## CASE NOTE*

# *NEWS LIMITED v AUSTRALIAN RUBGY LEAGUE:* MORE THAN JUST FOOTBALL

## I. INTRODUCTION

Few first instance decisions of the Federal Court of Australia have attracted as much public scrutiny or media comment as the decision of Burchett J in *News Limited v Australian Rugby League Ltd & Ors.*[1]

Few decisions have also had the resources and legal firepower devoted to them in what, at its core, has involved a fight for pay TV product.[2]

The decision has had the effect of preventing the commencement of the planned Australian Superleague competition in 1996. If upheld on appeal,[3] the decision could also stop this competition from operating viably until the turn of the century.

In addition to its wide reaching practical impact, the decision also contains a number of significant legal developments, particularly in the area of trade practices law.

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1 (1996) 135 ALR 33.

2 For an interesting discussion of the resources involved see Pengilley, "Rugby League at Trial", (1996) 11 *Australia & New Zealand Trade Practices Law Bulletin* 9.

3 At the date of writing, an appeal to the Full Federal Court had been heard but the judgment not handed down.

This article provides a summary of the salient aspects of the decision and also seeks to answer a few of the unanswered questions raised by the judgment of Burchett J.

## II. FACTS

The applicant, News Limited ("News"), intended to introduce "Superleague" as a new rugby league competition in Australia.

The Australian Rugby Football League Ltd ("ARL") and the New South Wales Rugby League Limited ("NSWRL") were respondents in the case (ARL and NSWRL are jointly referred to as the "League"). The existing National Rugby League Competition comprised 20 clubs and was run by the League.

In the wake of rumours about the establishment of a new rugby league competition by News, the League had each of its member clubs sign a "Commitment Agreement" under which the clubs were committed to play in the National Competition for the following 5 years and not participate in any competition not conducted or approved by the League.

Evidence adduced in the case suggested that throughout early 1995, representatives of News and Superleague had held discussions with both the League and its member clubs with a view to commencing a rival league competition or having a role in the existing competition.

The League had repeatedly rejected the advances of News.

At a meeting on 6 February 1995, the League and the clubs decided against joining the Superleague and the clubs reaffirmed their commitment to the League by signing "Loyalty Agreements" confirming the "Commitment Agreements".

News then proceeded to contract with clubs, players and coaches for the formation of new clubs to be part of the Superleague competition notwithstanding that the parties to these contracts with News had signed Commitment and Loyalty Agreements with the League.

These proceedings were then instituted by News claiming that the Commitment Agreements and Loyalty Agreements should be set aside on the basis that they contravened ss 45 and 46 of the *Trade Practices Act* 1974 (Cth) (the "Act"). News argued that the arrangements evidenced by the Agreements would have or be likely to have the effect of substantially lessening competition in the market and that they contained exclusionary provisions.

The League cross-claimed against News, the new Superleague companies, and clubs which had joined Superleague. The League claimed breach of contract against the rebel clubs and sued News in tort for inducing breach of contract. The League also sued the clubs which had defected to the Superleague for breaches of fiduciary obligation, and News for being dishonestly involved in the clubs' breaches of fiduciary obligation.

Subsequently, some of the clubs that had joined with Superleague cross-claimed on the basis that the Loyalty Agreements should be set aside on the grounds of economic duress.

As a general comment on the evidence, it is clear that Burchett J took an unfavourable view of evidence given by a number of News' witnesses and also of the failure of senior News executives to take the stand. Whilst the discussion of the legal aspects below are important, ultimately the failure of News to succeed could be seen as stemming from its failure to adduce the necessary evidence to support its case.

## III. MARKET DEFINITION

As set out above, News alleged the League's conduct involved breaches of s 45(2)(a)(ii) and s 46 of the Act. Each of these sections require, as part of their analysis, the definition of the relevant market or markets.

Burchett J's discussion on market definition in this case, if upheld on appeal, may reduce the efficacy of the Act as a means of upsetting contractual relations.

As the onus of establishing a breach of the sections referred to above was on News, it also bore the onus of establishing the relevant market or markets.

