HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

SST CONSULTING SERVICES PTY LIMITED APPELLANT

AND

STEPHEN CHARLES RIESON & ANOR RESPONDENTS

SST Consulting Services Pty Limited v Rieson [2006] HCA 31
15 June 2006
S452/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 15 February 2005 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation:

C J Birch SC with K W Dawson for the appellant (instructed by Henderson Taylor Workplace Lawyers)

R I M Lilley with P R Franco for the respondents (instructed by Synkronos Legal)

CATCHWORDS

SST Consulting Services Pty Limited v Rieson

Trade Practices – Restrictive trade practices – Exclusive dealing – *Trade Practices Act* 1974 (Cth) ("TPA"), s 47(1) – Loan agreement obliged borrower to acquire services of a particular kind from third persons specified by the lender – Lender thereby engaged in "exclusive dealing" in breach of s 47(1) of the TPA – Guarantors of loan sought to avoid enforcement of guarantee on basis that contract was void and unenforceable for illegality – Whether contract void or unenforceable for illegality – Relevance of other forms of relief available under ss 87 and 87A – Whether severance an exceptional form of relief – Whether TPA, s 4L permitted or required severance of the prohibited provision.

Statutes – Interpretation – Structure and meaning of s 4L – Whether s 4L engaged common law "rules" of severance – Whether identifiable "rules" of severance existed at common law – Relevance of rules of severance devised and applied in other contexts.

Statutes – Interpretation – Statutory context of s 4L – Objects and purpose of the TPA – Relevance of legislative history of s 4L – Relevance of report of committee (Swanson Committee) appointed to review legislation prior to introduction of s 4L.

Words and phrases – "exclusive dealing", "illegality", "in so far as", "making of a contract", "severance", "subject to", "third line forcing".

Trade Practices Act 1974 (Cth), ss 4L, 47(1), 47(6), 87.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. This case turns on the construction and application of a provision of the *Trade Practices Act* 1974 (Cth), s 4L, which deals with severability. Section 4L provides:

> "If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 87 or 87A, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable."

2 The relevant facts can be summarised as follows. The appellant lent money to AFS Freight Management (USA) Inc ("AFS USA"), a company of which the respondents were directors. The respondents guaranteed repayment of the loan. The loan agreement obliged AFS USA to direct all work of packing and unpacking shipping containers at certain ports "to the corporations that the lender shall direct". The appellant, by lending or agreeing to lend money on that condition, engaged in the practice of exclusive dealing, contrary to s 47(1) of the *Trade Practices Act*. AFS USA repaid some but not all of the money lent.

3 Was the appellant's claim under the guarantee, for the balance of the loan and for interest, properly met by the answer that the principal debtor, AFS USA, was not indebted to the appellant because the contract of loan was illegal and unenforceable? Or did s 4L of the *Trade Practices Act* require severance of provisions of the loan agreement so that the principal debtor's obligations to repay the loan and to pay interest remained enforceable?

<u>The loan agreement and the guarantee</u>

4 It is desirable to say something about how the agreements now in question came about, and to set out some of the principal provisions of the loan agreement and the guarantee.

5 At the relevant times, the directors of the appellant were Messrs Peter Sweeney, Paul Sweeney and Denys Truman. Before late 1998 or early 1999 (the exact date does not matter) these three men had carried on business through various companies referred to collectively as the Port Botany Group. The business included packing and unpacking shipping containers. The Port Botany Group dealt with Australian Freight Services Ltd ("AFS"), a company which, until the late 1990s, acted as a local agent for a United States freight forwarder called Brennans. When Brennans was taken over by a competitor of AFS, AFS

decided to set up its own American operation and AFS USA was formed to carry on that activity.

6 In January 1999, the assets of the Port Botany Group were acquired by the Mayne Nickless group of companies. A company associated with Messrs Sweeney, Sweeney and Truman (it matters not which company) had a management agreement with Mayne Nickless.

7 In June 1999, the first respondent asked Mr Peter Sweeney to provide about $1 million, by instalments, to be used as additional working capital for AFS USA and he offered what he described as "certainty in relation to the work". Mr Sweeney's contemporaneous notes recorded, as the first proposition agreed, that all packing and unpacking work and "LCL" (consignments less than a full container load) transport in Sydney, Melbourne and Brisbane, and Sydney air freight, would be directed to "Port Botany/MPG/Pitkin facilities during the life of loan". The second note he made was that "[i]f any work directed away from the above facilities, the loan becomes due and payable". It seems that the "Port Botany/MPG/Pitkin facilities" were in some way associated with Mayne Nickless and it may be that directing this work to those facilities was of advantage to the appellant or its associated interests. Nothing turns on the accuracy of either of these propositions.

8 During June and July 1999, the parties agreed upon the terms of the loan to AFS USA and the guarantee to be given by the respondents. The loan was to be made by instalments between July 1999 and June 2000 and to be repaid by payments in August 2000, 2001 and 2002 with the balance, together with compounded interest at the rate of 20 per cent, in September 2003.

9 The terms of the proposed loan agreement were recorded in a document headed "Special Terms for Inclusion in Agreement". One of the terms thus recorded was "[i]f any work is directed away from those facilities [ie the 'Port Botany/MPG/Pitkin facilities'], this is a default event". Another matter recorded in the document was the proposal that if AFS, or any subsidiary of AFS, was sold or otherwise disposed of, subject to some exceptions whose content was to be agreed later, the lender could require repayment of the loan and interest. In the event of non-compliance with any condition of the loan or a default event, the whole amount of the loan became due and payable "together with interest that would otherwise have been payable at the end of year four". This record of the terms of the loan agreement was signed by the first respondent and by Mr Truman on 7 July 1999.

10 On 10 September 1999, solicitors for the appellant wrote to the directors of AFS USA setting out the terms of the loan agreement. A copy of the letter was signed on behalf of AFS USA and it is this letter that was later treated in argument as constituting the loan agreement. The letter contained a provision about AFS USA directing work which was expressed differently from the way that provision was set out in the earlier documents, but nothing was said to turn on the differences. The letter provided that:

> "AFS Freight Management (USA) Inc will direct all work of pack and unpack LCL nature in Sydney, Melbourne and Brisbane, together with Sydney air freight to the corporations that the lender shall direct. Such work shall include transport."

Reference was made in the letter to the respondents selling their shares in AFS USA. The letter provided the "vendor" (presumably this was intended to read the "lender") "holds no objection provided all principal and interest on the basis of interest is paid up to date of settlement". The letter recorded that the respondents would guarantee the repayment of all principal and interest of the loan.

11 The respondents subsequently made a deed of guarantee dated 23 December 1999. That deed recited that the appellant had advanced funds, at the request of the respondents, to AFS USA. It provided that:

> "In the event of the Borrower defaulting under any of its obligations, as set out in the 10th of September document both as to payment of interest and principal as well as positive acts to be done, the Guarantors will pay on demand to the Lender the principal amounts advanced with interest at the rate reserved in the payment schedule up to the time of payment under the Guarantee.
>
> This Guarantee is a continuing guarantee and takes into account future advances in accordance with the Schedule attached or variations therefrom to the document of the 10th of September 1999."

(The "10th of September document" was the solicitor's letter mentioned earlier.)

12 The guarantee contained no provision making the sureties liable as principals and so preserving the guarantors' liability in circumstances where the

guarantors otherwise would be discharged[1]. It provided that "[t]his Deed will not be prejudiced or discharged or in any way affected by ... any part of this Deed being unenforceable, void or voidable" but it contained no provision dealing with the possibility that the loan agreement might be wholly or partly unenforceable, or wholly or partly void or voidable.

Third line forcing

13 Section 47(1) of the *Trade Practices Act* provides that "[s]ubject to this section, a corporation shall not, in trade or commerce, engage in the practice of exclusive dealing". One kind of exclusive dealing (third line forcing) is identified in s 47(6). That sub-section, so far as now relevant, provides:

> "A corporation also engages in the practice of exclusive dealing if the corporation:
>
> (a) supplies, or offers to supply, goods or services;
>
> ...
>
> on the condition that the person to whom the corporation supplies or offers or proposes to supply the goods or services or, if that person is a body corporate, a body corporate related to that body corporate will acquire goods or services of a particular kind or description directly or indirectly from another person."

Several of the words and expressions used in this provision are defined or given extended meanings in other provisions of the Act. For present purposes, it is necessary to note only that "services" is defined in s 4(1) as including:

> "any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:
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> ...
>
> (d) any contract for or in relation to the lending of moneys;

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1 O'Donovan and Phillips, *Modern Contract of Guarantee*, [1.1240].

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

It follows that the appellant's granting or conferring upon AFS USA the right to borrow money from the appellant was a supply of "services" to AFS USA. That supply was on the express condition that AFS USA would acquire services of a particular kind or description (namely, "all work of pack and unpack LCL nature" at the specified ports, including transport) from another person (namely, corporations nominated by the appellant). It follows that, by making the loan agreement and by providing the loan, the appellant engaged in the practice of exclusive dealing[2].

Procedural history

14 The appellant commenced an action in the Supreme Court of New South Wales against the respondents claiming payment of the balance of the loan and interest. By an amended defence the respondents pleaded that the loan agreement was "[a]n agreement to effect the illegal purpose of exclusive dealing" as defined in s 47(6) of the *Trade Practices Act* and accordingly was "void and unenforceable". The respondents further alleged that, if they had entered into a guarantee in favour of the appellant, that guarantee was "void and unenforceable having been given to effect and maintain the illegal purpose of third line forcing". The respondents sought leave to deliver a cross-claim seeking a "declaration pursuant to s 87 of the [*Trade Practices Act*] that the guarantee is void and/or unenforceable".

