FEDERAL COURT OF AUSTRALIA

South Sydney District Rugby League Football Club Ltd v News Ltd
[2000] FCA 1541

TRADE PRACTICES – exclusionary provision – rival sporting competition organisers making and giving effect to understanding or arrangement to form a single competition – fundamental term of arrangement that new competition involve fourteen teams achieved through mergers, joint ventures or an admission criteria process – whether a substantial purpose of parties in making or giving effect to arrangement was to prevent, restrict or limit supply or acquisition of various services to or from particular persons or classes of person for purposes of sections 45(2) and 4D of *Trade Practices Act* 1974 (Cth) – whether in competition in relation to services – whether services were "services" for purposes of section 4 of *Trade Practices Act* – time at which parties are required to be in competition in relation to services subject of arrangement – consideration of nature of exclusionary provisions – whether fourteen team term aimed at "particular classes of persons" – whether relevant class constituted in the circumstances – statutory defences – whether available in circumstances.

TRADE PRACTICES – exclusionary provisions – relief – appropriate relief in circumstances – considerations.

AGENCY – existence of relationship – whether relationship with independent contractor was that of principal and agent – significance of control – effect of express disclaimer of agency – weight to disclaimer in circumstances.

PARTNERSHIP – formation – whether conduct of parties was carrying on business of partnership or acts in anticipation of partnership – later formal formation of partnership – retrospective commencement date in formal partnership agreement – effect – evidential value for purposes of actual commencement date.

CONTRACT – implication of terms – informal contract – test for implication – distinction between implication in fact and in law – whether terms necessary for reasonable or effective operation of contract in circumstances – implied duty of good faith and fair dealing – whether a legal incident of contract or particular classes of contract – whether qualifies conduct reasonably taken to promote legitimate business interests – content of alleged terms – whether possible to imply objective standard of fairness in circumstances.

CONTRACT – relief – whether breach of contract would found relief in circumstances – considerations.

TRADE PRACTICES – misleading and deceptive conduct – representations – express and implied – as to future matter – sections 52 and 51A of *Trade Practices Act* 1974 (Cth) – whether properly characterised as aims – whether reasonable grounds for making representations.

TRADE PRACTICES – misleading and deceptive conduct – relief – whether injunctive relief appropriate in circumstances – factors

Trade Practices Act 1974 (Cth), ss 2, 4D, 4F, 45, 47, 51A, 52, 84
Uniform Partnership Act 1997 (US), §308
Partnership Act 1892 (NSW), s 1
Corporations Law (1996 Reprint), s 183
Sale of Goods (Vienna Convention) Act 1986 (NSW)

South Sydney District Rugby League Football Club Ltd v News Ltd (1999) 169 ALR 120 considered
News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410 applied
International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co (1958) 100 CLR 644 referred to
Garnac Grain Co Inc v HMF Faure & Fairclough Ltd [1968] AC 1130 referred to
Branwhite v Worcester Works Finance Ltd [1969] 1 AC 552 referred to
Board of Trade v Hammond Elevator Co 198 US 424 (1905) referred to
Colbron v St Bees Island Pty Ltd (1995) 56 FCR 303 referred to
Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385 referred to
Ex parte Delhasse; In re Megevand (1878) 7 Ch D 511 referred to
Salomon v Salomon & Co [1897] AC 22 referred to
Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89 referred to
Briggs v James Hardie & Co Pty Ltd (1989) 16 NSWLR 549 referred to
CFTO-TV Ltd v Mr Submarine Ltd (1994) 108 DLR (4^{th}) 517 referred to
Lower Hutt City v Attorney-General [1965] 2 NZLR 65 referred to
Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd (1931) 46 CLR 41 referred to
Northern v McGraw-Edison Co 542 F 2d 1336 (1976) referred to
Condus v Howard Savings Bank 986 F Supp 914 (1997) referred to
Royal Securities Corp Ltd v Montreal Trust Co (1966) 59 DLR (2d) 666 referred to
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449 referred to
Roberts v Murlar Pty Ltd (1986) 68 ALR 62 referred to
Queensland Aggregates Pty Ltd v Trade Practices Commission (1981) 57 FLR 314 referred to
Trade Practices Commission v TNT Management Pty Ltd (1985) 6 FCR 1 referred to
Eastern Express Pty Ltd v General Newspapers Pty Ltd (1991) 30 FCR 385 referred to
ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1) (1990) 27 FCR 460 applied
Dowling v Dalgety Australia Ltd (1992) 34 FCR 109 referred to
Trade Practices Commission v Garden City Cabs Co-Operative Ltd (1995) ATPR §41-410 referred to
Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc (1989) 24 FCR 127 referred to
SA Brewing Holdings Ltd v Baxt (1989) 87 ALR 134 referred to
Schindler Lifts Australia Pty Ltd v Debelak (1989) 89 ALR 275 referred to
Health Services for Men Pty Ltd v D'Souza (2000) 48 NSWLR 448 referred to
Waddington v O'Callaghan (1931) 16 TC 187 referred to
Saywell v Pope [1979] STC 824 referred to
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266 referred to
Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1982) 149 CLR 337 referred to
Byrne v Australian Airlines Ltd (1995) 185 CLR 410 applied
Breen v Williams (1996) 186 CLR 71 applied

Australis Media Holdings Pty Ltd v Telstra Corporation Ltd (1998) 43 NSWLR 104 referred to
Simonius Vischer & Co v Holt & Thompson [1979] 2 NSWLR 322 referred to
Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 referred to
Service Station Association Ltd v Berg Bennett & Associates Pty Ltd (1993) 45 FCR 84 referred to
Hughes Aircraft Systems International v Airservices Australia (1997) 76 FCR 151 referred to
Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349 referred to
Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd (1999) ATPR §41-703 referred to
Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236 referred to
Asia Television Ltd v Tau's Entertainment Pty Ltd [2000] FCA 254 referred to
Advance Fitness Corporation Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd [1999] NSWSC 264 referred to
Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310 referred to
Commonwealth v Amann Aviation Pty Limited (1991) 174 CLR 64 referred to
NSW Cancer Council v Sarfaty (1992) 28 NSWLR 68 referred to
MJB Enterprises Ltd v Defence Construction (1951) Ltd (1999) 170 DLR (4th) 577 referred to
Tymshare Inc v Covell 727 F2d 1145 (1984) referred to
Willow Grange Pty Ltd v Yarra City Council, (SC of Vic, Byrne J, 1 December 1997, unreported) referred to
Zusman v Royal Western Australian Bowling Association (Inc) [1999] WASC 86 referred to
Sykes v Reserve Bank of Australia (1998) 88 FCR 511 referred to
Bowler v Hilda (1998) 80 FCR 191 referred to
Wheeler Grace & Pierucci Pty Ltd v Wright (1989) ATPR §40-940 referred to
Ting v Blanche (1993) 118 ALR 543 referred to
Miba Pty Ltd v Nescor Industries Group Pty Ltd (1996) 141 ALR 525 referred to
James v Australia and New Zealand Banking Group Ltd (1986) 64 ALR 347 referred to
Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31 referred to
Marks v GIO Holdings Ltd (1998) 196 CLR 494 referred to
ICI Australia Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248 referred to
Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd (1997) 78 FCR 197 referred to

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2A Corpus Iuris Secundum "Agency"
Fisher, *Agency Law*, (2000)
10 *Halsbury's Laws of England*, 1st Ed, (1909)
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Finn (ed), *Essays on Contract*, (1987)
Fried, *Contract as Promise*, (1981)
Farnsworth, *Contracts*, (2nd Ed, 1990)

SOUTH SYDNEY DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED v NEWS LIMITED & ORS
N 1295 of 1999

FINN J
3 NOVEMBER 2000
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1295 OF 1999**

BETWEEN:	**SOUTH SYDNEY DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 002 487 390)** **APPLICANT**
AND:	**NEWS LIMITED (ACN 007 871 178)** **FIRST RESPONDENT**
	NATIONAL RUGBY LEAGUE INVESTMENTS PTY LIMITED (ACN 081 778 538) **SECOND RESPONDENT**
	AUSTRALIAN RUGBY FOOTBALL LEAGUE LIMITED **THIRD RESPONDENT (ACN 003 107 292)**
	NATIONAL RUGBY LEAGUE LIMITED (ACN 082 088 962) **FOURTH RESPONDENT**
	AND the Fifth to Twenty-third Respondents set out in the Schedule

JUDGE:	**FINN J**
DATE OF ORDER:	**3 NOVEMBER 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The matter be set down for further directions on the issue of costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1295 OF 1999**

BETWEEN:	**SOUTH SYDNEY DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 002 487 390)** **APPLICANT**
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JUDGE:	**FINN J**
DATE:	**3 NOVEMBER 2000**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

INTRODUCTION

1 On 19 December 1997 both Australian Rugby Football League Ltd ("ARL") and News Ltd ("News") issued media releases announcing their intentions to enter into a partnership that would unite their respective rugby league competitions in 1998 so bringing to an end what had become known as the "Super League war". Fundamental to the competition proposed was that by the year 2000 it would be reduced to one of fourteen teams. This "fourteen team term", as it has been called, is at the centre of the dispute in this proceeding.

