



Some outside observations on overly restrictive agreements and the *Souths* rugby case

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*United States courts have adopted a variety of rules for presuming a lessening of competition, in part because it is too burdensome to demand that plaintiffs prove that challenged conduct takes place within a particular market whose definition will be highly contested by skilled defence counsel. From an outsider's perspective, the High Court's decision in **News Ltd v South Sydney District Rugby League Club Ltd** to narrowly construe the application of s 4D of the TPA to rivals' agreements designed to restrict the supply of services seems unfortunate, for several reasons. As a matter of competition doctrine, the decision fails to recognise that a requirement of proof that competition be substantially lessened can allow firms to enter into overly restrictive agreements because of the cost and difficulties of litigation. Given a dichotomous choice between the per se and 'full monty' provisions of s 45, sound competition policy supports a construction that allows relief without a full inquiry for demonstrably overbroad competitor agreements that exclude buyers from the market. As a matter of comparative competition law, the court's approach departs from the more flexible standard used by — albeit somewhat inconsistently — US courts, as well as the standard of the common law, under which overbroad restraints can be condemned without necessarily engaging in a full-blown economic inquiry including proof of market power. As a matter of statutory interpretation, a creative reading of the TPA to prohibit overbroad restraints that exclude firms from the market is more consistent with Australian precedents mandating a broad interpretation to protect consumers. Finally, as a matter of public policy, the decision makes it substantially easier for powerful sports officials to make decisions that enhance their own economic power without constraints provided by a free market or competition law. The preferred approach would have been to interpret s 4D to condemn agreements that deprive victims of services essential for them to viably compete, where the agreement is not necessary to achieve some other legitimate pro-consumer goal.*

Like Australia, the United States was fortunate in the previous decade to have competition enforcement directed by a leading academic, in our case Dean Robert Pitofsky. Alan Fels' counterpart is the author, inter alia, of a leading casebook in antitrust law, which I have used for years.¹ Like other texts, the book covers the typical subjects of monopolisation, horizontal restraints, vertical restraints, mergers, and price discrimination. Unconventionally, the book divides the section on monopoly, first briefly introducing students to the concepts of monopoly power and market definition before commencing a

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¹ R Pitofsky, H Goldschmid and D Wood, *Trade Regulation*, 5th ed, Foundation Press, 2003.

careful study of horizontal restraints. The reason, I suspect, for this approach is because, as Pitofsky and his co-authors observe, in ‘theory and practice, relevant market definition is as difficult an undertaking as any in antitrust’.² Students cannot appreciate why US courts have adopted a variety of not-always-transparent rules for presuming a lessening of competition until they realise how difficult it is to demand that plaintiffs prove that challenged conduct takes place within a particular market whose definition will be highly contested by skilled counsel for the defence.

This insight is critical to the resolution of a major competition law issue in both the United States and Australia: when rival firms combine in a manner that has plausible efficiencies, how should competition law treat claims that ancillary restraints are so overbroad that they warrant proscription? On one view, if an applicant demonstrates that rivals have restrained trade in a significant way, the courts should not permit the restraint unless it is justified and not overly restrictive. The opposite view is that unless the conduct is so blatantly anti-competitive that it has no possible beneficial value, any business conduct is permissible (and firms need not justify their conduct in court) unless the applicant first bears the burden of proving significant harm in a precisely defined economically relevant market.

In the United States, the broad language of the applicable section of the Sherman Act — which prohibits ‘contracts, combinations . . . or conspiracies in restraint of trade’³ — allows US judges the freedom to craft flexible rules. It is a common misconception that US doctrine creates two discrete dichotomous categories — per se illegality and full economic inquiry under a ‘rule of reason’. Rather, the US Supreme Court has written:

there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. *What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.* The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.⁴

Specifically, the court expressly rejected the claim that cases other than ‘naked’ restraints on price and output require a ‘plenary market examination’,⁵ or, as Professor Stephen Calkins has artfully termed it, the ‘full monty’.⁶

The challenge for Australian competition law is that the more detailed structure of the Trade Practices Act 1974 (Cth) (TPA) narrows — although, as argued herein, does not eliminate — the discretion that judges have to craft sensible rules. The principal provision protecting consumers from illegal agreements among competitors is s 45(2). This section prohibits corporations from entering into contracts or arrangements that: (i) contain an ‘exclusionary provision’, or (ii) have the purpose or likely effect of substantially lessening

² Ibid, p 185.

³ 15 USC §1.

⁴ *California Dental Ass’n v Federal Trade Comm’n* 526 US 756 (1999) at 780–1 (emphasis added).

⁵ Ibid, at 779.

⁶ See S Calkins, ‘*California Dental Association: Not a Quick Look But Not the Full Monty*’ (2000) 67 *Antitrust LJ* 495.

competition. Liability under the latter prong of s 45(2) generally requires a detailed inquiry and economic determination,⁷ an ‘Australian Full Monty’. Regarding the topic of this article — allegedly overbroad agreements among rivals who have combined in a manner that has plausible efficiencies — the only way to avoid the ‘Full Monty’ is to find that the defendants have agreed to an ‘exclusionary provision’, defined in s 4D as an agreement between competitors entered into with ‘the purpose of preventing, restricting, or limiting’ the supply of services to ‘particular persons or classes of persons’.⁸ Such agreements are illegal per se.

In *News Ltd v South Sydney District Rugby League Club Ltd*,⁹ the High Court rejected Souths’ claims that they were illegally excluded from the nation’s premier rugby league competition. The High Court held that the enforcement of a joint agreement to use objective criteria to reduce to 14 the number of teams in a new competition did not constitute a per se illegal agreement formed with the purpose of limiting the supply of ‘competition organising services’ to Souths. Relief would only be granted if Souths could prevail after a ‘full monty’, where market power rather than the overbreadth of the defendants’ agreement would play the critical role.

From an outsider’s perspective, the High Court’s decision to adopt a narrow construction of the statute’s condemnation of competitor agreements designed to restrict the supply of services seems unfortunate, for several reasons. As a matter of competition doctrine, the decision fails to recognise that a requirement of proof that competition be substantially lessened can allow firms to enter into overly restrictive agreements because of the cost and difficulties of litigation. Given a dichotomous choice between the per se and ‘full monty’ provisions of s 45, sound competition policy supports a construction that allows relief without a full inquiry for demonstrably overbroad competitor agreements that exclude buyers from the market. As a matter of comparative competition law, the court’s approach departs from the more flexible standard used by — albeit somewhat inconsistently — US courts, as well as the standard of the common law, under which overbroad restraints can be condemned without necessarily engaging in a full-blown economic inquiry including proof of market power. As a matter of statutory interpretation, a creative reading of the TPA to prohibit overbroad restraints that exclude firms from the market is more consistent with Australian precedents mandating a broad interpretation to protect consumers. Finally, as a matter of public policy, the decision makes it substantially easier for powerful sports officials to make decisions that enhance their own economic power without constraints provided by a free market or competition law.

