Determining the limits of an exclusionary provision under the Trade Practices Act 1974

By Ian Pike

Section 45(2)(a)(i) of the *Trade Practices Act 1974* (Cth) prohibits a corporation from making a contract or arrangement, or arriving at an understanding, if the proposed contract, arrangement or understanding contains an 'exclusionary provision'. Section 45(2)(b)(i) prohibits a corporation from giving effect to an 'exclusionary provision'.

These two prohibitions attempt to strike at the heart of market rigging practices and are an important weapon in achieving the overall purpose of Part IV of the TPA of procuring and maintaining competition.

Two recent decisions of the full Federal Court have considered the scope of the prohibition and have expressed, on one reading of the two judgments, conflicting views as to what amounts to an exclusionary provision. This article considers the recent cases.

The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition.

In respect of one of the cases – the *South Sydney Rugby League* case – the High Court has granted special leave to appeal, with argument having been heard on the appeal, and judgment currently reserved. It is hoped that the High Court will clearly delineate what is, and what is not, an exclusionary provision.

The elements of an exclusionary provision

Exclusionary provisions are defined in sec 4D of the Act. It provides as follows:

(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:

(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any two or more of whom are competitive with each other;

(b) the provision has the purpose of preventing, restricting or limiting:

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods of services from, particular persons or classes of persons in particular circumstances or on particular conditions;

by all or any of the parties to the proposed contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate.

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

Exclusionary provisions are generally referred to as either collective or primary boycotts: see *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 40 IR 304 at 352 per Lockhart J. It is generally held that there are three elements that must be satisfied in order for there to be an exclusionary provision:

1. a provision of a contract arrangement or understanding made between the persons, any two of whom are competitive with each other;

2. the provision of the contract, arrangement or understanding must be for the purpose of preventing, restricting or limiting one of the acts referred to in sec 4D(1)(b); and

3. the purpose of the provision of the contract arrangement or understanding must relate to the supply of services to or the acquisition of services from particular persons or particular classes of persons in particular circumstances or in particular conditions: see *Trade Practices Commission v TNT Management Pty Limited* (1985) 6 FCR 1 at 74.

An exclusionary provision is a per se prohibition, there is no need to prove a substantial lessening of competition, and therefore no need to engage in an analysis of markets. This approach may reflect a belief that primary boycotts invariably lessen competition and that as a result, it would be wasteful to require this to be established in every case. One reason for the strict per se approach is that boycotts may be seen as objectionable on non-economic grounds as well as because of their potential to have an adverse impact on competition. In particular, they are disliked because they can be used to take away the freedom of firms and individuals to trade as they wish and because they can be used to threaten the very existence commercially or professionally of targets having little or no countervailing economic power. The potential for boycotts to generate and exploit power is seen as inherently objectionable, regardless of whether or not they are used to lessen competition. For this reason they are seen as being properly the subject of a per se prohibition: see Clarke & Corones, *Competition Law and Policy Cases and Materials*, Oxford 1999 at 252-3.

1. Competitive with each other

For there to be an exclusionary provision, the contract, arrangement or understanding must have been made between two or more people who are competitive with each other. Section 4D(2) contains a deeming provision for this purpose. It deems people to be competitive with each other *only* if:

- they or related bodies corporate are or are likely to be

competitive with each other; or

- they or related bodies corporate would be or would be likely to be competitive with each other but for the contract, arrangement or understanding

in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision relates.

The key element in this regard is that the area of competition has to coincide with the area of contractual restriction in relation to the exclusionary provision: see *Eastern Express Pty Limited v General Newspapers Pty Ltd* (1991) 30 FCR 385. Put another way, there will not be an exclusionary provision if the parties to the contract, arrangement or understanding are in competition with one another, but in respect of goods or services different to those which the alleged exclusionary provision relates.

2. Purpose

For a provision of a contract, arrangement or understanding to amount to an exclusionary provision, the provision must have the purpose of 'preventing, restricting or limiting'

- the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
- the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions.

