RUGBY LEAGUE AND THE LAW

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Abstract

Rugby league has been played in Australia for over a hundred years. While some cases originate from when the sport was semi-professional, the rise of professional leagues over the last two decades has also seen an increase in the involvement of the law. It is suggested that rugby league has been involved in more litigation than any other sport in Australia, with there being legal cases in areas such as competition law, restraint of trade, torts, criminal law and copyright. It is also suggested that some of these cases could have been avoided with better governance and administration. The draft system once implemented by rugby league, for example, was poorly designed and inevitably successfully challenged. However, other cases could have happened in a number of other sports and, at other times, other sports were actually involved in the litigation. Thus, there are a number of reasons why rugby league has experienced more litigation than other Australian sports.

I INTRODUCTION

The North Queensland Cowboys' win in the 2015 National Rugby League (NRL) Grand Final was the culmination of over twenty years participation in a national competition, and represented the club's first ever premiership. For South Sydney, meanwhile, the 2014 Premiership was its first in over forty years, the length of time this represented being indicated by the fact its previous premiership, in 1971, had been won in a competition organised by the New South Wales Rugby League (NSWLR). This competition, however, was not even the precursor of the NRL, Australia's main rugby league competition having been run by the Australian Rugby League (ARL) in between those of the NSWRL and NRL. It was also no ordinary journey for South Sydney between these premiership successes, the club having been banished from the competition for two years, only being re-admitted after a court case fought just as hard as any of its grand finals. Further battles were later to occur when Russell Crowe and Peter Holmes à Court successfully sought to bring the club under private ownership. Thus, unlike the Cowboys, there was a strong legal background to the South Sydney premiership.

South Sydney is not alone within rugby league in finding itself facing court proceedings, with Canterbury-Bankstown, and more recently, Cronulla-Sutherland, facing, or undertaking, legal action. Various rugby league governing bodies have also found themselves in court, and it is the author's observation that rugby league has been involved in more litigation than any other sport in Australia. This article will therefore examine these legal cases that have involved competition law, restraint of trade, torts, criminal law and copyright. The underlying question in the analysis of these cases is whether there are any inherent reasons why rugby league should be the subject of more litigation than other sports.

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II COMPETITION LAW AND RESTRAINT OF TRADE

A Competition Law

1. News Limited v Australian Rugby League

One of the most significant competition law cases was *News Ltd v Australian Rugby League*[1] that arose in 1995 after ARL refused News Ltd's attempt to try and obtain the pay television rights for ARL matches. The ARL then signed all the clubs to five year commitment and loyalty agreements, but this did not stop News Ltd from recruiting players and coaches in order to form new Super League clubs with offers of higher wages.[2] News Ltd also began legal proceedings in the Federal Court, claiming that these agreements were in breach of s 45 of the then *Trade Practices Act 1974* (Cth) (now *Competition and Consumer Act 2010* (Cth)) in that they constituted an agreement or undertaking containing an exclusionary provision, that is, a provision likely to reduce competition by preventing, restricting or limiting the supply of goods or services. It was also argued there had been a breach of s 46, which states that a corporation with a substantial level of market power cannot take advantage of that power to eliminate or reduce competition in that market.[3]

In regard to s 46, News Ltd argued that there was a rugby league market for the supply of the service of conducting a premier rugby league competition, and a teams' market for the supply of a team of players suitable for participation in such a competition. It was News Ltd's claim that the ARL had a monopolist control of a narrow rugby league market with its twenty team competition.[4] The original trial judge, Justice Burchett, however accepted evidence that there was a perception amongst various sporting bodies that a competitive market existed with a number of different sports vying for spectators. It was therefore held that the ARL had not acted as a monopolist and there was not a narrow market limited to rugby league.[5] In relation to the s 45 exclusionary provisions, Justice Burchett noted that under the Super League competition, new teams would be formed and so there was no competition between the clubs for the supply of services to News Ltd. Since the loyalty agreements had given the clubs assurance of participation in the national competition, they did not amount to being an exclusionary provision.[6]

On appeal to the Full Court of the Federal Court, it was held that the commitment agreements were entered into for the purposes of preventing the supply by the clubs of teams to any organiser other than the ARL. This was seen by the court as being the substantial purpose of the agreements which were therefore held to be exclusionary provisions, and therefore invalid.[7] It was also noted by the court that the clubs were only bound to the ARL by their annual commitment to the league, not by any additional longer or more permanent term.[8] This indicates that the relationship between a club and the organising body is a contractual one, and in the case of the

[1] (1996) 58 FCR 447, 135 ALR 33; (1996) 64 FCR 410, 139 ALR 193.
[2] (1996) 58 FCR 447, 471; 135 ALR 33, 51.
[3] Note that these two sections have been retained as s 45 and s 46 of the *Competition and Consumer Act 2010* (Cth).
[4] (1996) 58 FCR 481; 135 ALR 33, 63.
[5] (1996) 58 FCR 481, 500; 135 ALR 33, 81.
[6] (1996) 58 FCR 447, 516-7; 135 ALR 33, 96-7.
[7] (1996) 64 FCR 410, 582; 139 ALR 193, 354.
[8] (1996) 64 FCR 410, 508; 139 ALR 193, 282.

clubs in the ARL competition at the time, it was one that came to an end at the completion of the season. This meant the clubs were free to join Super League since the loyalty agreements they had signed had by then ceased to apply.

Super League was to run a rival competition to the ARL's for two seasons, before a merger was sought due to the fact both were losing money.[9] This merger, to form the NRL, resulted in another Federal Court case involving s 45 of the then *Trade Practices Act,* namely *South Sydney v News Ltd.*[10]

2. South Sydney v News Limited

During negotiations for the formation of the NRL, one of the main issues was the number of teams that would be allowed into the competition. The ARL wanted 16, News Ltd 12, with the eventual decision being the compromise of 14 teams. The reasons for wanting to limit the number of teams in the competition to 14 were practical ones, such as wanting to have a competition where all the teams could play each other twice, and financial ones, such as not wanting to distribute income from sources like television rights to too many clubs. Selection criteria were then set up to decide what clubs would be allowed into the 14 team competition, and they included crowd numbers (home and away), competition points, gate receipts and sponsorship.[11]

The NRL also encouraged clubs to amalgamate, with these merger clubs being guaranteed entry into the competition. The first clubs to agree to a merger were St George and Illawarra, with Wests and Balmain agreeing to form the Wests Tigers, while Manly-Warringah and North Sydney formed the Northern Eagles. Other teams, namely the Gold Coast and Adelaide, indicated that they would not seek admission.[12] This then left 15 teams vying for the 14 team competition, South Sydney becoming the team excluded on the basis of its ranking under the selection criteria.[13] South Sydney immediately began legal proceedings, lodging an application for an interlocutory injunction. However, Justice Hely concluded that South Sydney's case was not a strong one, and on the balance of convenience declined to grant the injunction.[14] The NRL was therefore allowed to continue its competition without South Sydney while proceedings commenced in the Federal Court. Trial judge, Justice Finn, held that the purpose of the 14 team term was to achieve a viable and sustainable national competition and that South Sydney had no right to be admitted. Thus, the 14 team term was held not to be an exclusionary provision under s 45.[15] Justice Finn also noted that even if South Sydney had been omitted by an invalid

[9] It should be noted that Super League, like the World Series Cricket (WSC) organised by Kerry Packer in the late 1970s, suffered from the problem of having many of the star players, but no tradition. The ARL's Winfield Cup competition on the other hand, like the Australian Cricket Board (ACB), had the tradition, but struggled for crowd support without many of its star players: see Chris Davies, 'News Ltd v ARL, South Sydney v News Ltd – and the Question of Authorisation Under s 88 of the Trade Practices Act' (2002) 10 *Trade Practices Law Journal* 215, 216.