2 The applicant, South Sydney District Rugby League Football Club Ltd ("Souths"), was a foundation club in the premiership rugby league competition that began in Sydney in 1908. Thereafter it was a constant participator in premier competitions until the end of the 1999 competition when it was unsuccessful in securing admission to the fourteen team National Rugby League competition ("the NRL competition") for the year 2000. This proceeding is concerned with Souths' objections both to the fact of its exclusion from the NRL competition and to the manner of it.

3 The respondents to the proceeding are many. All of the football clubs and entities

either that participated in the selection process for the NRL competition in 2000 or that were licensed to participate in that competition have been joined. Theirs has been a passive role in the litigation, Souths having made plain that it does not seek by its claim to have any team excluded from the NRL competition that was successful in being selected for the competition in 2000. Souths' principal targets are ARL, News, and two other companies. One of these is National Rugby League Investments Pty Ltd ("NRLI"), a News subsidiary, that became ARL's partner in the partnership ("the NRL partnership") that was envisaged in the 19 December 1997 announcements. The other company, National Rugby League Ltd ("NRL"), is jointly owned and controlled by ARL and NRLI and was appointed by them as the NRL partners to conduct the NRL competition. I should note that in these reasons the acronyms NRL and NRLC Co are used to refer to the same entity. The relief sought in the proceeding whether by way of declarations, injunctions or damages is limited to that against News, NRLI, ARL and NRL. I should note that the practical defence of this proceeding has been conducted by News, NRLI and NRL. ARL has not sought actively to advance a defence independent of those put by these other respondents.

4 Souths' claims fall into three general categories. The first (which I will call "the s 45 claims") is that it was unlawful for ARL, News, NRLI and NRL to make or give effect to the agreement for a fourteen team term in 2000, as also for a related term for the funding of the teams in 2000, as those terms were exclusionary provisions within the meaning of s 4D and s 45 of the *Trade Practices Act* 1974 (Cth) ("the TP Act"). There is an additional, alternate s 45 claim to which it is unnecessary to refer at this point. The second category of claims ("the contract claims") is based on breaches of an alleged contract Souths made with the NRL partners on 24 March 1998. The various breaches complained of relate to implied terms which (compendiously described) obliged the partners to adopt and to apply fairly and reasonably, criteria for selection for the 2000 competition that were themselves fair and reasonable. The essence of Souths' various grievances is that it was unfairly dealt with by the partners. The third category ("the s 52 claims") involves alleged contraventions of s 52 of the TP Act, it being contended that various representations made as to the formulation and application of the selection criteria for the 2000 competition were misleading or deceptive or were likely to mislead or deceive. There is considerable overlap in the substance of the contract and the s 52 claims. It will be necessary later to refer to the pleadings in some detail. As I will indicate, for certain purposes it will be as important to emphasise what has *not* been pleaded as what has been pleaded.

5 Turning to the structure of my reasons, the proceeding raises a range of issues of factual and legal complexity. The format of these reasons will reflect this. Necessarily they are of some length. To assist understanding I have included a schedule that contains a glossary of terms, acronyms and proper names. Likewise, before dealing with the three distinct categories of claim made by Souths, I have provided both a description of the principal witnesses who gave evidence in the proceedings and a general chronology of events so as to provide the setting of the various claims made. As each particular claim in each separate category is considered, the additional factual material relevant to it will be separately outlined.

6 I should also indicate at the outset that, given the conclusions at which I have arrived on some number of matters, I have not always gone on to consider claims founded on contrary conclusions. In consequence there is a range of very detailed factual issues to which I have not referred. I have taken this course in the interests of time. It has been clear to all concerned, myself included, that a speedy resolution of this proceeding is required if such opportunity as Souths may have to secure admission to the 2001 competition is not rendered illusory by the passage of time.

PART I: PRELIMINARY MATTERS

1. PRINCIPAL WITNESSES

7 This alphabetical list is of those persons who gave evidence whose positions made them significant actors in the events that gave rise to this proceeding. Frequent reference will be made to them. I should indicate that, where their evidence (oral or affidavit) is recounted in these reasons, I accept that evidence save where I indicate to the contrary.

8 1. Edwin Farish. Mr Farish is a chartered accountant. He was Finance Manager of NRL from October 1998 to January 2000. He was a member of the Admission Criteria Committee ("the ACC").

9 2. Richard Fisher. Mr Fisher is a partner in the firm of chartered accountants, Ernst & Young. He has employment experience in, amongst other things, auditing and business strategy advice, and an expertise that focussed on major sports, events and venues. He led a team that advised NRL on the application of the Admission Criteria that determined the selection of clubs to participate in the NRL competition in 2000.

10 3. Ian Frykberg. Mr Frykberg has had a long career in both the print and television media particularly in relation to sport. From late 1996 until 1998 he was News' Executive Director of Sport, a position that made him directly responsible for the operation of Super League in 1997. With Mr Macourt (below) he was responsible from mid-1997 for the negotiations with ARL that led to the formal establishment of the NRL competition in May 1998 and the formal end to what was known as the "Super League war" between News and ARL. He was an NRLI appointee to both the board of NRL and to the Partnership Executive Committee ("the PEC") of the NRL partnership.

11 4. Peter Jourdain. Mr Jourdain was chief operating officer of Super League Pty Ltd ("Super League") from 1996 until early 1998 when he became General Manager of NRL. He remained in that position until November 1998. He is an accountant. He was responsible for integrating the Super League interests into the NRL competition. He led the team that developed the Admission Criteria for the 2000 competition.

12 5. Peter Macourt. Mr Macourt is a director of News and of NRLI. He has been the Chief Financial Officer of News since 21 July 1994 and its Deputy Chief Executive Officer since 1 September 1998. He was appointed by NRLI to the NRL Partnership Executive Committee. With Mr Frykberg he was responsible for negotiations with ARL to merge the ARL and Super League competitions.

13 6. Ian Philip. Mr Philip has been Chief General Counsel of News since 1997. He was an NRLI appointee to the NRL Partnership Executive Committee. He was involved from the beginning of 1998 in negotiating and settling the documentation that effected the formal merger of the ARL and Super League competitions in May 1998.

14 7. George Piggins. Mr Piggins was appointed Chairman of the board of directors of Souths in August 1990. He has had a long association with the club both as a first grade player and as a coach. He was an opponent of the in principle peace deal agreed to by most of the ARL clubs on 19 December 1997. Since 1998 he has asserted Souths' right to challenge the fourteen team term.

15 8. Neil Whittaker. From late 1996 until mid-1998 Mr Whittaker was Chief Executive Officer ("CEO") of ARL and General Manager of NSWRL. In January 1998 he was nominated CEO of NRL. He relinquished that position in October 1999. He was a first

grade player for Balmain and a director on Balmain's board for two periods. He was one of ARL's negotiators with News from July 1997.

2. GENERAL CHRONOLOGY

Background: 1907-1997

16 Souths was formed at a meeting held in Redfern, Sydney, on 17 January 1908. It was the third of nine clubs formed that year and won the first premiership competition conducted by NSWRL in the same year. NSWRL was established in 1907. Both it and the clubs of that time were unincorporated associations. The clubs constituting NSWRL changed over time, some withdrawing, others joining. Of note for present purposes, Canberra and Illawarra joined NSWRL's competition in 1982. Brisbane, Newcastle and Gold Coast joined in 1988.

17 In 1982 Souths, in common with the other clubs, incorporated using the form of a company limited by guarantee. NSWRL took the same step on 21 December 1983. Early in December 1983 the General Committee of NSWRL passed a resolution to amend NSWRL's constitution to make it plain that the clubs were not entitled to participate in its competition as of right. This resolution was later reflected in NSWRL's articles of association on its incorporation. From 1984 until at least 1995, the clubs were required formally to apply on a year by year basis for admission to the NSWRL competition. At the time of the "Super League war" litigation between News, and ARL and NSWRL in 1995/1996, Rule 40 of the NSWRL rules provided that a club which had entered a team in one season would not be entered as of right in the following season, the board of NSWRL being entitled to refuse the application of any club to enter a team in any of NSWRL's competitions.