In what might, in hindsight, be seen to have been a major tactical error, News chose to define the relevant markets narrowly. As His Honour said, the failure by News to establish the relevant markets pleaded, would be dispositive of its claims which relied on market definition.[4]

The markets pleaded by News were limited to Rugby League; they did not extend to any other sport or form of entertainment. The markets pleaded were:

(a) A "Rugby League competition market". This market was alleged to be an Australia wide market (or in the alternative a market in the ACT, NSW and QLD) for the supply of the service of conducting national premier Rugby League competitions in which the League supplied various services to customers. These services included the viewing of Rugby League matches by the public, broadcast rights (television, Pay TV and radio), intellectual property rights and sponsorship rights.

(b) A "teams market". This was alleged to be a market for the supply of teams of premier players suitable for participation in the competition.

(c) A "League market". The market pleaded here was a market for the supply of a Rugby League competition.

(d) A further series of markets were also pleaded including any one or more of markets:
    1. for the supply of competition for viewing by the public;
    2. for TV broadcast rights;
    3. for Pay TV transmission rights;
    4. for sponsorship rights.

The analysis adopted by Burchett J in determining whether any of the markets alleged by News existed is relatively standard, relying heavily on the frequently quoted passages from *QCMA*[5] and *Queensland Wire.*[6]

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4 Note 1 *supra*, at 73.

5 *Queensland Co-Operative Milling Association Ltd - Proposed Merger* (1976) 8 ALR 481.

His Honour reiterates the point that market definition is not a matter to be determined in a vacuum, "rather its content will be affected - but in a predictable way - by its application.".[7]

Burchett J went on to say, in what will be refreshing news to those concerned about the encroachment of the Act on ordinary commercial dealings, that markets should be defined broadly rather than narrowly. In so doing, he relied on the following passage from the Trade Practices Tribunal's decision in *Application by Tooth and Co Limited; Application by Tooheys Limited*:[8]

> Competition may proceed not just through the substitution of one product for another in the use (substitution in demand) but also through the substitution of one source of supply for another in production or distribution (substitution in supply). The market should comprehend the maximum range of business activities and the widest geographic area within which, if given a sufficient economic incentive, buyers can switch to a substantial extent from one source of supply to another and sellers can switch to a substantial extent from one production plan to another. In an economist's language, both cross elasticity of demand and cross elasticity of supply are relevant.

Having set out the legal framework in which the question of market definition is to be determined, Burchett J then addressed the factual question of whether any of the markets alleged by News actually existed.

News' case relied heavily on US authorities which held that certain sports (and other products) were single product markets and were not relevantly substitutable for other sports or products. Burchett J examines in detail each of these decisions, ultimately concluding that they were not decisive in this case.

His Honour stated:[9]

> Overseas authorities, whether European or American, provide valuable assistance in interpretation of the Act. But they are not substitutable for the application of the law as it is stated in the Act itself and in decisions of high authority in this country.

His Honour's reluctance to embrace the US decisions was in part due to the different size and dynamics of the US markets, as well as the fact that many of these decisions were jury decisions or were based on concepts not applicable to Australian law, such as the Rule of Reason.

Turning to the factual elements of market definition, Burchett J draws from several sources to show that other sports were competitive with Rugby League. There was evidence from officials of leagues' clubs that they were conscious of other sports such as Rugby Union, soccer, Australian Rules and basketball in making pricing decisions and in the battle for the sponsorship dollar.

A presentation made by a News executive to the League was also used by Burchett J to support his conclusion that Rugby League was not in a market of its own. This presentation acknowledged that Rugby League was competing in the same market place as other sports such as cricket and basketball.

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6 *Queensland Wire Industries Proprietary Ltd v The Broken Hill Proprietary Company Ltd and Anor* (1989) 167 CLR 177.

7 Note 1 *supra*, at 59.

8 (1979) ATPR 40-113 at 18,196.

9 Note 1 *supra*, at 72.

The marketing strategies of other sports, such as Rugby Union, also contemplated their sport as being in competition, as a provider of a spectator sport, with Rugby League.