Purpose in this regard, has been held to refer to the subjective purpose of the parties to the contract, arrangement or understanding: see *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No. 1)* (1990) 27 FCR 460. In the absence of direct evidence of the parties' intention, regard can be paid to all the surrounding circumstances including their conduct and the natural consequences of that conduct: see *Hughes v Western Australian Association (Inc)* (1986) 19 FCR 10 at 38 per Toohey J.

Further, sec 4F of the Act makes it plain that it is sufficient that a purpose was or is a substantial purpose, it need not be the sole purpose: see *News Limited v Australian Rugby Football Ltd* (1996) 64 FCR 410.

The purpose of a provision is determined at the time that the contract, arrangement or understanding is made: see *Stokely-Van Camp Inc v New Generation Beverages Pty Limited* (1998) ATPR 41-657 at 41,297 per Young J.

Preventing, restricting or limiting

The provision must have the purpose of preventing, restricting or limiting the supply or acquisition of goods or services from or to particular persons or classes of persons.

They boycott must relate to 'goods or services'. These terms are defined broadly in sec 4(1). Excluded from the definition of services is 'the performance of work under a contract of service'. In *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242 (the Rugby League Draft Case) it was held that because rugby league players were employed by their clubs under contracts of service, they did not supply services within sec 4(1) the acquisition of which could be the subject of a boycott by those clubs.

In this regard, 'prevent, restrict or limit' are words of ordinary English usage.

3. Persons or class of persons

The purpose of the provision must be to prevent, restrict or limit the supply or acquisition of goods or services to or from, 'particular persons or classes of persons'. It is clear in this regard that the persons or class of persons must be identified. It is not an exclusionary provision if there is no particular person or class of person that is the subject of the proposed restriction. It has been held that the adjective 'particular' applies both to 'person' and 'class of person'.

In *ASX Operations Pty Limited v Pont Data Australia Pty Limited (No. 1)* (1990) 27 FCR 460 at 487-488, the full court of the Federal Court held that the particular persons or class of persons may be identified by the fact that they were precluded from access to certain goods or services unless they accepted certain restraints imposed by the supplier. In other words, the particular persons or class of persons, can be defined by the simple fact of exclusion.

This aspect of an exclusionary provision has been considered recently in two cases – *South Sydney District Rugby League Football Club Limited v News Limited & Ors* (2001) 111 FCR 456, and *Rural Press Limited v Australian Competition and Consumer Commission* [2002] FCAFC 213. These cases are discussed in more detail below. For present purposes, it should be noted that what constitutes a particular class of person for the purposes of sec 4D is uncertain. The High Court has heard argument in the South Sydney appeal, and it is hoped that when judgment is handed down in this matter, the High Court clarifies the precise meaning of 'particular persons or classes of persons'.

Recent cases on exclusionary provisions

The recent decisions of the full Federal Court in *South Sydney* (supra) and *Rural Press* (supra) provide useful illustrations of what is, and what is not, an exclusionary provision.

South Sydney District Rugby League Football Club Limited v News Limited & Ors (2001) 111 FCR 456 concerned the well-known restructuring of Rugby League in Australia after the conduct of separate ARL and Super League competitions, which resulted in South Sydney being excluded from the 2000 rugby league season.

It will be recalled that in 1997 there were two premier rugby league competitions, the ARL Optus Cup competition organised by the Australian Rugby League and the Super League competition organised by News Limited and its subsidiaries. Twelve clubs fielded a team in the ARL Optus Cup competition, and ten clubs fielded a team in the Super League competition. It was universally accepted that the running of two competitive rugby league competitions was not only a financial disaster, but was killing rugby league as a sport. As a result, in December 1997, News and the ARL reached an agreement to merge the two competitions into one unified competition, the National Rugby League (NRL) competition.

In December 1997 the ARL and News each publicly announced the details of an in-principle agreement to merge the two competitions. The arrangements were then formally documented over the following six months.