15 On the appellant's application to a single judge (Sully J), the cross-claim and those parts of the respondents' amended defence relying on the *Trade Practices Act* and alleging illegality were struck out[3]. They were struck out on

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2 The loan was to be made in instalments between July 1999 and June 2000. The trial judge found that two instalments totalling $350,000 were advanced in July and August 1999 – before the right to the loan was formally created in the 10 September 1999 letter. The analysis set out above applies in relation to the instalments of the loan to be advanced after 10 September 1999. A similar analysis operates for the first two instalments, for they were evidently advanced on the terms of the "Special Terms for Inclusion in Agreement" document signed on 7 July 1999, which contained a similar s 47(6) condition.

3 *SST Consulting Services Pty Ltd v Riesen* [2001] NSWSC 804 at [26].

the basis that, because the unlawful provision of the loan agreement could be severed, the matters alleged in the defence and cross-claim were unarguably bad, provided no arguable answer to the appellant's claim, and pleaded no arguable cross-claim. The respondents' application for orders transferring the proceedings to the Federal Court pursuant to s 6(1) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) was dismissed[4].

16 The respondents sought leave to appeal to the Court of Appeal of New South Wales. Leave was granted, the appeal allowed, and the orders made at first instance set aside[5]. The Court of Appeal held that the points sought to be raised by the impugned pleadings were not unarguable. The Court ordered that the proceedings be transferred to the Federal Court.

17 In the Federal Court, amended pleadings were filed. The respondents alleged that the loan was made "pursuant to an overall agreement to provide for a loan to ... [AFS USA] and related Australian performance arrangements". They further alleged that this "overall agreement" and the guarantee (whose making was no longer put in issue):

> "(a) [w]ere [a]greements to effect the illegal purpose of exclusive dealing as defined in s 47(6) of the [*Trade Practices Act*] proscribed by s 47(1) of the [*Trade Practices Act*;]
>
> (b) [a]re void and unenforceable as illegal for the reason that they are proscribed by s 47(1) of the [*Trade Practices Act*]."

The respondents also filed a cross-claim in which they alleged that, by reason of the contravention of s 47, they:

> "were and are likely to suffer damage if the guarantee is enforced against them in that they are likely not to be able to pursue rights of contribution against [AFS] or to seek to recover or prove for any amount paid to [the appellant] pursuant to the guarantee for the reason that they are persons involved in the contravention".

They claimed a declaration pursuant to s 87 of the Act that the guarantee "is void and/or unenforceable".

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4 [2001] NSWSC 804 at [26].

5 *Riesen v SST Consulting Services Pty Ltd* [2002] NSWCA 163.

18 At first instance[6], Emmett J entered judgment for the amount claimed (which, by then, amounted to $1,514,890) and dismissed the cross-claim. To the extent that there was an unlawful provision in the overall agreement the appellant was held[7] "entitled to treat that provision as severed from the arrangement, so as to permit the enforcement, as against [AFS USA], of its obligations in respect of the advances". It was held[8] that it followed that the obligations in respect of the advances that were guaranteed by the respondents were valid and enforceable obligations.

19 It does not appear that any argument was advanced at trial (and no point was pleaded) to the effect that severance of a provision of the loan agreement presented separate questions about the enforceability of the guarantee. In particular, there was no argument advanced at trial (or subsequently on appeal to the Full Court of the Federal Court or in this Court) based on considerations of the kind discussed in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[9], *Chan v Cresdon Pty Ltd*[10] or *Andar Transport Pty Ltd v Brambles Ltd*[11]. Those considerations may be noted but put aside from further consideration as not put in issue in the courts below or in the appeal to this Court.

20 On appeal to the Full Court of the Federal Court (Wilcox, Sackville and Finn JJ), the appeal was allowed, the orders of the trial judge set aside and the appellant's application dismissed[12]. The Full Court held that it was not possible to sever the offending provision which obliged AFS USA to direct work to corporations nominated by the appellant from the balance of the loan agreement and that, accordingly, the agreement as a whole was illegal and void. This was

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6 *SST Consulting Services Pty Ltd v Rieson* (2004) ATPR ¶42-016.

7 (2004) ATPR ¶42-016 at 48,957 [49].

8 (2004) ATPR ¶42-016 at 48,957 [49].

9 (1987) 162 CLR 549.

10 (1989) 168 CLR 242.

11 (2004) 217 CLR 424.

12 *Rieson v SST Consulting Services Pty Ltd* (2005) 142 FCR 482.

said[13] to follow from the conclusion that the parties had structured their contractual arrangements in such a way as to evince a mutual understanding that the obligations assumed by the parties under the contracts constituted an indivisible whole such that severing the offending provision would fundamentally alter the character and nature of the agreement they had made.

21 The central focus of the reasons of the Full Court was upon the application of what were understood to be the common law rules governing the consequences of illegality[14]. There was, therefore, a deal of reference to the decisions of this Court in *Brooks v Burns Philp Trustee Co Ltd*[15], *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd*[16] and *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955*[17] as well as to *McFarlane v Daniell*[18] and *Brew v Whitlock [No 2]*[19]. But as these reasons will later demonstrate, whether the principles stated in those cases find application in the present matter depends upon first construing the relevant provisions of the Act.

22 The Full Court concluded that to excise the obligation to direct "all work of pack and unpack LCL nature" to the corporations nominated by the appellant "would be to alter the nature of the contract notwithstanding that what remained of the arrangement would embody a loan obligation"[20]. The validity of that conclusion need not be examined. Nor is it necessary to consider what significance should be attached to the course of negotiations between the parties in deciding questions of the kind that lie behind that conclusion.

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13 (2005) 142 FCR 482 at 497-498 [61]-[67] per Wilcox and Finn JJ, 504-505 [94] per Sackville J.

14 (2005) 142 FCR 482 at 496-497 [59] per Wilcox and Finn JJ, 501-502 [81] per Sackville J.

15 (1969) 121 CLR 432.

16 (1978) 139 CLR 410.

17 (1994) 179 CLR 597.

18 (1938) 38 SR (NSW) 337.

19 [1967] VR 803.

20 (2005) 142 FCR 482 at 498 [63] per Wilcox and Finn JJ. See also at 504-505 [94]-[95] per Sackville J.

The construction of s 4L

23 Both at trial[21], and on appeal to the Full Court[22], the construction of s 4L acted on by the Full Court of the Federal Court in *News Ltd v Australian Rugby Football League Ltd*[23] was adopted and applied. In *News Ltd*, the effect of s 4L was understood[24] to be that "the invalidity of an exclusionary provision of a contract, *if severable*, does not affect the validity or enforceability of the balance of the provisions" (emphasis added). The Full Court in the present case rejected the construction of s 4L preferred by Emmett J, but not applied by his Honour in deference to the decision in *News Ltd*. What Emmett J said[25] was that the effect of s 4L was that "even if the making of a contract *involves* a contravention of the Act, the contract would be valid and enforceable *except to the extent that* the provision of the contract that renders the contract a contravention *can* be severed" (emphasis added).

24 For the reasons that follow, s 4L does not bear the meaning or effect given to it in *News Ltd*. Emmett J was right to construe s 4L as providing that where the section is engaged the contract in question is valid and enforceable except to the extent that the offending provision is severed. It is, however, not right to say that the section is engaged where the making of a contract *involves* a contravention. The condition for engagement of s 4L is more precisely stated. Further, the operation of s 4L is to *require* severance of the offending condition of the contract. Severance of the offending provision is not predicated upon the separate application of common law rules governing severance. It is, therefore, not right to speak of the contract being valid and enforceable except to the extent that the offending provision *can* be severed.

25 In order to make good those propositions it is necessary to begin by considering the statutory context in which s 4L takes its place.

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21 (2004) ATPR ¶42-016 at 48,955 [34].

22 (2005) 142 FCR 482 at 484 [3] per Wilcox and Finn JJ, 499 [71] per Sackville J.

23 (1996) 64 FCR 410.

24 (1996) 64 FCR 410 at 582.

25 (2004) ATPR ¶42-016 at 48,954 [33].

26 The *Trade Practices Act* proscribes certain forms of conduct. Those proscriptions take several different forms. Some[26] hinge upon the making of a "contract, arrangement or understanding". Some[27] hinge upon requiring the giving of, or giving, a "covenant" which is defined[28] as "a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land)". Others, like the exclusive dealing provisions now in issue, focus upon the supply or acquisition of, or the refusal to supply or acquire, goods or services, and the conditions of supply or acquisition or the reason for refusal. Making a contract may, as here, constitute a contravention of the exclusive dealing provisions, but those provisions encompass many other kinds of conduct. Because the exclusive dealing provisions encompass the making of certain kinds of contract, the Act provides in s 45(6) for the way in which the otherwise overlapping provisions of s 45 and s 47 are to operate[29]. The construction of s 45(6) was considered by this Court in *Visy Paper Pty Ltd v Australian Competition and Consumer Commission*[30]. Issues of that kind do not arise here.

27 Still other provisions of the Act[31] prohibit the acquisition of shares in or assets of a corporation, if the acquisition would or would be likely to have a particular effect. Provisions found in Pt IVA prohibit unconscionable conduct;

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26 cf s 45(2).

27 For example, s 45B(2).

28 s 4.

29 So far as relevant, s 45(6) provides:

> "The making of a contract ... does not constitute a contravention of this section by reason that the contract ... contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) ... constitute a contravention of section 47 and this section does not apply to or in relation to the giving effect to a provision of a contract ... by way of:
>
> (a) engaging in conduct that contravenes, or would but for the operation of subsection 47(10) ... contravene, section 47".