[10] (1999) 169 ALR 120; (2000) 177 ALR 611; (2001) 181 ALR 188; (2003) 77 ALJR 1515.

[11] (2000) 177 ALR 611, 627. Note that gate receipts were rated at 1.25, and sponsorship at 2, and the fact these criteria were weighted indicates that the financial situation of the clubs was a highly significant factor in determining admission to the 14 team NRL.

[12] Ibid, 628-9.

[13] Ibid, 630.

[14] (1999) 169 ALR 120, 148.

[15] (2000) 177 ALR 611, 678.

exclusionary provision, it could still have been legally omitted by the implied one year term that had been held to exist in the Super League case.[16]

South Sydney then appealed to the Full Court of the Federal Court, and in a 2-1 decision, the Full Court held that the 14 team term was an exclusionary provision, and that South Sydney could not be excluded from the NRL on the basis of this term. The reason for this decision was that while the ultimate end purpose of the 14 team term was to create a viable national competition, its immediate purpose was to exclude clubs.[17] For South Sydney the decision saw it returned to the NRL in a 15 team competition, with News Ltd stating it would be allowed to remain in the NRL whatever the outcome of its appeal to the High Court. In a 4-1 decision the High Court held that the 14 team term was not an exclusionary provision since it was not aimed at South Sydney, or any other club.[18]

Predictably, South Sydney started slowly after its return to the NRL, and although the club finished last in 2006, it did manage to reach the finals in 2007. This was after millions of dollars was put into the club by new owners, actor, Russell Crowe, and businessman, Peter Holmes à Court.[19] It is suggested that the private takeover of South Sydney has proven to be a success story, despite some problems along the way.[20] A question that then arises is whether it was private ownership that turned South Sydney from being a club unwanted by the NRL to NRL Premiers. The author would suggest that while it was important, what was also significant was that South Sydney had what money cannot always buy, namely tradition. South Sydney had been excluded by the NRL, despite the fact it had won the most rugby league premierships, and with that pedigree reasonable on-field success was likely to see a return to off-field success. Thus, while the 14 team selection criteria had been designed to objectively decide which clubs would be allowed into the NRL, it is suggested that perhaps a subjective one, namely tradition, should also have been included.

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[16] Ibid, 682.

[17] (2001) 181 ALR 188, [278]. For a further discussion of this case see Chris Davies, 'South Sydney District Rugby League Football Club v News Ltd' (2001) 8 *James Cook University Law Review* 121, cited by Justice Kirby in *News Ltd v South Sydney District Rugby League Football Club* (2003) 215 CLR 563, 604.

[18] *News Ltd v South Sydney District Rugby League Football Club* (2003) 215 CLR 563, 576; 77 ALJR 1515, 1521, 1551. For further discussion if the High Court cases see Chris Davies, 'News Ltd v South Sydney District Rugby League Football Club' (2003) 10 *James Cook University Law Review* 116.

[19] Note that Holmes a Court later sold his 50 per cent share in Blackcourt League Investments, the company that he and Crowe has set up to purchase the club, to James Packer. Honeysett suggests it may have been was for around $7m, with Holmes a Court having paid $1.5m to buy the club, and having injected $4.5m into it: Stuart Honeysett, 'Packer's pledge to take Souths global', *The Australian*, 9 October, 2014, 32.

[20] One question that then arises is whether private ownership should be seen as the future for all professional teams sports in Australia. There are, however, two cautionary tales from the NRL regarding private ownership, namely Manly and Newcastle. There is little doubt that the financial input in 2000 from local Manly millionaire, Max Delmage, prevented the club from going into administration after the failed merger with North Sydney. It did bring on-field success, but has created board room problems after the Penn family also became involved in the ownership of the club. Of more concern, however, has been the takeover of Newcastle by Nathan Tinkler as he was forced to relinquish his interest in mid-2014 by selling it back to the members for $1: Ray Catt, 'Tinkler set to bail out of Jets,' *The Weekend Australian*, 23 August, 2014, 44.

Rugby league, along with the Australian Football League (AFL) and many Australian media outlets, later found itself subjected to more competition law litigation in *Seven Network v News Limited*.[21]

3. Seven Network v News Limited

In this third major s 45 sports-related case to be heard by the Federal Court, the Seven Network claimed anti-competitive behaviour in regard to the NRL and AFL pay television rights, and that this had led to the demise of its pay television network, C7. In regard to the anti-competitive behaviour Seven claimed that there had been a consortium involving News Ltd, Foxtel, PBL and Telstra which had made an agreement (the Master Agreement), the objective of which, Seven claimed, was to deprive C7 of the pay television rights to the NRL and AFL, the two 'marquee' sports which were essential to C7's continued existence as a sports channel. Seven therefore claimed there had been a contravention of s 45(2) and s 46 of the then *Trade Practices Act*.[22]

An important consideration in the case therefore was the definition of the relevant markets for the television rights. Justice Sackville noted that the expert witnesses and the parties had agreed that markets at least as narrow as separate ones for the NRL and AFL broadcasting rights did exist, but disagreed that there were separate markets for the respective pay television rights and free to air television rights.[23] Justice Sackville stated that the wholesale sports channel market pleaded by Seven was central to its case,[24] but held that the availability of C7 as a sports channel did not support the existence of a wholesale sports channel market and that C7 and Fox Sports were not competitors in a wholesale sports channel market.[25] His Honour also held that the NRL and AFL pay television rights were supplied in separate markets, but that there was a retail pay television market since pay television provided what free to air could not, namely, a wide choice and range of programs.[26]

It was then stated by Justice Sackville that because of his findings in regard to the markets relied on by Seven, the only aspect of the s 45(2) effects case was in regard to the retail pay television market.[27] His Honour also noted that while Seven consistently maintained that securing the pay television rights was essential to the survival of C7, it failed to make its best offer for those rights.[28] The question then was whether the Master Agreement provision was likely to have the effect of substantially lessening competition in the retail pay television market, with it being held that the alleged contravening conduct was unlikely to have had the effect of substantially lessening competition in the retail pay television market.[29] This meant Seven's effects' case under s 45(2) failed.