⁷ See *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259–60; 44 ALR 173 (FC):

To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening.

⁸ Sections 45(2)(a)(i) and 45(2)(b)(i) make it illegal for firms to agree on terms containing an ‘exclusionary provision’. Section 4D defines ‘exclusionary provision’ as quoted in the text.

⁹ (2003) 200 ALR 157 (HC).

Background

In *Souths*, the parties accepted that for several years in the mid-1990s, vigorous rivalry existed in Australia between the News-owned Super League and the Australian Rugby League. Among the markets in which these firms competed was a market for competition organising services: each league sought to provide these services to traditional or newly formed clubs, who would then participate in their competition. This rivalry ended in 1997 with an agreement by the parties to form the National Rugby League, which would henceforth be the sole organiser of a top-tier competition in the sport of rugby league. As part of the negotiations over the 1997 agreement, News demanded, and insisted over objections by ARL negotiators, that by 2000 the competition that the two rival leagues would henceforth jointly operate would be limited to 14 teams. The parties devised an objective formula for determining the identity of these teams, provided incentives for the 20 teams then participating in the competition to voluntarily merge or exit, and adopted criteria to select among remaining teams those who would be allowed to participate in the competition. Souths was the only team that chose not to merge or exit that was involuntarily excluded from the competition.

After a defeat before the trial judge, a divided panel of the Full Federal Court agreed with Souths' claim that the implementation by the NRL of the agreement entered into by News and the ARL constituted an agreement by rivals to refuse to provide services 'to particular persons or classes of persons in particular circumstances or on particular conditions', to wit, those clubs who did not voluntarily merge or exit and who failed to fall within the top 14 clubs based on the selection criteria contained in the agreement. Under s 4D of the TPA, such a refusal constituted an 'exclusionary provision', and was therefore in contravention of ss 45(2)(a)(i) and 45(2)(b)(i) of the TPA. Thus, Souths prevailed without the need to show that the agreement substantially lessened competition, as would be required for Souths to prove a contravention of s 45(2)(a)(ii). The High Court upheld News' appeal.

The court and Souths appeared to perceive the case in very different ways. First, although no detailed analysis was given, the four High Court justices who voted to grant News' appeal seemed to view the absence of proof that the agreement substantially lessened competition to mean that the agreement in fact did not substantially lessen competition. In dicta, for example, Gleeson CJ suggested that the agreement did not lessen competition because rugby league competes with other codes of football (rugby union, Australian Rules, soccer), and because the intra-code rivalry seemed to damage both competition organisers and the image of the code generally.¹⁰ Second, recognising that the News-ARL agreement was not a 'naked' agreement simply to end competition, but rather a complex scheme to form a new competition that necessarily requires some joint agreement on how to determine the number of clubs for whom competition organising services will be provided, the justices

¹⁰ Ibid, at [5]. Callinan J expressed the view at oral argument that the NRL was in vigorous rivalry with the other Australian football codes. Transcript of Oral Argument, *News Ltd v South Sydney District Rugby League Football Club Ltd* (unreported, S34/2002, 6 August 2002), available at <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/S34/1.html>> (HC Transcript).

then strove to ensure that the strictures of s 4D would not prohibit what they saw as an efficient, welfare-enhancing agreement. Although not cited by the court, it has been suggested that a 14-team competition resulting in a full home-and-away round-robin competition within a 26 week framework was optimally-designed to enhance consumer appeal.¹¹

Souths' supporters, of course, are inclined to another view.¹² Qualitative differences and very durable 'brand loyalty' among each club's supporters render the other codes as weak substitutes for rugby league. Thus, even accepting for the sake of argument the 'ruinous competition' view that the Super League/ARL war should have ended with a unified competition,¹³ Souths maintained that there was no external marketplace constraint on the ability of those running the NRL to artificially suppress the number of clubs in the new competition. Far from being a necessity, Souths' fans believe that the marginal benefits from a 14-team competition, as compared to a 16 club format, were modest and clearly outweighed by the huge harm to legions of supporters that would occur with the exclusion of one of the founding clubs of rugby league. Souths supporters might also observe that, as News actually owned several teams in the new, smaller competition,¹⁴ it had a direct interest in limiting the number of teams to which its 50%-owned competition organiser would provide services; such a limitation would increase the pro-rata share of its club-subidiaries in broadcast and licensing revenue. Indeed, one could persuasively characterise News' insistence on a 14-team limit as a device to allow their owned or subsidised Super League clubs to have an advantage over their competitors who had been loyal to the ARL.¹⁵ Finally (although this point was not expressly asserted by South's counsel), even if Souths' views were incorrect, and the consumer appeal of rugby league

11 Asked directly by Kirby J about why the number 14 was 'magic', News' counsel artfully avoided the question in oral argument. See High Court Transcript, *ibid.* At trial, the court noted that a 1992 report commissioned by the ARL recommended a 14-club competition to permit two complete rounds of games to be played and that the former CEO of the ARL believed that the game's future depended on 'a reduction in the Sydney teams to a number that was economically sustainable in that area': *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at [215]–[220] (FC).

12 See, generally, G Piggins, *Never Say Die*, Pan Macmillan Australia, 2001.

13 Although the re-uniting of rugby league into a single competition appeared to be facially inconsistent with s 45 of the TPA (anticompetitive arrangements) and/or s 50 (anticompetitive mergers), the ACCC took no action to challenge the move, despite its long-standing policy that the authorisation procedure should be the exclusive means by which parties engage in competition-harming behaviour that is arguably in the public interest: W J Pengilly, 'Rugby League is reunited but what does the ACCC say?' (1998) 14(4) *ANZ Trade Practices Law Bulletin* 41–3. Notably, former ACCC Chairman Fels apparently does not accept the view that inter-code rivalry is sufficiently vigorous that any restraints within rugby league should be permitted: A Fels, 'Current Issues in Merger Policy and Regulation: A Discussion' (1996) 9 *Corporate & Business Law Jnl* 174 at 179.

14 News Corporation maintained controlling or substantial investments in the Brisbane Broncos, Melbourne Storm, Canberra Raiders and North Queensland Cowboys. See R Masters, 'Raiders Can't Ask For More As Rupert Tightens His Belt', *Sydney Morning Herald*, 22 April 2002, p 17 (describing News' efforts to divest itself of clubs).