30 (2003) 216 CLR 1.

31 s 50(2).

the provisions of Pt V prohibit various other forms of conduct including, of course, misleading or deceptive conduct.

28 Some of the conduct otherwise proscribed by the Act may be authorised under Pt VII. Further, conduct, and in particular conduct constituting the practice of exclusive dealing, may be notified to the Australian Competition and Consumer Commission. If exclusive dealing conduct is notified, engaging in the conduct will not, in the circumstances identified in the Act, constitute a contravention.

29 The Act does much more than proscribe (with the elaborations mentioned) certain forms of conduct. It contains detailed provisions, in Pt VI, dealing with the enforcement of the Act and providing remedies for past or proposed contraventions of the Act. In addition, particular provision is made for the extent to which certain contractual provisions are enforceable. Thus, s 45(1) provides:

> "If a provision of a contract made before the commencement of the *Trade Practices Amendment Act 1977*:
>
> (a) is an exclusionary provision; or
>
> (b) has the purpose, or has or is likely to have the effect, of substantially lessening competition;
>
> that provision is unenforceable in so far as it confers rights or benefits or imposes duties or obligations on a corporation."

30 Section 4L takes its place in this statutory framework: a framework of legislation that makes elaborate provision not only for the creation of norms of conduct but also for the consequences that are to follow from the contravention of those norms[32]. It is not readily to be supposed that the consequences of contravention are to be determined by resort to principles hinging upon inferences about legislative intention or the imputed intentions of contracting parties.

31 Section 4L was inserted in the Act following the Swanson Committee Report[33] and both sides in this appeal sought to turn the legislative history of the

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32 cf *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 520-521 [75]-[76].

33 Australia, Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs*, August 1976.

provision to their advantage. It will be necessary to say something about that history and those arguments but it is necessary to begin by considering the text of the provision.

32 Section 4L is engaged only "[i]f the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract". It is, therefore, engaged (a) only if there is a contract (as distinct from an arrangement or understanding), (b) only if the *making* of that contract contravenes the Act, and (c) only if the making of the contract contravenes the Act by reason of the inclusion of a particular provision in the contract. It follows that s 4L cannot be engaged in respect of a number of kinds of contravention of the Act because it cannot be said that they turn on the making of a contract which contravened the Act by reason of the inclusion of a particular provision.

33 As explained earlier in these reasons, the making of the loan contract in this case contravened the Act by reason of the inclusion of the provision in the loan contract requiring AFS USA to direct certain work to the corporations that the lender directed. Making the contract with that condition constituted engaging in the practice of exclusive dealing. It was the inclusion of the condition obliging AFS USA to direct its work in that way that brought the lender's supply of services within s 47(6). It is that condition with which s 4L deals in the second part of its provisions, namely: "subject to any order made under section 87 or 87A, nothing in this Act affects the validity or enforceability of the contract *otherwise* than in relation to *that* provision in so far as *that* provision is severable" (emphasis added).

34 It is important to recognise the way in which this second part of s 4L is constructed. It sets out what may be identified as its central proposition – "nothing in this Act affects the validity or enforceability of the contract". That central proposition is qualified in two respects. First, it is "subject to any order made under section 87 or 87A"; secondly, different consequences are to follow in relation to the offending provision "in so far as that provision is severable". But it is to be noted that, subject to those qualifications, what we have called the "central proposition" is that the contract, the making of which contravened the Act, is valid and enforceable. That central proposition is the direct opposite of the ordinary rule that a contract whose making is illegal will not be enforced. As was said in *Yango Pastoral*[34]:

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34 (1978) 139 CLR 410 at 430 per Jacobs J.

> "When a statute expressly prohibits the making of a particular contract, a contract made in breach of the prohibition will be illegal, void and unenforceable, unless the statute otherwise provides either expressly or by implication from its language."

35 The second qualification to the central proposition hinges about the words "in so far as". The offending provision is not valid and is not enforceable "in so far as" that provision is severable. The words "in so far as" describe the extent[35] of invalidity and unenforceability that is to follow from the contravention that engages the section. Much of the argument in this Court and in the courts below (informed as it was by what was said in *News Ltd*) treated the words "in so far as that provision is severable" as stating a condition for the engagement of s 4L. In particular, the assumption which lay behind the consideration, by the Full Court in the present matter, of cases concerning what were understood to be the common law rules governing the consequences of illegality was that if, according to those rules, the offending provision could not be severed, s 4L had no work to do. Thus, because the Full Court concluded that the offending provisions in this case could not be severed, it was held that the contract of guarantee was wholly unenforceable.

36 It is important to recognise that this is a conclusion that stands sharply at odds with the recognition that the central provision of s 4L is that (subject to certain qualifications) nothing in the Act affects the validity or enforceability of the contract. The conclusion that the loan contract was wholly unenforceable was seen as following from the second of the two qualifications to the central provision of s 4L. But as noted earlier, that qualification is that different consequences follow in relation to the *offending* provision.

37 That the construction which underpinned the Full Court's decision is not the proper construction of s 4L is revealed by substituting "if" or "if, and to the extent that," for the words "in so far as". That is the sense given to the concluding words of s 4L both in *News Ltd* and by the Full Court in this case. What that substitution reveals is that to treat the reference in s 4L to severance of the offending provision as a *condition* for the section's engagement leads to an unresolvable contradiction. On the one hand, the central provision says that "nothing in this Act affects the validity or enforceability of the contract"; on the

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35 *The Oxford English Dictionary*, 2nd ed (1989), vol 7 at 763, "in" meaning 39; Burchfield (ed), *Fowler's Modern English Usage*, 3rd ed (rev) (1998) at 401.

other, if a condition for engaging that central provision is that the offending provision is severable, the general rule is said to be that the contract is not valid and not enforceable. There is no such contradiction if "in so far as" is given its ordinary meaning as an expression of extent.

38 As noted earlier, both sides sought to draw some advantage from reference to the legislative history of s 4L. Little can be gleaned, however, from the very short references made to severance in the Swanson Report[36]. The essence of the recommendation made by the Committee is sufficiently captured by what was said in par 4.32 of the Report:

> "The Committee agrees that there is, at least, a problem of uncertainty felt by the community at the present time, namely whether the common law rules of severance will be applied to contracts containing clauses made unlawful by section 45. We feel that it is too harsh a penalty for contracts to be made totally unenforceable in circumstances where the restraint of trade is merely ancillary to, and not the core of, the contract. Accordingly, we recommend that the Act should clearly provide an express power in the courts to apply the common law rules of severance in relation to such offensive clauses."

The Committee did not offer a draft provision to give effect to this recommendation.

39 It is clear, of course, that s 4L was enacted in response to the Committee's recognition and acceptance of the proposition that the Act should prescribe what consequences would follow from finding that making a contract contravened the Act. But beyond that, the Report provides no guidance about how the particular legislative solution that was in fact adopted should be construed. The Report suggested giving a power to the courts; s 4L is cast as a rule to which the courts must give effect. Nor is there any guidance to be had on that question from the Second Reading Speech for either the Trade Practices Amendment Bill 1977 (which proposed the insertion of a provision in like form to s 4L, but lapsed) or the subsequent Bill of the same name which inserted s 4L in the Act.

40 Much more often than not the definition of the extent of severance will be revealed by the way in which the condition for engagement of s 4L operates.

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36 Australia, Trade Practices Act Review Committee, *Report to The Minister for Business and Consumer Affairs,* August 1976 at 18-19, pars 4.31-4.33.

That condition requires the identification of a provision whose inclusion in the contract brings about the result that making the contract contravened the Act. It is *that* provision which is unenforceable and void and it is *that* provision which is to be severed from the other provisions of the contract. Subject to any order made under s 87 or s 87A, nothing in the Act affects the validity or enforceability of *those other* provisions.

41 Are some common law "rules" relating to severance nonetheless engaged by the reference made in s 4L to the extent of severance of the offending provision?

42 Posed in this way the question assumes that there is a single set of readily identified and stable rules that would be engaged. But, as Kitto J said in *Brooks*[37]:

> "Questions of severability are often difficult, and tests that have been formulated as useful in particular classes of cases are not always satisfactory for cases of other kinds".

In *Carney v Herbert*, Lord Brightman, speaking for the Privy Council and with reference to the statement by Kitto J, added[38]:

> "There are not set rules which will decide all cases."

43 Not least is that so because questions of "severance" arise in different circumstances. In public law, what have been called common law rules of severance were devised to preserve valid portions of subordinate legislation after textual surgery to remove the invalid portions[39]. The term "severance" is also used to describe what is done when a contractual term is ignored as being too uncertain to admit of enforcement but other promises in the contract are

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37 (1969) 121 CLR 432 at 438.

38 [1985] AC 301 at 309.

39 *Harrington v Lowe* (1996) 190 CLR 311 at 326-328; *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 at 811; *Commissioner of Police v Davis* [1994] 1 AC 283 at 298-299.

enforced[40]. Further, "severance" is a term employed in considering the enforceability of provisions of contracts other than provisions whose making or enforcement is illegal[41] or contrary to one of the heads of public policy[42]. Different considerations arise in these various cases.

44 The origin of what came to be known as the "blue pencil" test[43] lay in the treatment by the common law of illegal conditions in bonds and other instruments under seal. This was a field where matters of form were paramount and the concern was with whether what remained was a valid instrument rather than with the implication of a promise to take effect if part of the bargain was illegal[44].