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[21] [2007] FCA 1062. Note that a feature of the case was the fact there were over twenty interlocutory judgments, mainly dealing with issues of privilege and the use of expert evidence. For discussion of these judgments see Chris Davies, 'Seven Network v News Limited: the Interlocutory Stage' (2006) 13 *James Cook University Law Review* 260.
[22] Ibid, [92]-]94].
[23] Ibid, [1793].
[24] Ibid, [1858].
[25] Ibid, [2002].
[26] Ibid, [2077].
[27] Ibid, [2179].
[28] Ibid, [2274].
[29] Ibid, [2309].

It was also contended by Seven that contracts, arrangements or understandings containing provisions had been made that had the purpose of substantially lessening competition. The alleged purpose was that Foxtel would acquire the AFL pay television rights, and that C7 would be prevented from acquiring the NRL pay television rights, with the objective being to force C7 out of business. This would then prevent C7 from competing against Fox Sports for pay television rights, with both Foxtel and Fox Sports as suppliers in the wholesale sports channel market, and against Foxtel as a provider of services in the retail pay television market.[30] Justice Sackville noted that if Seven could establish that the object or purpose was the 'killing off' of C7, it was then a question as to whether the achievement of that object or purpose was realistically capable of lessening competition in the retail pay television market.[31] It was held, however, that the answer to that question was 'no' as any lessening of competition in that market would have occurred anyway since, regardless of C7, Optus would have ceased to have provided even weak competition to Foxtel in this market.[32] Thus, the purpose case under s 45(2)(a)(ii) also failed.

Justice Sackville also stated that, in relation to Seven's purpose case against News Ltd, Foxtel and PBL, it was difficult to see why a corporation which sought a legitimate commercial objective, such as the manufacture of superior products, would contravene the Act, even if it acted with the deliberate intent of harming its competitors.[33] The only time a problem would arise was when substantial market power under s 46 was present. His Honour also noted that there was nothing inherently wrong in having an objective of becoming the dominant supplier of a product or service as long attaining that objective did not require the use of anti-competitive means, or required conduct that was in contravention of the Act. Thus, competition, by its very nature, was deliberate and ruthless, with competitors often willing to try and injure, even eliminate, each other.[34]

In regard to Seven's claim that Foxtel had taken advantage of its substantial power in the retail pay television market for a purpose that was proscribed by s 46(1) of the then *Trade Practices Act*, Justice Sackville noted that for a contravention of s 46(1) to be established, three elements had to be satisfied. First, the corporation must have a substantial degree of power in a market, and secondly it must have taken advantage of that power. Finally, a corporation must do so for one of more of the proscribed purposes listed in s 46(1)(a),(b) and (c), namely eliminating or substantially damaging a competitor, preventing entry into that market, or deterring engagement in competitive conduct in that, or any other, market.[35]

Justice Sackville then held that in regard to Foxtel's refusal to accept an offer from C7 in a letter from 16 April, 1999, Foxtel was not assisted by its power in the retail pay television market because, even in the absence of such power, Foxtel could still have acted in the same way.[36] Thus, there had been no contravention of s 46 (1) by Foxtel's

[30] Ibid, [2325].
[31] Ibid, [2433].
[32] Ibid, [2436].
[33] Ibid, [2492].
[34] Ibid, [2486]-[2487].
[35] Ibid, [2633].
[36] Ibid, [2745]. For further discussion of this case see Chris Davies, 'A Cautionary Tale: Seven Network v News Limited' (2008) 15 *James Cook University Law Review* 223.

refusal to accept this proposal made by C7. While Seven did appeal this decision, the appeal was dismissed.[37]

Thus, the case highlighted the need to distinguish between the ruthless nature of competitive business and actual anti-competitive behaviour, and that it was the former, rather than the latter, that had been exhibited in *Seven Network v News Ltd*. While it did involve the NRL, it should be noted it was one of 22 respondents. Rugby league's involvement in the *News Ltd v Australian Rugby League* on the other hand was a result of it being the target of an alternative competition, like the Australian Cricket Board (ACB) was in the 1970s with World Series Cricket. This did give rise to a s 45 case, *Hughes v Western Australia Cricket Association*,[38] where the ACB was held to be in breach of s 45 when it banned players who had participated in a rebel tour of South Africa from playing club cricket.[39] While there appears no inherent reason why rugby league was involved in most of the major competition law cases in Australian sport, it is suggested the NRL could have explored the possibility of seeking authorisation for the 14 team term under s 88 of the then *Trade Practices Act*.[40] It should also be noted that the New Zealand Rugby Football Union (NZRFU) had earlier been successful in seeking authorisation under the similar s 58 of the *Commerce Act 1986* (NZ) for a quota system in its domestic National Provincial Championships (NPC),[41] and later for a salary cap.[42] The author suggests that had the NRL similarly sought authorisation it may well have been successful.[43]

It should be noted that breaches of s 45 were also argued in *Adamson v New South Wales Rugby League*.[44] However, it was held that the players could not rely on this section as it did not apply to employees. Instead the players had to rely on restraint of trade, an area of law in its own right, but one with connections to competition law.[45]

B Restraint of Trade

The most significant restraint of trade case in the Australian sporting context is undoubtedly the High Court decision in *Buckley v Tutty*[46] which remains the binding precedent to this day. In this case the High Court had to determine whether a retain and transfer system operated by the NSWRL was an unreasonable restraint of trade.

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[37] *Seven Network v News Ltd* [2009] FCAFC 166.
[38] (1986) 69 ALR 660.
[39] Ibid, 36-37.
[40] For a further discussion on these competitions and whether the NRL could have sought s 88 authorisation for the 14 team term see Chris Davies, 'News Ltd v ARL, South Sydney v News Ltd – and the Question of Authorisation Under s 88 of the Trade Practices Act' (2002) 10 *Trade Practices Law Journal* 215.
[41] This decision of the Commerce Commission was upheld in *Rugby Union Players' Association Inc v Commerce Commission* [1997] 3 NZLR 301.
[42] See Chris Davies, 'Labour Market Controls and Sport in Light of UEFA's Financial Fair Play Regulations,' (2012) 33 *European Competition Law Review* 435, 437; Rex Ahdar, 'Professional Rugby Competition Balance and Competition Law,' (2007) 28 *European Competition Law Review* 37, 47.
[43] Chris Davies, 'News Limited v Australian Rugby League, South Sydney v News Limited – and the Question of Authorisation Under s 88 of the Trade Practices Act', (2002) 10 *Trade Practices Law Journal* 215, 224.
[44] (1991) 31 ALR 242, 246, 263. .
[45] Note that the original 1974 wording of s 45 of the *Trade Practices Act* was 'restraint of trade' rather than 'exclusionary provisions' that it later became.
[46] *Buckley v Tutty* (1971) 125 CLR 353. .

