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Super League : Full Federal Court Prefers Competition On And Off The Field

Murray Deakin reviews the key findings of the trial judge and the Full Federal Court in the Super League case and examines some of the case's implications

On 4 October 1996, the traditional custodians of rugby league football in Australia, New South Wales Rugby League Limited (**'the League'**) and Australian Rugby Football League Limited (**'ARL'**), suffered a massive and historical defeat. In a dramatic reversal of fortunes, the Full Federal Court swept aside the decision of the trial judge who had earlier found in favour of the League and ARL. Mr Ken Arthurson of the ARL was reported to have said to the media on the day of the decision: *'I can't believe it, one day we win 100:0 and eight months later we lose 95:5.'*

On 15 November 1996, the High Court refused to grant the League and ARL special leave to appeal. This marked the end of the appeal process and effectively enshrines the Full Federal Court's decision as the final judicial authority on the issues raised.

Introduction

The Super League case arose out of the attempt by News Limited ('News') to establish a new professional rugby league competition in Australia, known as 'Super League', in opposition to the national rugby league competition run for many years by the League and ARL.

News sought to attack certain contractual arrangements, the Commitment and Loyalty Agreements, which the League and ARL had entered into with each of the 20 rugby league clubs participating in the 1995 national competition. Those contractual arrangements committed the clubs to playing exclusively in the League's national competition until the year 2000. News attacked these arrangements under sections 45 and 46 of the Trade Practices Act 1974 (**'TPA'**). Under section 45, News argued that the agreements constituted an arrangement containing exclusionary provisions or an arrangement substantially lessening competition. News also argued that by entering into the agreements, the League had misused its market power in breach of section 46.

The League and ARL argued that the establishment of Super League constituted an attempt to destroy the existing competition by unlawful means. The nub of their case was that News and its associated Super League companies induced some of the clubs participating in the national competition to breach fiduciary and contractual obligations owed to the League, ARL and other clubs.

Trial judge's decision

In a colourful judgment, Justice James Burchett comprehensively rejected the attempt made by News to set up Super League.

Burchett J decided that the Commitment and Loyalty Agreements which the League and ARL entered into with each of the clubs did not contravene the TPA and therefore were valid and enforceable. His Honour also rejected the claim made by the rebel clubs (aligned with News) that they were subjected to economic pressure or duress by the League when signing the Commitment and Loyalty Agreements.

By joining Super League, each of the rebel clubs were found to be in breach of contract with the League and also of breaching their fiduciary duties to the League, as each of the clubs were found to be involved in a joint venture with the League.

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By enticing League players and coaches into joining Super League, Burchett J found that News and the Super League companies had committed the tort of intentionally inducing the rebel clubs and coaches into breaching their contract with the League.

Definition of Market

A critical element in the Super League case at first instance was the definition of the market.

At the trial, News argued that the relevant market was confined to the professional sport of rugby league football. Burchett J rejected that market definition. He concluded that the market was much wider than rugby league and included not only rugby league but other sports such as rugby union, soccer, Australian Rules football and basketball and possibly other types of entertainment.

Although the Full Federal Court's unanimous decision has corrected much of the trial judge's flawed reasoning, the appellate judges did not find it necessary to consider questions of market definition. The Full Federal Court's judgment therefore leaves undisturbed the trial judge's definition of the relevant market. As he found a very broad market, his analysis is likely to be used in future cases by those who seek to dilute the impact of their allegedly anti-competitive conduct by having the Court examine their conduct in the context of the widest possible market. For this reason, it is worthwhile reviewing the trial judge's market definition analysis in more detail.

Burchett J's finding of a multi-sport market is at odds with a series of US antitrust cases which have found a number of discrete markets each confined to a single sport. While it is no doubt appropriate, as the trial judge observed, to take into account the complexity and range of forms of entertainment available in the United States when examining the American decisions, Burchett J's attempts to distinguish this line of authority is unconvincing. His Honour's reference to the possibility that some of the American cases may be concerned with per se violations of the *Sherman Act* is not a distinguishing feature as the Super League case involved a potential per se violation in the form of an exclusionary provision in breach of section 45(2) of the TPA. His Honour also referred to the recognition of submarkets in the United States and the existence of the 'rule of reason' doctrine as further reasons why American courts may draw markets more narrowly than in Australia. However, none of these factors would account for an approach to market delineation so substantially different to that which should prevail in Australia.

Now that the High Court has refused special leave to appeal from the Full Federal Court's decision, it is clear that there will be no review of Burchett J's analysis of the market. This is regrettablee as the author believes that the trial judge's market analysis ignores the functional dimension of the market.