45 The "blue pencil" test was imported into the treatment of covenants in restraint of trade even though in that field, at least following the general adoption of the approach of courts of equity to such restraints[45], the emphasis has been upon questions of substance and of public policy[46].

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40 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 72; *Fitzgerald v Masters* (1956) 95 CLR 420 at 427 per Dixon CJ and Fullagar J, 438 per McTiernan, Webb and Taylor JJ.

41 *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391 at 411.

42 *A v Hayden* (1984) 156 CLR 532 at 557-559 per Mason J.

43 Namely that the "severance can be effected when the part severed can be removed by running a blue pencil through it", a figurative expression of the principle applicable where two parts of the covenant are expressed in such a way as to amount to a clear severance by the parties themselves and so as to be substantially equivalent to two separate covenants: *Attwood v Lamont* [1920] 3 KB 571 at 578 per Lord Sterndale MR.

44 Marsh, "The Severance of Illegality in Contract", (1948) 64 *Law Quarterly Review* 230 at 233-234; 347 at 351-352.

45 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Company* [1894] AC 535 at 562-565 per Lord Macnaghten.

46 *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at 134-136 [14]-[19].

46 The modern law respecting severance in relation to covenants in unreasonable restraint of trade may be seen as turning on three questions. The first question is whether the covenantee can enforce the restraining covenant to the extent to which it would have been valid had it been narrowly drafted. The answer is that the covenantee can do so if the parts which are too wide can be removed without altering the nature of the contract and without having to add to, or modify, the wording in any way other than by excision. The second question is whether the covenantor can enforce the promise in consideration of which the restraining covenant was given. The answer is that the covenantor can enforce the promise if the main consideration provided for it is not illegal. The third question is whether, if a contract is unenforceable because it contains a covenant in restraint of trade, transactions connected or associated with it are also unenforceable. The answer is that the unenforceability of the contract may affect the enforceability of other transactions with which it is closely connected.

47 *Thomas Brown and Sons Ltd v Fazal Deen*[47] concerned not a covenant in restraint of trade but a contract of bailment for certain gold bars and a parcel of gems. Performance of the contract, so far as concerned the gold bars, contravened a law of the Commonwealth and was illegal; but this Court held that an action lay to recover the value of the gems because the terms of the bailment relating to the gold were severable. Kitto, Windeyer and Owen JJ held[48] that the test of severability was that stated by Jordan CJ in *McFarlane*[49], a restraint of trade case.

48 In *McFarlane*, Jordan CJ stated the applicable rule as being[50]:

> "If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable."

But different circumstances may arise in cases of illegality from those that fall for consideration when the enforcement of certain provisions is contrary to public policy. That is why it is necessary to distinguish between cases in which a promise made by a party to a contract is void or unenforceable, but not illegal,

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47 (1962) 108 CLR 391.

48 (1962) 108 CLR 391 at 411.

49 (1938) 38 SR (NSW) 337.

50 (1938) 38 SR (NSW) 337 at 345.

and cases in which the contract or the performance of a promise would be illegal[51]. And as Jordan CJ rightly observed[52], there is particular difficulty in identifying the limits of a doctrine that permits enforcement of a legal promise associated with, but said to be severable from, an illegal promise[53]:

> "It is difficult to see how, in principle, a legal promise associated with an illegal promise can ever be enforceable unless it is supported solely by a separate consideration so exclusively attributable to it that there are in substance two independent contracts and not one composite contract."

References which postulate particular contractual intentions of the parties if the restraint of trade doctrine strikes at part of their contract are inapposite when construing s 4L. The severance it requires does not hinge upon any assumption about the intention of the parties, but turns upon the effect to be given to statutory purposes.

49 Further, in the circumstances in which s 4L is engaged (*making* the contract is a contravention of the Act) there is a more deep-seated problem. It is that the making of the contract is contrary to law[54]. As was noted[55] by Sackville J in the present case, *Trade Practices Commission v Milreis Pty Ltd*[56] demonstrates that "the ordinary rule is that if Parliament prohibits the making of a contract, the contract does not give rise to an enforceable right or obligation". What then would be the basis upon which more general rules, intended to give effect to what is *inferred* to be "the legislative intention regarding the extent and the effect of the prohibition which the statute contains"[57], are to be regarded as relevant to,

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51 *McFarlane v Daniell* (1938) 38 SR (NSW) 337 at 345 per Jordan CJ.

52 (1938) 38 SR (NSW) 337 at 345-346.

53 (1938) 38 SR (NSW) 337 at 346.

54 *George v Greater Adelaide Land Development Co Ltd* (1929) 43 CLR 91; cf *Braham v Walker* (1961) 104 CLR 366.

55 (2005) 142 FCR 482 at 502 [81].

56 (1977) 14 ALR 623 at 637 per Brennan J.

57 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 423 per Mason J.

and delineating the field of operation of, a statutory provision expressly dealing with that very subject? That is reason enough to reject a construction of s 4L that would require resort to common law rules of severance.

50 Even putting these difficulties to one side, there are at least two further reasons for concluding that common law "rules" relating to severance are not engaged by the reference made in s 4L to the extent of severance of the offending provision. First, while s 4L identifies the relevant contravention of the Act as resulting from the inclusion of a particular condition in the contract whose making contravenes the Act, and singles that condition out for different legal consequences from those attaching to the contract otherwise, the cases in which the offending condition did not constitute consideration for the promise that it is sought to enforce, or was not to be understood as an important and inseparable element in the contract, would be rare indeed. There would, in that event, be very few cases in which common law "rules" about severance would permit the severance of the offending condition. Section 4L would thus have little effective work to do. The cases in which provisions of a contract, apart from the offending condition, could be enforced would be few and far between.

51 The second, and a determinative, consideration which requires the rejection of a construction of the section requiring resort to such a body of rules is that, upon analysis, it is apparent that marking out the bounds of severance by reference to some set of common law "rules" as to severance would treat severability as the condition for the operation of s 4L. It would treat severability as the condition for the operation of s 4L because, if the offending condition is not severable, the consequence is said to be that the contract as a whole is unenforceable. For the reasons given earlier, that construction of the section should be rejected.

52 What follows is that s 4L, on its proper construction, *requires* rather than *permits* the severance of offending conditions. The phrase "in so far as" marks the limit of the severance that must be undertaken. In many cases that would be achieved by a "blue pencil" approach to severance. But that may not always be the case. If it is not, the phrase marks the limit of invalidity and unenforceability of the offending condition. The working out of those limits in each case will depend upon the particular contractual provisions that are to be considered. In the present case, no such difficulty arises. So much of the provisions of the loan agreement as required repayment of the loan with interest are valid and enforceable. It follows that the answer which the respondents sought to make to the claim against them on the guarantee they had given was not made out.

53 This outcome is wholly consistent with the purpose, text and structure of the Act. It is an outcome that recognises that the consequences of contravention are prescribed by the Act, not by resort to a general and all-embracing principle whose application in this case would favour one group of parties knowingly concerned in the contravention over another party in like contravention of the Act. AFS USA and the respondents were all knowingly concerned in the appellant's contravention of the Act. It was the first respondent who, on behalf of AFS USA, offered "certainty in relation to the work". Yet on the respondents' arguments, the debt which AFS USA owed would be irrecoverable. That result would not advance any purpose of the Act. Nor, for the reasons given earlier, is it a result that is consistent with either the Act's text or its structure.

54 No separate issue was raised (whether by notice of contention or otherwise) about the respondents' cross-claim for a declaration under s 87 of the Act that the guarantee "is void and/or unenforceable". It is, therefore, not necessary to examine whether or what relief would be available under s 87 to a party who was knowingly concerned in the contravention which founds the claim, under that section, as a party likely to suffer damage by the conduct of the other in contravention of Pt IV.

Restraint of trade

55 In this Court, by notice of contention, the respondents took the point that the loan agreement was unenforceable as containing an unreasonable restraint of trade at common law. This had not been pleaded and was raised for the first time in this Court. The appellant contended that evidence could have been given at the trial which might possibly have prevented the point succeeding, and hence it was not open to the respondents to take the point in this Court. That contention is correct, and it is not necessary to discuss any of the other answers which the appellant advanced.

Orders

56 The appeal should be allowed with costs. The consequential orders sought by the appellant should be made. The orders of the Full Court of the Federal Court of Australia made on 15 February 2005 should be set aside and, in their place, there should be orders that the appeal to that Court is dismissed with costs.

57 KIRBY J. The reasons of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons") conclude that this appeal[58] should be allowed. I disagree. My disagreement reflects considerations that I have identified in earlier decisions of this Court involving the meaning and operation of the *Trade Practices Act* 1974 (Cth) ("the TPA")[59].

58 Having correctly insisted that the resolution of this appeal is to be found, not in common law doctrines of severability, as such, but in the applicable statutory provisions, the majority has then faltered. It has failed to apply one of the most important rules for the ascertainment of statutory meaning. I refer to the rule that obliges meaning to be assigned by reference to the purpose of the Parliament in enacting the provision. It is not enough to subject the words to "metaphysical analysis"[60].

59 When giving meaning to the TPA, decision-makers with the responsibility of interpretation should do so by reference to the Act's purposes, ascertained with the assistance of available tools. These might include the background to, and history of, its enactment; the entire context and structure of the legislation; the course of relevant amendments to the text; and the content of sources that throw light on the issues, such as law reform and like reports, admissible parliamentary speeches and applicable supplementary materials.