Under the relevant NSWRL rules each club was required to put forward to the League Secretary a list of players on their register they wished to retain and a list of players they were willing to transfer. If a player was not on either of these lists he could then seek employment with other clubs.[47] After he was denied a transfer from Balmain to Penrith Australian representative, Dennis Tutty, challenged the rules.

The High Court held that the rules prevented 'professional footballers from making the most of the fact that there are clubs prepared to bid for their services' and so therefore operated as a restraint of trade.[48] It was then held that the rules under consideration went beyond what was reasonable because they enabled a club to prevent any professional 'from playing with another club, notwithstanding that he has ceased to play for the club which retains him and no longer receives any remuneration from that club.'[49] Since there was no time limit for the exercise of this power, a club could 'retain a former player no matter how short the period of his employment with it may have been or how much time has elapsed since his engagement expired.'[50] The transfer fee, meanwhile, 'not only may prevent a player from reaping the financial rewards of his own skill but it may impede him in obtaining new employment.' Hence the restraint imposed by the transfer rules went 'further than what was necessary to protect the reasonable interests of the League and its members.'[51]

It should also be noted that a similar retain and transfer system had been used in English League football, and although the retain aspect had been declared an unreasonable restraint of trade in *Eastham v Newcastle United,*[52] the transfer system remained in use until being held to be invalid by the European Court of Justice in *ASBL v Bosman*.[53] Thus, the High Court in *Buckley* was twenty five years ahead of Europe in regard to the legality of transfer systems. It also raises the question of why the NSWRL continued with a retain and transfer system when there had been a clear court decision stating a retain system was invalid as an unreasonable restraint of trade, and that it was therefore likely to lose any legal challenge.

While the AFL draft is now well established within that sport, it has never been subjected to a court challenge. However, a NSWRL internal draft system that was implemented in 1990 was challenged by the players in *Adamson v New South Wales Rugby League*.[54] The original trial judge, Justice Hill, held that although it was a 'borderline case' the internal rules did not constitute an unreasonable restraint of trade.[55] On appeal, however, Justice Wilcox held that if you are compelling a person to either surrender their occupation or enter into the service of someone they have not chosen, then the justification must be extra-ordinarily compelling for it to be said to be reasonable.[56] His Honour therefore held that the draft limited the freedom of a

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[47] Ibid, 365.
[48] Ibid.
[49] Ibid, 378.
[50] Ibid.
[51] Ibid.
[52] [1964] Ch 413, 430-31. .
[53] *Union Royale Belge des Societes de Football Associations (ASBL) v Bosman* [1996] 1 CMLR 645. For discussion of the Bosman ruling see Chris Davies, 'Post Bosman and the Future of Soccer is Contract Law' (2003) 19 *Journal of Contract Law* 190-202.
[54] (1990) 27 FCR 535.
[55] Ibid, 566-68.
[56] *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 535, 268

player to select his employer,[57] and imposed 'a new post-contractual restraint upon him,'[58] also noting that the rules were too broad.[59] Justice Gummow, meanwhile, stated the objectives could be obtained 'by rules which were more limited in their operation and which did not offend the restraint of trade doctrine,' concluding that 'the essential vice in the internal draft' was its restraint upon trade.[60]

It is the author's opinion that the NSWRL draft was poorly designed as it did not give players already in the competition much bargaining power. This meant that, firstly, it was likely to be challenged by the players, and secondly, that it would then be held to be an unreasonable restraint by the courts. Thus, it is suggested that both the *Buckley* and *Adamson* cases were the result of poor rugby league governance, the former because the retain and transfer system was implemented despite there being a court decision stating it was unreasonable, the latter because the draft system was poorly designed as it did not take into sufficient consideration the interests of the players.

It is also worth noting that there were statements in *Adamson* regarding the NSWRL's use of a salary cap along with the draft system. While these are obiter statements, since the salary cap was not challenged in the case, the author suggests they can be interpreted as indicating it represents a reasonable restraint of trade,[61] although Buti[62] presents an opposing view. Whatever the interpretation, it is suggested that the fact salary caps have never been challenged indicates an acceptance by players that they are needed in Australian sporting leagues. This is why the NRL has handed down severe penalties to clubs that have deliberately infringed the salary cap, namely the Canterbury-Bankstown Bulldogs, the Melbourne Storm[63] and more recently, the Parramatta Eels, which was fined $1m, lost competition points and had five officials suspended.[64]

It is suggested that these cases indicate it was governance issues at these clubs that allowed for these clear and deliberate breaches of the salary cap. It is also suggested that there were governance issues from the NRL itself in regard to the most recent scandal involving Parramatta as, arguably, procedural fairness was not followed, which is why the five club officials were able to obtain injunctions to prevent their deregistration by the NRL.[65]

When discussing NRL salaries it is also worth mentioning the Sonny Bill Williams situation when he effectively walked out part way through a five year contract with Canterbury-Bankstown in order to play rugby union in France. The reason was that he knew he could earn more than twice as much in France. The club then took legal

[57] Ibid, 280.
[58] Ibid, 281.
[59] Ibid.
[60] Ibid, 297.
[61] Chris Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246, 252.
[62] Antonio Buti, 'Salary Caps in Professional Team Sports: an Unreasonable Restraint of Trade', (1999) 14 *Journal of Contract Law* 130, 137-39..
[63] For discussion of these cases see Chris Davies, 'Salary Cap Scandals in Australian Sport' (2011) 11 *International Sports Law Review* 30-36.
[64] Brent Read, 'Disgraced Eels won't back down,' *The Australian*, 4 May, 2016, 38.
[65] Ibid.

action to freeze his assets in Australia.[66] It was successful, with the matter being settled with an out of court payment to the club. While this case can be viewed as highlighting the restrictive nature of salary caps, it should be noted that the underlying problem was that Williams had signed a 'bad' contract as it was reportedly for a fixed $400 000 a year over that five year period, totally inadequate remuneration for a player of Williams's ability. It is also suggested that the outcome indicates it was also a not a good deal for Canterbury-Bankstown since, once Williams realised how much he had restricted himself financially by signing the contract, he walked out on the club.

III TORTS AND CRIMINAL LAW

A Defamation

While South Sydney's return to the NRL was an emotional time for its supporters, the team inevitably struggled on the field until Russell Crowe and Peter Holmes à Court injected an estimated $3m into the club in return for a controlling interest in its management.[67] It was a proposal 'that generated extreme controversy and saw members bitterly divided',[68] with its implementation requiring approval by the members at a general meeting.[69] An Extraordinary General Meeting was called for Sunday 19 March, 2006,[70] with the takeover being approved, Crowe and Holmes à Court each acquiring a 37.5 percent interest in the club, the remaining 25 percent being retained by the club members. Not all of those involved with the club agreed, however, most notably club legend and 1971 premiership player, George Piggins, who refused to attend any matches.

