deliberations – but is the solution to be found elsewhere?", (2002) 10 *Competition and Consumer Law Journal* 218 at 222.

107 Relevantly, ss 4D(1) and 45(2)(a) and (b).

competitive. Such a construction would defeat attainment of the economic objectives of the Act.

128 On the other hand, objective purposes, as defined by a judge, may represent, in practice, little more than an expression of the subjective evaluation of the deciding judge[108]. Although the "purpose" in question is defined by the Act to be the purpose of "the provision" (that is, a provision of an "arrangement"), the Full Court of the Federal Court has held that what has to be evaluated is the subjective purpose of the parties to the "arrangement" in adopting the provision in question[109]. It has concluded that, because of the provisions of s 4F of the Act, the search is for the significant operative purpose of the provision itself[110]. This approach has been applied in many cases.

129 The present state of authority on this issue was applied by all of the judges in the Federal Court as they were bound to do in the light of the Full Court rulings. Of necessity, as their Honours recognised, this obliged acceptance of the primary judge's conclusions concerning the subjective beliefs of the important witnesses (such as Mr Whittaker and Mr Frykberg) who gave evidence[111]. In accordance with conventional principles governing an appellate rehearing, the impressions of the trial judge on such matters would be (as they were here) accepted and given appropriate effect.

130 Left to myself, I would conclude, for textual and policy reasons, that the better view is that the court decides its own characterisation of the "provision" in question (that is an objective classification)[112]. In my view, the line of authority to the contrary in the Federal Court is wrong. However, in the present case, nothing turns on the difference. The conclusion which I favour can be reached by either approach. Obviously, even where an objective characterisation is required, it will still be necessary to take into account any admissible evidence of the subjective purposes of the relevant actors. The application of a subjective test by the judges of the Federal Court did not, therefore, in this case consitute a critical error. But in my opinion, it was an error.

---

108 Pengilley, "Hilmer and 'Essential Facilities'", (1994) 17 *University of New South Wales Law Journal* 1 at 24.

109 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460.

110 (2001) 111 FCR 456 at 519 [252].

111 Reasons of Gummow J at [64] where the passages in the reasons of the primary judge are quoted: (2000) 177 ALR 611 at 675 [284].

112 cf reasons of McHugh J at [32]-[43].

131 *Particular persons vs class*: Secondly, I can put out of consideration the way that Moore J in the Full Court approached the error that he found in the decision of the primary judge. According to Moore J, the primary judge had erred in failing to discern the purpose "of the 14-team term" as one of "restricting or limiting supply of services to particular persons and the acquisition of services from them" simply because, at the time the term was agreed to, it was not known when and upon whom the exclusionary provision would impose the burden of the restriction or limitation[113]. Relevant extracts from the analysis of Moore J appear in other reasons[114]. In essence, Moore J rejected the notion that the words "restricting or limiting" in s 4D(1) of the Act required that the supply or acquisition of services must be restricted or limited, not that the persons or class of persons must be the subject of the restriction or limitation. He said[115]:

> "The adoption of the 14-team term was effectively a declaration to Souths and each of the other clubs competing in the rival competitions that they collectively could not do what to that point each of them had done, namely field their team in a top level rugby league competition."

132 Upon this analysis, the provision was an indication that teams, including Souths, could continue to provide a team in the premiership competition by merging or forming a joint venture. However[116]:

> "[T]he provision of a team of this character was not the provision of the *same services* that had been provided, and correspondingly acquired, before the adoption and implementation of the 14-team term. It would not be a team of that club but a hybrid team of two or more clubs. In this way, the services to be acquired by operation of the 14-team term, would, as to some of the 1997 clubs, not be the *same services* that had been acquired formerly when the two competitions conducted the rival competitions. The services acquired would be limited and restricted."

133 The construction of the Act favoured by Moore J (also supported by the ACCC) is, in my opinion, correct. However, Heerey J complained that it represented an approach to the application of the Act different from that pleaded and presented by Souths at trial. In Heerey J's view, it could not be allowed on appeal because it could give rise to a different factual dispute involving,

---

113 (2001) 111 FCR 456 at 507-508 [201]-[204].

114 Reasons of Gummow J at [82]; reasons of Callinan J at [205]-[206].

115 (2001) 111 FCR 456 at 501 [185].

116 (2001) 111 FCR 456 at 502 [186] (emphasis added).

potentially, different evidence[117]. In his reasons, Moore J disputed this criticism[118]. In a convincing deployment of excerpts from the pleadings[119], passages from the reasons of the primary judge[120], and portions of the written submissions in the appeal[121], Moore J concluded that the approach that he favoured had been a live issue in the trial. It was one mandated by the terms of the Act. It could therefore properly be considered on appeal.

134 A majority in this Court has come to a contrary view[122], preferring in this regard the approach of Heerey J. I am of the opposite opinion. However, because I can reach my conclusion by a different route, there is no point in pursuing the course that led Moore J to his conclusion. His Honour's approach, which is a direct and simple one, remains available in the record for future toilers in this legal vineyard.

135 *The legality of the merger*: As other members of this Court have demonstrated, the ACCC sought to argue that the real flaw, from the point of view of competition law, in what had occurred affecting Souths, arose at the earlier point of the *making* of the contract merging the two rival competitions[123]. This submission was ultimately opposed by all parties to the appeal. It involved an attempt by a late entrant intervener, in effect, to shift the litigious goal posts in a way as impermissible in a court of law as it would be in a game of rugby league.

136 I agree that we may not decide the appeal on that basis. In so far as the ACCC's submission carried resonances of the submission that News and the forces aligned with it had advanced (that the exclusionary provision needed to exist in an "arrangement" between parties in competition with each other at the time the provision takes its effect), that contention was rightly rejected by all of

---

117 (2001) 111 FCR 456 at 479 [104]-[105].

118 (2001) 111 FCR 456 at 494-508 [161]-[205].

119 (2001) 111 FCR 456 at 496 [164].

120 (2001) 111 FCR 456 at 494-495 [161]-[162].

121 (2001) 111 FCR 456 at 496-497 [165]-[166].

122 Reasons of McHugh J at [46]; reasons of Gummow J at [83]; reasons of Callinan J at [222].

123 Reasons of Gummow J at [84]-[88]; reasons of Callinan J at [224]-[231].

the judges in the Full Court, explicitly or by implication[124]. News itself did not attempt to revive that argument in this Court.

The emerging issues

137 The foregoing analysis narrows the issues that I will decide in this appeal to two. They are whether the majority in the Full Court erred in concluding:

(1) that the impugned provision in the "arrangement" had a proscribed "purpose"; and

(2) that Souths constituted a "particular class of persons" for the purposes of s 4D(1).

The proscribed "purpose"

138 *Purposes vs effects*: After referring to the evidence of the negotiators[125], the primary judge found that a foreseen consequence of the 14-team term was that, if more than 14 clubs sought selection for the 2000 premiership competition, the club or clubs in excess of 14 would be denied competition-organising services[126]. These clubs would also be denied the opportunity to provide team services. The primary judge therefore considered the case on the basis that, should more than 14 clubs seek to field teams in the 2000 NRL competition, the clear and intended effect of the 14-team term was that the NRL would not provide competition-organising services to, nor acquire team services from, a greater number of teams than the number fixed by that term[127]. Although the primary judge's search thereafter was for the "purpose" of the provision in question, not simply its "effect" (a distinction between those terms being mirrored in the language of the Act[128]), any rational elucidation of the "purpose" of the term would have to take into account the foreseen exclusionary effect which it was intended to have in the given contingencies. The primary judge was fully alive to this interrelationship between intended effect and purpose[129].

---

124 (2001) 111 FCR 456 at 480-481 [110]-[116] per Heerey J, 508 [208] per Moore J, 516 [234]-[235] per Merkel J.

125 (2000) 177 ALR 611 at 668-670 [252]-[260].

126 (2000) 177 ALR 611 at 671-672 [269].

127 (2000) 177 ALR 611 at 671-672 [269].

128 The Act, ss 45(2)(a)(ii) and 45(2)(b)(ii).

129 (2000) 177 ALR 611 at 674 [279].

139 Where the provisions of an "arrangement" are in writing, the "purpose" of a provision can be more readily ascertained from its terms than where it is made orally, whether partly so or wholly[130]. Yet even where the "arrangement" is not in writing, the "purpose" can be inferred from the circumstances of the case[131]. In *Transfield Pty Ltd v Arlo International Ltd*[132], in the context of s 45 of the Act and of the question whether a provision had a "purpose" of substantially lessening competition, Wilson J said, "[i]ts purpose must be gleaned from the words used, and its context". That is how the "purpose" of the 14-team term should be ascertained.

140 *Immediate vs long-term purposes*: The basic problem with the word "purpose", in this and in other contexts, was described by Evatt J in *McKernan v Fraser*[133]. If a soldier who shoots to kill in battle is asked whether his purpose is to kill the enemy or to defend his country, the answer will depend on the questioner, the occasion and the degree of particularity adopted in the response. Looking at the question generally, and with a view to the long term, the broader answer of defending the country might be given and accepted. But, focusing on the particular action of aiming the barrel of the rifle and pulling the trigger, killing the enemy will take on a compelling appearance as the soldier's immediate "purpose".