60 This appeal is ultimately concerned with giving effect to the command of the Parliament, expressed in the TPA. When that command is clarified, it sustains the unanimous conclusion of the Full Court of the Federal Court of Australia, now before us. The section of the TPA providing for severability of a provision must be given effect, but in a way that conforms to the large, national objectives of the Act. When this extra element is added to the reasoning of the other members of the Court, and the severability provisions are viewed in that

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58 From the Full Court of the Federal Court of Australia: *Rieson v SST Consulting Services Pty Ltd* (2005) 142 FCR 482. As explained in the joint reasons, the proceedings were first heard in the Supreme Court of New South Wales, both at first instance in *SST Consulting Services Pty Ltd v Riesen* [2001] NSWSC 804 and by the Court of Appeal in *Riesen v SST Consulting Services Pty Ltd* [2002] NSWCA 163. The proceedings were transferred to the Federal Court of Australia by order of the Court of Appeal, that Court having found the respondents' arguments to be deserving of a grant of leave to appeal.

59 See, for example, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 35-39 [90]-[98].

60 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128 at 137 [34].

context, the result is the opposite to that reached without due regard to it. It requires an order that the appeal be dismissed. That is the order which I favour.

The context: the large purposes of the TPA

61 *Reading provisions in context*: The section whose meaning and application is critical to the outcome of this appeal, s 4L of the TPA, is not, nor was it intended to be, entirely free-standing. It is a provision the meaning of which is to be ascertained in the context of the entire Act, so far as other provisions are relevant. In short, the requirements of the TPA, attracted by "a particular provision in [a] contract"[61] that causes the making of a contract to contravene the TPA and to be illegal or unenforceable, may be viewed as one of a number of general sanctions included in the TPA as a means of upholding the Act's purposes.

62 To such general sanctions, an exception has been provided by s 4L "in so far as" the offending "provision is severable" from the impugned "contract". The facility of severance, "in so far as" severability applies, only takes its meaning from the context. The context involves a particular provision in a contract, the inclusion of which contravenes the TPA. If this insight is lost, the correct operation of the primary provision, and of the exception, is at risk of being misunderstood. That is a serious risk because it threatens the proper operation of the TPA.

63 I have made the same or similar points over many years in other cases involving the TPA[62]. It should not require repetition. In many other statutory contexts, this Court has accepted the purposive and contextual interpretation of statutory language as essential to the proper fulfilment of the task of judicial interpretation[63].

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61 TPA, s 4L.

62 See, for example, *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 481-482 [323]; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 79 [65]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 602-603 [120]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 20 [56].

63 See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

64 *The purpose of the TPA*: In the context of the TPA, however, it is especially important to adopt this approach. In *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*[64] I explained why:

> "The object of the Act is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'[65]. The Act incorporates a number of important departures from the previous law. It should be approached as a 'fundamental piece of remedial and protectionist legislation [that is to] be construed broadly'[66]. This approach to the meaning and purpose of the Act is not only to be taken to Pt V, which concerns consumer protection, but also to Pt IV, designed to outlaw 'Restrictive trade practices'[67]. This approach is warranted, indeed necessary, because of the important policy objectives that the legislation evidences, the large economic purposes it sets out to attain and the atypical mode of drafting that was adopted to express the Parliament's objectives[68]."

65 It follows that, in ascertaining the meaning and application of provisions of the TPA (both primary provisions as to a breach and exceptional provisions for severance of contractual terms that manifest such a breach), it is a serious mistake to ignore the design and structure of the Act. To interpret its provisions as if one were construing a charterparty or deed of trust, is to fall into error. In this case, the Court's obligation is to uphold the significant national purposes of the TPA, and the public interests that those purposes defend, save only "in so far as" exceptions (such as statutory severance) apply; and not to provide "loopholes for escape"[69] that frustrate the achievement of the Act's objectives.

66 *Sanctioning exclusive dealing*: Section 4L of the TPA is not a general code for the common law of severance. Still less is it a statutory consolidation of

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64 (2001) 205 CLR 1 at 35-36 [90].

65 TPA, s 2.

66 *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41.

67 The heading of Pt IV of the Act. See *Accounting Systems 2000 (Developments) Pty Ltd v CCH Australia Ltd* (1993) 42 FCR 470 at 503 per Lockhart and Gummow JJ, approved and applied in *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15 at 41; *Qantas Airways Ltd v Aravco Ltd* (1996) 185 CLR 43 at 60.

68 Australia, Senate, *Parliamentary Debates* (Hansard), 30 July 1974 at 542 (Senator Murphy).

69 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 37 [91].

the rules of severance, applicable in a multitude of contexts. It is a particular provision, applicable only to particular contracts, having legal consequences in the context (relevantly) of restrictive trade practices. One form of restrictive practice, prohibited by s 47 of the TPA, is the practice of exclusive dealing. A fundamental purpose of the TPA is to discourage and impose sanctions on that practice.

The facts

67 *A conjoined arrangement*: The background facts are summarised in the joint reasons[70]. However, at the outset it is essential to understand the full context of the dispute. SST Consulting Services Pty Limited (the appellant) sued Messrs Stephen Rieson and Scott Bell (the respondents) as guarantors of a loan made by the appellant to AFS Freight Management (USA) Inc ("AFS USA"). The respondents' guarantee was not disjoined from the exclusive arrangement under the TPA in issue in this appeal. The appellant is not a banker, a finance house or some other disinterested financial intermediary, now concerned with the recoupment of a loan made to AFS USA. The uncontested facts show that all of the parties were, in their different ways, involved, directly or indirectly, individually or by the acts of their directors, in trading and carrying on business involved in the packing and unpacking of shipping containers at ports, in Australia and elsewhere.

68 The directors of the appellant (Messrs Sweeney and Truman), through corporations trading as the Port Botany Group, formerly acted as agents for a United States freight forwarder whose activities AFS USA was created to secure. For this purpose, in 1999, AFS USA needed to raise capital. The parties then formulated the "deal" by which the appellant would lend approximately $1 million to AFS USA. In return for this loan, Mr Rieson, for the respondents, not only guaranteed the discharge by AFS USA of the loan. He also guaranteed "certainty in relation to the work". This was affirmed by Mr Rieson in a conversation with Mr Peter Sweeney. The primary judge in the Federal Court, Emmett J, found that the conversation included the promise: "If you provide the funds you can have certainty in relation to the work"[71].

69 The "work" envisaged was the flow of work to the company that had succeeded the Port Botany Group. Messrs Sweeney and Truman were interested in that company. Some of the judges below made heavy weather of the interests of the respective parties in the "deal" that led to the contract challenged under the TPA. However, as I approach the case, that interest was really quite simple. The

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70 Joint reasons at [2]-[13].

71 *SST Consulting Services Pty Ltd v Rieson* (2004) ATPR ¶42-016 at 48,949 [11].

lender (the appellant), the borrower (AFS USA) and the guarantors (the respondents) all shared a common interest in the arrangement to which they severally agreed. The appellant lent a fund of capital at a "somewhat usurious"[72] rate of interest to AFS USA, the borrower. The borrower's directors Messrs Rieson and Bell (who had an interest in the commercial success of the borrower) became guarantors of the repayment of the loan by the borrower. They offered (and the appellant accepted) not only the promise of the agreed interest but also the tied arrangements constituting an exclusive dealing prohibited by s 47 of the TPA.

70 The clear consequence of the exclusive dealing was that members of the Australian public were deprived of the operation of the market forces of competition that would tend to drive down the costs of the packing and unpacking of containers, and improve the quality of the services that AFS USA would perform. The appellant secured high interest, a closed market with the borrower and the prospect of both repayment and a steady flow of work. The respondents secured the loan and the prospect that AFS USA would prosper. Had things not gone sour before the loan was repaid, the parties would have furthered their respective economic interests. But the Australian public, dealing with AFS USA, would have borne the disadvantages that flowed from the exclusive dealing.

71 *A loan and mutual interests*: The agreement that led to the impugned "contract" was effected as contemplated. Mr Sweeney made notes during his conversation with Mr Rieson. Those notes were subsequently reflected in the formal documents prepared by the solicitors. Thus, the notes included:

> "(1) All pack, unpack, LCL transport in SM & B and Sydney airfreight to be directed to Port Botany/MPG/Pitkin facilities during the life of loan.
>
> (2) If any work directed away from the above facilities, the loan becomes due and payable."

72 The "facilities" nominated, and the venues for transport named[73], were those in which companies associated with the Sweeney and Truman interests were involved. To demonstrate even more clearly the attractiveness of the tied dealing, in a further conversation involving Messrs Sweeney, Truman and Rieson, Mr Rieson explicitly affirmed the mutual advantages proposed. They arose because of the then recent alteration in the position of the United States freight forwarder which AFS USA was hoping to replace. Because of this

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72 *Rieson* (2005) 142 FCR 482 at 495 [56]; cf at 504-505 [94].

73 *SST Consulting* (2004) ATPR ¶42-016 at 48,949 [12].

prospect, Mr Rieson pointed out that "your Port Botany container depot will suffer a short term loss of FAK containers ex the States"[74]. All in all, the replacement of the United States freight forwarder during the shortfall with the new Australian company, tied to interests with which the appellant was associated, would be a very attractive one all round. The only deficiency was that the contemplated contract of loan, entered into on such conditions, would breach s 47 of the TPA. The purpose of the loan was to maintain and assure the exclusive dealing, because, in the event that the borrower ceased to acquire packing and unpacking services from the third party, default would occur, entitling the appellant immediately to recover the loan principal.