The essential elements of the agreement included that a joint venture company owned by News and ARL would grant licenses to participate in the unified NRL competition, that applicants would have to satisfy licence criteria determined by that company, that twenty teams would be licensed to play in 1998, sixteen teams would be licensed to play in 1999, fourteen teams would be licensed in 2000 (the 14-team term), mergers or joint ventures before certain dates would receive financial grants and a longer license, and licenses would be allocated in the following order of priority: merged clubs, regional clubs and stand alone Sydney clubs.

A finalised version of the criteria to be used to reduce the number of teams, was adopted in September 1998. The criteria

included basic criteria, to be satisfied by all clubs, dealing with such matters as playing facilities and solvency, and selection criteria, which were to be applied to all clubs that had participated in the relevant years.

The unified NRL competition began in 1998. Two super league clubs had ceased to exist at the end of 1997 and one ARL did not participate in the unified NRL competition in 1998. The nineteen remaining clubs and one new club each fielded a team in the NRL competition making up the allocated twenty teams for the 1998 NRL season. At the end of 1998, two clubs withdrew teams from the NRL competition and two other clubs merged so as to field a combined team. Consequently, the 1999 NRL season commenced with seventeen clubs fielding seventeen teams. In late July 1999, a joint venture was formed between another two clubs which fielded a combined team. The consequence was that sixteen teams played in the 1999 NRL competition, as agreed. Souths fielded a team in both the 1998 and 1999 NRL season.

Under the 14-team term, the 2000 NRL competition was to be limited to 14 teams. This meant that there would have to be a reduction of two teams from the sixteen that had been available at the end of 1999. One club (Norths) failed, for solvency reasons, to meet the basic criteria for eligibility to compete in the 2000 NRL competition. It later entered a joint venture with another club (Manly) to field a combined team (the Northern Eagles). Souths met the basic criteria but received the lowest number of points under the selection criteria. Souths was therefore excluded from the 2000 NRL competition by reason of the 14-team term. Souths were advised of their exclusion on 15 October 1999.

In November 1999, Souths commenced proceedings in the Federal Court claiming that the 14-team term was an exclusionary provision within sec 4D(1) of the Act, and that there was a breach of sec 45(2) of the Act. Souths sought an interlocutory injunction to enable it to participate in the 2000 NRL competition. This injunction was refused (see *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 169 ALR 120 per Hely J). A substantive trial was then heard before Finn J, who dismissed Southss claim (see *South Sydney District Rugby League Football Club Ltd v News Ltd* (1999) 177 ALR 622). Souths then appealed to the full Federal Court which, by a 2–1 majority (Moore and Merkel JJ, Heerey J dissenting), upheld the Souths appeal. The High Court granted News special leave to appeal from the decision of the full court of the Federal Court. Argument was heard on the substantive appeal on 6 August 2002, and judgment is currently reserved. (For a detailed case note on the decision of the full Federal Court see Duns 'Super leagues and primary boycotts – a whole new ball game' (2002) 10 TPLJ 115).

Souths contention was that the 14-team term amounted to an exclusionary provision in that:

> 1) there was an agreement or understanding between the ARL and News, being competitors in relation to competition organising services, or in relation to the acquisition of team services;
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> 2) One provision of the agreement or understanding was the 14-team term. The purpose of the 14-team term was to prevent, restrict or limit the supply or acquisition of four discreet types of services:
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> > a) organising and running top level rugby league competitions;
> >
> > b) acquiring the services of rugby league teams;
> >
> > c) supplying entertainment services; and
> >
> > d) providing funding to clubs participating in the top level rugby league competitions; and
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> 3) the 14-team term had the purpose of
>
> > a) restricting or limiting the supply of competition organising services to particular persons, namely '…the clubs which have participated in the ARL competition and the Super League competition prior to 19 December 1997 and who have not withdrawn from those competitions before that date'; and
> >
> > b) preventing the supply of competition organising services to particular classes of persons, namely:
> >
> > > i) the clubs which participated in the 1997 ARL and Super League competitions and who have not withdrawn from those competitions before that date, other than the 14 clubs (including merged clubs as a single club), who would be selected to participate in the competition from the year 2000; and
> > >
> > > ii) all rugby league clubs which were willing and able to participate competitively in a top level rugby league competition other than the 14 clubs (including merged clubs as a single club) who would be selected to participate in the NRL competition from the year 2000.'