141 In *Mikasa (NSW) Pty Ltd v Festival Stores*[134] Menzies J observed that "in business affairs it is usual to find that a course of action has been adopted for a number of reasons". In the case of secondary boycotts, for example, an analogous problem has been addressed by this Court. In the context of s 45D of the Act, a question may arise as to the "purpose" of the person engaged in the impugned conduct. How is that question to be answered? By addressing the long-term or short-term purposes of the person concerned? The visionary or practical purposes? The purposes viewed as ends or as means? The purposes given a laudatory gloss by a party alleged to be in breach of a statute or those

---

130 *Federal Commissioner of Taxation v Newton* (1957) 96 CLR 577 at 630; *Slutzkin v Federal Commissioner of Taxation* (1977) 140 CLR 314 at 329.

131 *R and Attorney-General v Associated Northern Collieries* (1911) 14 CLR 387 at 402 per Isaacs J.

132 (1980) 144 CLR 83 at 108.

133 (1931) 46 CLR 343 at 403; cf *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367 at 374; *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc* (1989) 24 FCR 127 at 133-135.

134 (1972) 127 CLR 617 at 641.

representing the actual, immediate hard-nosed objectives of the person concerned?

142 In a secondary boycott case an industrial organisation of employees might assert that its "purpose" is to advance the economic interests of its members. But if, more immediately, the fulfilment of that "purpose" involves conduct that hinders or prevents the supply of goods or services to another person, in a way likely to cause damage to the business of that person, the existence of long-term, abstract, ethereal or self-laudatory "purposes", that are arguably well-intentioned, justifiable or even noble, will not prevent a court from looking in the context to the "purpose" with which the Act is concerned. In the case of s 45D and secondary boycotts, this will be the alleged hindering and prevention of the supply of services causing substantial loss or damage to a business. In the case of exclusionary provisions in "arrangements", it is preventing, restricting or limiting the supply of goods or services to or from particular persons or classes of persons, including in the case of future contingencies created by "particular circumstances" or "particular conditions"[135].

143 Consistency with the way in which this Court has approached the meaning of "purpose" in the case of secondary boycotts, suggests that the ascertainment of the prescribed "purpose" in s 4D of the Act must similarly be found in the context of the operative prohibitions in s 45 of the Act. This Court could not legitimately adopt a different approach, for example, because it views with more favour the proscribed activities of sporting organisations and their media supporters than it does the proscribed activities of trade unions and their supporters. Relevantly, the prohibition on a corporation making an "arrangement" that contains an exclusionary provision (or giving effect to such a provision) must also be viewed from the more immediate perspective of the prohibition stated in the Act. This Court must give effect to the Act impartially. Impartiality is important in a football referee. It is even more important in a court of law.

144 *The relevant purpose of the "provision"*: Read in this way, and keeping in mind that the "purpose" in question is not, as such, the "purpose" of the parties generally or the "purpose" of the "arrangement" but the purpose of the "provision" that is impugned[136], it is my view that Merkel J was right in detecting error on the part of the primary judge. As Merkel J found, the primary judge conflated the "purpose" of beneficial provisions in the relevant "arrangement" (notably those encouraging club mergers, joint ventures and regional participation) with the 14-team term which was the "provision", and the only

---

135 The Act, s 4D(1)(b).

136 (2001) 111 FCR 456 at 522 [262].

provision, that Souths had identified as carrying the stain of the proscribed purpose that it alleged. This was the same mistake as it would be to excuse a secondary boycott by a trade union on the argument that its "purpose" was to advance the economic interests of its members, the rights of workers generally, or greater equity in Australian industrial life and not, as such, to put economic pressure on the target.

145 With all respect, the inquiry by the primary judge as to the intention of the authors of the 14-team term for the objectives of the "arrangement" overall[137], diverted his Honour from focusing on the term itself and how it might operate. It switched his concentration to why those persons thought that the term would not, in the end, prove necessary to secure what the team merger provisions sought to achieve overall. If the applicable "purpose" is to be ascertained from the reason why the parties included the 14-team term in the merger agreement, the evidence at trial compellingly suggested that such reason was that, if a 14-team competition could not be achieved through *incentives* such as mergers or by the operation of the basic selection criteria, it was to be achieved by a process of *enforced* exclusion. Thus Mr Frykberg, whose evidence was accepted, said:

> "It was an essential element of the agreement that there be in the absence of being able to reach a 14 team competition naturally that there be a mechanism in place which would arrive at a 14 team as agreed by both sides."

146 Mr Macourt, likewise accepted, said that it was essential to have an exclusionary process if more than 14 teams applied for selection in the 2000 competition. Mr Whittaker agreed to the analogy that the funding was the "carrot". The threat of exclusion contained in the 14-team term was the "stick".

147 The issue in these proceedings was not whether the overall objective of the merger or of the "arrangement", taken as a whole, was rational or beneficial or in the best interests of the game, its supporters or sport generally. Nor was it whether, subjectively, the officers of News or any of the other bodies in its camp had the hope, wish or expectation of avoiding the exclusion of a team with such a long history in the game of rugby league as Souths. The issue, and the only issue, was the "purpose" of the impugned clause that contained the exclusionary provision limiting the competition in 2000, and thereafter, to 14 teams and providing, if need be, for the removal of any team or teams beyond that number from the supply and acquisition of services which, at the time the "arrangement" was agreed, they enjoyed in the applicable market. I entirely agree that, in ascertaining the "purpose" of the "provision", regard should be had to relevant

---

137 (2000) 177 ALR 611 at 671-674 [269]-[276].

matters of context. But it is critical to focus on the "provision" in the midst of the context because that is what the language of the Act requires.

148 When the attention of decision-making is focused in this precise way, there can only really be one answer to the "purpose" of the "provision" containing the 14-team term. It was exclusionary. True, it might have been justifiable in terms of the interests of the sport, the fans, the majority of the affected players and other employees in several clubs, the media interests, the nation, the wider watching world of global television and human happiness. It might even have been without substantial deleterious impact on the interests of market competition, viewed as a whole. But these are not the questions posed by the Act. In s 4D(1)(b), it addresses attention only to the purpose *of the provision*. So confined, the "purpose" of the provision was, upon its coming into effect (as must be postulated to attract the operation of the Act), exactly what those who agreed to it foresaw and contemplated and intended and what the provision stated. It was to exclude from the market supplying and receiving premiership services any team or teams beyond the number of 14.

149 *Omitting the element of sport*: It is relatively easy to demonstrate that, when the context of sport is put in its correct place, such a provision is exclusionary[138]. If any two corporations that were business competitors agreed that there were too many suppliers in their industry or market, and they agreed to choose a supplier, or suppliers, according to predetermined criteria, and to refuse to deal with them in the future, such conduct would obviously fall within the proscription of the Act. Yet that is precisely what happened in the present case, when the context of sport is removed. Such a term would still be exclusionary even if the two competitors were acting according to their conception of the best interests of the market (for example, that too many suppliers had produced too much stock which lowered the quality of goods and services to customers). This "best interests of the market" argument would not protect other business competitors under the Act. It should not protect News and ARL. As is usually the case in such matters, the restricting competitors assert that the best interests of the market or game or participants happen conveniently to coincide with their own best economic interests. Such an opinion is not always universally shared. In this case, Souths vehemently denied it.

150 The Act requires a precise focus in order to ascertain the "purpose" relevant to its provisions. Once that more precise focus is adopted (as Merkel J favoured) it identifies an error of law on the part of the primary judge. It was possible, adopting all of the primary judge's findings on credibility of witnesses and their motives and aspirations, for the Full Court to address for itself,

---

138 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 209-211 per Barwick CJ, 234-237 per Mason J, 239-240 per Murphy J.

accurately, the "purpose" of the "provision" in question. Indeed, the primary judge's finding made it relatively easy to discern the "purpose" of the 14-team term, to decide that it was "a substantial purpose" amongst the provisions of the "arrangement" in question and to conclude that it was a proscribed exclusionary purpose, precisely as its terms indicated[139].

151 *Exceptions and authorisations*: To construe s 4D of the Act by reference to what was seen as the "necessary" restrictions to avoid its application to what might be judged as "legitimate" or "commercial" decisions distorted the approach both of the primary judge and of Heerey J in the Full Court[140]. Whilst s 45(2) of the Act has a wide operation in relation to exclusionary provisions, specific exceptions are envisaged by the Act. These exceptions relate to covenants, resale price maintenance, exclusive dealing arrangements, the acquisition of shares or assets of a company and arrangements between related companies[141] and cases where specific authorisation has been obtained from the ACCC. That body has the power to authorise the making of, or giving effect to, an "exclusionary provision" where it is satisfied that such provision has resulted, or is likely to result, in a *benefit* to the public so that the contract, arrangement or understanding containing the exclusionary provision should be allowed to be given effect[142].

152 It has been held that the public benefit relevant to an authorisation by the ACCC may include the achievement of efficiencies, rationalisation or financial viability[143]. In such cases, the private interests of the parties to the "arrangement" are not irrelevant to an authorisation[144]. However, instead of seeking such an authorisation for their "arrangement" the merger parties pressed on without it. They may have been hoping that a problem would not arise. But when it did, their "arrangement" was governed by the Act. It applied without any applicable exception or authorisation.