73 Nonetheless, the parties pressed on. The loan agreement and the deed of guarantee were finalised and executed. Apparently oblivious to the requirements of the TPA, the parties took steps to formalise the "deal". "Special Terms" were prepared by solicitors and sent to the appellant. These referred to "default events" that would apply during the life of the loan "[i]f any work is directed away from [the specified] facilities"[75]. The parallel deed of guarantee was executed in December 1999. It contained the identical provision obliging the borrower (AFS USA) to conform to the exchange of letters representing the loan agreement. Thus, in terms, the borrower agreed that, if it defaulted on the payments of interest and principal, or the "positive acts to be done", the respondents, as guarantors, would "pay on demand to the lender the principal amounts advanced with interest … up to the time of payment under the Guarantee"[76].

74 The "positive acts" and "default events" referred to in the exchange of letters were clear. Relevantly, the "default events" included the failure to direct all pack and unpack in Sydney, Melbourne and Brisbane and Sydney air freight to the specified venues, as agreed. The sixth clause contained the express promise of the borrower, AFS USA, to "direct all work", which was to include transport, in the same language as the expression used for the relevant "default event"[77]. The breach of s 47 of the TPA could not have been more brazen.

75 To strengthen the assurance still further, an additional exchange of letters was procured. It contemplated a further guarantee of the loan obligations of AFS USA by its holding company, Australian Freight Services Limited ("AFS"). This letter specifically contemplated that AFS would itself also enter into a deed

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74 *SST Consulting* (2004) ATPR ¶42-016 at 48,949 [13].

75 *SST Consulting* (2004) ATPR ¶42-016 at 48,950 [15].

76 *SST Consulting* (2004) ATPR ¶42-016 at 48,951 [19].

77 *SST Consulting* (2004) ATPR ¶42-016 at 48,952 [22].

"whereby they will cause all their pack and unpack LCL transport in Sydney, Melbourne and Brisbane and Sydney air freight to be directed to [the specified facilities in which the appellant was interested]"[78]. Before this could occur, default by AFS USA in the payment of interest took place. That default occasioned demand on the respondents upon their guarantee. It also gave rise to these proceedings.

76 *Unenforceability of the loan*: I have included this detail of the oral and written exchanges that were formalised in the impugned loan "contract" for a reason. It adds to the bare bones contained in the joint reasons. It shows how the several parties (the appellant, the respondents and AFS USA) were, and had been for some time, associated. Those parties were all interested in the exclusive dealing upon which they mutually agreed. Imprudently as it transpired – but candidly, reflecting their agreements – each had a reason to want the terms for the exclusive dealing to be contained both in the loan agreement and in the deed of guarantee. The terms did not slip into these documents by accident or oversight. As I have shown, from the beginning, they were essential conditions of each "contract". They were a direct affront to s 47.

77 The language containing these terms survived through several drafts. It remained essentially the same from the moment of its first formulation in the telephone conversation between Mr Rieson and Mr Peter Sweeney, noted down by the latter and acknowledged by the primary judge[79]. There was no relevant disparity between the reproduction in the letters which were treated as constituting the loan agreement, and the terms of the deed of guarantee. By law, to enforce the deed of guarantee, the appellant was obliged to establish default by the borrower on a legally valid and enforceable loan. The ultimate question was therefore whether, given the language and purpose of s 47 of the TPA, read with the provision as to severability in s 4L, the appellant was entitled to take this course.

The legislation

78 *Sections 47 and 4L of the TPA*: The provisions of s 47 of the TPA, prohibiting the practice of exclusive dealing[80], and the way in which it applies to

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78 *SST Consulting* (2004) ATPR ¶42-016 at 48,952 [23].

79 *SST Consulting* (2004) ATPR ¶42-016 at 48,949 [11].

80 TPA, s 47(1).

corporations that supply or offer to supply "services"[81], are set out in the joint reasons[82].

79 Also contained there are the terms of s 4L of the TPA, concerning "[s]everability"[83]. To understand the operation of these two provisions and how they relate to one another, it is necessary to take the following steps:

- Read the section of the TPA (s 47) that renders the inclusion of a specific provision in a contract a contravention of the TPA;
- Consider the section of the TPA providing for severability (s 4L) in so far as it applies to the impugned provision of the contract; and
- Consider both sections of the TPA in the context of the Act as a whole, with its large public purposes[84].

80 *Section 87 of the TPA*: Two other sections of the TPA are expressly referred to in s 4L. They are ss 87 and 87A. Nothing in s 87A of the TPA would appear to be relevant. Section 87 is a provision that empowers the court, when dealing with a contravention of the TPA, to[85]:

> "… make such order or orders as it thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2) of this section) if the Court considers that the order or orders concerned will compensate [a person who has suffered or is likely to suffer loss or damage] in whole or in part for the loss or damage …".

81 The orders contemplated by s 87(1) of the TPA are stated in extremely broad terms. They include the power to make orders:

- Declaring the whole or any part of a relevant contract "to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on or after such date … as is specified in the order"[86];

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81 TPA, s 47(6). See also the definition of "services" in TPA, s 4(1).

82 Joint reasons at [13].

83 Joint reasons at [1].

84 See these reasons at [61]-[66].

85 TPA, s 87(1).

86 TPA, s 87(2)(a).

- "[V]arying such a contract … in such manner as is specified in the order and, if the Court thinks fit, declaring the contract … to have had effect as so varied on and after such date … as is so specified"[87];

- "[R]efusing to enforce any or all of the provision of such a contract"[88];

- "[D]irecting the person who engaged in the [prohibited] conduct or a person who was involved in the contravention constituted by the conduct to refund money or return property to the person who suffered the loss or damage"[89]; and

- "[D]irecting the person who engaged in the [prohibited] conduct or a person who was involved in the contravention … to supply specified services to the person who suffered, or is likely to suffer, the loss or damage"[90].

82 The flexibility of the orders that might be made under s 87 indicates that the Parliament contemplated that, in some cases where a contract breaches the TPA, invalidation of the contract will not be the only remedy available under the Act. In a proper case, the response of a court might include an order under s 87. Alternatively, it might include the severance of offending provisions under s 4L of the Act. The latter remedy is available "in so far as" the relevant provision ought to be severed. But it is not the only available remedy. The battery of orders afforded by s 87 permits, in some cases, a much more nuanced adjustment of the rights of the parties than the "blue pencil"[91] solution that severance allows.

83 The existence of additional remedies, and the provision for multiple orders which the court might make, reduces the need to deploy the technique of severance under s 4L when an order under s 87 has been made. It also withdraws the need to impose on s 4L an artificial or "metaphysical"[92] construction that

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87 TPA, s 87(2)(b).

88 TPA, s 87(2)(ba).

89 TPA, s 87(2)(c).

90 TPA, s 87(2)(f).

91 cf joint reasons at [44].

92 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (1999) 90 FCR 128 at 137 [34].

would undermine the achievement of the fundamental purposes of the Act, including those expressed in s 47, which are protective of competitive and fair trading practices and defensive of large social and economic objectives for the nation.

84 There is much common ground between the approach that I favour in this appeal and that expressed in the joint reasons. It is as well to set this out before turning to the points of difference.

The common ground

85 *The loan agreement breached s 47*: I agree in the analysis in the joint reasons, indicating that the appellant's grant to, or conferral upon, AFS USA of the right to borrow money from the appellant was a supply of "services" to AFS USA on "the condition that [AFS USA] will acquire … services of a particular kind or description"[93], namely the specified "pack and unpack LCL" work in designated ports, "includ[ing] transport"[94]. For the reasons there given, I agree that the appellant, by entering into the loan agreement and providing the loan, thereby engaged in the practice of "exclusive dealing" within s 47(6) of the TPA, a course prohibited by s 47(1)[95].

86 *The initial instalments are included*: I also agree with the joint reasons[96] that the initial two instalments advanced by the appellant to AFS USA, before the right to the loan was formally created, should be treated as having been paid in anticipation of the loan agreement and pursuant to the Special Terms to which I have referred[97]. Those instalments do not cast doubt on the existence, and provisions, of the loan agreement ultimately entered into. In any case, as I have shown, the Special Terms included, in the provision for "default events", express reference to the tied arrangements.

87 *The loan and the guarantee*: The case has been approached on the footing that no additional questions arise in respect of severance of a provision of the loan agreement, separate from the enforceability of the deed of guarantee. I agree that such questions can be disregarded by this Court[98].

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93 TPA, s 47(6).

94 Joint reasons at [10].

95 Joint reasons at [13].

96 Joint reasons at [13], fn 2.

97 See these reasons above at [73].

98 Joint reasons at [19].

88 *The primacy of statutory severability*: I also agree that the obligation of the courts below was to address any question of severability presented by the circumstances, by giving effect to the requirements of s 4L of the TPA. At most, the earlier doctrines of severability at common law were available by analogy to assist in the application of s 4L. To the extent that the judges of the Supreme Court of New South Wales and of the Federal Court, who considered this case, thought it appropriate to apply the common law rules as such, they were mistaken. Their duty was to apply the statutory provisions and to give effect to the requirements of the TPA, including any requirement imported by s 4L, providing a statutory remedy of severance.

89 In the past, severability has arisen in many different contexts. Some of those contexts[99] have involved the operation of statutory provisions. Such cases might afford useful analogies for s 4L. But as this Court has had occasion to say repeatedly in other contexts, where statutory provisions are engaged, attention must primarily be addressed to those provisions and to their terms, and not to earlier judicial elaborations of the common law or of other statutory provisions[100].

90 *Applying the language of s 4L*: The language of s 4L makes it clear that the provision is only engaged in respect of a "contract", the "making" of which contravenes the Act, by reason of the inclusion of a particular "provision". This confines severability to cases of the specified kind[101]. The loan agreement was such a case. Ultimately, this was undisputed.