Burchett J concludes:[10]

> I conclude that at least the Rugby Union, Soccer, Australian Rules Football and Basketball against which, the evidence shows, Rugby League sees itself as competing for spectators, would attract a significant proportion of Rugby League's crowds if the League chose to attempt to assert market power by significantly raising prices or giving less; and the sports which would attract persons away from Rugby League in those circumstances belong in the same market with it.

On the basis of the matter set out above, Burchett J finds that News failed to establish any of the markets alleged by it. That is, in respect of each of the markets alleged by News, the market was wider.

To a certain extent, this left the most interesting questions undecided; what is the correct market definition and would Rugby League have a substantial degree of market power in that market (as required by s46)?

In *Dowling v Dalgety Australia Limited*,[11] Lockhart J set out the following as the major factors to be taken into account in identifying market power:

(a) the ability of a firm to raise prices above the supply cost (a minimum cost an efficient firm would incur in producing the produce) without rivals taking away customers in due time;
(b) the extent to which the firm's conduct in the market is constrained by that of competitors or potential competitors;
(c) the market share of the firm, although this alone is not generally determinative of market power;
(d) the existence of vertical integration, although this alone is not generally determinative of market power; and
(e) the extent to which it is rational or possible for new entrants to enter the market, that is, the extent of barriers to entry.

Applying these principles to the facts of the present case, it is difficult to determine whether the League would have a substantial degree of market power on the assumption that the correct market was a wider sport market (involving principally Rugby League, Rugby Union, Australian Rules, soccer and basketball).

Burchett J does state that if the League sought to assert market power by significantly raising prices or giving less, the other sports in the market would attract a similar proportion of Rugby League's crowds.[12] This indicates that the League would not have had market power in the wider market.

The judgment of Burchett J does not cite relevant market shares of Rugby League compared with the rival sports. Accordingly, it is not possible to determine whether market shares would infer that the League had the relevant degree of market power.

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10 *Ibid* at 81.
11 (1992) 34 FCR 109.
12 Note 10 *supra*.

## IV. EXCLUSIONARY PROVISIONS

Section 45 of the Act (among other things) prohibits a corporation from making an exclusionary provision. The term encompasses a provision of a contract, arrangement or understanding arrived at between persons any two or more of whom *are competitive with each other* and where the provision has 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. Exclusionary provisions are illegal irrespective whether such a provision may substantially lessen competition.

Each of the 20 teams participating in the League's competition signed Loyalty and Commitment Agreements the effect of which was to bind the clubs to the League's competition for a period of 5 years and to prohibit them from participating in any rival competition. It was alleged that these Commitment and Loyalty Agreements evidenced an arrangement or understanding between the 20 clubs not to supply their services to a third party, that is, that they contained an exclusionary provision. On the facts, Burchett J found that there was no agreement or understanding between the clubs. Rather, each of the clubs had an arrangement with the League. As it was only the clubs which were potentially competitive with one another, there was no relevant arrangement or understanding as required by the definition of exclusionary provision.

Burchett J examined the history of Rugby League, and in particular the fact that the ARL was incorporated to run the Rugby League competition with each club agreeing to be bound by certain rules of the competition - including to field its team, which by definition meant that the clubs did not participate in a "competitive" competition. In this sense the court concluded the clubs were not actually, nor could they potentially be, in competition with each other.

This very pragmatic approach to the application of competition law may have some surprising but commercially useful consequences for joint venture participants if this principle is upheld on appeal. Burchett J's discussion of the necessity for an arrangement between competitors to have *the purpose* of preventing, restricting or limiting supply of goods or services to, or the acquisition of goods or services from a third party is also useful. To date, cases regarding these provisions of the Act have showed no real focus on the necessity for the proscribed purpose to be present.

Burchett J held that the term "purpose" when used in s4D, means the "real, dominant or ultimate purpose".[13] His Honour also held that whilst it is possible that the relevant purpose could be the purpose of only one of the parties to the agreement, in most cases the purpose would need to be jointly shared by at least two parties to the agreement. In this case, Burchett J held that the real, dominant or ultimate purpose of the loyalty and commitment agreement was a commercially valid one and was not to prevent the supply of services to a rival competition.