153 *Conclusion: Full Court correct*: It follows that I would uphold the reasoning and conclusion of Merkel J that the element of a proscribed "purpose"

---

139 (2001) 111 FCR 456 at 525 [274].

140 (2000) 177 ALR 611 at 676 [293]; (2001) 111 FCR 456 at 477 [94].

141 s 45(5)-(8).

142 See the Act, ss 88(1) and 90(8); cf Heydon, *Trade Practices Law*, vol 1 at [4.1570]-[4.1650].

143 *Re Rural Traders Co-operative (WA) Ltd* (1979) 37 FLR 244 at 276, 281-283.

144 See *Re Tooth & Co Ltd and Tooheys Ltd* (1979) 39 FLR 1 at 25.

of the impugned "provision" was established by the terms of that provision, read against compelling evidence that was not really in dispute. That conclusion justified, and required, the intervention of the Full Court.

Services to or from "particular classes of persons"

154 *Operation of the exclusionary provision*: But is the proscribed "purpose" contemplated by s 4D(1) inapplicable in this case because the impugned provision did not have the purpose of preventing, restricting or limiting relevantly the supply of services to, or the acquisition of services from, "particular ... classes of persons in particular circumstances or on particular conditions"? I agree with Gummow J[145] that there are dangers in dissecting the concepts in the Act and reading them in isolation. They represent a compound idea. Each word and phrase takes its meaning from the entire provision. This, in turn, must be read in its context so as to achieve, as far as possible, its objective[146].

155 On the face of things, once the character of the "purpose" of the 14-team term is correctly identified as that foreseen and intended by the merger parties in their "arrangement", there is little difficulty in classifying the "purpose" as one of preventing the supply and acquisition of services to Souths in particular circumstances. The "particular circumstances" involved are those foreseen and contemplated by the 14-team term, namely, that in the run-up to the 2000 premiership rugby league competition, of the teams that were supplying and acquiring services in 1997, there would be one or more teams, beyond 14, which otherwise met the criteria for participation but had to be eliminated in the "particular circumstances" that had by then transpired. Such "circumstances" included those expressly contemplated by the relevant "arrangement". The inducements of merger had not operated to put Souths directly into the competition. The balance of Sydney and regional teams advantaged other remaining competitors. The considerations agreed by the merging parties therefore applied to eliminate Souths. Accordingly, by the provisions of the merger agreement (but not with the agreement of Souths) and by the application of the pre-existing standards that the merging parties had agreed, the exclusionary provision meant that there would be a number of clubs in 2000 which would be denied the supply or acquisition of services, just as the "arrangement" envisaged. This, in the event, affected Souths.

---

145 Reasons of Gummow J at [68].

146 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 397; Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 97.

156 *Exclusion on pre-ordained criteria*: What is the argument against this construction of the Act? It was put for News that Souths was not within a "particular class of persons". It was simply an excluded team to which, individually and alone, sensible criteria for the benefit of the game had been applied, requiring its exclusion on this occasion. With respect, this argument, and the suggested analogy to immigration law[147], were unconvincing. Even if it were accepted that a "particular class" within the meaning of s 4D(1)(b) could not be defined by the *fact* of exclusion, this is irrelevant. If ever there was a case in which there were identified criteria for exclusion, that pre-existed the fact of exclusion, this was it. Those who drafted the 14-team term may have hoped that its provisions would not have to be invoked. But, if need be, they (and especially News) were insistent that, in the stated circumstances, the term would be applied, according to pre-ordained criteria. Those criteria existed separately from the exclusion. They identified a particular class of persons, being the club or clubs supernumerary to 14, which in 2000 would lose the right to supply and acquire services in the relevant market during that year.

157 From what I have said it also follows that I agree with Gummow J that it is inappropriate to import notions of malice or to employ terms such as deliberately "targeting", "discriminating" or "aiming at" for the purposes of s 4D so as to limit its application to circumstances where the concerted action can be classified as a "boycott"[148].

158 Accordingly, on each of the grounds pressed in this Court, the appellants' attack fails.

The discretionary provision of relief

159 *The grant of an injunction*: News did not, in this appeal, canvass the orders made by the Full Court granting an injunction restraining those in its camp "from giving effect to, or continuing to give effect to, the 14-team term"[149]. No submissions were therefore addressed to the injunctive order. This means that an important part of the reasoning of Heerey J concerning the "discretionary remedy of injunction"[150] is not, as such, before us. But I would not want to pass it by without comment.

---

147 Referring to *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 241 per Dawson J. See (2001) 111 FCR 456 at 474-478 [79]-[97] per Heerey J.

148 Reasons of Gummow J at [77].

149 (2001) 111 FCR 456 at 534, order 4.

150 (2001) 111 FCR 456 at 482 [126].

160 In that section of his reasons, Heerey J picked up part of the reasoning of the primary judge[151] to the effect that, even if Souths had made out its claims based on s 45 of the Act, injunctive relief should be refused and the relief confined to an applicable declaration as to the breach of the Act occasioned by the making of, arriving at and giving effect to, the 14-team term and an order for the ascertainment of the damages to which Souths was entitled under s 82 of the Act as a consequence. Such declaration and order were, in due course, made to formalise the conclusions of the majority of the Full Court. The majority agreed on their terms[152]. However, they also ordered the injunction.

161 *Remedies and sensible outcomes*: Because of the state of the record, I will not explore this issue fully. Suffice it to say that there is force in the reasoning of Heerey J concerning the provision of injunctive relief in such circumstances, even where it is accepted that a breach of s 45 has been established[153]. In his reasons, Merkel J also recognised that injunctive relief could not extend to obliging the conduct in 2002 of a 15-team competition[154]. Moreover, he accepted that there could be other, lawful reasons for withholding an invitation to Souths to participate in the competition in 2002 or thereafter.

162 It is possible that, in providing relief under the Act, in respect of which the trial judge has very large powers, just and sensible remedies may be fashioned to avoid the application of the Act to unwarranted circumstances. In default of legislative attention to the Act's suggested overreach, the remedies under the Act may, as Heerey J proposed, have an important part to play in the accommodation of the substantive provisions of the Act, and to ensure sensible outcomes that take into account the conduct of the parties and the larger objectives of competition law and policy.

---

151 (2000) 177 ALR 611 at 682 [327]-[328].

152 (2001) 111 FCR 456 at 534 [307] per Merkel J, 508-509 [209]-[212] per Moore J.

153 (2001) 111 FCR 456 at 483-485 [130]-[138]. See also reasons of Callinan J at [223].

154 (2001) 111 FCR 456 at 532 [300]; cf Pengilley, "Fifteen into fourteen will go: the Full Federal Court defies the laws of mathematics in the South Sydney case", (2001) 17 *Australian and New Zealand Trade Practices Law Bulletin* 25; Duns, "Super leagues and primary boycotts – a whole new ball game", (2002) 10 *Trade Practices Law Journal* 115 at 122.

Orders

163 No doubt because of supervening happenings, News made it clear that, in the event that it succeeded in this appeal, it sought no orders as to costs of the proceeding before this Court or in the Full Court of the Federal Court. Likewise, Souths asked that, if it should succeed, the appeal should simply be dismissed. For the foregoing reasons, I would so order. The appeal should be dismissed. In accordance with the parties' agreement there should be no order as to costs.

164 CALLINAN J. This appeal is concerned with the construction of ss 4D and 45 of the *Trade Practices Act* 1974 (Cth) ("the Act") and their application to a sporting competition which replaced two competing competitions.

The facts and relevant legislation

165 The first respondent, South Sydney District Rugby League Football Club Ltd ("Souths"), is a sporting club which competed, from its inception in 1908 in a rugby league competition conducted in New South Wales by the New South Wales Rugby League ("NSWRL") (an incorporated body since 1982). Rugby League is essentially a winter sport. Souths had many successes over the years. It won the inaugural competition in 1908, and, by 1997 had won more premierships, and had produced more international players than any other club. In 1983 NSWRL resolved that each club would have to apply annually for a right to compete in the competition. From 1984 the rules governing the competition provided that participation in one year conferred no right to participate in the next or subsequent years. In 1995 a rival competition called Super League was also conducted. It was created and sponsored by Super League Limited ("Super League"), a subsidiary of the first appellant News Limited ("News Ltd") which is a large commercial organisation heavily involved in publishing and telecasting. By sponsoring or subsidizing sporting competitions and participants in them it obtains valuable telecasting rights and advertising revenue. Some clubs which had previously competed in the other, longstanding competition joined the new rival competition as did some clubs which came into existence for the first time. Souths continued to compete in the former.

166 In this litigation the other clubs which had participated in either or both of the competitions were parties but played no active role in the conduct of the case.

167 In 1997 the two competitions, the older of which was by then being conducted by the Australian Rugby League Ltd ("ARL") were merged to form the National Rugby League ("the NRL"). By 19 December 1997 ARL and News Ltd had reached an agreement in principle (the "Understanding") pursuant to which the second appellant National Rugby League Investments Pty Ltd ("NRLI"), effectively a joint venture company to be controlled equally by the other appellants, would conduct the merged competition. On 18 February 1998 the ARL and Super League executed a Memorandum of Understanding (the "Memorandum of Understanding"), which in terms provided for a unified competition to be conducted between, not initially, but ultimately, 14 teams only (the "14-teams term").