This meeting also led to defamation action, with Tony Papaconstuntinos, a strong supporter of a no vote, subsequently suing Holmes à Court in relation to a letter that Holmes à Court had written. This letter had been sent to Andrew Ferguson, State Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU). In it, Holmes à Court had complained about the behaviour of Papaconstuntinos, an official of the CFMEU, stating that 'I am, frankly, at a loss to understand why Mr Papa has spread misinformation about the proposal.' Holmes à Court also raised his concerns about Papaconstuntinos using the club 'for his own advancement', pointing out that his son had been hired in an assistant coaching position, on a salary much higher than others in similar roles.[71] In the original trial, McCallum J held that the letter conveyed imputation,[72] and was 'not satisfied that the letter was published on an occasion of qualified privilege.'[73] Damages of $25,000 were then awarded.[74]

On appeal, it was held that Holmes à Court had a 'tangible interest in his takeover bid for Souths succeeding' and had discovered that Papaconstuntinos had been 'spreading

[66] *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822, [73].
[67] *Papaconstuntinos v Holmes à Court* [2009] NSWSC 903, [2].
[68] Ibid, [4].
[69] Ibid, [2].
[70] Ibid, [4].
[71] Ibid, [6].
[72] Ibid, [30].
[73] Ibid, [72].
[74] Ibid, [116].

what he regarded as misleading information about the bid.' Furthermore, Holmes à Court had 'formed the belief that the respondent's action was influenced by a concern to prevent new blood taking control of Souths.'[75] Papaconstuntinos then appealed to the High Court, but that was dismissed, the majority stating that:

> The sole proposition upon which the appellant's grounds of appeal depend is that the law requires the respondent not only to prove that both he and the recipients of the letter had an interest in the matters of which he spoke, but also to justify the publication of the letter by reference to there being some pressing need to protect his interests. The appellant has failed to identify any such requirement of the law.[76]

This, however, was far from the first defamation case involving rugby league, with perhaps the most significant being *Ettingshausen v Australian Consolidated Press*.[77] The imputation involved a photograph taken of Andrew Ettingshausen, an Australian rugby league player, while in the showers after a test match against Great Britain in 1990. The photograph was subsequently published in the HQ magazine and while the black and white photograph was grainy, it still depicted a shape between the plaintiff's legs that was capable of being interpreted as his penis. He subsequently sued for defamation, with the imputation being that (a) he had deliberately permitted a photograph to have been taken of him with his genitals exposed for the purposes of reproduction in a publication with a widespread readership; and (b) the plaintiff is a person whose genitals have been exposed to the readers of the defendant's magazine 'HQ' a publication with a widespread readership.[78] Both imputations were held to be capable of defaming the plaintiff.[79]

Another rugby league case involving a player was that of *Boyd v Mirror Newspapers*[80] with Les Boyd taking legal action in regard to the headline 'Boyd is fat, slow and predictable' that had appeared in the newspaper. This, however, was held not to be defamatory since there was nothing in the description that would tend to make people shun or avoid him, and it was not disparaging of Boyd.[81] The case of *Hall v Gould*[82] meanwhile involved criticisms made by commentator, Phil Gould. These appeared in *The Sun-Herald* newspaper, as well as being aired on radio 2GB, and were in relation to the suspension of Craig Smith by the rugby league judiciary. Gould's comments were that the members of the judiciary had acted 'perversely', 'corruptly', 'unfairly', had 'conspired together' and 'acted disgracefully' in finding Smith guilty of striking another player.[83] Justice Levine, not surprisingly, it is suggested, held that these imputations were all capable of being defamatory.[84]

More recently, Cronulla-Sutherland found itself facing defamation action from Stephen Dank in regard to comments made during ASADA's investigation into the

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[75] *Holmes à Court v Papaconstuntinos* [2011] NSWCA 59, [141].
[76] *Papaconstuntinos v Holmes à Court* [2012] 249 CLR 534, 555.
[77] (1991) 23 NSWLR 443
[78] Ibid, 445.
[79] Ibid, 449.
[80] [1980] 2 NSWLR 449.
[81] Ibid, 456.
[82] [2002] NSWSC 359.
[83] Ibid, [3]-[5].
[84] Ibid, [31]. For further discussion of these cases see Chris Davies, 'A Storm Drifting By? Defamation Law and Sport in Australia and New Zealand', (2009) 40 *Victoria University of Wellington Law Review* 669.

club.[85] The claim arose primarily out of a Channel Nine television broadcast and involved comments Damien Irvine, the Cronulla-Sutherland Chairman, had made to journalist, Phil Rothfield, which had been published in *The Daily Telegraph*. The broadcast had been on 10 March 2013 and showed Irvine being confronted by journalists in regard to the contents of this newspaper article. Dank's statement of claim alleged 'defamatory publications arising from those events'[86] in relation to a comment that had been made by Irvine 'on or about 9 March.'[87]

Justice McCallum, however, noted 'that the pleading of the words attributed to Mr Irvine does not plead the whole of the words said by him on any single occasion and does not plead the context in which the words were allegedly said.'[88] Her Honour then held that 'the pleading of the oral publication in its present form is embarrassing because it does not provide the whole of any single publication sought to be sued on or the context. It is, in my view, liable to be struck out for that reason.'[89] Justice McCallum then granted Dank an opportunity to draft interrogatories which he would seek to have answered.[90] This was despite objections from Cronulla-Sutherland and Irvine 'that the words attributed to Mr Irvine did not consist of single, continuous publication but were, rather, a collection of disparate remarks published possibly on different occasions and certainly in different forms.'[91]

However, when the proceedings resumed four months later on 5 December, Justice McCallum noted that 'the litigious path took a bizzare twist' with Dank seeing 'no utility in interrogating Irvine.'[92] This was considered by her Honour to be 'an extraordinary decision and one which is capable of being understood to display a contumelious disregard for the processes of this list.'[93] It was also held that the amended statement of claim repeated 'the vices identified in the original'[94] and that the 'matter complained of remains in embarrassing form and must be struck out.'[95] Justice McCallum also stated that 'where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.'[96] Dank did appeal the decision, but the Court of Appeal upheld the decision.[97]

While this case is not a major one in the context of sports defamation cases, it is suggested that this statement by Justice McCallum is significant since it is common within sport for people to be re-quoted by media sources as second hand, or even third hand, hearsay. Thus, it is logical that, unless the person has assented to the final form, a statement should not be considered defamatory.

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[85] *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd* (No 1) [2013] NSWSC 11
[86] Ibid, [5].
[87] Ibid, [17].
[88] Ibid, [24].
[89] Ibid, [25].
[90] Ibid, [36].
[91] *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3)* [2013] NSWSC 1850, [4].
[92] Ibid, [10].
[93] Ibid, [26].
[94] Ibid, [14].
[95] Ibid, [16].
[96] Ibid, [17].
[97] *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288.