18 On 23 May 1986, ARL was incorporated. In 1992 an organisational review of ARL was conducted by a Dr G Bradley, apparently, for NSWRL. At the time of the Bradley Report there were sixteen teams in the competition. The Report will be referred to in a little detail later in these reasons. Here I would note that it recommended that, to enable the competition to become a national one, NSWRL's competition should be run by it on behalf of ARL. It likewise proposed, in the long term, a reduction in the number of clubs in that national competition to fourteen thus allowing the clubs to play two complete ("home and

away") rounds.

19 In 1995, the number of participating teams had grown to twenty, with the competition by then being conducted by NSWRL on behalf of ARL. This was the year when the Super League war began. News, through its subsidiary Super League, moved to establish its own premier rugby league competition. Its ten teams were in part newly created clubs and in part, former ARL clubs that had changed their allegiance. After protracted litigation, culminating in the decision of the Full Court of this Court in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, the Super League competition commenced in 1997. Its teams were, to abbreviate, Brisbane, Cronulla, Canberra, Penrith, Canterbury, Auckland, Perth, North Queensland, Adelaide and Hunter.

20 The ARL competition continued from 1995 but with now twelve teams. These were, again to abbreviate, Balmain, Manly, Norths, Parramatta, St George, Souths, Sydney City, Wests, Newcastle, Illawarra, Gold Coast and South Queensland. I would emphasise in passing the distinctly higher proportion of Sydney based teams in the ARL competition than in Super League's.

21 In March 1996, ARL and Optus Vision Pty Ltd ("Optus") entered into a sponsorship arrangement that resulted in the ARL competition being named the "Optus Cup". Optus in turn was to make significant financial provision for the participating clubs in 1997 ($2 million per club) and 1998 ($1.8 million per club). As from August 1995 ARL had as well a comprehensive funding agreement with Nine Network Australia Pty Ltd ("Nine").

22 In December 1996 Mr Whittaker was appointed General Manager of NSWRL and CEO of ARL. He relinquished both positions in mid-1998.

23 Souths continued to participate in the ARL competition, though still on the basis of annual applications to participate. By countersigned letter dated 18 July 1997, Souths contracted with ARL and NSWRL for the 1998 and 1999 seasons. The letter stated in part:

> *"Subject to the Club receiving the agreed funding of $1,800,000 not later than 30 October 1997 and $1,600,000 not later than 30 October 1998, the Club will:-*
>
> *(a) continue to support the ARL and the NSWRL in both the 1998 and 1999 seasons; and*

(b) participate in the Optus Cup Competition in those years.

The Club also authorises the ARL/NSWRL to negotiate with Optus Vision with a view to, if possible, accelerate the timing of payment of funding for each of the 1998 and 1999 seasons.

The Club continues to support the efforts of the ARL/NSWRL to seek a united competition."

24 This agreement was prompted by a letter from Optus to ARL of 18 July 1997 that stated, inter alia, that subject to confirmation of club loyalty for the 1998 and 1999 seasons (in the form loyalty agreements executed by the ARL clubs), Optus would continue to fund the 1998 and 1999 ARL seasons in the amount of $1.8 million per club per season. There were certain conditions attached to the funding that need not be recounted. Additionally, Optus agreed to continue to negotiate funding for the 2000 season and beyond. The letter also stated that ARL/NSWRL and Optus would continue to work together for a united competition and to minimise Optus' funding requirement under such a competition. It was noted that "there will be benefits from having one competition".

25 It is common ground between the parties that the ARL and Super League competitions were of similar standard and were the two premier rugby league competitions in Australia in 1997.

26 Between 1908 and 1997 Souths won twenty premierships (the last in 1971) and was the runner-up in thirteen finals and grand finals. It has won more premierships than any other club in the history of top grade rugby league and has produced more international players than any other club.

Factual Setting 1997-2000

27 The principal events from the commencement of negotiations for a peace deal in July 1997 until the formal merger of the two competitions in May 1998 are recounted in some detail in the various "Additional Factual Material" sections of Part II and Part III of these reasons. Reference to them here will be relatively brief.

28 By May 1997 Mr Whittaker and the Chairmen of ARL and NSWRL (Mr McDonald and Mr Lockwood) had concluded that the conduct of rival rugby league competitions had

caused substantial damage to the game. On 20 June Mr Whittaker made a presentation to the NSWRL board on the future of rugby league in Australia. The written report he provided contained three possible ways forward - do nothing; reduce the national competition to a Sydney competition; or negotiate a solution with News, Optus, Nine and others to rebuild the game. It advocated the last of these and proposed a particular model for the merged competition. It was to comprise twelve licensees, licensed by ARL on a tender basis, of which five were to be from Sydney, three from Queensland and four from other regional areas. It considered other options as well (fourteen, sixteen/eighteen and twenty team competitions).

29 The NSWRL board agreed in principle to a fourteen team competition in 1998 - this was subsequently changed to "a sustainable number of teams" reflecting a later ARL board resolution - and that there be only one competition in place. At an adjourned meeting on 24 June 1997 it was resolved that:

> *"The league continue discussions with Super League and television companies to achieve an acceptable outcome in the interests of rugby league in Australia."*

30 From the commencement of the 1997 season, meetings of Mr Macourt, Mr Frykberg and Mr Lachlan Murdoch were held by News at which the future of the Super League competition was raised. At a June meeting, and as a result of his becoming aware that Mr Whittaker was prepared to discuss with News a possible merger of the competitions, Mr Frykberg obtained Mr Murdoch's authorisation to have discussions with ARL, News' position being that:

> *". the competition would be called Super League;*
> *. the ARL would run representative and other football;*
> *. there would be 12 teams in the domestic competition; and*
> *. the competition would be jointly funded by News and the ARL."*

31 Discussions began in late June 1997. The ARL/NSWRL representatives were Mr Whittaker, Mr Lockwood and Mr McDonald. News' were Mr Frykberg, Mr Macourt and, for a time, Mr Cowley. The competition structure and number of teams were the subject of much consideration. News had proposed a twelve team competition; ARL, a sixteen team one. Mr Whittaker proposed as a compromise a fourteen team, home and away, competition phased in over three years. This was agreed to by News provided the phasing in was over

two years.

32 Negotiations broke down in late August and did not resume until the beginning of October 1997. In the interim ARL and NSWRL continued to develop their proposals for a National Rugby League Competition ("NRLC"). Those proposals were based on two documents prepared by Mr Whittaker - the "ARL/Super League Terms Sheet" of 31 July 1997 and "ARL/Super League Issues Paper" of 17 August. What these documents envisaged was a national competition conducted and managed by ARL through a joint venture company (NRLC Co) owned by ARL and News that would licence teams to participate in the competition. The transitional arrangements to achieve a fourteen team competition were, as stated in the Terms Sheet, that:

> *"3.1 It is proposed that 16 licensees participate in the 1998 NRLC.*
>
> *3.2 The reduction in the number of teams for the 1998 NRLC would be determined by the ARL clubs and the Super League clubs each contributing 5 'stand alone' teams ie existing clubs that will be a licensee in its own right [sic] in the 1998 NRLC.*
>
> *3.3 If clubs enter into joint ventures to form a licensee to participate in the NRLC, those licensees will be granted a five year licence and guaranteed funding for five years (1998-2002 inclusive). This provides an incentive to clubs to undertake joint ventures.*
>
> *3.4 In 1999 the NRLC will be reduced to 14 teams. At least 2 'stand alone' clubs in 1998 will not be entitled to participate as a 'stand alone' club in the 1999 NRLC, based on financial and other performance benchmarks set out in the licences."*

33 After the resumption of negotiations, the parties were by early December able to contemplate the preparation of a draft Memorandum of Understanding ("MoU"). ARL sought to revisit the fourteen team compromise. It was told that News' position was that this was no longer negotiable. By 10 December 1997 documentation entitled "Proposal for Competition Structure" had been prepared. It used a twenty team (1998), sixteen team (1999) and fourteen team (2000) formula. It provided positive incentives to merger. It provided that in the fourteen team competition there should be no less than six and no more than eight teams from Sydney and conversely no less than six and no more than eight from outside of Sydney ("the 8-6/6-8 split"). It prescribed the regions outside of Sydney until 2001. And it set out the priority order for licences in the event of too many teams meeting the criteria. This was (i) merged clubs (ii) regional clubs and (iii) stand alone clubs. The

only change of significance that was to occur in the competition structure thereafter was that, at ARL's request, the 1999 sixteen team provision was varied to allow up to twenty teams.