168 If only 14 teams were to play in the competition, it would be possible for each to play one another both at home and away, and for semi-finals, finals and a grand final to be conveniently conducted within a reasonable frame of time within the cooler months of the year. Another practical constraint is imposed by the nature of the game itself. As a body contact sport it requires a high level of

physical fitness and hardness, and a reasonable interval between games to enable players to rest and recover from injuries inflicted from time to time. This can also be said of such an arrangement. The parties wished to establish a financially sustainable national competition of a very high standard which would attract the best players and clubs, and accordingly the support of News Ltd and other media companies: in substance a competition of the best. The competition would, self evidently, itself be in competition simultaneously, not only for athletes to participate in it, but also for sponsors, advertisers, spectators, radio stations and television channels, with other codes of football and other sports. And, as will appear, one at least of the appellants would assume an obligation of subsidizing in a considerable amount each of the participating clubs (see cl 7.7 of the agreement). It is easy to see therefore why the ultimate number 14 might commend itself to the appellants.

169 The following was the term of the agreement between the appellants which made provision for the 14 teams:

> "7. COMPETITION STRUCTURE
>
> 7.1 The Parties agree that the structure of the NRL competition will be as set out in this clause 7 and each of ARL and NRLI agree to procure NRL to comply with this clause 7.
>
> 7.2 Before 30 June 1998, NRL must:
>
> (a) inform Clubs that no less than 16 teams, but no more than 20 teams (the actual number to be determined by NRL and approved by the Partners), will be entitled to Franchises in 1999, and not more than 14 teams will be entitled to Franchises in 2000; and
>
> (b) release the franchise criteria for 1999 and beyond.
>
> 7.3 No more than 20 teams will participate in the 1998 NRL Competition, each team being granted a Franchise for a term of one year. However, once the franchise criteria are determined, Brisbane, Newcastle and Auckland will be assessed by NRL against the franchise criteria and, if NRL is satisfied, the term of their Franchises will be extended to five years.
>
> 7.4 No less than 16 teams but no more than 20 teams, (the actual number to be determined by NRL and approved by the Partners), will participate in the 1999 NRL Competition, on varying terms depending on the level of satisfaction of the franchise criteria. These Franchises will be granted no later than 1 October 1998. NRL will be entitled to extend the

term of Franchises at this time if it is in the best interests of the NRL Competition.

7.5 No more than 14 teams will participate in the 2000 NRL Competition on varying terms depending on the level of satisfaction of the franchise criteria.

7.6 Clubs entering into mergers or joint ventures before March 1998 with the approval of NRL are entitled to:

(a) receive grants of $4 million per annum in respect of the merged club in 1998 and 1999 rather than a single $2 million grant under clause 7.12(a); and

(b) a 5 year Franchise.

7.7 Clubs entering into mergers or joint ventures before 1 October 1998 with the approval of NRL are entitled to:

(a) receive a grant of $4 million in 1999 rather than a single $2 million grant under clause 7.12(a); and

(b) a 5 year Franchise.

7.8 On or before 1 October 1999 NRL must determine the Franchisees for 2000 (there being no more than 14 Franchisees).

7.9 In a 14 team NRL Competition, there will be no less than six teams, and a maximum of eight teams, from Sydney. Conversely, there will be no less than six teams, and a maximum of eight teams, from regions outside Sydney.

7.10 Until 2001, the regions outside Sydney are:

(a) Adelaide;

(b) Melbourne;

(c) Auckland;

(d) Canberra;

(e) Brisbane;

(f) North Queensland;

(g) Newcastle;

(h) Gold Coast; and

(i) Central Coast.

7.11 The Parties recognise that it is in the best interests of rugby league to prioritize the grant of Franchises, for example, to encourage:

(a) mergers of Sydney clubs; and

(b) a national competition.

If the number of applicants satisfying the franchise criteria exceed the number of available Franchises, the grant of available Franchises will be determined in the following order of priority:

(a) merged clubs;

(b) regional clubs; and

(c) stand alone Sydney clubs.

Otherwise, NRL will determine the grant of Franchises on the level of satisfaction of the franchise criteria.

7.12 A Franchise will entitle each Franchisee to:

(a) an annual grant of $2 million from NRL; and

(b) the payment of all travel costs and accommodation for the 1998 and 1999 NRL Competition seasons. The payment of travel and accommodation costs for 2000 and beyond will be reviewed by NRL in 1999.

7.13 Each of ARL, NRLI and News [Ltd] must make its decisions on the franchise criteria, the grant (or withdrawal) of Franchises, and any other matter to be determined under this clause 7 and, when executed, the Franchise Agreements, in the best interests of the NRL Competition, disregarding any conflicting (or potentially conflicting) interests, such as interests in Franchisees."

170 The arrangements between the appellants included the provision of financial incentives to clubs which agreed to merge or form joint ventures. In September 1998, the NRL published criteria for the grant of a franchise to clubs wishing to participate in the merged competition. The criteria were generally objective. They were, in substance: spectator attendances home and away;

competition points won; gate receipts; sponsorships and their value; and profitability. If by 2000 more than 14 clubs able to satisfy the criteria wished to compete then a descending order of priority would be applied: merged clubs, regional clubs, intact Sydney clubs. On 14 May 1998 a merger agreement (the "Merger Agreement"), largely fleshing out the arrangements contemplated by the Memorandum of Understanding, was executed between the ARL, NSWRL, Super League, NRLI and News Ltd.

171 Some further facts, for their bearing upon an understanding of the purpose of the appellants and their relevance to the application of the Australian Competition and Consumer Commission ("ACCC"), should be noted. As the primary judge found, and as the ARL's entry into the merger suggests, the continuation of the competing competitions was doing "irreparable damage to the game". (It was common ground that the competing competitions were of the same or a similar standard).

172 The purpose of the Merger Agreement was stated in recital B:

> "The Parties wish to merge the ARL Competition and the Super League Competition, on the terms set out in this Agreement, so that there is one premier rugby league competition in Australia, called the NRL Competition, on and from the 1998 rugby league playing season in Australia."

173 On 15 October 1999, Souths was informed that it had been refused a place in the draw for the 2000 season. The remaining clubs were granted licences or franchises for three years. Souths commenced proceedings in the Federal Court for an injunction to require the NRL to allow it to field a team for the 2000 season in the merged competition.

174 There were several issues litigated at the trial and an appeal to the Full Court of the Federal Court, but the principal issue in this Court is whether the 14-teams term was an exclusionary provision within the meaning of s 4D of the Act, and, whether therefore, in entering into the Understanding, and subsequent documents giving effect to the Understanding, the appellants had contravened s 45(2)(a)(i) or s 45(2)(b)(i) of the Act. In this Court the ACCC sought to intervene to raise a different issue not litigated previously. I will defer consideration of that issue until after I have dealt with the parties' cases. But first the relevant sections of the Act should be set out.

175 Section 45 of the Act prohibits corporations from entering into anti-competitive arrangements. So far as is relevant it provides:

> "(2) A corporation shall not:

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

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

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

(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:

(i) is an exclusionary provision; or

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

(3) For the purposes of this section and section 45A, ***competition***, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services.

(4) For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect."

176 Section 4D defines an "exclusionary provision" as follows:

> "(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
>
> (a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and
>
> (b) the provision has the purpose of preventing, restricting or limiting:
>
> (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
>
> (ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;
>
> by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate."

177 "Competitive" is also defined in s 4D:

> "(2) A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person or a body corporate that is related to that person is, or is likely to be, or, but for the provision of any contract, arrangement or understanding or of any proposed contract, arrangement or understanding, would be, or would be likely to be, in competition with the other person, or with a body corporate that is related to the other person, in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract, arrangement or understanding or of the proposed contract, arrangement or understanding relates."

178 Section 4F defines "particular purpose" as follows:

"(1) For the purposes of this Act:

(a) a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, or a covenant or a proposed covenant, shall be deemed to have had, or to have, a particular purpose if:

(i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose; and

(b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if:

(i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and

(ii) that purpose or reason was or is a substantial purpose or reason."

179 It may be noted that par (a) of s 4F(1) speaks of a purpose, actual or deemed, of a "provision of a contract" whereas par (b) refers to the purposes of a person, but because nothing turns on that difference it is unnecessary to decide the significance or otherwise of it.

180 In order to obtain injunctive relief under the Act, Souths had therefore to establish the following matters, the first two of which were not, in the circumstances, in contest:

(1) that the ARL and Super League were competitors prior to the execution of the Memorandum of Understanding;

(2) that the ARL and Super League had entered into a contract, arrangement or understanding; and

(3) that a substantial purpose of the contract, arrangement or understanding (or of the parties to the arrangements) was to prevent, restrict or limit the

supply or acquisition of services to or from particular persons or classes of persons.