The starting point to any definition of the market is to identify the goods or services that are supplied by the undertaking in question. The services supplied by the League are the services associated with the organisation of a national rugby league football competition.

In identifying the relevant market, it is necessary to examine whether there are any other services that are, in the words of section 4E of the TPA, 'substitutable for, or otherwise competitive with' the League's organisational services. From a supply side perspective, it would seem possible but unlikely that organisers of

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other sports (for example, organisers of soccer, basketball or Australian rules football) would switch sporting codes and proceed to organise rugby league if given a sufficient price incentive. From a demand side perspective, the rugby league clubs (who are the acquirers of the League's organisational services) would be unlikely to switch sporting codes and offer their players as soccer, basketball or Australian rules players as they would lack the appropriate skills for these sports. However, the same league clubs would, given a sufficient price incentive, switch their allegiance to another rugby league organiser. The conduct of the rebel clubs, in aligning themselves with News, demonstrates this level of substitutability in demand.

This analysis would suggest that the relevant market was the market for the organisation of national professional rugby league football competitions. The current rivalry between the News-sponsored Super League competition and the Optus Vision-sponsored ARL competition lends some factual support to this narrower definition of the market.

Rather than examining substitutes at the organisational level, Burchett J would appear to have examined substitutability at the game level by posing the question whether other sports were substitutable for or competed with the game of rugby league as a spectator sport or entertainment event. Substitutability was examined at this level by looking at admission charges for other sports, the perceptions of other sporting bodies, the scheduling of games by venue administrators and the perspectives of rugby league officials, television proprietors and major advertising sponsors. However, a criticism of this approach is that the trial judge examined the substitutability of the end product of the League's organisation (namely, the football game itself) rather than the substitutability of the League's organisational services.

Implications

As the approach to market delineation adopted by Burchett J has not been disturbed by the full Federal Court, this may have wide implications reaching well beyond the Super League case. First, the decision would represent a windfall gain for other sporting bodies (such as the Australian Football League and the Australian Rugby Union) who may have believed they occupied such a powerful position in their sport that they needed to be conscious of trade practices law prohibiting anti-competitive conduct. These sporting bodies would, under Burchett J's definition of the market, have a powerful defence to any attack made against them under those provisions of the TPA which require an assessment of competition.

Outside the sporting world, the decision would support much wider market definitions than have traditionally been applied. For example, it would be difficult, in relation to Foxtel's earlier proposal to acquire Australis Media, to reconcile a market confined to pay TV with Burchett J's judgment.

Full Federal Court's decision

The key findings of the Full Federal Court may be briefly summarised as follows:

a) The Commitment and Loyalty Agreements contained exclusionary provisions within the meaning of section 4D of the TPA.

b) The clubs and the League entered into the Commitment and Loyalty Agreements pursuant to a common understanding between them and for the purpose of restricting the availability of rugby league teams and players for any rival rugby league competition organiser (including Super League).

c) Accordingly, the making of the Commitment and Loyalty Agreements contravened section 45(2)(a)(i) of the TPA.

d) As the exclusionary provisions cannot be severed from the Commitment and Loyalty Agreements, those agreements are void.

e) The only valid contracts between the Clubs and the League were those created when each club was admitted by the League to the 1995 competition. As these contracts were to last for one season only, the contractual obligations of each club to the League and ARL expired at the end of the 1995 season.

f) Each of the 1995 season contracts contained an implied term requiring each club to do everything reasonably necessary to enable the 1995 competition to be carried on in a manner that allowed the League and ARL to receive the benefit of that competition.

g) By releasing their players during the 1995 season and by taking other action to support Super League, the rebel clubs breached the implied term of their 1995 season contracts. The trial judge was justified in finding that News and the Super League companies had induced the rebel clubs to breach these implied terms. Given that the League and ARL had already enjoyed the benefit of an injunction restraining Super League from establishing its rival competition during the 1996 season, the remedies available to the League and ARL for the rebel Clubs' breach of contract and Super League's actions of inducing those breaches should be confined to an award for damages.

h) The relationship between the League, ARL and the 20 clubs admitted to the national competition in 1995 was not such as to create reciprocal fiduciary obligations among those parties. Accordingly, the rebel clubs did not owe fiduciary duties to the League and did not therefore act in breach of any such duties. Similarly, News and the Super League companies could not have induced any breaches of fiduciary duty.

The Full Federal Court's decision to declare void the Commitment and Loyalty Agreements rests solely on a finding that those agreements contained exclusionary provisions (as defined in section 4D of the TPA) in breach of section 45(2)(a)(i) of the TPA.