34 On 11 December Mr Whittaker presented to meetings of the boards of NSWRL and ARL a draft MoU which, with the boards' approvals, would be put to News. That MoU confirmed the intention of the parties to negotiate and finalise all necessary agreements to implement a merger of the two competitions. It proposed (i) a 50/50 partnership between ARL and Super League to operate the NRLC competition, the partnership to be managed by an executive committee comprising three Super League and three ARL nominees; (ii) the partnership would appoint a management company, NRLC Co (later to become NRL), to operate the competition on a day to day basis; (iii) each of ARL and Super League would use their best efforts to ensure that their respective clubs participated in the unified 1998 competition; (iv) NRLC Co would be a joint venture company equally owned by ALR and Super League and they would have equal representation on the board; (v) reflecting the earlier Competition Structure document, a competition structure leading to a fourteen team term in 2000, incentives for Sydney clubs to merge, an 8-6/6-8 split, and a priority order for the grant of licences in the event that the number of applicants exceeded the number of available licences; and (vi) each licensee would receive an annual grant of $2 million. Both boards resolved to meet again the following week to finalise decisions in relation to the merger proposals and to meet with the clubs.

35 On 17 December Mr Whittaker sent a memorandum to each of the clubs advising that a meeting of the CEOs and Chairmen of the clubs would be held on 19 December 1997. It would be followed by a meeting of the board of each of the clubs, and then by a meeting of the General Committee of NSWRL. The memorandum stated that:

> *"[t]he purpose of these meetings is to consider recommendations from the Boards of the NSWRL and the ARL on the terms and conditions of a proposed merger of the ARL and Super League Competitions, and if thought fit, to approve those terms and conditions."*

36 Early in the morning of 19 December at a NSWRL board meeting Mr Whittaker again presented a report on the merger proposals. They were similar to what was outlined above in the draft MoU. Subject to certain conditions that are not relevant for present purposes, the board adopted the recommendation that:

> *". The terms and conditions of the proposed ARL/Super League merger,*

as presented on 19 December 1997, when considered as a package, be agreed by ARL/NSWRL provided that

...

. *The ARL's negotiation team be authorised to continue further negotiations with Super League ...*

. *The ARL's negotiation team be authorised to enter into a Memorandum of Understanding substantially on these terms and conditions."*

A like meeting with a like outcome was held by the ARL board.

37 At the meeting later that day of the club CEOs and Chairmen, Mr Whittaker distributed an "Executive Summary" of the merger proposals. The detail of the summary will be referred to later in these reasons. Here I would note it provided (inter alia):

". All clubs given opportunity to participate in rationalisation process

. *50/50 ownership and control of NRLC competition."*

In like dot-point format it described, inter alia, (a) the National Rugby League Partnership, (b) NRLC Co that would be appointed "to operate the NRLC competition", (c) television and broadcasting rights, (d) the competition structure in terms reflecting the earlier "Competition Structure" document (including the incentives to merger, the 8-6/6-8 split and the priority order), (e) that "no deadlock provisions to apply" and (f) under the heading "Transparency":

". All arrangements will be transparent

. *Super League to disclose all interests which Super League or News has in any of the Super League clubs."*

38 At the subsequent meeting of its board of directors, Souths resolved to vote against the merger proposals. In the afternoon of 19 December the meeting of the General Committee of NSWRL took place. It approved the proposals in terms recommended by the NSWRL and ARL boards. Souths and Balmain were the only dissenters.

39 Both ARL and News issued media releases later the same day. The ARL release announced "in principle" agreement to a partnership with News for a united competition with a new jointly owned company to be formed to administer the National Rugby League Competition. Mr Whittaker was recorded as stating that had the "war" not ended the game

of rugby league would "continue to suffer enormous and perhaps irreparable damage"; that the clubs would have the ability and responsibility of deciding their own futures and would be given incentives to reduce overall numbers of teams to sixteen in 1999 which was "a year later than the ARL's original target set back when expansion was announced in 1992"; and that "by the year 2000 the competition will trim to 14 teams". The News announcement was to the same effect, noting that it had been agreed that Super League and ARL would reach agreement with (and make arrangements for) their respective clubs on financial matters. The Super League clubs, which were meeting elsewhere on that day, were informed of the agreement.

40 I would note in passing that the events and the documentation of 19 December 1997 are relied upon by Souths to establish the "understanding" which is the foundation of a number of its claims under s 45 of the TP Act.

41 Consequent upon a meeting of representatives of ARL, NSWRL, News, Super League, Optus and Nine on 22 December to consider the formation of NRLC Co and the funding necessary to achieve its establishment, Nine consented on 23 December 1997 to the formation of the company provided it entered into an agreement with Nine for free-to-air television rights. It also indicated it would provide additional funding to ARL that was provisional on both Optus and News making corresponding commitments. The following day News and Optus confirmed their preparedness to make funding available to ARL. This funding resulted in the ARL clubs each obtaining $1.5 million in addition to the $2 million to be provided to them as licencees of NRLC Co.

42 On 24 December 1997, ARL issued a media release announcing that ARL had secured the funding necessary to pave the way for the reunification of the game in 1998 in a single competition. Mr Whittaker was reported as saying:

> *"We could not send our clubs into what will be a testing two years without the resources to compete."*

43 On 23 December 1997 a version of the draft MoU considered by the boards of ARL and NSWRL on 11 December was sent to News. This was considered at a meeting between representatives of News and ARL/NSWRL on 24 December. Though subject to considerable alteration in detail, agreement was reached on the substance of the matters dealt with in the MoU though an agreed document was not then prepared and signed. I will in

these reasons refer to the 11 and 24 December draft MoUs as "the December MoUs".

44 It would appear that at the end of 1997 two Super League clubs, Perth and Hunter, ceased to exist.

45 From the beginning of 1998 developments began to occur on a number of fronts. Those employees of Super League and of ARL who were to join NRLC Co began work on preparing for the new competition including preparation of selection criteria for the 1999 and 2000 competitions. News began the process of securing the agreement of the Super League clubs to terms that would result in the release of its contractual obligations to them severally.

46 On 19 January 1998 a meeting of the proposed NRL partnership's PEC was held that determined that Mr Whittaker was to be the CEO of NRLC Co and Mr Jourdain its General Manager. On 22 January, a meeting of the "National Rugby League (NRL) Club Chief Executives" was held where it was made known that the Selection Criteria were being drawn up and were expected to be complete by the end of February. At some point before the end of February 1998 it was decided that clubs would not be subject to a selection process for the 1999 season. The seventeen clubs then still in existence would all participate in that season.

47 On 18 February 1998 ARL, NSWRL, News and Super League formally executed an MoU ("the 18 February MoU"). It carried forward with some alteration what was proposed in the December MoUs. Reference in some detail will be made to various provisions of this MoU later in these reasons. I would note in passing the MoU is one of the arrangements impugned in Souths' claims under s 45 of the TP Act.

48 From at least February 1998 onwards the negotiation and preparation of the voluminous documentation necessary formally to merge the two competitions was put in train.

49 On 23 February 1998 a match schedule of the first five rounds of competition commencing on 13 March 1998 was distributed to the media and to NRL club CEOs, who met on 25 February. On that day the "Proposed PEC" also met. It was updated on the formation of the partnership and NRL and on the process for determination of criteria for club licenses. It also was presented with a draft ten year Business Plan for NRL.

50 The 18 February MoU envisaged that the NRL partners would be ARL and Super League or a "wholly owned subsidiary of either of them". NRLI was incorporated on 25 February 1998. It was a wholly owned subsidiary of Super League. It formally became ARL's partner on the execution of the Partnership Agreement on 14 May 1998. I would note in passing there is an issue between the parties in this proceeding as to whether a partnership between ARL and NRLI was in fact formed at an earlier date.

51 On 6 March 1998 ARL wrote to Souths "confirm[ing] the opportunity to participate in the NRL Competition in 1998". That letter was the prelude to an exchange of correspondence between ARL and Souths and communications between Mr Piggins and Mr Whittaker which gave rise to the alleged contract of 24 March 1998 upon which Souths' contract claims are based. The correspondence and the surrounding circumstances are set out in detail in Part III of these reasons. Here I need merely note that the rights Souths alleges it has in relation both to the 2000 competition and to the Admission Criteria and the selection process stem, it is said, from this contract.

52 On 11 March Super League sent to each of the Super League clubs a letter for execution confirming the club's participation in the 1998 NRL competition. The club, and its franchisee entity, would be offered participation in the 1999 season provided they were solvent and had abided by the rules of NRL which were being promulgated, and provided that the Super League arrangements had been terminated. The letter contained an acknowledgment that the NRL competition would have "no more than fourteen participating clubs in 2000 or thereafter". A similar letter-agreement was also sent to Melbourne (a new club) to enable it to confirm its agreement to participate in 1998.

53 On 13 March 1998 the football competition commenced. Souths (an"ARL club") played Auckland (a "Super League club") in Auckland. I note in passing that there is an issue in this proceeding as to what, and whose, competition was being conducted on that day.