South Sydney Rabbitohs celebrate appeal court victory at South Sydney Leagues club. *Photo: Andy Baker / News Image Archive*

The two key issues were 'purpose' and 'class of persons'.

Finn J rejected Souths' contention that a substantial purpose of the 14-team term was one of the proscribed purposes. Whilst Finn J held that both News and the ARL had the purpose of encouraging mergers or joint ventures to avoid exclusion of clubs from the services, it was one of their purposes that, if the requisite reduction in numbers could not be achieved by joint ventures and mergers, then one or more of the clubs that had participated in the 1997 season in either competition would be denied entry in 2000. Notwithstanding this, Finn J concluded that the 14-team term was included in the overall understanding to create a new business running a new competition. This was to secure the future of the game, to ensure that rugby league was financially viable and sustainable in the future. In effect, the purpose of the 14-team term was to achieve the viability and sustainability of a national competition. Finn J also held that there was no particular class of

person the subject of the prevention, restriction or limitation. It was not possible to define the class simply by reason of the fact of their not being selected.

There was a divergence of views expressed by the three members of the full court (Heerey J, Moore J and Merkel J) on these two issues. The discussion of these issues by the three members of the full court highlights the difficulties in the two concepts. Hopefully, the High Court will provide some guidance in its judgment.

Heerey J dissented in the full court. He agreed with Finn J that the purpose of the 14-team term was not one of the prescribed purposes, and that in any event, there was no particular class of person, the subject of the prevention, restricting or limiting.

The essence of Heerey J's reasoning on purpose was as follows:

- the trial judge found (and this was not challenged on appeal) that of the three key persons involved (Messrs Whittaker, Macourt and Frykberg) - none of those gentlemen wanted or desired or sought to achieve the exclusion of Souths (or any other club or clubs) from the 14-team competition in 2000. They believed that in the two years that followed mergers and joint ventures – encouraged by very substantial financial assistance – would result in all clubs being accommodated in a 14-team competition, which was in their view the only viable solution for the possible terminal crisis facing top level rugby league in Australia;
- the inherent logic of these findings was compelling. Why would the men running rugby league want to exclude Souths, or any other club?;
- the recognition of a possible outcome detracting from the desired purpose does not alter of the nature of the purpose. Assume a surgeon is about to perform a major operation which historically has had a fatal outcome in 10 percent of cases. The surgeon knows and accepts this, but believes the operation is essential and the risk acceptable (as does the properly informed patient). If the operation is not performed the patient is likely to die anyway. The operation is performed but the risk materialises and the patient dies. It would surely be a misuse of language to say that the purpose (or a purpose) of the surgeon in performing the operation was to cause the patient's death;
- as at 19 December 1997, any exclusion of a club for the 2000 14-team competition was two years in the future. It was something hypothetical and dependent on multiple, interacting contingencies; and
- exclusion of clubs was not a purpose at all.

Moore J and Merkel J held that the 14-team term was included for a proscribed purpose, although they reached this result by different reasoning. The essence of the reasoning of Moore J was as follows:

- a purpose of the 14-team term, which was a substantial purpose, was to bring about a situation where some of the clubs participating in the rival 1997 competitions would not field their team in the year 2000 as they had done in 1997 but would do so in conjunction or collaboration with other clubs. This meant that the services that would be supplied or acquired from 2000 onwards would be restricted or limited in comparison with the services that had previously been supplied and acquired; and
- the fact that the 14-team term was included in the 19 December understanding to achieve particular commercial objectives which were, in a sense, unexceptionable, did not lead to some other characterisation of the purpose of the 14-team term.