15 Every one of the pre-1995 ARL clubs that joined Super League remains intact. Of the 12 clubs loyal to the 'wartime' ARL, two are defunct (Gold Coast and South Queensland), six have merged (St George/Illawarra, Balmain/Wests, Manly/Norths), and only three 'loyal' clubs besides Souths (Paramatta, Sydney City, Newcastle) remain intact.

would be enhanced with a competition featuring 14 teams with only eight from Sydney, it is difficult to understand why that decision could not have been entrusted to the board of directors of the newly-formed NRL, rather than insisted upon by News as a condition of the merger. The fact that Souths' barrister had chosen to not press these points, with limited resources and even more limited time, did not mean that Gleeson CJ's factual assumptions were correct. In light of Souths' need for prompt resolution of the case, and the limited resources available to the defence,¹⁶ it is clear that a legal standard requiring Souths' to prevail only following a full-blown economic analysis of rugby league would be fatal, even if Souths could show that the exclusion was unnecessary to promote the sport.¹⁷

Analysis of the narrow construction of s 4D

The High Court in *Souths* was obviously concerned that an unduly broad reading of s 4D would result in the per se condemnation of a variety of pro-competitive activities. The illustration used by Gleeson CJ was that of a joint venture between two previously competitive restaurants to open a new jointly-operated dining establishment.¹⁸ If their previous establishments had combined capacity for 100 patrons, and the new, improved facility only had room for 60 diners, absent an unusual situation where a substantial lessening of competition could be proven, the justices reasoned that the restaurateurs' agreement did not have the purpose of preventing the supply of dinners to the 40 patrons who would be unable to dine at the new establishment. Similarly, Callinan J worried that s 4D could be read to prohibit rival competition organisers¹⁹ from creating an elite competition by refusing to admit inferior talent.²⁰

The differences between the hypotheticals and *Souths* are apparent, even accepting Gleeson CJ's debatable view that inter-code competition constrains the NRL's ability to render output of 'football' unresponsive to consumer demand.²¹ Absent a malicious targeting of particular patrons, neither the purpose nor the effect of a decision by two restaurateurs to merge operations

¹⁶ Piggins, above n 12, ch 15.

¹⁷ Although Australian and US litigation differs significantly, it would seem that the concerns that animate the US desire to avoid a 'Full Monty' inquiry would be equally if not more applicable in Australia: cf Calkins, above n 6, at 521 (footnotes omitted):

As a practical matter, making market power an issue means that defendants can and do hire talented economists who help them win motions to dismiss or summary judgment on grounds of market shares of perhaps 20–30 percent or less, or ease of entry, or elastic supply or demand, or powerful buyers, or excess capacity, or changing conditions. Any plaintiff filing a 'full blown' rule of reason case faces the prospect of long, expensive discovery, extensive motions practice, and then a merger-like battle over market power without the benefit of the prophylactic language of Clayton Act s 7. Making a decision turn on a full, formal proof of market power, the antitrust equivalent of the Full Monty, is a defendant's paradise.

¹⁸ Above n 9, at [20], [23].

¹⁹ A decision by an organiser of a single tournament would not fall within s 4D, which requires agreement among rivals.

²⁰ Above n 9, at [211]. This view was repeated by Gleeson CJ and Callinan J in their joint opinion in *Rural Press Ltd v ACCC* (2003) 203 ALR 217 at [6] (HC).

²¹ Gleeson CJ reasoned that the competition between rugby league and other forms of sporting competition explained in part why the Super League-ARL war was so damaging: *ibid.*, at [5].

and open a smaller facility would be to deprive patrons of dining services, because it is clear that diners would have many other options on places to patronise. Nor would the fact that diners have these other options affect the decision to jointly operate a smaller facility. In contrast, because the overriding purpose of the News-ARL agreement was to present a single, unified premier rugby league competition, it is clear that they would have not adopted the 14 team limit if there was any realistic possibility that excluded teams like Souths could obtain competition organising services from any other source.²²

Moreover, in Gleeson CJ's restaurant hypothetical or Callinan J's masters tournament, there is no hint of an *unnecessary* restriction in output. In contrast, a key part of Souths' case — and the appropriate focus for proper inquiry — was the allegation that the 14-team term was not essential to the effective development of a merged National Rugby League competition by the two previously competitive league organisers. This allegation is critical, both as a matter of competition policy and statutory interpretation. For example, when News and ARL agreed (without challenge) that they would henceforth not provide competition organising services to clubs that did not meet minimum standards for financial viability and playing facilities, standards that were clearly necessary to the efficient operation of the new NRL, they were obviously not doing so with the purpose of excluding the teams; the purpose was to ensure an efficient NRL. In contrast, *if the 14 team provision was unnecessary to ensure an efficient NRL*, then it is fair to infer that the parties' purpose in insisting upon the limit was not to promote the NRL but rather to exclude Souths and any others falling into the 'class of persons' who were unwilling to merge or withdraw from the competition. In light of News' insistence that exclusion would be necessary if incentives did not get the

Evidence of damaging competition is not helpful in seeking to determine whether two firms compete against each other and many others in a broader market characterised by product differentiation or in a narrower product where they alone compete. Although competition between rival leagues has often proved damaging in the United States, US courts have uniformly held that major dominant sports constitute distinct and relevant product markets. See, eg, *National Collegiate Athletic Ass'n v Board of Regents*, 468 US 85 (1984) (college football is a separate market); *International Boxing Club v United States* 358 US 242 (1959) (ordinary boxing matches do not constrain power of those dominating championship boxing); *United States Football League v National Football League* 842 F 2d 1335 (2d Cir 1988) at 1364 (professional football); *Philadelphia World Hockey Club, Inc v Philadelphia Hockey Club, Inc* 351 F Supp 462 (ED Pa 1972) (ice hockey); *Fishman v Estate of Wirtz* 1981-2 Trade Cas (CCH) ¶64,378 (ND Ill 28 Oct 1981) at 74,756 (basketball).

As to the rugby league wars, I have previously suggested that the massive damage caused by inter-league rivalry was primarily attributable to News' strategic goals (not to enter the market to engage in stable rivalry with ARL, but simply to develop a rugby league product for its pay television network) and predatory conduct by one or both of the parties, rather than an inherent inability to maintain a stable competition between two leagues: see S F Ross, 'Anti-competitive aspects of sports' (1999) 7 *CCLJ* 125 at 135-7.