54 On or about 20 March, NRLI, ARL and two nominees of each of them executed the Members Agreement. This was in effect a shareholders' agreement for the NRL company that was about to be formed. On 25 March NRL was incorporated as a company limited by guarantee. Its articles of association were made subject to the Members Agreement. The substance of that agreement is set out in detail in Part II of these reasons.

55 In early April 1998 Mr Jourdain, who led the team that developed the Admission Criteria, circulated to NRL management a first draft of the criteria. These were substantially different in a number of respects from those later adopted by NRL.

56 On 22 April the NRL club CEOs met and were presented with a paper entitled "Timetable in relation to NRL Competition Structure Documentation". Comment on the Timetable was to be received by 24 April. On 28 April 1998 NRL circulated a revised version of the Timetable. The accompanying memorandum indicated that "in essence we have allowed for a longer period of consultation with the Clubs … the Clubs will now have essentially two months for proper consideration". Under the heading "Background", the Timetable stated (i) that NRL "must create and sustain a vigorous and sustainable competition"; (ii) that all clubs would be dealt with equally and in a consistent manner; and (iii) that although NRL would consult with each club, "ultimately the NRL will make the final decision on the basis of what is best for the NRL competition". The Competition Structure Documentation ("CSD") was to include the criteria for admission to the competition in 2000, the Franchise Agreement and the NRL rules. Again I would note in passing that the statements made in the 28 April paper under the heading "Background" found the first of Souths' claims under s 52 of the TP Act.

57 On 8 May 1998 NRL published the draft Admission Criteria in accordance with the Timetable, along with an accompanying explanatory statement for the media. The stated "Aims" of the draft criteria were to "create and maintain a viable national competition" and to "set and apply criteria for inclusion in the competition in a fair and reasonable manner". The heading "Method" provided for the provision of the criteria to "stakeholders" followed by a consultative period to "objectively evaluate suggestions from stakeholders". The criteria were set out in three phases: Basic Criteria (playing facilities, administration, solvency and development), Qualifying Criteria and Selection Criteria. It was noted in the introduction that the Selection Criteria outlined a mechanism to differentiate between competing tenderers, and was "intended to provide an objective basis for ranking tenderers through a calculation of measurable criteria, appropriately weighted". The statement of "Aims" in the draft criteria founds Souths' second claim under s 52 of the TP Act.

58 The consultative processes foreshadowed in the draft proposals were undertaken. Explanation to the clubs was offered and comments were received from them. A consultant

statistician was engaged for advice on the draft criteria and a number of reports were provided to NRL. Those reports dealt with such topics as how the criteria interacted, what risk there was of perceived bias in the weighting system proposed for the Selection Criteria, the transparency and integrity of the Selection Criteria, sponsorship and merger options. The report of 20 May 1998 noted that:

> *"The vastly different histories of the competing clubs together with the different existing facilities, locations etc. means that the playing field starts out being far from level with respect to all of the suggested draft criteria.*
>
> *If the selection criteria are a genuine attempt to end up with a fair result, then it is important that they be easily audited and difficult to manipulate.*
>
> *The draft criteria are not independent and in some cases difficult to audit.*
>
> *Actual performance on the field is least likely to be manipulated and has the benefit of being readily identifiable by the supporter base who are the essential stakeholders and who in many cases have been burned by the recent history and are already suspicious."*

59 The NSWRL Boundaries Committee provided a report to NRL on "Future of the National Rugby League Competition" that aimed in part "to … dissect and discuss the draft criteria". The consultative process did result in some changes being made to the draft criteria.

60 It should be noted of the consultative process that on 17 June 1998 Mr Bampton, Souths' CEO, sent a response to NRL in the form of a commentary document entitled "NRL Draft Criteria Document" expressing its reservations with aspects of the criteria. In summary it stated:

> *"South Sydney District Rugby League Football Club Ltd is opposed to the reduction of teams from twenty as at present constituting the National Rugby League. If the theory is that Sydney cannot support its traditional teams its not necessarily that there are to [sic] many teams rather than the game is fundamentally unhealthy.*
>
> *The Club has made its position abundantly clear it will if necessary seek relief in the courts to prevent its exclusion from and [sic] future competition conducted by the National Rugby League Ltd. The Club made its position clear on the 19th December 1997 and at various times thereafter.*
>
> *The Club has commented on the draft criteria without prejudice to its rights to pursue relief in the Courts and in an endeavour to avoid protracted litigation which would by its nature and content prove damaging not only to certain*

> *persons but also to the game of Rugby League. In our view Rugby League is an icon to be preserved for the people who love and support it, not a product to be carved up to the media for their own financial gratification."*

61 On 14 May 1998 the various News companies, ARL and NSWRL, NRL and Nine and Optus executed, as appropriate, what counsel has aptly referred to as a suite of documents which formally effected the merger of the competition and put in place a range of consequential arrangements. The centrepiece was the Merger Agreement that superseded the 18 February MoU. Its recitals stated that it was the parties' wish to merge the two existing competitions so that "there is one premier rugby league competition in Australia, called the NRL Competition, on and from the 1998 rugby league playing season". The Agreement stated the parties' objectives to be (cl 2):

> *"to implement the Merger so that:*
>
> *(a) public interest and support for the game of rugby league is maximised;*
> *(b) the viability and sustainability of the game of rugby league is protected; and*
> *(c) sponsors and media companies obtain access to an enhanced sports entertainment product."*

Clause 7 provided the definitive version of the competition structure. It is set out in full in Part II of these reasons. I would again note in passing that the fourteen team term in this agreement is impugned in Souths' claims under s 45 of the TP Act.

62 The other 14 May agreements to which reference should be made are the Partnership Agreement that formally established the NRL partnership and the NRL Services Agreement ("the Services Agreement"). The latter was executed by NRLI, ARL and NRL and appointed NRL to provide designated services to the partnership. These included (Sched 1) "conducting the NRL Competition in accordance with the Business Plan" approved by the partners. Clause 2.2 of the Services Agreement provided:

> *"In providing the Services, NRL will act solely as an independent contractor. Nothing in this Agreement will constitute, or be construed to be or create, the relationship of employer and employee, principal and agent, trustee and beneficiary, joint venturers or partnership between the Partners and NRL."*

The legal effect of this provision is in contention in this proceeding.

63 After further consideration of the Admission Criteria in July and August, NRL published its finalised version on 8 September 1998. There were three classes of criteria: (i) Basic Criteria, to be satisfied by all clubs, that dealt with playing facilities, club

administration, club solvency and input into development of the game; (ii) Qualifying Criteria, that were to be applied only to Brisbane, Auckland and Newcastle, which required, inter alia, that each demonstrate it had minimum revenue of $8 million made up of a number of specific minimum revenue targets; and (iii) Selection Criteria, that were to be applied to all teams that had participated in the "relevant years" (these were specified by individual criteria) save for teams that had merged early enough for the newly merged entity to participate in the 1999 competition. Only St George and Illawarra effected an "early enough" merger.

64 Some considerable part of the Selection Criteria warrants quotation:

"C. SELECTION CRITERIA

The purpose of this matrix included in this section is to rank Clubs that have not obtained a licence to participate in the NRL Competition in 2000 as at 1 October 1999.

Subject always to the overriding objective (previously advised to Clubs) of having no more than 14 teams in the NRL Competition in 2000, with no more than 8 and no less than 6 Sydney teams, and no more than 8 and no less than 6 Regional teams, selection of Clubs for admission in 2000 will be based on Club rankings after the application of these Selection Criteria.

All teams that have participated in the relevant years will be included for the purpose of the matrix calculation and therefore the relevant ranking.

(NB. Refer separate paragraph relating to joint ventures occurring before 1999 season.)

Criteria	*Note*	*Weighting*	*Measurement to Obtain Initial Points*
1 Crowd Numbers (Home Games)	*(a)*	*1*	*Ranked on a scale of 1-20, 20 being the Club with the highest aggregate crowd at home games.*
2 Crowd Numbers (Away Games)	*(b)*	*1*	*Ranked on a scale of 1-20, 20 being the Club with the highest relative aggregate crowds at away games.*
3 Competition Points	*(c)*	*1*	*Ranked on scale of 1-20, 20 being the Club with the best results over the past 5 years.*
4 Gate Receipts (Home Games)	*(d)*	*1.25*	*Ranked on a scale of 1-20, 20 being the Club with the highest gate receipts in dollar value from home games.*
5 Sponsorship	*(e)*	*2*	*Ranked on a scale of 1-20, 20 being the*

and Other Income			*Club with the highest total.*
6 Profitability	*(f)*	*1*	*Ranked on a scale of 1-20, 20 being the Club with the highest overall profitability.*

NOTES:

(a) Crowd numbers (home games) are measured as the total aggregate crowd (paying or complimentary) for the highest attended 16 games in 1998 and 1999 (does not include finals series).