181 The 14-team term was pleaded by Souths as having the purpose of:

> "(a) restricting or limiting the supply of services (namely organising and running top level rugby league competitions) by the NRL Partnership to particular persons …; and
>
> (b) preventing the supply of services (namely, organising and running top level rugby league competitions) by the NRL Partnership to particular classes of persons…"

and of:

> "(a) restricting or limiting the acquisition by the NRL Partnership of services (namely, the provision of rugby league teams to play in the NRL competition) from particular persons …; and
>
> (b) preventing the acquisition by the NRL Partnership of the services of the provision of rugby league teams to play in the NRL competition from particular classes of persons …"

182 The "competition-organising services" of the NRL partners were pleaded as:

> "the supply of the services of organising and running top level rugby league competitions to Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL Optus Cup and the Super League competition including the Clubs, and to any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition."

183 The "team services" were pleaded as:

> "the acquisition of services, being the provision of rugby league teams to play in the top level rugby league competitions organised and run by the ARL on the one hand, and News [Ltd] and [Super League] on the other hand, from Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL Optus Cup and the Super League competition including certain of the Clubs and any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition."

184 The "particular persons" or "class of persons" said to be affected by the exclusionary provision were:

"(i) the clubs which participated in the 1997 ARL and Super League competitions and who had not withdrawn from those competitions before that date, other than the 14 clubs (including merged clubs as a single club), who would be selected to participate in the competition from the year 2000; and

(ii) all rugby league clubs which were willing and able to participate competitively in a top level rugby league competition other than the 14 clubs (including merged clubs as a single club) who would be selected to participate in the NRL competition from the year 2000."

The decision at first instance

185 The primary judge, Finn J, held that although the 14-team term was part of a contract, arrangement or understanding made between News Ltd and the ARL, which were competitive with each other, it did not have the purpose of preventing, restricting or limiting the supply of services by News Ltd and the ARL, or the acquisition by News Ltd and the ARL of services from, particular persons or classes of persons. His Honour said this[155]:

> "A clear and intended effect of the 14-team term was that the NRL partnership would not provide its competition-organising services to, or acquire team services from, a greater number of teams than the number so fixed. This was a fundamental element of the peace deal. A foreseeable and, for ARL and News [Ltd], a foreseen consequence of the term was that if more than the stipulated number sought participation in the NRL competition, the excess over the stipulated number (howsoever determined) would be denied the provision of the partnership's competition-organising services and would not have its (their) team services acquired by the partnership. There can be no controversy about both the effect and the consequence I have described. The real matter in issue is whether the term was included in the 19 December understanding and its successor documents for the purpose, or for purposes that included the purpose, alleged by Souths. To resolve this it is necessary at the outset to place the 19 December understanding and the 14-team term within it, in their respective contexts.
>
> The objective the 19 December understanding was working towards was to bring together in one competition the separate competitions of ARL/NSWRL and Super League, the latter at News [Ltd's] instigation having broken away from the former. The parties to the understanding clearly appreciated and, for somewhat varying reasons,

---

155 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 671-672 [269]-[270], 673 [274].

accepted the need for a united competition. As the evidence of Mr Macourt, Mr Frykberg and Mr Whittaker indicates, as also did contemporary documentary evidence, a variety of factors informed that need. For present purposes I need mention only three and in general terms. First, positively, there was the perceived need to establish a financially viable and sustainable competition. Secondly, negatively, there was the wish to avert continuing damage to the game. And thirdly, there was the need both to satisfy and to respond to the pressures and demands of the media companies on whose financial support both the several and the proposed competitions had relied or would rely for their survival.

…

Against this background, the purpose or purposes for which the 14-team term was included in the 19 December understanding become(s) more apparent. The primary purpose of the understanding itself was to constitute a partnership to own and conduct the proposed NRL competition. I need not further consider the reasons that led to the proposed formation of the partnership. I would note, though, that the proposed NRL competition structure served an important role in defining the scope of the partnership's business both in providing competition-organising services and in acquiring team services. While the NRL competition has variously been described as a 'merged' or 'unified' competition, it was in my view a new competition that supplanted the two competitions it was designed to replace."

186 Finn J found persuasive the evidence that it was thought, by the parties to it at the time of execution of the Memorandum of Understanding, that the 14-team competition could be achieved without resort to exclusion. His Honour said[156]:

"I accept the evidence of Mr Whittaker that he believed the 14 teams for 2000 could be, and of Mr Frykberg that they would be, achieved without resort to exclusion. And I consider the early and continuing significance they attributed to the formation of mergers and joint ventures as being consistent with the absence of a proscribed purpose. The significance so attributed to mergers, etc, evidenced a form of recognition of both the wish and the need to maintain some level of participation of the established clubs in a competition not designed to accommodate them all individually.

---

156 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 675 [284]-[285].

> Further, while it may be said that the 14-team term was only a means to achieving the objectives I have mentioned, the evidence (i) does establish that that term was fundamental to the 19 December understanding and (ii) does not establish that there was another means available not involving the 14-team term (or for that matter any maximum size stipulation) that would have been likely to secure either the merger itself or the objectives sought to be achieved in the competition structure. In these circumstances I am unable to conclude that a variety of means was available to the parties such that the adoption of the 14-team term was merely a means to an end and as such had another purpose as well as that of securing the objectives sought."

187 What kind of provision, in his Honour's view, would have been an exclusionary provision? His Honour answered that question, correctly, in my opinion, in this way[157]:

> "There is a significant difference between being merely an unsuccessful contender for selection in a process not designed to preordain that particular outcome and being a target for exclusion in a selection process designed to that end. The latter, but not the former, if otherwise the product of a s 4D understanding, is capable of being found to be an exclusionary provision."

188 His Honour also said[158]:

> "One can envisage a size provision with its proposed ancillary criteria being designed with the substantial purpose in mind, not simply of limiting the size of the competition for reasons that are considered to be in the interests of the game and its stakeholders, but of specifically targeting a club or clubs that is or are anticipated to be applicants for selection. Such is far from the present case. A selection process having more applicants than positions necessarily results in there being winners and losers. What for s 4D purposes is important for those who lose is the manner of their losing."

189 His Honour also rejected Souths's attempt to set up that it was a particular person, or within a particular class of persons within the meaning of s 4D of the Act because it was an excluded person or a member of a class of excluded

---

157 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 675 [282].

158 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 675 [281].

persons: in short that the fact of exclusion itself defined a relevant person or class of persons. Finn J said[159]:

> "I am unable to agree ... . In substance it is a submission that a class for s 4D(1) purposes can be constituted simply by the defining characteristic of failing to secure selection for entry into the 2000 competition. As a matter of language usage, where resort is had to a selection process that, as applied, could result in the failure of a number of persons (or teams) to be selected, those who might so fail could quite properly be described as a class in that in their failure they share a defining characteristic. But, in the setting of s 4D(1) of [the Act], to be able to say that one belongs to a class (whatever its defining characteristic) is of no practical significance unless that class is the object of the proscribed purpose – unless it is 'aimed at specifically'.
>
> In the present case while the purpose of having resort to the proposed selection criteria underpinning the 14-team term was to differentiate between those who would and those who would not be selected for participation in the 2000 competition, it did not on the evidence before me have or have as well the purpose of discriminating against a particular applicant or class of applicants for selection. … Not having that purpose, the fact that a group could exist that could be said to constitute a class by reason of the fact of their not being selected is without significance or consequence for s 4D purposes." (footnotes omitted)

190 It was also his Honour's opinion that even if Souths had been able to make out that cl 7 of the agreement was an exclusionary provision, it would not be entitled to an injunction because it had no right to participate, and might be able to be excluded for other reasons.

The Full Court of the Federal Court

191 By majority, (Merkel and Moore JJ, Heerey J dissenting) the Full Court of the Federal Court, allowed Souths's appeal. It held that there had been a breach of s 45(2)(a)(i) by the appellants by the execution of the Memorandum of Understanding including as it did, the 14-team term, and which resulted in Souths's exclusion from the NRL 2000 season competition.

192 As to the question whether the purpose of the 14-team term was a proscribed purpose under s 45(2), Merkel J said[160]:

---

159 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 676 [291]-[292].

> "The purpose, of which s 4D speaks, requires consideration of the subjective purpose or purposes of the party or parties as a result of whose efforts the alleged exclusionary provision was included in the relevant contract, arrangement or understanding: ... [T]he Judicial Committee in *Newton v Commissioner of Taxation (Cth)*[161] (which related to s 260 of the *Income Tax Assessment Act* 1936 (Cth)) [said]:
>
> > 'The word "purpose" means, not motive but the effect which it is sought to achieve – the end in view. The word "effect" means the end accomplished or achieved.'" (some footnotes omitted)

193 And later, in indicating that the effect of the provision informed the inquiry as to its purpose, his Honour said[162]:

> "Whichever phraseology is employed, the Court is required to consider, as a question of fact, the effect sought to be achieved or the result intended by the inclusion of the alleged exclusionary provision."

194 The purpose to be considered, his Honour continued, is that of the impugned provision in isolation from the remainder of the agreement[163]:

> "Section 4D(1) mandates that the focus of the enquiry be *the* provision in question, rather than the contract, arrangement or understanding in which it was included. This distinction is critical as often the overall result or effect intended by a contract will be quite inconsistent with the result or effect intended by a particular provision in the contract." (original emphasis)

195 (Moore J, the other judge of the majority, expressed a similar view on this issue[164]).