22 The problem under discussion here primarily arises concerning the purchase of intermediate inputs in markets characterised by product differentiation. If playing rugby league was completely fungible with playing Aussie Rules football or soccer, then Souths could have stayed in business by seeking to enter the Australian Football League or the National Soccer League. If everyone accepted that rugby league was a unique market, then the News-ARL agreement would have clearly lessened competition substantially, and Souths' barristers would not have had to invoke s 4D.

number to 14, there was substantial record evidence (supported by the post-record evidence that the NRL is doing just fine, thank you, with the Rabbitohs back in the competition) that the ARL had to be dragged kicking and screaming toward agreeing to the 14-team term.²³ The parties' purpose in including the 14-team provision in their 1997 merger agreement (or, more accurately, News' purpose in insisting that the term be included) must also be considered in light of an obvious alternative, which was to leave the determination as to the size of the NRL competition three years hence to the new NRL board, especially since News was guaranteed half the seats on that board. Although it is true, as Gleeson CJ observed, that 'exclusivity is a necessary feature' of sports leagues,²⁴ an agreement by rival leagues to specify the future size of a competition was not. If, as some have claimed, a 14-team competition is optimal, and reducing the number of Sydney teams will permit the remaining teams to enhance fan appeal by gaining financial strength, then surely a new board with a fiduciary duty to act in the best interests of the new league would reach the same result. If, however, as News' critics have claimed, the 14-team provision was not intended to improve rugby league but rather to limit the subsidies paid by the competition organiser and to improve the relative standing of News-owned clubs, then a new board may not have adopted the provision. This would explain why News was so keen to have the term be part of the 1997 merger agreement. Given the excellent legal advice that News has at its disposal, it is noteworthy that the 14-team term was included at its insistence, giving rise to a plausible claim under s 4D; had the decision been made in 2000 by the new NRL board instead, Souths would have been excluded by the act of a single firm and no s 4D claim could have been made.

Moreover, the background to the agreement makes it clear that Souths was not like some innocent yuppie who finds himself unable to get a reservation at a restaurant for his big Saturday night date; among all possible firms that might want to participate in rugby league competition, the Sydney clubs were specifically targeted (only eight of the 14 clubs could come from Sydney) and special incentives were provided to induce Sydney clubs to merge.²⁵ In sum, two former competitors agreed not to provide essential services to a known class of persons (unless they kow-towed to merger demands), knowing that this class of persons had nowhere else to turn. This would seem to be precisely the sort of 'unfair exercise of power against a targeted person or class of persons' that the TPA was designed to prevent.²⁶

The High Court was legitimately concerned that an expansive interpretation of s 4D would jeopardise myriad arrangements by joint ventures where the incidental and necessary effect of the arrangement is to reduce the firms' combined purchasing or quantity of output. On the other hand, the *Souths*

23 As described by Finn J, *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at [31]–[33] the ARL had originally sought a 16-team competition while News sought a 12-team league, and the parties initially compromised on 14 teams. When ARL sought to reconsider this, they were told that the term was 'no longer negotiable'.

24 Above n 9, at [11].

25 Above n 23, at 621.

26 *Ibid.*

reasons do not appear to reflect a recognition that overbroad and unnecessarily restrictive agreements, which eliminate otherwise vibrant firms from the market, may be successfully challenged only by those willing to undertake the very time-consuming and costly endeavour of proving a substantial lessening of competition. The court could have sharpened its focus on the purpose of the arrangement, by inferring that parties do not ordinarily enter into overly broad agreements for the purpose of achieving narrower legitimate results. Thus, when (i) the foreseeable result of an agreement is that a third party will lose its ability to compete because of the loss of an essential input or outlet, and (ii) the agreement is not necessary to protect the parties' legitimate interests, the court should have found that a purpose of the agreement is the exclusion of the victimised third parties.

Comparative analysis of overbroad competitor restraints

US courts have confronted the same difficulty in crafting rules to deal with overly restrictive agreements among rivals who are collaborating for some plausibly efficient purpose. The response has been a flexible one, with the Supreme Court directing trial judges to pursue an 'enquiry meet for the case'.²⁷

An effort to glean this flexible approach by taking the language of decisions of the US Supreme Court at face value, however, will mislead the reader. For example, a leading Australian commentator summarised US jurisprudence as imposing 'a per se ban only when [courts] can say on the strength of unambiguous experience that the challenged conduct is a naked restraint with no purpose except that of stifling competition'.²⁸ Indeed, the Supreme Court has said words to that effect.²⁹ Having said that, however, the court has proceeded to summarily condemn practices that would not appear to qualify for per se treatment under the language quoted above. Most notably, in *Arizona v Maricopa County Medical Society*,³⁰ the court affirmed the trial court's summary condemnation of an agreement among competing physicians to accept specific maximum prices to be charged for patients with private health insurance. The court of appeals had vacated the judgment of liability and remanded for trial requiring a full inquiry into the economic effect of the agreement; the Supreme Court reversed, despite the lack of experience with agreements in the complex business of health insurance, with no record evidence that the agreement actually harmed competition, and despite significant evidence that the agreement facilitated millions of dollars in cost savings for consumers. Significantly, the court held that even accepting

²⁷ Above n 4.

²⁸ W Pengilly, 'Collective Boycotts under the Australian Trade Practices Act: What our policy makers have failed to understand and what the Dawson Committee should do about it' (2002) 10 *CCLJ* 144.

²⁹ See, eg, *Broadcast Music Inc v Columbia Broadcasting System* 441 US 1 (1979) at 19–20 (to be per se illegal, practice must facially appear to be one that would 'always or nearly always tend to restrict competition and decrease output'); *Northern Pacific Railway Co v US* 356 US 1 (1958) at 5 (per se rule applies to practices that have 'a pernicious effect on competition and lack any redeeming virtue').

³⁰ 457 US 332 (1982).

evidence that the agreement provided consumers with 'a uniquely desirable form of health coverage that would otherwise not exist',³¹ the arrangement warranted per se condemnation because it was not necessary for competing doctors (as opposed to the independent insurers) to set the fees in order for consumers to receive this form of health coverage.³² In other words, even if an agreement among competitors is not a naked agreement, and even if the agreement as a whole has legitimate purposes, per se condemnation is appropriate where rivals significantly restrain competition and their agreement is overly restrictive.³³

The decision in *Federal Trade Commission v Indiana Federation of Dentists*³⁴ is another example of how the US courts do not necessarily require a full economic analysis of unnecessarily restrictive agreements. In that case, the FTC prohibited competing dentists from agreeing not to provide private insurers with x-rays used to determine if services warranted reimbursement under the patient's insurance policies. The court of appeals upheld the appeal because the FTC had not found that the agreement had any impact on price or that the defendants possessed market power. The Supreme Court reversed, finding that the FTC was entitled to conclude competition had been harmed based on economic theory regarding the likely effects of the agreement, and evidence that dentists behaved differently in markets that were clearly competitive.