The third member of the court, Merkel J, reasoned thus on the issue of purpose:

- the recognition of a possible outcome detracting from the desired or intended purpose does not alter the nature of the purpose (and in this sense be agreed with Heerey J);
- Finn J did not conflate the overall purpose of the agreement, arrangement or understanding with the purpose of the 14-team term;
- Finn J failed to distinguish between the purpose of the club merger, joint venture and regional participation provisions (referred to as the 'carrots') on the one hand and the purpose of the 14-team term (referred to as the 'stick') on the other. His Honour appeared to assume that the purposes of the two sets of provisions can be conflated. If the two sets of provisions have discrete purposes, which is a question of fact, his Honour would have fallen into error in conflating the purpose of the merger, joint venture and regional participation provisions with the purpose of the alleged exclusionary provision;
- Finn J's conclusion that the 14-team term was only a means to an end did not absolve him from determining the purpose of the means selected; whether it was a substantial purpose and, if so, whether it was a prescribed exclusionary purpose;
- the ultimate purpose of the term (the end) is the achievement of a viable and sustainable competition, but its immediate purpose (the means) is to exclude any clubs or entries in excess of the 14 selected to provide teams to participate in the 2000 NRL competition. Put another way, the immediate purpose is to limit or restrict the supply or acquisition of the relevant services to or from (as the case may be) the 14 clubs or entities selected to provide the 14 teams. The ARL partners' contention that the possibility of exclusion as a result of the 14-team term was an 'undesired consequence' of the term incorrectly focuses on the purpose of clause 7 rather than on the purpose of the 14-team term; and
- the purpose of the 'stick' was to achieve exclusion.

The second issue was whether there was a particular class of persons the subject of the boycott. Again, the court was split two one (Moore and Merkel JJ in the majority, and Heerey J in the minority) on this issue. Heerey J's reasoning was as follows:

- The reasoning of the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 to the effect that a 'particular social group' cannot be defined by the fact of persecution itself, applies to the concept of 'particular classes of persons' in sec 4D. To define the class, there must be something more than the fact of persecution (in the immigration sense) or the fact of exclusion (in the section 4D sense). The whole point of a boycott is that the conduct or interests of some person or class of persons is seen as being inimical to the interests of the boycotters. The boycott is adopted as a means of inflicting some adverse consequences on that person or class. A boycott necessarily involves a target, a person or persons 'aimed at specifically'. It is hard to see how this notion can apply to a class not

defined in advance but only defined in an essential respect by the fact of exclusion, if and when it happens. And if it is wrong, as Heerey J thought, to have a class defined by the fact of exclusion, it is in principle no different when exclusion is one of a number of defining characteristics. Either way, the class cannot be ascertained unless and until all putative members satisfy the test of exclusion – whether or not other tests must be satisfied;

- The class must be defined by some shared characteristic before it can be aimed at. The rules of good marksmanship dictate that the shooter first identifies the target and then aims at it;
- If Souths argument be correct, competitors who enter into a partnership and agree to provide a lesser range of services or goods (or deal with a narrower range of customers) will have contravened sec 45(2);
- If the argument be correct, there is an inevitable slide into prohibition of conduct which amounts to no more than persons deciding the limits of the business in which they wish to engage;
- Had this issue been determinative in the outcome of the case, Heerey J would have reconvened the full court, for the purposes of arguing the correctness of the earlier full court decision in *Pont Data*.

It is hoped that the High Court will clarify the meaning to be given to each of the key provisions in sec 4D.

Moore J's reasoning was as follows:

- The expression (particular persons) is to be taken to be a reference to identified or identifiable persons whether or not there are other identified persons or otherwise on whom the apparently exclusionary provision is not intended to operate. That is, it is not necessary that a provision operates selectively in the way just discussed for it to be an exclusionary provision;
- Section 4D(1)(b) should have a wide operation in circumstances where the identity of each of the persons on whom the alleged exclusionary provision might operate are neither ascertained nor ascertainable at the time the agreement was entered.

Moore J did not need to consider the meaning of 'classes of persons', because he was satisfied that Souths were 'particular persons' for the purposes of section 4D.