---

160 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 518 [243] and see also 486-487 [144] per Moore J.

161 [1958] AC 450 at 465.

162 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 518 [245].

163 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 518 [245].

164 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 486-487 [144].

196 Merkel J observed that this was an important point of departure from the reasoning of the trial judge. His Honour said[165]:

> "In my view, in reaching the conclusion at which he arrived the trial judge failed to distinguish between the purpose of the club merger, joint venture and regional participation provisions on the one hand and the purpose of the 14-team term on the other. His Honour appeared to assume that the purposes of the two sets of provisions can be conflated. ... It was in that context that the trial judge found that the evidence is bereft of any exclusionary purpose. But if the two sets of provisions have discrete purposes, which is a question of fact, his Honour would have fallen into error in conflating the purpose of the merger, joint venture and regional participation provisions with the purpose of the alleged exclusionary provision."

197 As to the evidence that it was believed that the 14-team competition could be achieved without resort to exclusion, Merkel J said[166]:

> "His Honour [the trial judge] also drew some support for his conclusions from his finding that there were no other means available to achieve the NRL partners' objective. If there was an absence of any other means, which is not self-evident, that only serves to emphasise the significance attached by the parties to the means chosen by them to secure their objective."

198 Merkel J decided that in the context of s 4F, substantial purpose means "a significant operative purpose".[167] His Honour said[168]:

> "On the issue of substantiality of purpose the trial judge accepted that the means chosen to achieve the 14-team limitation was one of the 'defining characteristics of the new competition' and 'a fundamental element of the peace deal' between the ARL and News [Ltd]. It is clear

---

165 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 522-523 [264].

166 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 525 [273].

167 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 519 [252].

168 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 528 [283].

the exclusionary purpose of the provision, the 'buttress' to secure the 14-team outcome, was a significant operative purpose and therefore, in my view, a 'substantial' purpose."

199 His Honour held[169]:

"In summary, the class aimed at by the NRL partners' exclusionary purpose of preventing the supply or acquisition of the relevant services by or from the NRL partners was a particular class of persons for the purposes of s 4D(1). Analogously to *Pont Data*[170] the proscribed exclusionary purpose of the NRL partners was to prevent supply or acquisition to or from a particular class of persons (the excluded class) by restricting or limiting supply or acquisition to or from the clubs or entities selected to be included in the 2000 NRL competition. Accordingly, Souths has established that the trial judge erred in dismissing its case insofar as it relied upon s 4D(1) of the Act."

200 Moore J said[171]:

"Before 19 December 1997 the services supplied by each of the 1997 clubs and acquired by the organisers of the rival competitions was the provision of a team. To indicate, as the adoption of the 14-team term did, that the 1997 clubs then supplying 22 teams could, in the year 2000, supply, and the organiser would only acquire, 14 teams (even if the clubs were able to do so as a merged club or through a joint venture) constituted, in my opinion, conduct which had the purpose of at least restricting or limiting the acquisition of team services from the 1997 clubs and probably the supply of organising services to them.

This may be illustrated by referring to the position Souths was in though considered in the context of the position each of the other clubs (identified by reference to their circumstances at 19 December 1997) was in also. Souths had its own team and had fielded it in the 1997 competition. Souths (unlike some, but not all, of the other 1997 clubs) had fielded its team for decades. It had provided a team and the ARL had acquired the services (that is, the provision of a team) from Souths both in 1997 and earlier. The ARL had provided services which facilitated Souths

---

169 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 531 [295].

170 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460.

171 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 501-502 [184]-[186].

competing with its team in a top level rugby league competition. The adoption of the 14-team term was effectively a declaration to Souths and each of the other clubs competing in the rival competitions that they collectively could not do what to that point each of them had done, namely field their team in a top level rugby league competition.

The organisers of the rival competitions were indicating that they would no longer acquire the services the clubs had been providing and would both limit and restrict the services they would acquire. They would not acquire services manifest by the provision of 20 or 22 teams but would acquire services manifest by the provision of 14 teams. It may be accepted that under the 19 December Understanding any club, including Souths would, at the least, be able to continue to provide a team by merging or forming a joint venture. However the provision of a team of this character was not the provision of the same services that had been provided, and correspondingly acquired, before the adoption and implementation of the 14-team term. It would not be a team of that club but a hybrid team of two or more clubs. In this way, the services to be acquired by operation of the 14-team term, would, as to some of the 1997 clubs, not be the same services that had been acquired formerly when the two competitions conducted the rival competitions. The services acquired would be limited and restricted."

201 Heerey J, in dissent, held that the exclusion of clubs from the 2000 competition "was not a purpose at all" under s 4D of the Act.[172] Heerey J explained why he differed from Moore J and Merkel J in the following passages[173]:

"Moore J has found a restricting or limiting of services in that the services in 2000 would relate, in the case of some clubs, to a hybrid team of two or more merged or joint venture clubs.

This case was not pleaded and not run at first instance. I am not sure it was even put on appeal. Since the nature of the restricting or limiting is an aspect of the alleged proscribed purpose, and since the latter is a question of fact, it is too late to raise such an argument. It raises an infinite range of factual dispute. For example, it could be said that if St George providing in 2000 a team in conjunction with Illawarra called St George-Illawarra is to be characterised as a different team from that

---

172 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 474 [78].

173 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 479 [104]-[106].

> fielded in 1997, then equally a team fielded by St George in one week in 1997 (or 2000) might contain different players from that of the previous week and so be not the 'same service'. By the same token, a change in name, nickname, colours or sponsorship might all be said to make a team 'different' and thus not the 'same service'. Moreover, as already mentioned, reduction to 14 teams in 2000 by mergers and joint ventures was not the only possibility as at 1997. There could be a withdrawal of clubs.
>
> In any case, the prospect of clubs merging or entering into joint ventures was seen, in 1997, as one which would necessarily involve the voluntary choice of those clubs. Substantial financial incentives were offered. If clubs freely exercised that choice so as to get the money and avoid or lessen the risk of exclusion, then that was a matter for them. The concept of boycott in ss 4D and 45(2) does not seem to fit the situation where the supposed target is not a passive victim but freely enters into a mutually satisfactory agreement with the supposed boycotters."

202 Heerey J also referred to passages from the judgment of Finn J which indicated that the primary judge had carefully distinguished between purpose and effect. Heerey J said[174]:

> "His Honour observed … that while the purpose of a provision may be evidenced in the effects it produces, the purpose for its inclusion in a contract, arrangement or understanding is not to be determined necessarily by, or simply by reference to, its effects. What has to be ascertained is the reason (or reasons) for its inclusion. And that reason, or those reasons, could be determined by ascertaining the effect or effects the parties subjectively sought to achieve through the inclusion of the provision in the contract, arrangement or understanding."

Heerey J continued[175]:

> "His Honour [the primary judge] accepted that the 14-team term limited, and was intended to limit, the number of clubs for the supply to and acquisition of services by the NRL Partnership. It equally had that foreseeable, and foreseen, consequence. But it did not follow that a purpose for including the 14-team term was to prevent the supply of services to, or acquisition of services from clubs in excess of the stipulated

---

174 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 465 [29].

175 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 467 [37].

> 14. ARL and News [Ltd] proposed to create a new business running a new competition having particular characteristics, one of which was that it would have a maximum number of clubs. For present purposes it did not matter what the number was. What was important was that the competition so designed embodied a limit to the number of clubs to or from which the NRL Partnership would provide or acquire services."

203 Turning their minds to the "particular persons" or "class of persons" said to be affected by the exclusionary provision, the majority in the Full Court held that the class could be defined with sufficient particularity for the purposes of s 45(2), and that it was permissible to define a class by the mere fact of its members' or a member's exclusion from the 2000 season competition. Merkel J first cited and then adopted a passage from the judgment of Hely J at an earlier stage of these proceedings[176]:

> "In the application for interlocutory relief in the present matter Hely J stated[177]:
>
> > 'The respondents submitted that the distinguishing feature of the class cannot be the fact of exclusion itself. In other words, in order for persons the target of an exclusionary provision to be a class, there must be a common feature distinguishing those persons other than the mere fact of them being subjects of exclusion. It may be thought that there is some force in this submission. However, *Pont Data* provides otherwise: a class may be identified by reference to the fact that its members may not be supplied with services unless those members accept and become bound by restraints imposed by, in that case, the supply agreement. This suggests that the unifying characteristic of a group can include the fact of exclusion itself. Here, the unifying characteristic of the group is that the relevant clubs were participants in the 1997 competitions, and are not within the groups to be carved therefrom.'"

204 Merkel J continued[178]:

---

176 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 530 [290].

177 *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120 at 133 [76].

178 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 530 [291], 531 [294].