To the best of the author's knowledge these defamation cases are the only ones in Australia that have involved a professional team sport. However, there does not appear to be any inherent reason why all have involved rugby league, and for instance, Andrew Ettinghausen was being followed on tour by a non-sport magazine and the incident could easily have involved someone from another Australian touring team. Stephen Dank's approach to his involvement with both the Cronulla-Sutherland and Essendon drug scandals meanwhile was to sue anyone who questioned what he had done for defamation, Cronulla-Sutherland being far from the only one.[98]

B *Intentional Torts*

Rugby league has had two intentional torts cases involving professional players, the first being *Rogers v Canterbury-Bankstown*.[99] This involved Steve Rogers, a star player during the 1970s and 1980s, who played most of his career for Cronulla-Sutherland. As a star player he was often targeted by opposition players, and that was the case when he played in a match against Canterbury-Bankstown in March, 1985. Before the match the Canterbury-Bankstown players were instructed by their coach to target Rogers, and hooker, Mark Bugden, subsequently broke Rogers' jaw with an illegal hit to the head. It was an injury that effectively ended Rogers' career, and he subsequently sued both Bugden and the Canterbury-Bankstown club. The court held that Bugden had deliberately hit Rogers in the face with his forearm with the intention of hurting him, while the club was also held vicariously liable for the assault because of the coach's instructions to target Rogers.[100] Damages were then awarded because of the way Bugden had carried out his attack, with exemplary damages also being awarded to deter Bugden from doing such acts again.[101]

The case of *McCracken v Melbourne Storm*[102] involved an incident that occurred in a match between the Wests Tigers and the Melbourne Storm in May 2000 where two Melbourne Storm players, Stephen Kearney and Marcus Bai, had lifted the West Tigers' Jarrod McCracken into a dangerous position in a tackle. This caused McCracken to fall head first into the ground, causing him to suffer a neck injury that ended his career.[103] During the trial video evidence of the tackle was presented to the court, with former first grade player and coach, Warren Ryan, giving expert evidence on how players are coached to tackle in a competition like the NRL. Ryan's opinion was that the tackle was unreasonably dangerous and that, given the training and experience of the two players involved, was something that could, and should, have been avoided.[104] Justice Hulme saw no reason to reject these opinions, and also looked at the fact that, when they had appeared before the NRL tribunal, both Kearney and Bai had pleaded guilty to the charge of dangerous throw when effecting the tackle. In his Honour's opinion the three factors that had stood out in the case were the inherent danger of lifting a player upside down in a tackle, the fact that the rules of the game prohibited such a dangerous tackle, and the fact that such an action

[98] See also *Dank v Whittaker* [2013] NSWSC 1062, 1064, 1822; [2014] NSWSC 186; *Dank v Nationwide News Pty Ltd* [2016] NSWSC 156; *Dank v Nine Network Australia Pty Ltd* [2014] NSWSC 1728.
[99] (1993) Aust Torts Reports 81-246.
[100] Ibid, 62, 541.
[101] Ibid, 62,549.
[102] [2005] NSWSC 107
[103] Ibid, [1].
[104] Ibid, [21].

was not necessary to prevent the forward movement of a player.[105] Justice Hulme therefore held that the defendants had breached their duty of care owed to McCracken and that it was the intention of Kearney and Bai to injure him in the tackle.[106] The Melbourne Storm, as the employer of both Kearney and Bai, was held to be vicariously liable for the actions of their two employees.[107]

Thus, *McCracken* followed *Rogers* and illustrates that players inflicting injuries can be held liable for their actions, and their respective employers vicariously liable. Another additional significant factor from *McCracken* was that the judge allowed the guilty plea of the players before the NRL tribunal to be used as evidence. It therefore highlighted a potential problem from a guilty plea at the tribunal, though it should be noted that the rules of the NRL allow for a no contest plea, as well as a guilty or not guilty plea. This may well be how players in similar situations to Kearney and Bai should perhaps be advised to plead. More recently the Newcastle Knights' Alex McKinnon sustained more serious damages in 2014 from a similar style tackle to that suffered by McCracken, with McKinnon being left a quadriplegic. At this point no court action has been taken, though a proposed new two year contract with Newcastle that had not been completed was paid in full, while the NRL has also given McKinnon a job for life. It is suggested that these measures indicate an acknowledgment that there was legal liability for what was a dangerous tackle with the NRL being keen to see that it did not result in court proceedings. It is suggested that such action may well have been in negligence, and while *McCracken* was argued as an intentional tort, it could also have been a negligence case, like that of *Green v Country Rugby League of NSW Inc.*[108]

C Negligence

In *Green* the plaintiff was a 16 year old who played rugby league for Laurieton United' reserve grade team in the Country Rugby League's (CRL) Group Three competition on the mid north coast of NSW. He was selected as hooker for a match against the Old Bar Pirates, a team that had a front row significantly bigger than Laurieton's. Green himself was described as being around 175cm in height, weighing 57kg, and being slight in build. Another significant factor was that he had a neck that was considered to be slightly longer than average. During the match a scrum collapsed which left Green a permanent tetraplegic, with the issue then being whether the CRL was negligent in allowing someone with a long neck to play in the position of hooker.[109]

It was held that the CRL was ultimately responsible for the administration of country rugby league in NSW, and it therefore owed a duty of care to Green. The question then was whether there had been a breach of that duty, with a number of potential breaches being argued, one being the lack of medical examinations of the players. It was held, however, that while a medical examination would be of benefit to the coach and the club to establish whether a player was suitable to play in the front row or not,

[105] Ibid, [26].
[106] Ibid, [37].
[107] Ibid, [43].
[108] [2008] NSWSC 26
[109] Ibid, [10].

the CRL was not in breach of its duty of care for not arranging such examinations.[110] The court also accepted that the accredited coaching system the CRL had in place, and the limited financial resources of the CRL, meant that it had adopted a reasonable response to the risk of injuries to players of Green's physique. This was despite the fact that this meant that the responsibility had been left to the coaching system and development officers.[111] It had also not breached its duty of care by failing to have a warning on the registration form and an acknowledgement that the player, or guardian, had seen the warning. Nor had it breached its duty for failing to ensure that all players involved in the scrums performed appropriate neck strengthening exercises, as the CRL had acted reasonably in leaving the matter to the clubs and coaches.[112] The CRL was therefore held by the court not to be negligent.[113]

It should be noted that Green had earlier failed to have the NSWRL joined as a defendant in the case with it being held that Green did not have a real case to advance against the NSWRL; nor was there any evidence that it was liable.[114] Similar decisions had been reached in *Haylen v New South Wales Rugby Union Ltd*,[115] *Agar v Hyde* and *Agar v Worsley,*[116] involving situations where players had become quadriplegics after collapsed rugby union scrums. What *Green* therefore confirmed is that it can be difficult to bring a successful negligence case against the governing bodies of a sport, and as was noted in the case, the game of rugby league has moved to non-contested scrums where there is no longer any push in scrums, greatly reducing the likelihood of injuries like that suffered by Green.