Most directly on point is the Supreme Court's decision in *National Collegiate Athletic Association v Board of Regents (NCAA)*,³⁵ involving a challenge to an agreement among major US college football programs to limit the sale of broadcast rights to their games. (College sports are uniquely huge businesses in the United States. Top universities attract over 100,000 fans to football games and football programs in top conferences average over \$6 million in annual profit.) Once the court found that the challenged restraint had a substantial effect on output, it imposed a 'heavy burden' on the defendants to justify the agreement. The court readily concluded that the defendants' justifications could not be sustained.

As explained elsewhere,³⁶ the standard that best reconciles these conflicting Supreme Court cases is the pathmarking decision in *United States v Addyston Pipe & Steel Co.*,³⁷ which has been hailed by scholars across the ideological spectrum.³⁸ In that decision, William Howard Taft J (later President of the

31 Ibid, at 351.

32 Ibid, at 352.

33 Similarly, in *Catalano, Inc v Target Sales, Inc* 446 US 643 (1980), the Supreme Court summarily reversed, in a brief per curiam opinion, a court of appeals' holding that a rule of reason inquiry was necessary to evaluate an agreement among rival beer wholesalers to standardise the credit terms they would offer. The agreement did not lack any redeeming value: the defendants credibly argued that the agreement made actual beer prices more visible and thereby facilitated vigorous price competition.

34 476 US 447 (1986).

35 468 US 85 (1984).

36 S F Ross, *Principles of Antitrust Law*, Foundation Press, Mineola, NY, 1993, pp 121–43.

37 85 Fed 271 (6th Cir 1898), aff'd, 175 US 211 (1899).

38 See, eg, L A Sullivan and W S Grimes, *The Law of Antitrust*, West Publishing, Eaton, MN, 2000, pp 191–2 (*Addyston Pipe* is the 'true precursor' of the per se rule and 'a rational and useful way of distinguishing lawful and unlawful restraints'); R H Bork, *The Antitrust*

United States and then Chief Justice) held that a restraint of trade was unenforceable at common law and illegal under the Sherman Act unless it was 'merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party'.³⁹ Under this standard, it would appear that if the evidence showed that the 14-team term was not necessary for the creation of the new National Rugby League, the result in *Souths* would have been different had the case arisen in the United States. Because the agreement in *Souths* facially reduced output in the market for competition organising services, evidence that the exclusion was not necessary would appear to make it subject to condemnation under *NCAA* as well as *Maricopa*. Evidence that leagues that face rivals do not ordinarily refuse to provide competition organising services to financially viable clubs would appear sufficient for a finding of liability under *Indiana Federation of Dentists*. Moreover, although group boycotts are summarily condemned in the United States only when the boycott targets rivals,⁴⁰ the Rabbitohs were indeed rivals of one of the conspirators, in that News Corporation maintained controlling or substantial investments in several clubs.⁴¹

Indeed, perhaps the closest US analogy to the rugby league saga was the accord ending the inter-league rivalry between our National and American Football Leagues in 1966. It was widely accepted that the merger would not be lawful under US antitrust law (notwithstanding competition from extremely popular college football programs and overlapping seasons with baseball, basketball and hockey). The merger was thus authorised by special legislation, but only upon the express condition that more, not fewer, teams participated in the combined competition.⁴²

Paradox: Policy at War with Itself, Basic Books, New York, 1978, p 26 ('one of the greatest, if not the greatest, antitrust opinions in the history of the law').

³⁹ Above n 37, at 284.

⁴⁰ See *Northwest Wholesale Stationers Inc v Pacific Stationery & Printing Co* 472 US 284 (1985) at 294. Australian law does not limit group boycott condemnation to rivals: *Hughes v Western Australian Cricket Ass'n* (1986) 19 FCR 10; 69 ALR 660 (condemning boycott by Western Australian cricket clubs of player who had led a team on tour to South Africa in defiance of the then-extant national ban on sporting competition with that country because of its apartheid policy).

⁴¹ See above n 14 and accompanying text.

⁴² See PL 89-800, § 6(b)(1), 80 Stat 1515 (1966), codified at 15 USC § 1291 (antitrust laws do not apply 'to a joint agreement by which the member clubs of two or more professional football leagues . . . combine their operations in expanded single league . . . if such agreement increases rather than decreases the number of professional football clubs so operating').

It would also appear that, if this case arose today, the US enforcement agencies would challenge this agreement without necessarily undertaking a full analysis of the extent to which rugby league competed against other codes, or other matters that Australian courts would be required to consider if analysing South's exclusion under s 45(2)(a)(ii). Agency guidelines provide that agreements among competitors to reduce output are normally considered illegal per se, see Federal Trade Commission and US Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors*, April 2000, p 3, available at <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>. The ARL-News agreement that they would reduce the number of clubs for whom they would jointly provide competition organising services facially would fall within that rubric. The guidelines further specify that joint

Construing the statute to permit a finding of illegality for overly restrictive agreements that exclude patrons from supplies, without showing a substantial lessening of competition in the sense of supra-competitive pricing in an economically relevant market,⁴³ is also consistent with the approach taken by the common law of restraint of trade. Under the common law, restraints are only valid if reasonable, and overbroad restraints have always been held unreasonable without a full inquiry demonstrating a substantial lessening of competition. Consider the pathmarking case of *Mitchel v Reynolds*,⁴⁴ upholding as reasonable a covenant ancillary to the sale of a bakery providing the seller would not compete for five years within a parish of London. Clearly, an overly restrictive covenant, ie, one that was not necessary to effectuate the sale of the business, would have been struck down, without the need to define the relevant market as bakeries or the geographic market within London. The leading Australian treatise on the subject notes that one of the key issues raised under the modern law of restraint of trade is whether the restraint is 'no wider than reasonably necessary to protect the covenantee's legitimate interest'.⁴⁵

Principles of statutory interpretation

Because the TPA provides a more detailed regime than contained in the broad language of the Sherman Act, the High Court's decision might be justified, even if not reflecting optimal competition policy, if it were compelled by the literal language of the statute or by established principles of statutory construction. A close examination of these points, however, suggests the opposite result: *Souths* exclusion falls within the literal language of s 4D, certainly in light of the canon of broad construction mandated by the precedents. Previous High Court decisions, including *Devenish v Jewel Food Stores Pty Ltd*, suggest that ambiguities in the TPA are to be interpreted to promote 'a broad construction', consistent with 'the wide, remedial and protective ambit' that parliament designed, and thus require 'strong reasons . . . to justify an interpretation of the provision which would narrow the scope of the provision and exclude conduct falling within its literal terms'.⁴⁶ These precedents suggest that Australian courts therefore have rejected the *laissez*

venture agreements that may reduce output are none the less examined under a detailed rule of reason where they are 'reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity': *ibid*, at 4. Where, as here, the plaintiffs assert that the restrictive term was not necessary, no further market analysis would be required if the assertion were proven.