> "On one view, as pleaded, the defining factor that distinguishes the class intended to be excluded from the 2000 NRL competition, and makes it particular, is the fact of exclusion. However, in the present case it is more accurate to identify the distinguishing exclusionary factor by reference to the reason for the intended exclusion, that is, a club's failure to meet the requisite level in the selection criteria for inclusion in the 14-team NRL competition as from 2000 by reason of 14 other clubs better satisfying the criteria.
>
> …
>
> The characteristic that identified and distinguished the class intended to be excluded from participation, and makes it particular, was that its members, the top level rugby league clubs eligible to participate (for example, by meeting the 'Basic Criteria') but not achieving the requisite level in the selection criteria achieved by 14 other clubs or entities, would not be supplied with team organisation services and team services would not be acquired from them. Accordingly, the particular class the subject of the NRL partners' exclusionary purpose has a distinguishing or identifying characteristic in addition to the mere fact of exclusion."

205 Moore J took a broader view of the meaning of "particular class" under s 45(2), excluding from its ambit such provisions as would "operate only on the generality of persons[179]". Moore J concluded[180]:

> "In my opinion the expression 'particular persons' is to be taken to be a reference to identified or identifiable persons whether or not there are other identified persons or otherwise on whom the apparently exclusionary provision is not intended to operate. That is, it is not necessary that a provision operate selectively in the way just discussed for it to be an exclusionary provision."

206 In his Honour's view, s 45(2) would apply even if, at the time the contract, arrangement or understanding was entered into, it was not known who would bear the burden of the restriction or limitation[181]:

---

179 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 506 [197].

180 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 507 [200].

181 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 507 [201]-[202].

> "This leads to a consideration of the second question posed … namely whether it can be said there existed a purpose of restricting or limiting of supply or acquisition to the 1997 clubs if it was in contemplation that some but not all of the 1997 clubs would field a team in conjunction or collaboration with other clubs though some of the 1997 clubs would continue to field a team in their own right. This really raises the question of whether competitors can have a purpose of restricting or limiting supply of services to particular persons and the acquisition of services from them if it is not known, when the exclusionary provision was agreed to, who of the particular persons would bear the burden of the restriction or limitation though it could be expected some of the particular people would not.
>
> The language of s 4D (when read with s 45(2)(a)(i)) does not, in my opinion, preclude its application in these circumstances nor would such an application be inconsistent with the apparent purpose of the provision. It may be accepted that if s 4D were to operate in this way, it would be because the expressions 'supply … to' and 'acquisition … from' are not to be read as meaning 'supply … to each of (or all)' or 'acquisition … from each of (or all)' the particular persons or members of the particular class. In relation to the parties to the contract, s 4D(1)(b) speaks of 'all or any of the parties', which might suggest the expressions just referred to should not, in the absence of the same or similar words, be given the same or a similar meaning. However there is no apparent reason for giving the expressions 'supply … to' and 'acquisition … from' that meaning, in a way that might limit the operation of s 4D as enlivened by s 45, in a statutory context where notions of purpose and preventing, hindering and restricting are central."

207 Heerey J preferred the trial judge's view of what may constitute a class, or person or persons, for the purposes of s 45(2). His Honour said[182]:

> "A boycott necessarily involves a target, a person or persons 'aimed at specifically': *News Ltd v Australian Rugby Football League Ltd*[183]. It is hard to see how this notion can apply to a class not defined in advance but only defined in an essential respect by the fact of exclusion, if and when it happens. And if it is wrong, as I think it is, to have a class defined by the fact of exclusion, it is in principle no different when exclusion is one of a number of defining characteristics. Either way, the class cannot be

---

182 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 477 [90]-[91].

183 (1996) 64 FCR 410 at 577.

ascertained unless and until all putative members satisfy the test of exclusion – whether or not other tests must be satisfied.

Looked at another way, if a particular class can be defined by the fact of exclusion, in effect the 'class' becomes the whole world, because anybody has the potential to be excluded."

208 Heerey J concluded[184]:

"If Souths' argument is correct, competitors who enter into a partnership and agree to provide a lesser range of goods or services (or deal with a narrower range of customers) will have contravened s 45(2). Nothing in the stated object of the Act ('to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection': s 2) would suggest such a startling result.

Once attention is diverted from the essential elements of boycott proscribed by ss 4D and 45(2) – the targeting of a *particular* person or class of persons *identified* at the time the exclusionary provision is created – there is an inevitable slide into prohibition of conduct which amounts to no more than persons deciding the limits of the business in which they wish to engage." (original emphasis)

Heerey J also held that an injunction would not lie in any event. To grant it would be to dictate that the competition have no fewer than 15 competitors or conceivably as many in addition to those as could satisfy the basic criteria. His Honour said[185]:

" ... a Federal Court mandated 15-team rugby league competition, an outcome which confers no public benefit, contradicts the freely negotiated agreement of those who know the game and its commercial setting, and achieves no discernible purpose of the Act."

Resolution of the issues in this Court

209 It seems to me that the submissions of Souths with respect to "purpose" have about them in the circumstances of the case, something of an air of unreality. This is so despite the sympathy that one might feel for a club that has survived and flourished in times when sport was principally that, and not a major

---

184 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 477-478 [94]-[95].

185 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 484 [137].

commercial enterprise, which, although providing entertainment to many, is also now a means of valuable advertising including indirect advertising by sponsorships and endorsement, and a source of revenue for many, including players, officials and telecasters. The reality is that a popular spectacle such as a game of rugby league played between superior teams has a monetary value transcending the pleasure that it may bring to its participants, whose rewards, it may be noted, nowadays often include substantial financial ones as well. The game is, as I mentioned earlier, essentially a winter game. That is no doubt why therefore, a contest of 14 teams requiring 28 match days for home and away games together with such other days as might be required for semi-finals, finals and a grand final, and time for players to rest and recover from injuries, might be regarded as the best possible sort of contest to conduct. In continuing competition with each other the prospects of each contest operator, and the game itself were bleak. That itself is enough to suggest that neither the "market" for the game, nor the number of players of a sufficiently high standard, could support two competitions in the long term. But in any event that was the evidence of the experts on the game and it was accepted by the trial judge. Furthermore, no one residing in the eastern states of this country in the last 10 years could be unaware of the fact that rugby league competes, not only commercially, and in respect of a finite number of sponsors and advertisers, but also for free-to-air time, and players, with other codes of football and winter games.

210 There is nothing novel in the wish, for not only commercial reasons, but also to achieve better and excellent standards of sporting achievement, that organizers of sporting contests might, as here, by reference to objective criteria, the seasons, and the capacity of operators to accommodate a certain number of contestants only, decree that a certain number of teams only may compete. So called "masters" tournaments, and the attainment of particular levels of excellence as a qualification for entry into competitions, in golf and tennis for example have become familiar, as have, again as here, the issue of sporting franchises or licences. It does seem, to say the least, a little contradictory that an objective of establishing a very high, indeed excellent competition of the best, largely objectively ascertained, and itself in competition in the "sporting marketplace" for funds, sponsorship, and public exposure, should be regarded as proscribable in the public interest, and as directed against "particular persons or classes" of persons. Whether that is so or not however, effect must be given to the language of the Act. But that does not mean that the established factual background against which an agreement is made is irrelevant to the purpose of its making. That, and because of their relevance to the ACCC's application is why I have mentioned the matters that I have.

Purpose of preventing supply

211 I should say at the outset that I am generally in agreement with the reasoning of the primary judge.

212 The "purpose" of the provision of the contract, arrangement or understanding to which s 4D directs attention is the parties' subjective reason for its inclusion of the provision in the contract, arrangement or understanding[186]. At first instance, Finn J accepted the evidence of Messrs Whittaker and Frykberg that they believed that an outcome, of the participation of 14 teams only in 2000, could or would be achieved without resort to the exclusion of any club[187]. Neither Heerey J[188] nor (apparently) Moore J[189] doubted the correctness of this finding of fact made by the trial judge.

213 Merkel J however was of the view that the trial judge erred in failing to distinguish between the purpose of the merger agreement, in its entirety, and the 14-team term[190]. He held that the purpose of the merger was to act as the sanction ("carrot"), and the 14-team term as a buttress ("stick") to achieve "exclusion" if the sanction ("carrot") failed[191]. His Honour said that while the 14-team term was a means to the end of a viable and sustainable national competition, the trial judge erred because he failed to consider whether that means had a more immediate purpose, to exclude any clubs in excess of the 14 selected to provide teams to participate in 2000[192].

214 I am unable to agree that the trial judge failed to distinguish between the purpose of the 14-team term and the purpose of the merger provisions as a whole.

---

186 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1*) (1990) 27 FCR 460 at 474-477 approving Toohey J in *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10 at 37-38; see also *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109 at 134; *Newton v Commissioner of Taxation (Cth)* [1958] AC 450 at 465.

187 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 675 [284] per Finn J.

188 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 472-473 [68]-[71].

189 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 493 [158].

190 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 522 [262], 522-523 [264]-[265].

191 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 522 [263].

192 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 526-527 [278].

His Honour identified the purpose of the 14-team term as the achievement of a viable and sustainable national competition. And that was also a substantial purpose of the merger agreement itself. A further purpose of both was that of encouraging mergers by clubs by providing incentives to those which agreed to merge, to obviate, if possible, the need for the exclusion, by, it should again be pointed out, reference largely to objective criteria, of any club[193]. This follows from the trial judge's finding of fact, not doubted by Heerey J and Moore J, that Messrs Whittaker and Frykberg believed the operation of the 14-team term could, or would be achieved without exclusion.