(b) Each visiting team at a venue will be ranked on the basis of relative attendance.

The away team with the biggest crowd that year at the venue will be awarded twelve points, the away team with the second biggest attendance eleven, and so on.

Relative points at each venue will be added together to give an overall rank.

Ranks will be calculated for each season and then aggregated over 1998 and 1999 for a final score, ie the highest team in this category will score twenty points (refer to calculation section).

(c) The 1997 season will be excluded in the calculation of the rankings in this category.

The position earned by a team at the end of the premiership rounds will be ranked, with minor premiers in a given year awarded 20 points to the last placed team 1. The annual points will then be weighted on the following basis:

1995	*a weighting of*	*1*
1996	*a weighting of*	*2*
1998	*a weighting of*	*3*
1999	*a weighting of*	*4*

In the case of Gold Coast, Melbourne and Adelaide, the 1998 season will be given a weighting of four and 1999 a weighting of six.

(d) Gate receipts will be measured in accordance with the definition used for the Qualifying Criteria measurement and will be aggregated for 1998 and 1999 for the highest 16 gates over 1998 and 1999.

(e) Sponsorship and Other Income will be measured in accordance with the definition used for the Qualifying Criteria measurement and will be aggregated for 1998 and 1999.

(f) Profitability will be measured on the aggregate of profit and loss accounts for each Club for the 1998 and 1999 seasons as follows:

> *(i) For 1998, the Profit and Loss Account prepared under current Australian Accounting Standards.*
>
> *(ii) For 1999, the forecast Profit and Loss Account (prepared under the principles of current Australian Accounting Standards) taking into account actual results to 31 August 1999 and the forecast to 31 October 1999. The estimate for the remaining two months must be agreed by NRL.*
>
> *(iii) Any revenue or expense item properly attributable to the football clubs, must be included in the Profit and Loss for this calculation irrespective of which entity it is recorded [sic].*
>
> *NRL reserves the right to verify and challenge the validity of any amounts to be included (or excluded) in any of the revenue/cost items for this purpose. This extends to both the quantum and the source of the item. NRL shall have the discretion to obtain an independent opinion, at its cost. The final decision on the application of the Selection Criteria rests with NRL.*
>
> *Any change in venue, where requested by NRL, will be done in consultation with the two teams to ensure the possible effects on the Selection Criteria are appropriately dealt with."*

The criteria went on to provide a method of allocation of points to a team's ranking as against each criteria.

65 The significance of the "note (e)" reference to the definition of "Sponsorship and Other Income" in the Qualifying Criteria was that those criteria set a $2.25 million maximum on "News Ltd/ARL/Leagues club funding" for sponsorship and other income. As was indicated in the Qualifying Criteria:

> *"[t]he maximum of $2.25 million allowed by News Ltd/ARL/Leagues Club funding is a total from all categories. None of this can be taken into account in determining either the Net Gate receipts or the Net Sponsorship and other income (unless proved to NRL that it is valid)."*

66 I would note that one of Souths' contract claims is that $3 million funding it received from South Sydney Junior Rugby League Club Ltd ("Souths Juniors") was improperly excluded from its "sponsorship and other income" figure as it was treated as equivalent to benefits derived from a Leagues club. I would also note that the contract claims generally relate to the setting, content and application of the Admission Criteria. The third and fourth claims under s 52 of the TP Act relate to alleged representations made in or in consequence of, the publication of the Admission Criteria.

67 At the end of the 1998 season two clubs that had participated in the NRL competition,

Gold Coast and Adelaide, reached agreement with NRL that they would no longer participate in the competition. On 10 November 1998 NRL approved a joint venture between the St George and Illawarra clubs.

68 The 1999 season commenced on 13 March with seventeen teams participating. Though it had received a Club Agreement for that season from NRL, Souths (as also several other clubs) did not sign it.

69 On 21 April 1999 NRL distributed a document, "NRL Admission Criteria Process", to the clubs. It set in train the processes that would, according to the timetable it specified, lead to an announcement on 15 October 1999 of the fourteen teams selected for participation in the 2000 competition. This document will be referred to later in these reasons in some detail.

70 On 30 April 1999 NRL issued an Invitation to Tender to the firm of chartered accountants, Ernst & Young. The tender document envisaged the tenderer would undertake a "data verification exercise" in relation to data provided by the clubs for the purposes of the Selection Criteria, though not the Basic Criteria and the Qualifying Criteria. In common with the "NRL Admission Criteria Process" document, the tender outlined a three stage process in which the tenderer would be involved. It is unnecessary to outline it here. Ernst & Young's tender was successful. A team led by one of its partners, Mr Fisher, was formed to perform the consultancy. It should be noted that on 6 August 1999, the consultancy was extended to assist in determining the solvency of clubs for the purposes of the Basic Criteria. Among Souths' contract claims is the allegation that, in the selection process, the solvency criterion was not applied according to its terms. NRL also engaged the services of Minter Ellison, solicitors, to provide legal advice in the implementation of the admission process.

71 In June 1999 an independent marketing consultant prepared a business plan, the "Millennium Management Plan", for Souths. Though there is no evidence of its having been approved by Souths' board (which was at that time in a process of reconstitution), it was submitted to NRL on 31 July as the five year business plan required of Souths under the Admission Criteria timetable. The Plan's executive summary indicated:

> *"[The Plan] has been written and the strategies and actions within predicated on the Club standing alone as a member Club of the NRL in 2000. The Club has resolved to take all necessary actions including "legal recourse" to ensure*

its continued participation in the competition."

72 In late July 1999, Balmain and Wests obtained NRL approval to form a joint venture for the 2000 competition.

73 NRL established an Admission Criteria Committee comprised of Mr Powell, Mr Farish and Mr Gallop to ensure that the Admission Criteria had been applied consistently and that a clear documentary trail was established to provide evidence of the decisions made in applying the Admissions Criteria and the reasons for those decisions. The first ACC meeting was on 6 August 1999.

74 Throughout August, September and early October 1999 exchanges occurred between NRL, Souths and Mr Fisher concerning the provision of information, issues to be dealt with, etc. The proper treatment of Souths Juniors funding was raised in these exchanges. On 1 October 1999 Souths was informed that it was one of the clubs that had met the Basic Criteria and would thus be subject to the Selection Criteria. Norths failed for solvency reasons to meet the Basic Criteria. Ten clubs were applying under the Selection Criteria for nine licences, the remaining five licences having gone to Brisbane, Auckland and Newcastle and the two joint venture entities, St George-Illawarra and Wests-Balmain.

75 On 14 October 1999 the ACC presented its final report to Mr Whittaker recommending the fourteen teams to be invited to participate in the 2000 competition. Souths did not receive such a recommendation. On 15 October Mr Whittaker then took his own recommendations to the NRL board. They were based on the ACC recommendation. The board resolved to adopt the ACC recommendation.

76 Souths had failed to secure admission to the 2000 competition and was notified of this by letter on 15 October. On the same day NRL Club Agreements were sent to the successful clubs for signing.

77 On 27 October NRL approved a joint venture of Manly and Norths. Souths commenced this proceeding on 12 November 1999. In interlocutory proceedings before Hely J in late November and early December 1999, Souths was unsuccessful in obtaining interlocutory relief that would in substance have required ARL and News to allow it to participate in the 2000 competition: *South Sydney District Rugby League Football Club Ltd*

v News Ltd (1999) 169 ALR 120.

PART II: THE SECTION 45 CLAIMS

1. THE STATUTE

78 Before considering the factual material that Souths contends brings its claims within the scope of s 45 of the TP Act, it is necessary first to explain what is comprehended by the term "an exclusionary provision" for the purposes of s 45. It is by no means without its curiosities.