43 In a perfectly competitive market, rivals whose combination does not confer market power will not be able to exclude patrons, because of the availability of alternate purchasers. In a market characterised by product differentiation, though, suppliers of intermediate goods and services might be able to sell only to the conspirators, even though the defendants face rivals using different inputs in the retail market. See above n 22.

44 (1711) 24 Eng Rep 347 (KB).

45 J D Heydon, *The Restraint of Trade Doctrine*, 2nd ed Butterworths, Sydney, 1999, p 27.

46 (1991) 172 CLR 32 at 43-5; 99 ALR 275 (HC). See also *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494; 158 ALR 333 at [99] (HC).

faire arguments of commentators whose faith in the self-correcting nature of markets is so strong that they urge that competition law be narrowly construed.⁴⁷

The court's precise holding was that News and the ARL did not have a purpose to deny competition organising services to Souths, because they hoped (and perhaps even expected) that voluntary inducements would reduce the number of teams in the merged competition to 14. This strikes an outside observer as inconsistent with the broad construction mandate of prior cases such as *Devenish*. As a matter of literal construction, it would appear that an agreement to restrict services to a particular class of persons that is conditional is still an agreement to restrict services. Consider the infamous story, popularised in 'The Godfather' movie, where a mafia hit-man puts a gun to the head of a famous band leader and threatens to shoot him if he refuses to sign a release excluding the Godfather's friend from an unfavourable contract (the famous 'offer he couldn't refuse'). Let's assume that the Godfather fully hoped (murder is messy) and expected (he usually gets his way) that the band leader would sign the release. Now if the band leader stubbornly refused, and was killed by the Don's hit-man, could anyone sensibly claim that the Don did not conspire for the 'purpose' of murder?⁴⁸ More within the realm of competition law, consider a classic US precedent establishing the per se illegality of group boycotts, *Fashion Originators' Guild v Federal Trade Commission*.⁴⁹ Here, as a private effort to prevent rivals from copying fashions and designs that were not protected by patent, copyright, or trademark, the leading designers agreed to boycott any retail outlet that sold 'pirated' clothing. After *Souths*, would s 4D apply to a similar boycott in Australia if credible testimony showed that the defendants hoped and anticipated that all retailers would fall into line so that no one would ever be boycotted?

The court was perhaps misled by the analysis in the initial decision by Finn J,⁵⁰ cited with approval in the opinion of Gummow J,⁵¹ that one denied services because of a collective decision among sellers is either 'a target for exclusion' who can take advantage of s 4D or 'merely an unsuccessful contender for selection in a process not designed to preordain that particular outcome', which falls outside the scope of the section. Rather, there is a third

47 See, eg, F Easterbrook, 'The Limits of Antitrust' (1984) 63 *Texas L Rev* 1 at 10. But see Pengilly, above n 13, at [62] and n 98 (citing Easterbrook favourably).

48 With respect to Callinan J, who wrote that News' purpose in insisting, over ARL's objection, on the 14-team provision was 'the achievement of a viable and sustainable national competition' (above n 9, at [215]), this would be like the Godfather insisting that his purpose was the elimination of a welfare-reducing business covenant that shackled the development of a great artistic talent.

If it is accepted that a threat to prevent or restrict services collectively falls within s 4D even if the threat is conditional and the parties hope and expect not to carry it out, then Souths clearly have a 'defining characteristic distinguishing it from others': cf Callinan J, above n 9, at [217]. The background to the agreement makes it clear that News sought not only to limit the competition by excluding existing rugby league clubs, but in particular sought to lessen the number of Sydney-based clubs in the competition. See above n 25 and accompanying text.

49 312 US 457 (1941).

50 (2000) 177 ALR 611 at [282].

51 Above n 9, at [71].

alternative. One can be denied services pursuant to an unnecessarily restrictive output restricting term, adopted without malice, but because the sellers' economic interests are served by eliminating a particular 'victim' at another level from the marketplace. In such a case, it is certainly fair to say that a purpose of the sellers' agreement is to exclude the victim. Indeed, the High Court's subsequent decision in *Rural Press Ltd v ACCC*⁵² would seem to confirm this view. In that case, the court held that s 4D was violated by a market division agreement because victimised consumers were a 'particular class of persons', even though they were neither targeted for exclusion nor unsuccessful contenders for the defendants' sales.

Although the wording of the TPA does not give the High Court the same flexibility that their US counterparts have to require 'an enquiry meet for the case',⁵³ the phrasing of s 4D is sufficiently 'malleable' to achieve desired results.⁵⁴ A better way to read s 4D is to apply it to cases where the foreseeable consequence of the defendants' agreement is not just to deprive sellers or buyers of the *defendants'* service, but to deprive them of services necessary to viably compete, *and* where the concerted decision to restrict supply is not essential to some other legitimate business activity. Where, as in the restaurant example provided by the court, two former rivals form a joint venture that happens to reduce their joint output, their purpose may be said not to restrict supply of dining services to any class of persons, since presumably other firms are substitutes. Even in *Souths*, if the 14-team provision were essential to form the merged National Rugby League, then it could not be fairly said that the purpose of the agreement was to exclude Souths. That exclusion would have been an inherent and unintended by-product of the broader agreement. But where, as alleged by Souths, the term was not necessary, then the purpose of insisting that the competition organising services be provided to only 14 teams and not Souths should be construed as falling within s 4D.⁵⁵

This reading of s 4D comports with the High Court's reasoning in *Rural Press Ltd v ACCC*, where the court noted that one of the reasons that parliament singled out boycotts for special condemnation was because of an abhorrence of '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'.⁵⁶ Although the principal opinion suggests that the per se ban on group boycotts, like the per se prohibitions on price fixing, is motivated principally by a legislative conclusion that these practices have no value,⁵⁷ from an outsider's perspective (and from the perspective of US antitrust law), the horizontal market division condemned in *Rural Press* required no extensive market findings because market power in these circumstances can

52 Above n 20.

53 *Cal Dental*, above n 4, at 780–1.

54 K McMahon, 'Church Hospital Board or Board Room?: The Super League Decision and Proof of Purpose under Section 4D' (1997) 5 *CCLJ* 129 at 129; W Pengilly, '*ARL v Super League*: What Does it Mean for Sporting Organisations?' (1997) 5 *CCLJ* 77 at 100.

55 The focus here, of course, must be on the 14-team term in the 1997 merger agreement. If at some later time a reduction to 14 teams was deemed necessary by the NRL board, that decision would not be subject to s 4D challenge as it would not arise from the joint decision of two former rivals.