91 *The importance of context and objectives*: To the extent that the reasoning of courts in the past, concerning severance of contractual provisions that would otherwise render a contract invalid or unenforceable at law, may be useful by analogy to the task presented by s 4L of the TPA, it must be recognised that there are no universal "set rules which will decide all cases"[102]. Whether severability is applicable depends on the considerations expressed or implied in the statutory

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99 See, for example, *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391; *Carney v Herbert* [1985] AC 301 at 313 (PC).

100 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 89 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 545 [63]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 10 [24].

101 Joint reasons at [32].

102 *Carney v Herbert* [1985] AC 301 at 309 (PC). See joint reasons at [42].

provision; the terms of the contract; the extent and seriousness of the breach of the TPA; the policy evident in the legislation; and the judgment of the decision-maker. The lastmentioned consideration necessitates recognition of the part that values play in such decisions, and the importance of harnessing such considerations to the context in which they are invoked. Here, that context is the TPA as a whole, with its significant social and economic objectives. The language of s 4L should not be construed in isolation from that context.

92 *Common law restraint of trade*: I am content, as the joint reasons hold[103], to treat as inadmissible the respondents' belated attempt to raise an alternative complaint that the appellant had engaged in unreasonable restraint of trade at common law, providing a different basis for unenforceability of the loan agreement. Whilst I have some doubts that any procedural unfairness to the appellant would flow from this Court's deciding that issue, raised by a notice of contention, I can put it aside. The proper application of the TPA's exclusive dealing provisions will be sufficient to bring me to the orders that I favour.

The issues

93 The foregoing analysis presents a high measure of common ground. When this common ground is taken into account, only three issues remain for decision in this appeal:

(1) *The approach to s 4L*: How is the decision-maker to approach the task of applying s 4L of the TPA, given the context in which that provision is found in the Act?

(2) *The meaning of s 4L*: Noting the existence of different approaches to the interpretation of s 4L, and having regard to its language and the somewhat complex structure in the closing phrases, what is the meaning to be given to that section?

(3) *The application of s 4L*: Having regard to the resolution of the two preceding issues, how is s 4L to be applied in the present case? Does the correct application indicate error in the orders of the Full Court or of the primary judge?

The proper approach to s 4L

94 *The contravention of the TPA*: The appellant accepted[104] that "in entering into the agreement [containing] the pack and unpack provision [the parties made

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103 Joint reasons at [55].

104 See appellant's written submissions at [38].

a contract that] directly contravened section 47(1)" of the TPA. It was a contract committing the parties to exclusive dealings which were antithetical to market competition and fair trade practices. The provision of the loan by the appellant was conditional on the promise that AFS USA gave (confirmed by the respondents) that the appellant would obtain "certainty in relation to the work". The combination was not accidental, ephemeral, mistaken or incidental to some other contract. The offending promise lay at the very heart of the integrated loan agreement and the associated deed of guarantee.

95 *The prima facie rule*: In these circumstances, the primary rule was that the inclusion of certain provisions in the contract, specifically the loan agreement, contravened s 47 of the TPA. The contract was therefore rendered illegal and unenforceable in accordance with that section.

96 The proper approach to the application of the TPA in these circumstances is therefore that which I have described above. It requires one to start with the invalidating provisions of general application. Only then does one turn to the special, saving provision (here, s 4L (severability) or s 87 (remedies to an innocent party)). Clarifying the existence and scope of the relevant invalidity in the making of the contract is the necessary precondition to the consideration of any relief available in the circumstances.

97 In *Trade Practices Commission v Milreis Pty Ltd*[105] Brennan J explained this approach in the following way:

> "The general rule is that if the Legislature prohibits the making of a contract, the making of the contract does not give rise to an enforceable right or obligation … The Legislature may, however, provide that the general rule should not apply, and that contractual relationships should be enforced or accorded effect although the contract be made in breach of the prohibition (*O'Neill v O'Connell*[106]; *Batu Pahat Bank Ltd v Official Assignee*[107]; *Bassin v Standen*[108]). There must be 'a special context in the statute demonstrating an intention to exclude the general rule' (*Menaka v Lum Kum Chum*[109])."

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105 (1977) 14 ALR 623 at 637.

106 (1946) 72 CLR 101 at 132.

107 [1933] AC 691.

108 (1945) 46 SR (NSW) 16 at 18.

109 [1977] 1 WLR 267 at 274.

98 In the lastmentioned case, *Menaka*[110], the Privy Council cited Parke B as stating the general rule in his reasons in *Cope v Rowlands*[111]:

> "It is perfectly settled, that where the contract which the plaintiff seeks to enforce … is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition."

99 In *Menaka*, the Privy Council went on to elaborate the correct approach by reference to earlier decisions in which, as here, a statute rendered the contract invalid or unenforceable. Their Lordships cited *Cornelius v Phillips*[112], a case involving the application of the *Money-lenders Act* 1900 (UK), as stating that the application of the general rule (voidness and unenforceability) might be modified "if there had been a special context in the statute demonstrating an intention to exclude the general rule [and there is no] doubt that such a context could be provided either by express words or by necessary implication"[113].

100 In the past, courts have struggled with what appear to be the disproportionate and unjust consequences of denying *any* effect to a contract merely because it contains provisions that are prohibited by statute. It was to afford relief against this outcome that the common law doctrine of severance arose. In the present case, there is no need, as such, to resort to the common law doctrine because the Parliament has provided specifically for severability in the context of the TPA by s 4L.

101 However, it should not be assumed that the earlier judicial rationalisations are completely irrelevant, so long as they are compatible with the language and purposes of s 4L; and so far as considering them does not detract attention from the primary duty to apply the statute. It is essential for a court, considering severance in this context, to apply s 4L of the TPA. But the fact that that section uses the word "severable" suggests that the statutory remedy is not entirely divorced from the common law that preceded it. For more than a century prior to the enactment of the TPA, judges explored the concept of severability. They developed a range of considerations that could be taken into account when

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110 [1977] 1 WLR 267 at 274.

111 (1836) 2 M & W 149 at 157 [150 ER 707 at 710].

112 [1918] AC 199.

113 *Menaka v Lum Kum Chum* [1977] 1 WLR 267 at 274, referring to *Cornelius v Phillips* [1918] AC 199 at 211.

applying the concept. These considerations are not irrelevant to the application of what is now a statutory remedy.

102 It follows that where "trading practices provisions"[114] prohibit certain kinds of conduct, "the effect upon contractual relationships is consequential upon the prohibition". The approach of Brennan J in *Milreis* was approved by this Court in *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd*[115]. The approach is applicable to the present appeal.

103 Here, a provision for exclusive dealing was included in the subject contract. As a result, the making of the contract contravened the TPA. In the circumstances, the contract was, at the least, rendered unenforceable. This was so because s 47 is not simply addressed to *inter partes* interests. It is designed for the protection of the public[116]. The public interest in invalidating the practice of exclusive dealing (and deterring others from engaging in such practices) demanded a sanction.

104 *Sanctions and hard cases*: If this result is thought to produce "harsh" consequences in the particular case[117], the TPA affords several justifications. First, the social and economic purposes of provisions such as s 47 are concerned, on a macroeconomic level, with the protection of the public generally. Because such agreements are usually entered into secretly, detection of exclusive dealing arrangements is very difficult. When they are discovered, the available sanctions must reflect this fact. Section 87 of the TPA provides remedies to an innocent party who suffers loss as a result of a contract being found void or unenforceable, for example, where it contains provisions for exclusive dealing. Further, in cases to which it applies, a party might seek severance of the offending provisions under s 4L. But the starting point for analysis is an appreciation of the importance of the policy expressed in s 47. Where that section applies, it has serious consequences for the validity and enforceability of the affected contract. So much is the clearly expressed command of the Parliament. It applies to the loan agreement in the present case.

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114 *Trade Practices Commission v Milreis* (1977) 14 ALR 623 at 637 per Brennan J.

115 (1986) 161 CLR 543 at 554-555.

116 cf *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 414.

117 *Rieson* (2005) 142 FCR 482 at 505 [96].

The preferable meaning of s 4L

105 *The competing meanings*: I accept that there is a degree of ambiguity in the meaning of s 4L of the TPA. It arises from the fact that, in the closing phrases, there are three ideas at play. The question for decision is how those ideas are intended to relate to one another. The three relevant provisions are identified by dividing the closing (operative) provisions of s 4L as follows:

- "nothing in this Act affects the validity or enforceability of the contract";
- "otherwise than in relation to that provision [the provision that contravenes the TPA]";
- "in so far as that provision is severable".

106 The phrase "that provision" is a reference back to the statement, earlier in s 4L, identifying "the inclusion of a particular provision in the contract" which renders the making of the contract a contravention of the TPA. In the present case "that provision" is the provision by which the parties to the loan agreement agreed to an exclusive dealing, and to the inclusion of that provision as a term of the contract. It was the inclusion of the provision that resulted in the appellant's breach of the TPA.

107 *The joint reasons*: The majority in this Court, rejecting past authority in the Full Court of the Federal Court[118], reads s 4L as a provision that "*requires* rather than *permits* the severance of offending conditions"[119]. That interpretation could only be adopted by overlooking the context in which s 4L appears in the statute. It is a context designed to provide *exceptional* relief from the provisions of the TPA dealing with invalidity and unenforceability. The approach of the majority also involves disregarding the overall purpose of the statute (relevantly, to redress anti-competitive and unfair trading practices). Whilst apparently approving what was said by Brennan J in *Milreis*[120], the majority fails to apply the approach established by that case for the application of s 4L.