The complete reversal of the trial judge's decision on exclusionary provisions is not the result of any real disagreement on the legal meaning or elements of the prohibition but the result of the appeal court drawing very different conclusions or inferences from the same facts. Perhaps the most striking differences between the Full Federal Court and the trial judge in this area relate to the findings in respect of purpose of the contracts and whether an arrangement or understanding should be inferred among the parties to those contracts.

Purpose

The issue which vexed the Court was the purpose of the League, ARL and the clubs for including in the Commitment and Loyalty Agreements provisions which prevented for five years (1995 to 1999) the supply by the clubs of

teams to a rival competition organiser and the acquisition by the clubs of the services of a rival competition organiser.

Burchett J found that while the negative stipulations in the contracts had the exclusionary effect of shutting News out as a rival competition organiser, the purpose of the League was to preserve the quality of its rugby league competition through the joint participation of all the clubs.

By contrast, the Full Federal Court found that the League, ARL and the clubs perceived News to be a potential rival competition organiser and entered into the contracts for the purpose of 'shutting out...News as a rival organiser and locking in the clubs to the national competition, to the exclusion of their participation in a rival competition.'

Arrangement or understanding

Another critical issue was whether an horizontal arrangement or understanding among the clubs (to which the League and ARL were parties) should be inferred from the circumstances in which each of the clubs executed the Commitment and Loyalty Agreements. It was undisputed that each agreement was executed by each club in substantially identical form and within a short time of each other.

Burchett J found that the clubs had no more than a hope or expectation that others would execute the Commitment and Loyalty Agreements. His Honour pointed to the absence of direct and express communications between the parties to the alleged arrangement or understanding and held that it was not possible to infer an horizontal arrangement or understanding out of a series of vertical agreements.

By contrast, the Full Federal Court found that the existence of the Super League proposal and Mr Arthurson's concern about it were common knowledge among the clubs. The Court pointed to the extensive newspaper coverage of the Super League proposal, the communication between club officials and Messrs Arthurson and Quayle and the receipt of a draft contract by each club which expressly prevented that club, for a five year period, from participating in any competition not conducted or approved by the League and ARL. Notwithstanding the absence of evidence of direct communications among the clubs, the Court stated that 'it is difficult to resist the conclusion that the clubs were consenting, through the medium of Mr Arthurson and Mr Quayle, to carry out a common purpose. They were not merely hoping that the other clubs would join in; what they were doing made sense only as a common undertaking.'

It is open to debate whether the evidence, at least in respect of the Commitment Agreement, properly supports a finding of an horizontal arrangement or understanding between the clubs. It remains arguable that what occurred was mere 'conscious parallelism', a concept well accepted in US anti-trust law as falling short of a conspiracy.

Conclusion

On balance, the author believes that the Full Federal Court's findings are more consistent with the evidence tha the trial judge's findings. However, the absence of any detailed analysis by the appellate court in respect of these critical elements of the prohibition against exclusionary provisions creates a level of uncertainty which is unacceptable in this field of law and makes it difficult to advise or act with confidence.

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A New Standard Telephone Service?

Holly Raiche analyses the expanded definition of 'Standard telephone service' in the *Telecommunications Bill* 1996 and explains why it has implications which require closer examination.

What a 'standard telephone service' (STS) is and does and how it is funded will be significantly different from the 1991 concept of an STS if the *Telecommunications Bill* 1996 is passed into law.

Under the Bill, the context of STS moves from the legislative mechanism for one carrier delivering telephony service to all Australians, to a benchmark for all providers of basic telephony services. Its definition potentially changes from the provision of a service, to a combination of service and equipment. Where there was only one deliverer of the STS in an area, the delivery of components of the STS may be split between USO carriers. Finally, the funding for STS provision, now based on provision of services to geographic areas, will need to be changed to accommodate the provision of equipment as part of the STS.

The changes to the STS and its context within the universal service are best understood by reviewing the current STS structure to highlight the signifcant changes made by the Bill.

STS In Context

Under current legislation, STS terminology is used primarily in the context of the universal service obligation (USO). The USO is the requirement on the universal service carrier to provide both a standard telphone service and payphones which are 'reasonably accessible to all people in Australian on an equitable basis, wherever they reside or carry on business.(1)

The only other reference to an STS in the current regime is the obligation on general carriers supplying an STS to residential or charitable customers to provide the option of access to untimed local calls if access to those calls was provided at the commencement of the Act.(2) This requirement ensures that the USO carrier, whether Telstra or another general carrier, continues to provide access to untimed local calls in areas where it had been available in 1991.