56 Above n 20, at [82].

57 *Ibid.*

fairly be presumed. Firms do not engage in naked market sharing that denies consumers access to supply of a good or service unless they have market power, and this justifies dispensing with full proof of an effect on competition. And even firms engaged in plausibly efficient joint conduct do not insist upon unnecessary and overbroad restrictions, unless they have some other purpose other than making their joint product efficient.⁵⁸ In contrast, where defendants are participating in a legitimate joint venture,⁵⁹ if they clearly lack market power then customers are not being prevented from access to desired goods or services. Even if they have market power, if the challenged restraint is necessary to effectuate the overall agreement, then the purpose is *not* to prevent supply.

The construction proposed here is also consistent with the general structure of the TPA. The default standard — requiring a showing of substantially lessened competition to impose liability — is based on the view that firms without market power will not harm consumers. As Judge Posner aptly put it, ‘[a] firm that has no market power is unlikely to adopt policies that disserve its consumers; it cannot afford to. And if it blunders and does adopt such a policy, market retribution will be swift.’⁶⁰ The terms of s 4D, imposing liability without such proof for certain exclusionary agreements, makes sense only if parliament believed that the difficulties inherent in proving a substantial lessening of competition justified summary condemnation in cases where the defendant’s conduct itself provides strong evidence of power.⁶¹

58 In the Full Federal Court review of *Souths*, Merkel J concluded, (2001) 111 FCR 456; 181 ALR 188 at [278], that although the ultimate purpose of the overall agreement was the achievement of a viable national rugby league competition, the immediate purpose was to exclude any clubs in excess of 14. This was, respecting the contrary view in *C Oddie and L McKeown*, ‘Joint ventures and exclusionary provisions: Anti-competitive purpose or unintended effects?’ (2002) 10 *CCLJ* 192 at 196, not a conflation of the purpose of the provision with the effect. If, as *Souths* alleged, the 14-team term was not necessary (or, to use the subjective test, not understood by ARL and News as necessary) to achieve a viable national competition, then there had to be some *other* purpose to explain why News would insist upon the limitation to 14 teams. That other purpose was to exclude Sydney clubs unless they agreed to merge, for reasons independent of the legitimate interest in maintaining the competition.

59 See, for example, the hypothetical agreement between A and B to jointly manufacture substitute products X and Y that includes an ancillary agreement to prevent the parties from independently manufacturing either product, raised in *ibid*, at 200. The High Court in *Rural Press* seems to agree: above n 22, at [84]–[85].

60 *Valley Liquors, Inc v Renfield Importers, Ltd* 678 F 2d 742 (7th Cir 1982) at 745.

61 The Minister introducing the Bill to amend the Act (Mr Howard) described the business activities involved in exclusionary contracts as ‘generally undesirable conduct’, requiring a ‘firm line’ where the relevant exclusion had the purpose ‘of restricting or limiting the trade of particular persons’. Australia, House of Representatives, Parliamentary Debates, *Hansard*, 3 May 1977, p 1476. As Kirby J noted in dissent, above n 9, at [118]:

From an economic point of view, such exclusionary provisions diminish the potential of unilateral decisions by market players; impose on others the aggregation of power which individual players may lack; and tend to be introduced by powerful market entities exerting what is the antithesis of competition. Such activities are frequently engaged in to prevent innovative market entry and to permit powerful players to divide the market like the Popes of old divided the world, for their own convenience and advantage.

Although obviously this does not describe every collective refusal to sell, parliament’s view that the best approach to deal with boycotts is to ban them all and allow the ACCC to authorise the exceptions, rather than to permit them all absent costly proof in federal court

Moreover, parliament recognised that this lessened proof requirement might result in the condemnation of some legitimate behaviour, for it not only permitted the ACCC to authorise otherwise illegal behaviour, but imposed a lessened requirement for authorising violations of s 4D.⁶² Read in this light, perhaps the NRL does compete in some markets vis-a-vis other codes (eg, sales of advertising for televised games; sale of sponsorship or naming rights; perhaps ticket prices in some specific geographic markets). However, the NRL did not compete with other codes in the provision of competition organising services to clubs. The question in *Souths* — for which, I submit, my approach to s 4D is the appropriate test — was whether the 14-team term was necessary to enhance the consumer appeal of rugby league by providing fewer clubs with more revenue to compete for the patronage of a set number of Sydney fans. If not, it is reasonable to infer that the term reduced competition, was unresponsive to strong demand for an independent Souths club, and designed to divide profits among fewer firms and enhance the NRL's bargaining power vis-a-vis clubs.⁶³ Applying Judge Posner's definition of market power, it is

that the effect may be to substantially lessen competition, seems quite reasonable. Some may question a legislative structure that broadly prohibits practices, many of which may well be contrary to the public interest, but then permit parties to seek immunity from an expert agency: see, eg, Pengilley, above n 13, at [56]. From an outside perspective, the ACCC authorisation procedure seems a reasonable attempt to accommodate the typical regulatory problem of minimising false positives, false negatives, and administrative costs. Parliament clearly felt that the Swanson Committee's recommendation that victims of boycotts prove substantially lessened competition drew a line that was under-inclusive: see above n 9, at [117] per Kirby J. In light of the difficulties that the US Supreme Court has had over the years in precisely developing standards for collective refusals to deal, parliament can hardly be faulted for its inability to draft a precisely targeted statute and its preference for a deliberately over-broad statute, with harm minimised by the authorisation process.

62 Section 90(7) requires a finding that the public benefit outweighs the detriment to the public resulting from a substantial lessening of competition. Contracts containing an exclusionary provision are not subject to s 90(7) but rather s 90(8), which simply requires a finding that the provision will result 'in all the circumstances' 'in such a benefit to the public that the proposed contract or arrangement should be allowed to be made'.

63 Although the implication is clear in the four opinions voting to uphold News' appeal that the 14-team term must have been a good idea for the NRL to accept it, there is strong evidence in the record and in economic theory that the term was neither essential for the viability of the new competition nor optimal in attracting consumers, but rather an artificial suppression of the number of clubs below that demanded by the public: cf *NCAA*, above n 35 (hallmark of antitrust violation is evidence that output is lower than it would otherwise be and output is unresponsive to consumer demand). As observed above at text accompanying nn 9–10, the pro-rata share of NRL clubs in various revenue streams distributed by the league would increase with fewer clubs, and News had a particularised interest in ensuring that News-owned clubs enhance their revenues. Although the NRL-participating clubs are constituents of the ARL, the ARL serves broader constituencies as well, and ARL opposition to the 14-team term may well have reflected a determination that the sport would be better off with more teams. Second, one of the important business policies that the NRL had to decide was the amount of money to be redistributed to the participating clubs and the amount retained by the NRL's partners, News and ARL. Artificially suppressing the number of teams in the competition obviously shifts the bargaining strength in favour of News.