The third member of the court, Merkel J, reasoned as follows on the issue of particular class of persons:

- In the present case it is more accurate to identify the distinguishing exclusionary factor by reference to the reason for the intended exclusion, that is, a club's failure to meet the requisite level in the selection criteria for inclusion in the 14-team NRL competition as from 2000 by reason of 14 other clubs better satisfying the criteria;
- In each case it is necessary to identify the characteristic distinguishing the class in order to determine if it is sufficiently particular to constitute a particular class that is the object of an exclusionary purpose proscribed by sec 4D(1). The fact of exclusion, without more, may not be a sufficient formula or distinguishing characteristic to identify the particular class intended to be excluded;
- The characteristic that identified and distinguished the class intended to be excluded from participation, and makes it particular, was that its members, the top level rugby league clubs eligible to participate (for example, by meeting the 'basic criteria') by not having the requisite level in the selection criteria achieved by 14 other clubs or entities, would not be supplied with team organisation services and team services would not be acquired from them. Accordingly, the particular class the subject of the NRL partners' exclusionary purpose has a distinguishing or identifying characteristic in addition to the mere fact of exclusion; and
- Although the matter is not free of doubt, Merkel J concluded that the objects of the NRL partners exclusionary purpose are sufficiently distinguishable and specific to constitute a particular class.

As set out above, there was a divergence of views amongst the three members of the full court in *Souths*. On the majority reasoning, an exclusionary provision is a term of extremely wide import. The criticisms of Heerey J appear however to be appropriate – it would be an exclusionary provision for two competitors to form a partnership and then determine to restrict, or somehow limit, either the services or goods that are supplied by the new venture, or the customers to whom those goods or services are to be supplied. It is hoped that the High Court will clarify the meaning to be given to each of the key provisions in sec 4D.

Rural Press arose out of a decision in April 1998 by Waikerie Printing, the publisher of the *River News* regional newspaper, to withdraw from actively promoting circulation of the newspaper in the Mannum Area of South Australia and to revert to its previous 'prime circulation area', stopping at a line some 40 kilometres north of Mannum.

The allegation by the ACCC was that Rural Press and Bridge Printing (a wholly owned subsidiary of Rural Press), publishers of regional newspapers in adjoining areas, caused Waikerie Printing to withdraw from the Mannum area.

At the relevant times, Bridge Printing published the *Standard* in Murray Bridge, a township east of Adelaide with a population of about 13,000. The *Standard* was published twice weekly, on Tuesdays and Thursdays, at a price of 90 cents. Its circulation was about 4000 to 5000 on Tuesdays and about 4500 on Thursdays. The *Standard* covered local news occurring in the Murray Bridge district and solicited advertising mainly from that district.

Importantly, the prime circulation area for the *Standard* extended north upstream along the Murray River to include the township of Mannum (population 2000), 30 kilometres from Murray Bridge.

The *River News* was published twice weekly by Waikerie Printing, at a price of 60 cents, and had a circulation of about 2,000 to 2,500. Whilst a few copies of the *River News* were sold in Mannum, it was not regarded as part of the prime circulation area of the *River News*.

After the establishment of the Mid-Murray Council on 1 July 1997 (formed by the amalgamation of several district councils), the area of Mannum became part of Mid-Murray Council. The Managing Director and Editor of the *River News* decided that it would benefit the *River News* if it circulated through the whole of the Mid-Murray Council area. Procedures were put in place to source material and advertisements from Mannum and the River News expanded from 24 pages to 28 pages in order to carry material from the Mannum area. The extended circulation of the

River News increased its circulation by 100 to 180 copies per week.

Thereafter there was considerable communication between, on the one hand, Rural Press and Bridge Printing, and on the other hand Waikerie Printing. The effect of the communications was that if Waikerie Printing did not keep the *Rural News* to its prime circulation area, Rural Press would have to respond commercially and that response might include publishing a newspaper in the Riverland area, being the prime circulation area of the *River News*.

In about April 1998, after considerable communication between the parties, the *River News* withdrew from Mannum, and thereafter ceased promoting circulation in the Mannum area and gathering Mannum news. It also ceased seeking advertising revenue on Mannum. In effect, it reverted to its prime circulation area.