In many joint tendering situations, there is a risk that exclusivity provisions contained in tendering agreements are exclusionary provisions and as such

13 Note 1 *supra*, at 102.

prohibited by the Act (without the necessity for there to be a substantial lessening of competition). That is, most consortium agreements contain exclusivity provisions preventing or restricting parties to the agreement from leaving the consortium and joining rival tenders. On their face, these are agreements between persons who are competitive with one another (being competitive, at least, in the market for joining rival consortia) and which have the effect of preventing a consortium member from providing services to a rival bidder.

Burchett J's decision, by focussing on the importance of the proscribed purpose, means that so long as the real, dominant or ultimate purpose of the exclusivity provision in the joint venture agreement is otherwise than to prevent members from joining rival bids, then the provisions will be enforceable. In most cases, it would be strongly arguable that the real reason for an exclusive arrangement between bidders is to ensure that the product of the bid is not used otherwise than for the benefit of the bid and so as to protect the integrity of the joint effort of the consortium members.

Burchett J said the following:[14]

> Any successful joint tender, submitted by parties otherwise in competition, must have the effect of restricting or limiting supply or acquisition of the goods or services the subject of the tender, insofar as that supply or acquisition, had the tender not been successfully made, might have involved third parties. But that kind of limitation is what competition is about, and s4D was not enacted to stifle competition. Only if a substantial purpose of a joint tender were to impose such restriction or limitation would s4D bite. In the case of an ordinary commercial dealing, the purpose would simply be the pursuit by the tenderers of their own businesses. In other words, s4D would strike at perfectly proper transactions if the legislature's careful insistence on an improper purpose were not sufficiently heeded. In the case of this particular section, it is the illicit purpose which is essential to an allegation of breach.

## V. DISCRETIONARY RELIEF

Having found that News had failed to make out its case on the basis of the trade practices claims, Burchett J goes on to address the question of whether, if News had made out its case, he would have granted the relief sought.

Having pointed out that the nature of the relief sought by News was discretionary in nature,[15] Burchett J states that if the conduct in question was technically in breach of the Act (by being anti-competitive in a narrow market) but pro-competitive in a wider market, the discretion inherent in the Act would allow the court to refuse the relief sought.[16]

His Honour, in stating that he would have declined to grant the relief sought by News, regarded News' actions as "self help in an extreme"[17] and "well outside the norms of proper commercial conduct",[18] and concluded that the remedies of the

14 *Ibid* at 103.
15 *Ibid* at 112.
16 *Ibid* at 113.
17 *Ibid.*
18 *Ibid.*

court should not be invoked for the furtherance and ultimate fulfilment of unlawful activities.[19]

## VI. CROSS-CLAIMS

### A. Economic Duress

The clubs aligned with News brought cross-claims to have the Loyalty Agreements set aside, arguing that they were voidable for economic duress.

The cross-claims on the ground of duress were dismissed.

A letter of 7 February 1995 accompanied the draft Loyalty Agreements which were sent to the chief executive of each club. It stated:

> The League will view the failure of any club to sign and return the deed by the deadline as an act of gross disloyalty.

And:

> I also refer you to yesterday's meeting of the League which passed a resolution to recommend that the board of the League consider the expulsion of any club which fails to sign and return the deed by the deadline.

The case of *Dimskal Shipping Co SA v International Transport Workers Federation*[20] was followed and Lord Goff (at 165) cited:

> ...economic pressure may be sufficient to amount to duress ... provided at least that the economic pressure may be characterised as illegitimate and has a significant cause inducing the plaintiff to enter into the relevant contract.

Burchett J held that the written statements did not amount to illegitimate pressure as the League had a legitimate interest in the competition not being fragmented. Furthermore, the evidence of the clubs cross-examined on duress showed that the alleged pressure was not a significant cause which had induced the clubs to enter into the Agreements.

Mr Packer's statement at a meeting on 6 February 1995 that he would sue any club or person that sought to interfere with his televising rights of Rugby League was also held not to constitute duress exercised by the League. Rather, Burchett J found that Mr Packer's statement was a "rigorous assertion of legal rights" Channel Nine genuinely claimed to hold.