This is not to suggest that there are not plausibly legitimate reasons to either limit the new competition to 14 teams, or even to specifically eliminate Souths. However, since this was a controversial issue, an outsider is puzzled as to why that decision could not have been left to the NRL Board at a later time, or why the ARL objected, if indeed the 14-team term enhanced the sport of rugby league.

difficult to claim that if the NRL's judgment turned out to be wrong, 'market retribution would be swift'.⁶⁴

Because a group boycott requires some economic power to be effective — hence its label as an 'exclusionary provision' — s 4D can be properly applied by exploring whether the defendants would likely have engaged in the challenged conduct if they faced serious competition from rivals offering services consumers perceived as close substitutes. As noted above, this is a technique used by US courts to determine both market power and the competitive effect of conduct,⁶⁵ and, indeed, is the test adopted by the High Court in *Melway* to determine whether a dominant firm's conduct constituted a misuse of market power under s 46.⁶⁶ Firms lacking power ordinarily do not conspire for the purpose of preventing a customer from receiving services; if they do, they will simply lose business to others.

Applying that test here, the court should have asked whether it is plausible that the NRL would have adopted this term if it faced serious competition from a close substitute league. Perhaps a smaller competition with fewer Sydney teams would result in greater appeal and so a non-monopoly rugby league would have also excluded Souths. On the other hand, the ARL could have allowed Souths to leave during the inter-league wars and chose not to do so. In any event, answering that question demonstrates the difference between this agreement — one part and parcel of an agreement between two leagues to end competition between them and that could well sacrifice the overall appeal of rugby league in the self-interest of the merging parties, and the process of exclusion by a single organiser of competition services whose sole interest was maximising profits for the game as a whole.⁶⁷ This is exactly why sound competition law needs to permit a finding of liability based on a showing that a firm has been unnecessarily excluded from the market, without the plaintiff being required to marshal the enormous evidence necessary to prove a substantial lessening of competition.⁶⁸

64 Professor Pengilley appears to acknowledge this when he observes that 'collectively to boycott an entity is necessarily a decision made by entities which have, or think they have, economic power in the market. Collective boycotting is not engaged in by weak market entities': above n 13, at [9]. See also *Re QCMA and Defiance Holdings* (1976) 8 ALR 481 (Trade Practices Tribunal) (where firms are 'sufficiently free from market pressures to "administer" own production and selling policies at [their] discretion', then significant market power exists). The evolution of the 14-team term strongly supports the conclusion that it was imposed as a discretionary matter, indeed over the objection of the ARL.

65 In *Indiana Fed'n of Dentists*, above n 34, the court noted that in several Indiana towns most dentists had agreed not to send x-rays to dental insurers who demanded them, while in other markets where there was no agreement to refuse to provide x-rays, dental insurers routinely received cooperation from dentists. This behaviour supports both the inference that the conduct was anticompetitive (not engaged in by parties not conspiring with one another) and that the defendants had market power (if the defendants lacked market power, they could not have profitably refused to cooperate with the insurance companies).

66 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1; 178 ALR 253 (HC).

67 Above n 9, at [210] per Callinan J.

68 Professor Pengilley argues that among the many reasons for amending s 4D is that as currently drafted it would summarily condemn any agreement among sports clubs that limit the supply of television rights: above n 13, at [52]. It is not clear that this would be so. Under the analysis set forth above, the sale of television rights ancillary to the organisation of a sporting competition would not be for the purpose of limiting supply to television networks, unless the sale was overly restrictive and the television networks' supply of programming

Sports and public policy

Finally, from the perspective of sound public policy relating to sports, the High Court's decision appears unfortunate. Any serious argument in favour of the ARL-News accord must be grounded in claims that the special nature of sports precludes inter-league rivalry. If these arguments have merit, they are best considered by the ACCC in an authorisation proceeding, not decided on the basis of casual assumption by federal judges in TPA cases. If we can infer from the ACCC's acquiescence in the merger that the commission would have likely accepted arguments about the need for a single premier competition in each sport, then the need for some review of overbroad restraints by those running the sport is even more important. In light of the abusive way that monopoly sports leagues in the United States have used their power to artificially limit the number of teams in the league in order to extort tax subsidies from localities,⁶⁹ if a league is going to set an artificial limit on the number of teams that can participate, an ACCC authorisation would seem to be the preferred path to take to ensure that the public interest is protected.

Conclusion

While the voluminous corpus juris of US competition law can provide some guidance for Australian judges, the flexible common law approach of the Sherman Act is quite different from the more detailed structure of the TPA. The latter generally requires a full and detailed economic inquiry in order to impose liability, while creating important exceptions for certain agreements among competitors that are to be summarily condemned, and in turn providing an administrative procedure for otherwise illegal agreements to be authorised. Whatever the context, an important feature of any sound competition law is the ability to ensure that firms with legitimate reasons to cooperate not engage in unnecessarily restrictive behaviour. Requiring those victimised by overbroad restraints to prove a substantial lessening of competition is not required by either the flexible standards of US law nor the traditions of the English common law of restraint of trade. Nor should the Australian TPA have been so construed. Rather, the TPA could have been creatively construed in *Souths* to permit pro-competitive restraints necessary to effectuate collaborative activity, as beyond the scope of the per se provisions of s 4D. At

would indeed be limited by the agreement. More significantly, the way that most sports leagues operate is that clubs grant the television rights to the league (this agreement would not be exclusionary under s 4D), and then *the league* sells the television rights, so any agreement between the league and a network to limit rights would not be an agreement among competitors necessary to trigger the collective boycott provisions of the Act. What made *Souths* unusual was that the exclusion was accomplished by agreement of two rival leagues.

⁶⁹ Although Professor Pengilly correctly states that a joint agreement among US football clubs to forego the sale of broadcast rights for their games into the home territory of another team while that team was playing at home was upheld in *US v National Football League* 116 F Supp 319 (ED Pa 1953), that same opinion condemned an agreement to forego sale of broadcast rights at other times when clubs would otherwise compete for television audiences. The court did so based on its conclusion that the latter agreement was not reasonably necessary to promote the league's legitimate interest. In so holding, the court did not require the government to prove that the NFL enjoyed any degree of market power.

the same time, the High Court should have found that overbroad agreements depriving targeted patrons of necessary services are indeed imposed for the purpose of restricting the supply of those services to these patrons, and warrant condemnation without the costly exercise of proving market power.