79 Souths' claim is sourced in s 45(2) which provides:

> *"A corporation shall not:*
>
> *(a) make a contract or arrangement, or arrive at an understanding, if:*
>
> *(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or*
>
> *(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or*
>
> *(b) give effect to a provision of a contract, arrangement or understanding, whether the contract or arrangement was made, or the understanding was arrived at, before or after the commencement of this section, if that provision:*
>
> *(i) is an exclusionary provision; or*
>
> *(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition."*

80 Though not directly in issue in the present proceeding, I have referred to subsections (2)(a)(ii) and (2)(b)(ii) so as to indicate that the composite forms in which they are expressed (ie "purpose" or "effect") embody the legislative recognition that the purpose of a provision and the effect of a provision are not necessarily the same. More generally I would note for present purposes that the subsection proscribes not only the making of a contract, etc, containing an exclusionary provision but also the *giving effect to* such a provision. By virtue of s 4 of the TP Act the formula "give effect to":

> *"includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce."*

81 Turning to the meaning of "exclusionary provision" itself, it is defined in s 4D(1) in

the following way:

> *"A provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:*
>
> *(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and*
>
> *(b) the provision has the purpose of preventing, restricting or limiting:*
>
> *(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or*
>
> *(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;*
>
> *by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or proposed party is a body corporate, by a body corporate that is related to the body corporate."*

82 The five matters to which I would draw attention in this provision are:

(i) an understanding or an arrangement, no less so than a legally binding contract, can contain an exclusionary provision;

(ii) two or more parties (but not necessarily all of the parties) to the contract, etc, must be competitive with each other (I return below to the deemed meaning of "competitive" in this context);

(iii) it is not the actual or likely effect of the provision as such that the TP Act proscribes: cf s 45(2)(a)(ii); but rather the purpose of the provision (the meaning of "purpose", as noted below, is the subject of a deeming provision);

(iv) the proscribed purpose must itself be related to "particular persons or classes of persons"; and

(v) the contract, etc, may envisage that only one party to it will effectuate the proscribed purpose.

83 As I have foreshadowed, the two terms whose meanings require elaboration are "competitive" and "purpose". First, "competitive". Section 4D(2) of the TP Act provides:

> *"A person shall be deemed to be competitive with another person for the*

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

The matter I would emphasise is that this provision envisages a number of different contingencies that can result in parties being deemed competitive. Later in these reasons when considering how the subsection impacts on Souths' claim I will provide a recast version of s 4D(2) that highlights the differences between the contingencies.

84 Secondly, "purpose". Section 4F(1) provides, for present purposes, that:

"

(a) a provision of a contract, arrangement or understanding shall be deemed to have had, or to have, a particular purpose if:

(i) the provision was included in the contract, arrangement or understanding ... for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose."

85 It will be necessary when considering particular defences raised to the s 45 claims to refer to other provisions of the TP Act. I defer exposition of these to avoid the need for repetition.

2. SOUTHS' VARIOUS S 45 CLAIMS

86 It is Souths' case that between 19 December 1997 and 14 May 1998 ARL and News (or a News subsidiary) entered into a sequence of agreements (I use this as a neutral term) that individually either contained or else gave effect to an exclusionary provision. The agreements relied upon in Souths' pleading are, first, what I will call the 19 December Understanding, secondly, the 18 February MoU, thirdly, the 14 May 1998 Merger Agreement and, fourthly, the 14 May 1998 the Services Agreement. Insofar as presently relevant I will outline briefly below the nature and purpose of these various agreements under the heading "The Contracts, Arrangements or Understandings". As a matter of convenience following consideration of the various agreements, I will refer to the distinctive position NRL occupied in the matter. It is Souths' contention that NRL acted as agent of the NRL partnership in

giving effect to the exclusionary provision. This is denied by the respondents. The issue will be considered under the heading "Agency and NRL".

87 The exclusionary provision said to be contained, or given effect to, in these agreements is pleaded in the alternative. The first, and principally relied upon, alternative is the "fourteen team term" and its related "funding term". The second is a provision that ARL and News will "cease altogether" to supply or acquire various services. This alternative responds to a defence raised by NRL and is aimed at meeting a particular contingency which, as a matter of convenience, I will consider separately: see "the cease altogether term" below. I will confine myself here to the various claims arising out of the fourteen team term.

3. THE FOURTEEN TEAM TERM

88 I would note at the outset that, as pleaded by Souths, the fourteen team term was that:

> *"[i]n the 2000 season and thereafter the number of teams to participate in the NRL competition would be restricted to 14, with no more than eight and no fewer than six teams from Sydney."*

The definitive documentary version of the term is set out later in these reasons. There are two matters I should emphasise about the term as pleaded. The first is that it embodied two ceilings - one on the number of teams to participate in 2000; the other, on the number of Sydney teams that could participate. The second is that it is claimed that the fourteen team restriction was intended to apply in and after 2000. This is contested by some of the respondents.

89 The purpose of the fourteen team term is said to have been to prevent, restrict or limit variously the supply or acquisition of four discrete types of service. Put shortly those services were (i) organising and running top level rugby league competitions; (ii) acquiring the services of rugby league teams; (iii) supplying entertainment services (ie top level rugby league matches); and (iv) providing funding to clubs participating in the top level rugby league competitions. Each of these is considered separately below under the heading "Services".

90 Consistent with the requirements of s 4D(2) of the TP Act, Souths alleges that at the times of the various agreements in the sequence said to contain the exclusionary provision, ARL and News (or a related body corporate) were, or (but for the provisions of an earlier

agreement in the sequence) would have been, in competition with each other in relation to the supply or acquisition of the four types of service I have mentioned. The complexities in this allegation are considered under the heading "Competition". There is a real question between the parties as to the time at which the parties to the agreement need to be shown to be, or to be likely to be, competitive for the purposes of s 4D(2).

91 In respect of each of the four types of service I have mentioned, and again reflecting the provisions of s 4D of the TP Act, it is claimed that the purpose of the fourteen team term was to prevent, limit or restrict their supply to or acquisition from "particular persons or classes of persons". In respect of each such service a variety of classes and persons are designated in the pleading. These will be considered severally under the heading "Purposes and their Objects".

92 There is a number of specific TP Act defences raised by the respondents that need separate consideration: see "Defences" below. I will then comment briefly on the issue of relief: see "Relief" below.

4. THE CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS

93 It is a matter of concession by News, NRLI and NRL that at or about 19 December 1997 there was an understanding between ARL and News as to their future conduct of a single premier rugby league competition, and it was a part of that understanding that the competition would be limited to fourteen teams in the year 2000. That concession was properly made. From (a) the News and ARL media releases of 19 December, (b) the Executive Summary provided to the Chief Executive Officers ("the CEOs") and Chairmen of the twelve "loyal" ARL clubs at the 19 December meetings (a document Mr Frykberg said in evidence seemed to contain the "fundamental agreement" negotiated by the representatives of News and ARL), and (c) documents exchanged by ARL and News immediately before and after 19 December (eg the "Competition Structure" document provided by Mr Whittaker to News on 17 December, as also the draft MoU supplied to News on 23 December), one can discern readily enough the central elements both of the proposed unified arrangement and of the fourteen team term as these were understood on 19 December. Given the concession, it is unnecessary to set out the above documentation and evidence in any detail.

94 The premise of the understanding was that ARL and News (via Super League) would

cease to conduct their existing competitions and would form a 50/50 partnership to own and control the proposed competition; that competition would be operated by a 50/50 joint venture company (then referred to as "NRLC" or "NRLC Co" but later as "NRL"); and, to quote the Executive Summary in part, the "Competition Structure" would involve (inter alia):

> *". NRLC will grant licences to participate in the NRLC competition.*
>
> *...*
>
> *. 20 teams will be licensed to play in 1998 on a 1 year licence, but Brisbane, Newcastle and Auckland are assessed against criteria for 5 year licences.*
>
> *. 16 teams will be licensed to play in 1999.*
>
> *. 14 teams will be licensed to play in 2000.*
>
> *...*
>
> *. In a 14 team competition there will no less than 6 teams, and a maximum of 8 teams, from Sydney.*
>
> *. Conversely, there will be no less than 6 teams, and a maximum of 8 teams, from regions outside Sydney, being:*
>
> | | | | |
> |---|---|---|---|
> | * | *Adelaide* | * | *North Queensland* |
> | * | *Melbourne* | * | *Newcastle* |
> | * | *Auckland* | * | *Gold Coast* |
> | * | *Canberra* | * | *Central Coast* |
> | * | *Brisbane"* | | |

95 It also was understood at the time, as stated in the News media release, that "[the] teams that will compete in the streamlined competition will be determined by strict criteria, to be agreed on by February 28, 1998". Clause 1.2 of the "Competition Structure" document provided to News by Mr Whittaker on 17 December 1997 was to like effect. This theme of selection by reference to criteria is common both to the pre-19 December documentation as also to that culminating in the 14 May 1998 documentation that finally gave formal effect to the "peace deal".

96 Turning to the MoU and the Merger Agreement, I do not understand the respondents now to suggest that these two agreements did not give effect to the 19 December Understanding. The MoU, formally executed on 18 February 1998 after an iterative process that began at least shortly after 19 December 1997, was an agreement between ARL,

NSWRL, News and Super League. As its "Purpose" clause stated, it outlined the parties' then "current understanding" on a merger of the two rugby league competitions. It confirmed the intention of the parties "to negotiate and finalise all necessary agreements … to implement the Merger". Clause 7 detailed the "Competition Structure" including the fourteen team term in a near-final form. The MoU clearly was a carrying forward of - a giving effect to - the 19 December Understanding.