### B. Equitable Rights to Property, Trade Marks and Fiduciary Duties

Burchett J described the situation of the ARL and clubs as an arrangement of "mutual trust and confidence in the pursuit of jointly held objectives in order to generate a product to be shared among each of the contributing participants".[21]

In other words, the arrangements between the League and clubs were a joint venture. Any property committed to a joint venture but vested in the name of a particular participant was held by that participant on trust for all of the joint

19 *Ibid* at 114.

20 [1992] 2 AC 152.

21 Note 1 *supra*, at 123.

venturers.[22] Any attempt to assert or retain the benefit of the relevant property, to an extent that it would be unconscionable, would not be permitted by equity. Such a situation would arise where:

> the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it.[23]

The clubs had rights in respect of goodwill, grounds and contractual rights under their long term contracts with players, which were held on trust by the players. Burchett J found that there was an attempt by the clubs who were aligned with News to retain for their own benefit and to use in the Superleague any assets which had been acquired for the purposes of the League (the joint venture). The clubs allied to Superleague had therefore breached the fiduciary duties they owed to the League.

Furthermore, News and the Superleague-formed clubs were also liable for these breaches. The transfer of the trust property was made with their knowledge. The basis of their liability for the breach of fiduciary duties owed by the clubs to the League was found in *Royal Brunei Airlines SDN BHD v Philip Tan Kik Ming*.[24] That is, if a third party dishonestly assists or procures a trustee to commit a breach of trust, the third party is liable to the beneficiary for the loss occasioned, not only where the trustee has been dishonest or fraudulent, but on the basis of the third party's own dishonest actions.

Burchett J found that the trade marks, registered in the name of and in the control of the ARL (to which the clubs had acquiesced over many years) and brought into existence for purposes associated with the participation of the clubs in the competition, was part of the joint venture. It was thus not unconscionable for the ARL to retain the trade marks.

### C. Breach of Contract by Clubs Allied to Superleague

Burchett J found that the clubs allied to Superleague had breached the following contracts with the League:

1. a contract between members of the NSWRL and the company, constituted by its memorandum and articles of association, under which the clubs had agreed to observe and perform the provisions of the constitution of the ARL;
2. a contract between each club and the NSWRL, comprised by an application for admission to the 1995 competition and acceptance of the application under which each club agreed to observe the memorandum and articles of association and rules and regulations of the NSWRL;
3. the Commitment Agreements;
4. the Loyalty Agreements.

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22 *Ibid* at 124.

23 *Muschinski v Dodds* (1985) 160 CLR 583 per Deane J at 620.

24 [1995] 3 WLR 64.

The clubs broke their contracts by releasing players or threatening to do so, encouraging sponsors to support a different entity, licensing the franchisee to use club names, jerseys and logos and giving up their own capacity to partake in the National Competition. As such actions were not in the best interests of the League, the clubs were in breach of the contract constituted by the articles of association and the Commitment and Loyalty Agreements.

### D. Inducing Breach of Contract by News

It was also found by Burchett J that News had induced breaches of the contractual obligations the clubs owed to the League. The League had to show:

1. that News had the intention to procure a breach of contract;
2. that they did in fact induce it; and
3. that damage was a consequence.

On the evidence, there was no doubt that News, knowing of the contracts, acted intentionally in inducing the breaches.

News argued that there was a defence based on legal advice that it had a strong case for having the Commitment Agreements set aside under the Act. Burchett J followed *Building Workers' Industrial Union of Australia v Odco Pty Ltd*,[25] which had held that it is not a defence to a claim of inducing breach of contract that the defendant held a bona fide and reasonable belief that the contract was unlawful or attended by unlawful conduct. Therefore, Burchett J dismissed the argument as News Limited's situation was quite different from a situation of ignorance of the existence of contractual rights unknowingly breached, and even if the legal advice was correct there was no certainty that the contracts would be set aside to a time back dated before their breach.

25 (1991) 29 FCR 104.