108 *Contrary textual arguments*: It would be remarkable if, in the language of s 4L, the exceptional cases of severability were given such predominance as to undermine the important work of the exclusive dealing provisions in protecting

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118 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 582-583. See *Rieson* (2005) 142 FCR 482 at 484 [1]-[3].

119 Joint reasons at [52].

120 Joint reasons at [49].

competition and fair trade practices. Self-defeating provisions may arise in legislation. But one would expect such a deep flaw to have been discovered a long time before this case; and the language of the TPA, said to justify that conclusion, to have been much clearer.

109 That severance was intended as an exceptional solution is evident from the language of s 4L, which provides for severability, but only "*subject to* any order made under section 87 or 87A"[121]. The explicit mention of those provisions makes it clear that s 4L operates on a micro level, by reference to the particular provisions of the contract. This particularity is reinforced by the reference in the preconditions for the attachment of s 4L to the "inclusion of a *particular* provision in the contract"[122]. The particularity of s 4L is not consistent with the construction favoured in the joint reasons, which *requires* (rather than exceptionally *permitting*) the severance of offending conditions. By the majority's construction, the more an agreement is tainted by illegality (due to non-compliance with the TPA) the more likely it is that the agreement will be rescued by s 4L. This is a counterintuitive result which the Parliament could not have intended.

110 *Inconsistent legislative history*: To confirm that this is so, one has only to look at the history that lay behind the enactment of s 4L. The provision arose out of recommendations of the Review Committee appointed by the Minister for Business and Consumer Affairs ("the Swanson Committee"), which reported in August 1976[123]. That Committee was established to consider problems that had arisen in the early operation of the TPA. It produced a report containing recommendations for the Act's amendment. Although the report did not include a draft of proposed legislative amendments, it expressed clearly the objectives that the Committee set out to attain.

111 On the subject of severance, the Swanson Committee noted a number of submissions that had requested amendment of the Act to deal with "the problem known as 'severance'". It described that problem as relating to "the enforceability of a contract which contains, as only a part of the contract, an unlawful term or condition, such as a term or condition that is prohibited by section … 47 … of

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121 Emphasis added.

122 Emphasis added.

123 Commonwealth of Australia, Trade Practices Act Review Committee, *Report to the Minister for Business and Consumer Affairs*, August 1976 ("the Swanson Committee report").

the Act"[124]. It described the issue for decision as being "whether, assuming that the part of the contract that is in restraint of trade can be isolated from the rest of the contract, the rest of the contract is still legally enforceable". It described the common law rule (which would apply in default of express legislative provisions) as permitting such severance "provided that it does not alter entirely the scope and intention of the contract". It addressed the question of whether the TPA permitted the operation of the common law doctrine of severance. It acknowledged the uncertainty "felt by the community"[125] as to whether this was so.

112 It was against this background that the Swanson Committee concluded that it was[126]:

> "too harsh a penalty for contracts to be made totally unenforceable in circumstances where the restraint of trade is *merely ancillary to, and not the core of*, the contract. Accordingly, we recommend that the Act should clearly provide an express power in the courts to apply the common law rules of severance in relation to such offensive clauses."

113 When the stated purpose of the Swanson Committee is taken into account, it contradicts the construction now adopted by the joint reasons in this Court. It makes it clear that s 4L of the TPA was intended as an exceptional, ameliorative provision designed to save individual contracts in special cases from total unenforceability. In fact, it was intended to operate much in the way that the common law rules of severance had done but, of course, according to the statutory formula enacted by the Parliament.

114 This Court should not adopt an unnatural interpretation of that formula that would significantly alter the character of s 4L and the remedial work that the

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124 The Swanson Committee report at 18 [4.31]. The Second Reading Speech and Explanatory Memorandum make it clear that the Bill that introduced s 4L into the TPA was designed "to implement such of the recommendations of [the Swanson] Committee as can be adopted immediately": Explanatory Memorandum at [1]. The Explanatory Memorandum at [8] indicates that what became s 4L of the TPA was intended to continue in operation the common law principles relating to the severance of restrictive provisions from contracts, subject only to their being displaced by the particular remedies in the TPA (hence the cross-reference to ss 87 and now also to 87A); cf *Rieson* (2005) 142 FCR 482 at 486-487 [16].

125 The Swanson Committee report at 19 [4.32].

126 The Swanson Committee report at 19 [4.32] (emphasis added). The Swanson Committee report at 19 [4.33] also concluded that the statutory amendment should apply retrospectively to contracts entered into on or after 1 February 1975.

section was enacted to perform. That work was to save particular contracts from the consequences of invalidity and unenforceability occasioned by a "particular provision". It was to do so only "in so far as" that provision was "merely ancillary to, and not the core of, the contract".

115 It follows that there is no occasion to press s 4L into a much larger, proactive and obligatory function beyond that which the words of the section would ordinarily bear. Especially is this so where the purposes of the TPA, the internal textual features of s 4L, the revealed object of enacting s 4L, and the harmonious operation of s 4L in the context of the entire Act, suggest the contrary.

116 *Conclusion on approach and meaning*: I accept the conclusion of the joint reasons that the proper approach to deciding issues of severability is to apply s 4L and not the common law rules that preceded the enactment of that section. Nonetheless, some of the old common law principles may still be helpful to an understanding of the work that s 4L was adopted to perform[127].

117 Once this is acknowledged, and the provisions of s 4L are read in the context of the TPA as a whole, it becomes clear that the proper way to read s 4L is in the manner urged by the respondents. This means that the operative provision of s 4L should be read, effectively, by placing certain words in parentheses: Thus:

> "Nothing in this Act affects the validity or enforceability of the contract (otherwise than in relation to that provision) in so far as that provision is severable."

This approach maintains the intended focus on the severability of the offending provision; and it requires severability to be determined in the context of the TPA, an Act concerned with large social and economic objectives.

The application of s 4L to this case

118 *Reasons for non-severance*: When the foregoing approach is adopted, it becomes apparent that the Full Court was correct to conclude that the "particular provision" in the impugned contract, namely, the exclusive dealing provisions in the loan agreement, should not be severed from that agreement pursuant to s 4L of the TPA. The reasons for this conclusion include:

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127 Changing social and legal conditions may make it necessary to reconsider some of the "tests" earlier propounded by judges for common law severability. See *Rieson* (2005) 142 FCR 482 at 499 [73], noting Marsh, "The Severance of Illegality in Contract", (1948) 64 *Law Quarterly Review* 230 at 233.

(1) The tying arrangements gave rise to an unlawful exclusive dealing that was manifestly contrary to s 47 of the TPA. So much is not now contested. It involved a serious breach of the TPA. Redress under the Act would be far from surprising. A total lack of redress in such a brazen case would be astonishing;

(2) The arrangements were not incidental, accidental, fortuitous, the product of oversight or merely ancillary to the terms of the contract. The primary judge accepted that the offending arrangements were "regarded as being of significance so far as [the appellant] was concerned"[128]. It could not be concluded that they "were insignificant or that they were not important to [the appellant]"[129]. The primary judge also found that "the tying arrangement … ensured that the advances would be made"[130]. Nor were the arrangements for the exclusive benefit of one party[131]. All of the participants, the appellant, the respondents and the borrower, had a mutual interest. The offending provisions of the contract brought them together in the anti-competitive terms on which they agreed;

(3) The parties' common interest was achieved at the cost of the public interest which the TPA, and specifically s 47, is designed to protect. The severance for which s 4L of the TPA provides is to be performed having regard to the ordinary requirement to secure the achievement of the overall purposes of the TPA, including s 47. Those purposes protect large policy objectives in which innocent members of the public have an interest for which the courts are the guardians;

(4) This case must be distinguished from earlier cases in which an unlawful provision has been severed. Those cases are very different from the present. In particular, they concern much more limited ("ancillary") provisions in the contract and less serious breaches of the TPA than those disclosed in the contract in this case[132]; and

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128 *SST Consulting* (2004) ATPR ¶42-016 at 48,956 [45].

129 *SST Consulting* (2004) ATPR ¶42-016 at 48,956 [46].

130 *SST Consulting* (2004) ATPR ¶42-016 at 48,956 [47].

131 cf *Carney v Herbert* [1985] AC 301 at 317.

132 See, for example, *Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108 CLR 391 at 411; *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 597 at 605, 606, 609; Rose, "Reconsidering Illegality", (1996) 10 *Journal of Contract Law* 271 at 273.

(5) Severance is not available because the exclusive dealing provisions lay at the core of the loan agreement (and of the deed of guarantee which contained an explicit cross-reference to the terms of the loan agreement).

119 *Conclusion on the application of s 4L*: When the foregoing considerations are given their proper weight, it becomes plain that this was not an occasion for the severance of the offending provisions of the loan agreement. In my respectful view, it is only by ignoring the context in which severance occurs under s 4L that the contrary conclusion could be reached in the present case. The Full Court was correct to decide as it did.

120 Any suggestion that the appellant was an innocent abroad, a disinterested financier uncontaminated by the breach of the TPA or unaware of the circumstances that constituted the breach of the Act, is completely unconvincing. To the complaint that the appellant's culpability in the breach of the TPA was less serious than that of the respondents, who proposed the exclusive dealing and secured the benefit of the loan, the answer is plain. This does not justify the use of severance to affirm the remainder of the contract, with its inherent affront to the TPA. At most, it may be a reason to enliven the more nuanced forms of relief for which s 87 of the Act provides.

Orders

121 The appeal should be dismissed with costs.