Haris v Bulldogs Rugby League Club[117] meanwhile involved the situation where a spectator was injured by a fire cracker let off during a Canterbury-Bankstown Bulldogs home game. The club however was held not to be liable since it had carried out sufficient searches, and had satisfactory security arrangements in place. Therefore, while there was a duty of care owed by the club to the spectators, this duty had been fulfilled.[118]

D Criminal Law

Intentional actions on the playing field can give rise to either a tortious action, or a criminal one. If it is the latter, custodial sentences for the various types of assaults that arise have been rare in Australia, though one was imposed in *R v Stanley*.[119] Stanley

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[110] Ibid, [146].
[111] Ibid, [174].
[112] Ibid, [216].
[113] Ibid, [235].
[114] *Green v Australian Rugby Football League* [2003] NSWSC 749, [4].
[115] [2002] NSWCA 114. In this case the plaintiff sued the NSWRU for failing to control and regulate rugby and eliminate unnecessary risk of injury. Justice Einstein held that there was no duty on the part of the NSWRU to make changes to eliminate injuries, and to impose a duty of care on a rule-maker to alter the rules as suggested was extending the notions of a duty of care too far. It was also held that no evidence was produced to indicate that the NSWRU had control in respect of the match in which the plaintiff was injured: [52]-]55].
[116] [2000] 201 CLR 552. The High Court held that the New South Wales Rugby Union and the Sydney Rugby Union did not owe the plaintiffs a duty of care as they were not in a position to amend the rules to make rugby union safer.
[117] [2006] NSWCA 53
[118] Ibid, [37]-[38].
[119] (Unreported, CCA (NSW) Hunt CJ, Sully and Levine JJ, 60554/94, 7 April, 1995).

was convicted of maliciously inflicting bodily harm, and sentenced to a year in prison after an incident in a district rugby league match where Stanley had raised an elbow in a tackle and broken the jaw of an opponent. It was held by the NSW Court of Criminal Appeal that a participant in a game of rugby league does not consent to being injured by an act that is not done within the legitimate objectives of the game, and that the mere occasion of being involved in a rugby league match did not excuse conduct that constituted bodily harm.[120] The author, however, does not agree with the decision and is of the opinion that custodial sentences are not appropriate for assaults on a sporting field that occur in the 'hustle and bustle of a football match' and considers the penalty to be inconsistent with other decisions in Australia since other incidents have resulted in suspended sentences, or even no convictions.[121]

While copyright and taxation are two different and distinct areas of law, from a sporting perspective both have, or may have, a potential impact on the finances of the sport, and rugby league has been at the centre of a number of cases in these areas.

IV FINANCIAL ASPECTS OF RUGBY LEAGUE

A Copyright of Broadcasts

National Rugby League v Singtel Optus Pty Ltd [122] involved allegations of breaches of the *Copyright Act 1968* (Cth) after Singtel Optus, and its subsidiary, Optus Mobile Pty Ltd, began a new service in July 2011. This was called TV Now and it enabled customers to record free to air television programmes on personal computers, iPhone or iPod, Android mobile devices, or 3G mobile phones. It was then alleged Optus had infringed the copyright of the NRL, AFL and Telstra in regard to a number of matches played in September 2011 by allowing people using TV Now to record programmes and then watch them time delayed. The issue was whether there had been a breach of the amended s 111 that allows people to record films, or sound recordings, to watch or hear at a more convenient time, as long as it is solely for private and domestic use. The original trial judge, Justice Rares, held there had been no breach of copyright as the users had made their films and viewed them near live solely for private and domestic purposes.[123]

On appeal, the Full Court of the Federal Court noted that Optus had retained possession, ownership and control of the physical copies made on the hard disc until deleted by Optus. It was then held that Optus' role in capturing the broadcast, and then embodying its images and sounds, meant that what Optus did was 'sufficiently close and causal to the illegal copying' by the machine owner who had breached the 'exclusive domain of the copyright owner.'[124] It was also held that without the subscriber's involvement, nothing would be created, and without Optus's

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[120] Ibid, cited in Thorpe D, A. Buti, C. Davies, S. Fridman, P. Johnson, *Sports Law*, (Oxford University Press, 2nd ed, 2013), 91-92.
[121] Chris Davies, 'Criminal law and assaults in sport: An Australian and Canadian perspective', (2006) 30 *Criminal Law Journal* 151, 152-53.
[122] [2012] FCAFC 59. For further discussion see Chris Davies, 'Copyright and Sport Broadcasting in Australia and England', (2015) *Bond Sports Law eJournal* 3.
[123] *Singtel Optus v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34, [82].
[124] *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59.

involvement, nothing would be copied. Thus, both parties were involved with the act of making the copies, but while the individuals were covered by the s 111 domestic purposes exemption, Optus was not protected due to its commercial activities.[125] Thus, only Optus could be sued for breach of copyright as the subscriber could rely on s 111. The appeal by the NRL was therefore successful.

The significance of this case cannot be underestimated since, if it had been held that Optus had not breached copyright, the value of the present broadcasting rights that are essential for fulltime professional team sports in Australia would have been affected. This could therefore have had an impact on the potential earnings of the players, with there also having been High Court cases involving the question as to what rugby league players can claim as expenses.

B Taxation

Alan Maddalena was a well-known rugby league player who played in the NSWRL competition run during the 1960s and 1970s. Rugby league at this time was only a semi-professional sport with the players usually having full time jobs. The issue in *Maddalena v Commissioner of Taxation*[126] was whether he was entitled to deduct expenses under s 51 of the *Income Tax Assessment Act* 1936 (Cth) ('the 1936 Act') in relation to travel costs between his home in Wollongong and Sydney while he attempted to obtain a contract with a NSWRL club, Newtown, and the legal expenses involved with obtaining this new contract. In the High Court it was held that the relationship of a professional footballer with his club was that of an employee which meant the employment agreement was a contract of service.[127] His Honour held that the expenses were incurred to obtain new employment and therefore were not an allowable deduction for income purposes under s 51 of the 1936 Act. The claim for a deduction under s 64A for the legal expenses involved in obtaining a new contract failed for the same reason.[128]

More recently the High Court had to decide on whether expenses involved in obtaining a contract could be claimed by Mark Riddell, who had commenced his NRL career in 1998 with the Sydney City Roosters.[129] He later moved to St George on a contract worth $100,000 in 2000, and then signed a three year deal with Parramatta in 2004 for $275,000 a season.[130] Riddell had also entered into a management agreement with the SFX Sports Group (Australia) Pty Ltd (SFX) where SFX claimed 7% of the gross earnings for any playing contract negotiated by SFX and 20% of other income earned by Riddell that was organised by SFX.[131] The NRL standard player contract expressly allowed for players to earn money outside of the football contract, and Riddell earned $11,394 from various promotional activities that had been negotiated by SFX during the 2005 financial year.[132] The issue was whether Riddell could claim the management fee of $21,175 for the 2005 financial year under s 8-1 of the *Income*

[125] Ibid, [67].
[126] (1971) ATR 541.
[127] Ibid, 549.
[128] Ibid, 550.
[129] *Riddell v Commissioner of Taxation* (2007) 68 ATR 757; [2007] FCA 1818.
[130] Ibid, [25].
[131] Ibid, [16].
[132] Ibid, [31].