The ACCC alleged that Rural Press and Bridge Printing engaged in conduct in contravention of sec 46 of the Act and that Rural Press, Bridge Printing and Waikerie Printing each contravened sec 45(2) of the Act. At first instance, Mansfield J upheld the ACCC's claims. On appeal, Rural Press and Bridge Printing were partially successful in that they overturned Mansfield J's finding of an exclusionary provision. The findings of Mansfield J of a breach of sec 45(2)(a)(ii) and sec 46 were upheld.

....it is hoped that the High Court in the Souths case clarify what is meant by the key concepts of an exclusionary provision

The unanimous judgment of the full court (Whitlam, Sackville and Gyles JJ) on exclusionary provisions, provides a useful contrast to the reasoning in *Souths*.

The principal argument of Rural Press on the issue of an exclusionary provision was that Mansfield J had erred in finding as to a class of persons the subject of the boycott. The argument was that Mansfield J had defined the class by reference to those who were excluded by the alleged provision. Further, it was contended that even if a particular class can be defined by exclusion, the provision alleged to be an exclusionary provision must nevertheless be aimed at the relevant class.

The court considered the legislative history of sec 4D. The court remarked (at [93] to [95]) as follows:

> [93] What is the special feature marking out this particular form of restraint between competitors for such draconian treatment, compared with the myriad of other anti-competitive agreements that might be arrived at between competitors, which are to be judged according to their effect upon competition in a market? It must, we think, lie in the abhorrence of a boycott, namely, an intentional shutting-out of particular persons or classes of persons from access to goods or services, where that is the aim or object of the agreement.
>
> [94] ……;
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> [95] The rationale which we favour is pellucid in relation to sec 4D as originally framed, since it required the target to be a particular person or persons who would obviously need to be individually identified at the time the prohibited conduct came into effect.'

It was not until 1986 that the words 'or classes of persons' were added into sec 4D. This was because, ordinarily, you could not identify each person the subject of the boycott.

The full court expressly stated that they agreed generally with the construction of sec 4D outlined by Finn J at first instance in *Souths*, an approach which broadly accords with that taken by Heerey J in the full court (see [99]).

The exclusionary provision case was really one where it was alleged that a market sharing arrangement on a geographic basis amounted to an exclusionary provision. There was no discussion by Mansfield J, however, which pointed to any of the persons involved in the arrangement having the actual purpose of specifically targeting the persons in the nominated geographic area or communicating such a purpose among themselves. The real purpose of Rural Press and Bridge Printing was to maintain their market power in Murray Bridge and to tell competitors to 'keep off their grass'.

Whilst it was obvious that the provision for geographic zoning would limit the ability of persons in the area to have access to a second local newspaper, that was the effect of the arrangement, not its purpose.

The full court concluded that 'market sharing or zoning of the kind involved in the present case, without more, is not an exclusionary provision' (see [104]). It was not necessary for the full court to consider the correctness of *Pont Data* because of the court's conclusion that there was no evidence or finding that the parties agreed upon a particular class at the time that the arrangement came into effect.

The decision of the full court provides a useful discussion of the elements of an exclusionary provision and demonstrates the distinction that exists between exclusionary provisions on the one hand and agreements etc that have the purpose or effect of substantially lessening competition on the other.

Conclusion

It is submitted that there are difficulties associated with both of the recent decisions discussed above. In relation to the *South Sydney* case, on the basis of the result reached by the majority of the full court, and as noted by Heerey J in dissent, if competitors were to form a joint venture for a limited purpose, and seek to restrict, in any way shape or form, the services that are supplied by the joint venture, or to whom those services are supplied, that would likely amount to an exclusionary provision. In relation to *Rural Press*, the result would suggest that geographic market rigging arrangements will not amount to an exclusionary provision, and will only contravene the Trade Practices Act if they have as their purpose, or likely effect, a substantial lessening of competition, or amount to a misuse of market power. This is not withstanding the fact that an exclusionary provision was intended to target market rigging arrangements, and to be a per se prohibition.

As set out above, it is hoped that the High Court in the *Souths* case clarify what is meant by the key concepts of an exclusionary provision and therefore give some guidance to practitioners as to what is, and what is not, an exclusionary provision.