215 In conducting an annual competition it was, and is necessary to set a limit on the number of participants. That number, because of the nature of the competition and competition itself is a defining characteristic of the competition. That the appellants may have nominated in advance of 2000 the maximum number of teams which would be permitted to compete does not mean that their purpose was to exclude any or any particular teams. That was neither the result that they expected nor the outcome that they desired.

216 There was in my opinion, no conflation as Merkel J held, of the purpose of the merger overall, and the purpose of the 14-team term. The fact that s 45(2) of the Act refers to *a* provision does not mean that the provision has to be read in isolation. It is the purpose of the provision that is important. The discovery of that purpose is by no means necessarily to be gained by an examination of the provision itself only. As with any term of an agreement or arrangement, a provision may, sometimes must, be read with, and seen for its true meaning, effect and purpose, the relevant agreement or arrangement as a whole. Here, the 14-team term cannot be divorced from the agreement as a whole. It was no more than facilitative, and then only contingently so, of the purpose of establishing a viable competition of a superior kind within the temporal, financial, and other practical constraints which were operating. That something may happen, indeed that it may have even been a foreseeable happening, in the course of the effectuation of a purpose, or even that it may help to achieve that effectuation, does not mean that a provision designed to accommodate that happening, has the occurrence of that happening as its purpose.

Preventing supply to a particular person or class of persons

217 In my opinion to attract the operation of the proscriptive provisions, there must also be an identifiable person, or class of persons at whom the purpose is directed at the time of the making of the agreement or arrangement. This is one aspect or consequence of the use of the word "particular". For a provision to

---

193 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 672 [271] per Finn J.

have a prohibited purpose with respect to a class, the class must have a defining characteristic distinguishing it from others, and marking out its members as the object of it: the class must be identifiable at the time the agreement or arrangement is made[194]. It follows, that in a case, as this one is, that is concerned with the prevention of supply, a class cannot be defined by the mere fact of non-supply or exclusion. Here the specification of the basic objective criteria and the possibility and encouragement of club mergers, had the consequence that there was no way of knowing, let alone specifying in advance, those that would come to fail to satisfy them. In this respect there was a randomness about the identity of the participants, and randomness is a concept remote from particularity of identity.

218 Souths was not a particular person or a member of a class for the purposes of s 4D.

Restricting or limiting supply to a particular person or class

219 Souths further contended that a substantial purpose of the 14-team term was to restrict or limit the supply of competition-organising services to particular persons, being the 20 clubs which had participated in the two competitions in 1997. There was said to be a restriction or limitation on the supply of those services because, whereas 20 teams had been supplied with services in 1997, only 14 would be supplied from 2000, some of those clubs having merged in the meantime.

220 This argument was rejected by the trial judge. It was also rejected by Heerey J on two grounds: first, because there was to be no restriction or limitation of the relevant services; although in 2000 some clubs would be fully supplied and some would not be supplied at all. Secondly, the 14-team term would of necessity operate with respect to "new" clubs coming into existence as a result of the mergers. Clubs, certainly in 1997, could not therefore be characterized as "particular" persons for the purposes of s 4D[195].

221 Moore J accepted Souths's argument that as a substantial purpose of the 14-team term was to bring about a situation in which some of the clubs fielding a

---

194 cf *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 477 [93] per Heerey J; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 264 [99]-[100].

195 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 677 [294]-[299] per Finn J; *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 478 [100]-[102] per Heerey J.

team in 1997 would only field a team in 2000 in collaboration with other clubs, this would involve a "restricting or limiting" of supply in 2000 to the 20 1997 clubs, because some would only be supplied as a merged or joint venture club[196].

222 The opinions of Finn J and Heerey J are to be preferred. But further, as Heerey J pointed out[197], and correctly so in my opinion, such a case was not pleaded or made at first instance, or on appeal to the Full Court. The evidence led at trial did not address the factual issues whether the services were restricted or limited as they were provided to the clubs in 2000, in comparison with the services supplied to the clubs in 1997. For that reason, the argument should not have been permitted to be raised on appeal to the Full Court of the Federal Court and should not be permitted to be urged in this Court now[198].

The relief sought

223 Both Finn and Heerey J would not have granted an injunction even if they had held that cl 7 was an exclusionary provision. In view of what I have so far held it is unnecessary to say more than that a grant of the relief sought could have serious repercussions for other clubs. Which club or clubs would then face exclusion? How many clubs should the appellants admit to the competition? Would a club excluded by reason of Souths's admission have any, and if any, what remedies? These are serious questions which might have to be answered had Souths established a proscribed purpose.

The application by and submissions of the ACCC

224 What I have said is sufficient to dispose of the issues between the parties in this Court. But there remains the application of the ACCC to intervene and the matters which it would seek to raise.

225 First, in its written submissions, the ACCC submitted that when a provision has the clear effect of preventing, restricting or limiting supply, and this is a foreseeable and foreseen eventuality of the implementation of the provision, the finding will be open that a substantial purpose of the provision is the prevention, restriction or limitation of supply, regardless whether that

---

196 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 507 [201]-[202], 508 [204].

197 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 479 [105].

198 *Water Board v Moustakas* (1988) 180 CLR 491 at 497; *Bond v The Queen* (2000) 201 CLR 213 at 223-224 [30].

eventuality is a means towards another end. That submission is answered by what I have already said and need not repeat.

226 Next, the ACCC submitted that the inquiry as to "purpose" should not be coloured by a search for an antagonistic or hostile intent of the kind said to be introduced by Heerey J in asking the rhetorical question[199]:

> "Why would the men running rugby league want to exclude Souths, or any other club?"

227 The answer to this question, it was submitted by the ACCC, was clear. ARL and News Ltd decided that only 14 teams would be permitted to participate in the competition in the year 2000. The ultimate aim of this decision was to make a profit. No hostility or antagonism toward the excluded clubs was necessary or relevant to the decision, which was a decision to exclude. So much may be accepted. But there must nonetheless be an object of the, or indeed any, purpose, and that object must be a particular person or class of persons, something which I have held to be absent here.

228 Then the ACCC wished to contend that Finn J and Heerey J adopted too narrow a construction of the expression "particular classes of persons", and that in doing so they were influenced by two factors: a concern generated by the unusual circumstances of the case; and secondly, an inclination to interpret s 4D as a "boycott" provision, requiring the identification of a specific and narrowly defined target. In the case of Heerey J, this latter concern also led his Honour to superimpose a necessity for a hostile intent in the inquiry which s 4D dictated be made. It was sufficient that "[the classes be] identified ... by the characteristic that they may not be supplied with the [service] in question, unless they accept and become bound by the restraints imposed by the [relevant agreement]."[200] This I take to be a slightly different expression of the conclusion of Merkel J that the fact of exclusion is determinative of the class, and accordingly one that I would reject for the reasons that I have stated.

229 The ACCC made a fourth submission that the words "restrict" and "limit" should be broadly construed. It contended that the primary judge[201] and

---

199 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 472 [70].

200 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 488.

201 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at 677 [299].

Heerey J[202] erred in holding that the reference to "restricting or limiting" in s 4D(1) is concerned with partial supply of services to, or partial acquisition of services from, particular persons or classes of persons, and not with supply or acquisition of services to or from some only of the particular persons. The better view was that of Moore J, whose opinion was that the words "restricting or limiting" ought not to be confined to situations in which there is a partial supply, in the sense that all previous recipients or providers continue to acquire or supply the goods or services but in a reduced amount.[203] Heerey J pointed to the possibility that evidence bearing on the question might have been adduced had it been raised at the hearing. In those circumstances it is not a matter which either the parties or an intervener should be permitted to raise now.

230 In oral submissions, and less explicitly in revised written submissions it became apparent that the ACCC really wished to put that any attack upon, or in relation to, the arrangement should be or have been launched against the merger of the competitions. It was at that stage, and at that level that it was appropriate to test the validity under the Act of the arrangements to which it gave effect, including the exclusionary provision.

231 All parties to the appeal were opposed to the ACCC's attempt to rely upon an argument of the last kind. They also submitted that it was misconceived and wrong.

Disposition of the ACCC's application

232 The ACCC sought leave to intervene at a late stage in the litigation despite the publicity which the proceedings attracted throughout.

233 The appellants have proceeded in accordance with the arrangements for some years. In making their arrangements the appellants have had to operate within the practical constraints to which I have referred. The principal argument the ACCC sought to advance was not one which any of the appellants chose to advance or adopt. Evidence relevant to it might have been, but was not called. Intervention could have been sought at, or before the trial itself. This was not a case in the original jurisdiction of this Court. To allow the ACCC to argue the last mentioned matter would be tantamount to the addition of an unwanted ground of appeal to the Notice of Appeal. The ACCC has powers and responsibilities under the Act. It would be an overstatement to say that it

---

202 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 478 [101]-[102].

203 *South Sydney District Rugby League Football Club Ltd v News Ltd* (2001) 111 FCR 456 at 499 [177], 501 [181].

administers the Act. This had been purely inter-parties litigation for a long time and throughout many hearings.

234 In the circumstances the ACCC should not be permitted to intervene to argue any of the issues.

235 I would allow the appeal and join in the orders proposed by the Chief Justice.