Tax Assessment Act 1997 (Cth) ('the 1997 Act'). The original trial judge, Justice Gordon, held that the management fee was both relevant and incidental to Riddell's income as an NRL player,[133] the fee having been paid to SFX being compensation for negotiating a playing contract with Parramatta,[134] and the fact that the contract was for employment did not preclude it from being deductable under s 8-1(a).[135] Her Honour then held that being an employee did not mean that he was not carrying on a business since business includes employment. Thus, while the definition of business does not include 'occupation as an employee', Riddell did not have such an occupation as his occupation was that of a 'professional sportsperson who plays rugby league and who exploits his sporting talent as a NRL player to account for money.'[136] Justice Gordon then held that it could not be said that the expenditure was incurred too soon to be properly regarded as having been incurred in gaining assessable income,[137] nor was it capital and not revenue.[138]

However, on appeal to the Full Court of the Federal Court[139] it was pointed out that it did not necessarily follow that a person whose activities were that of either a full time or part time professional sportsperson was carrying on a business as such.[140] Thus, if these activities were being carried on as an employee then any incidental, non-sporting activities were likely to be a business that was 'separate and discrete from his/her activities as an employee.'[141] It was noted that the primary judge had distinguished *Maddalena* on the grounds that Riddell had incurred the management fee within a framework of rules of the NRL and the terms of the standard player contract; that the fee was incurred after the contract was signed and would not have arisen if the contract had not been signed; that there was no resemblance between the era of professional sportspersons at the time of Maddalena and that of the 21st century since the factual matrix was different between the part-time football played by Maddelena, and Riddell's employment as a full-time footballer.[142] The Commissioner's appeal was based on the grounds that *Maddalena* could not be so distinguished.

The Court held that 'the factual matrix' was different, the distinguishing features relied upon by the primary judge did not result in the principles laid down in *Maddalena* not being applicable in *Riddell*.[143] The court also disagreed with the findings of the primary judge in regard to the first limb of s 8-1 that the management fees were relevant and incidental to Riddell's income as professional football players.[144] It was also held by the court that even if the non-playing activities constituted a business, these activities were 'separate and discrete from the taxpayer's

[133] Ibid, [35].
[134] Ibid, [39].
[135] Ibid, [41].
[136] Ibid, [45].
[137] Ibid, [50].
[138] Ibid, [54].
[139] *Commissioner of Taxation v Spriggs* (2008) 170 FCR 135; [2008] FCAFC 150. Note that while the citation only mentions *Spriggs* the appeal case involved both the *Spriggs* and *Riddell* cases. David Spriggs was an AFL player and his case with the Commissioner of Taxation was heard at the same time.
[140] Ibid, [33].
[141] Ibid, [35].
[142] Ibid, [41].
[143] Ibid, [43].
[144] Ibid, [47].

activities as a player' as these activities were carried out on the performance of their duties as an employee.'[145] Thus, in a unanimous decision the Full Court of the

Federal Court overturned the primary judge's decision. However, special leave to appeal to the High Court was granted.

It was noted by the High Court that when looking at the question as to whether the management fees were incurred in gaining or producing assessable income the answer could not 'be found by isolating a contract of employment from the arrangements between Riddell and his club.'[146] The Commissioner contended that *Maddalena* required that the playing and non-playing activities be separated and that therefore the management fees were incurred to obtain a new employment contract.[147] The High Court, however, rejected this argument stating that it was 'possible to obtain and perform an employment contract as part of, and during the course of, running a business.'[148] The facts were also held to be different to those of *Maddalena*[149] since Maddalena's activities in rugby league were part time and there was nothing that suggested 'he conducted himself in a business-like way, for instance, by retaining a manager.'[150] It was also pointed out that in the 1970s 'movement between the clubs was more difficult and less structured that it is today.'[151]

The High Court then stated that it would be 'artificial on the facts here to separate the stream of income' from the non-playing activities from that earned under the playing contract. Riddell's promotional activities involved exploiting his celebrity and was 'inextricably linked' to his employment.[152] It was further held that the players were not 'exclusively or simply an employee of his club' and 'there was a synergy between playing activities and non-playing activities, each of which was an income-producing activity.'[153] Riddell 'conducted the whole business in a commercial and business-like way, in particular by retaining a manager' whose duties 'included, but went well beyond the negotiation of playing contracts.'[154] Thus, in a unanimous decision the High Court held that the management fees were deductible under both s 8-1(1)(a) and (b) of the 1997 Act, and they were revenue expenses not covered by s 8-1(2)(a). The orders of Justice Gordon were therefore restored.[155]

Rugby league, like other professional sports, is a major business, which is why legal issues relating to the financial aspects of the sport are likely to arise. Although the *Riddell* case involved relatively small amounts it was clear the Australian Tax Office wanted to test what players could claim, with the subsequent High Court ruling

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[145] Ibid, [48].
[146] *Riddell v Commissioner of Taxation* (2009) 239 CLR 1, 17. Note that, as it had been in the Full Court of the Federal Court, the *Riddell* case was heard together with the *Spriggs* case.
[147] Ibid, 21.
[148] Ibid,22.
[149] Ibid, 23.
[150] Ibid, 22.
[151] Ibid, 23
[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Ibid,26. For further discussion of these cases see Chris Davies, 'The Business of Being an Australian Sportsperson: A Taxing Question,' (2011) 7 *Malaysian Journal of Sport Science and Recreation* 37.

benefiting not only all rugby league players, but also other professional players. It should also be noted that the reasoning in *Riddell* is consistent with *Stone v Commission of Taxation*[156] involving javelin thrower, Joanne Stone, in that once you utilise your sporting talent to make money it becomes a business. This means that such income is taxable, but appropriate deductions can be claimed.

IV CONCLUSION

Rugby league has been in existence for over a hundred years, and like most sports, for much of that time there was little interaction with the law. While there were some cases from when the sport was semi-professional, it has been the rise of professional leagues that has seen an increase in the involvement of the law. Indeed a number of cases involve the actual formation of these professional leagues, including the present day NRL. One case involved the exclusion, and subsequent re-inclusion of South Sydney, which can perhaps be seen as triumph for tradition over objective, business-orientated selection criteria. However, it is suggested that the cases involving South Sydney could have been avoided had authorisation been sought for the implementation of the 14 team term used to originally exclude South Sydney. It is also suggested there have been other cases that eventuated because of poor governance, or poor administrative decisions, such as *Buckley* and *Adamson*. While these cases have helped to create the situation where rugby league has seen more litigation than any other sport in Australia, other cases, such as *Ettinghausen*, could have happened in a number of other sports. *National Rugby League v Singtel Optus*, meanwhile, also involved other sports, despite the NRL appearing in the case title. Thus, there are a number of reasons why rugby league has appeared in the most litigation in Australian sport, and only sometimes has it been a reflection of the how the sport has been run.

[156] (2005) 79 ALJR 956, 963-4.