97 The Merger Agreement of 14 May 1998 was one of the complex of interlocking documents executed on that day that formalised the web of relationships of the various entities involved in the ownership, conduct, financing, etc, of the NRL competition. This agreement was between not only the parties to the MoU but also NRLI. Again this agreement carried forward, this time to finality, what was envisaged in the 19 December Understanding and the MoU. Indeed recital D of the agreement stated that it "supersedes the Memorandum of Understanding".

98 Insofar as presently relevant, the Merger Agreement's purpose was reflected in its recital B:

> *"The Parties wish to merge the ARL Competition and the Super League Competition, on the terms set out in this Agreement, so that there is one premier rugby league competition in Australia, called the NRL Competition, on and from the 1998 rugby league playing season in Australia."*

99 Because it contains the then definitive form of the agreed NRL competition structure including the fourteen team term, it is appropriate at this point to set out the provisions of cl 7 of the Agreement in their entirety:

> *"7. COMPETITION STRUCTURE*
>
> *7.1 The Parties agree that the structure of the NRL competition will be as set out in this clause 7 and each of ARL and NRLI agree to procure NRL to comply with this clause 7.*
>
> *7.2 Before 30 June 1998, NRL must:*
>
> *(a) inform Clubs that no less than 16 teams, but no more than 20 teams (the actual number to be determined by NRL and approved by the Partners), will be entitled to Franchises in 1999, and not more than 14 teams will be entitled to Franchises in 2000; and*

(b) release the franchise criteria for 1999 and beyond.

7.3 No more than 20 teams will participate in the 1998 NRL Competition, each team being granted a Franchise for a term of one year. However, once the franchise criteria are determined, Brisbane, Newcastle and Auckland will be assessed by NRL against the franchise criteria and, if NRL is satisfied, the term of their Franchises will be extended to five years.

7.4 No less than 16 teams but no more than 20 teams, (the actual number to be determined by NRL and approved by the Partners), will participate in the 1999 NRL Competition, on varying terms depending on the level of satisfaction of the franchise criteria. These Franchises will be granted no later than 1 October 1998. NRL will be entitled to extend the term of Franchises at this time if it is in the best interests of the NRL Competition.

7.5 No more than 14 teams will participate in the 2000 NRL Competition on varying terms depending on the level of satisfaction of the franchise criteria.

7.6 Clubs entering into mergers or joint ventures before March 1998 with the approval of NRL are entitled to:

(a) receive grants of $4 million per annum in respect of the merged club in 1998 and 1999 rather than a single $2 million grant under clause 7.12(a); and

(b) a 5 year Franchise.

7.7 Clubs entering into mergers or joint ventures before 1 October 1998 with the approval of NRL are entitled to:

(a) receive a grant of $4 million in 1999 rather than a single $2 million grant under clause 7.12(a); and

(b) a 5 year Franchise.

7.8 On or before 1 October 1999 NRL must determine the Franchisees for 2000 (there being no more than 14 Franchisees).

7.9 In a 14 team NRL Competition, there will be no less than six teams, and a maximum of eight teams, from Sydney. Conversely, there will be no less than six teams, and a maximum of eight teams, from regions outside Sydney.

7.10 Until 2001, the regions outside Sydney are:

(a) Adelaide;
(b) Melbourne;
(c) Auckland;

(d) Canberra;
(e) Brisbane;
(f) North Queensland;
(g) Newcastle;
(h) Gold Coast; and
(i) Central Coast.

7.11 The Parties recognise that it is in the best interests of rugby league to prioritize the grant of Franchises, for example, to encourage:

(a) mergers of Sydney clubs; and

(b) a national competition.

If the number of applicants satisfying the franchise criteria exceed the number of available Franchises, the grant of available Franchises will be determined in the following order of priority:

(a) merged clubs;

(b) regional clubs; and

(c) stand alone Sydney clubs.

Otherwise, NRL will determine the grant of Franchises on the level of satisfaction of the franchise criteria.

7.12 A Franchise will entitle each Franchisee to:

(a) an annual grant of $2 million from NRL; and

(b) the payment of all travel costs and accommodation for the 1998 and 1999 NRL Competition seasons. The payment of travel and accommodation costs for 2000 and beyond will be reviewed by NRL in 1999.

7.13 Each of ARL, NRLI and News must make its decisions on the franchise criteria, the grant (or withdrawal) of Franchises, and any other matter to be determined under this clause 7 and, when executed, the Franchise Agreements, in the best interests of the NRL Competition, disregarding any conflicting (or potentially conflicting) interests, such as interests in Franchisees."

100 Turning to the one matter of contention relating to the content of the fourteen team term, News and NRLI have submitted that the 19 December Understanding, the MoU and the Merger Agreement, while expressly imposing the fourteen team term for the year 2000, did not take it beyond that year. Souths has contended to the contrary.

101 Before expressing my view on the News/NRLI submission I should refer to cl 3.3(e) of the Services Agreement of 14 May 1998 under which, to put it inexactly, the NRL partnership appointed NRL to conduct the NRL competition. That sub-clause obliged NRL:

> *"not [to] grant any more than 14 Franchises in 2000* ***or in any year thereafter*** *(without the approval of the NRL Partnership):* [emphasis added].

102 Considered in isolation it may be open to suggest that this sub-clause reflected the later address of a matter (ie what was to happen beyond 2000) that the parties had not previously addressed. In consequence it could not properly be said that the provision simply gave effect to what were the clear and well-understood intentions of the parties on and from the 19 December Understanding.

103 Under the heading "Purposes and their Objects" below, I refer to the provenance of the fourteen team term and the purpose that "ceiling provisions" of its type were envisaged to achieve in the conduct of a premier national rugby league competition. Against that background and the elaborate and expensive process that was engaged in to select the fourteen teams for 2000, it requires a suspension of disbelief to suggest that the News and ARL interests were not intending in their negotiations, understandings and agreements to establish a new status quo not merely in relation to the unification of their respective competitions but also in relation to its projected size and characteristics. This was so obvious as to go without saying, save when a third party was being appointed to conduct the competition into the future - hence the need only to refer expressly in the NRL Services Agreement to what was to occur post-2000.

104 In so concluding I am not suggesting that it was not open to the NRL partnership later to vary the fourteen team ceiling either upwards or downwards. But unless and until such a consensual variation occurred, the term expressed and was intended to express what for the future was to be the status quo.

5. AGENCY AND NRL

105 The agency issue arises in those s 45 claims that are based on the fourteen team term being contained in, or given effect to in, the 19 December Understanding, the MoU and the Merger Agreement. NRL was not a party to any of these arrangements, and in the case of

the first two was not in existence at the time of their making. Section 4D, as I have noted, requires that for a provision to be an exclusionary provision (I here paraphrase) it must have the purpose of preventing, etc, the supply of goods or services to particular persons or classes of persons "by all or any of the parties to the contract, arrangement or understanding". If then it was NRL that was to be or was actually supplying or acquiring the services in question, it is claimed that for s 4D to be attracted NRL must have been intended to act, or have acted, as agent of ARL and NRLI or News which were parties to the three arrangements mentioned.

106 The question of the relationship in which NRL stood to the NRL partnership - agent and principal or principal and principal - is not without its difficulties. It is made the more so by the express provision (cl 2.2) in the Services Agreement that, in providing its contracted for services to the NRL partnership -

> *"NRL will act solely as an independent contractor. Nothing in this Agreement will constitute, or be construed to be or create, the relationship of employer and employee, principal and agent, trustee and beneficiary, joint venturers or partnership between the Partners and NRL."*

107 It is the respondents' case that the supply and acquisition of services in the conduct of the NRL competition was undertaken by NRL as a principal and not as agent of the NRL partnership. This contention impacts upon the TP Act claims, the contract claims, and the relief, if any, that ought be granted if either or both a TP Act and a contract claim is made out.

(a) Additional Factual Material

(i) The NRL company

108 NRL was incorporated on 25 March 1998 as a company limited by guarantee. It is a not-for-profit company and has no assets. It is not a body corporate "related to" ARL, News or NRLI: cf s 4D(1). Its articles of association were made subject to the Members Agreement. That agreement was executed around the time of NRL's incorporation (the precise date is disputed) by NRLI, ARL and two nominees of each of these companies. The Members Agreement (cl 4) prescribed the number and composition of the directors of the company ensuring equality of representation to ARL and NRLI. It stated that NRL was formed to:

> *"(a) organise and conduct the NRL Competition;*
> *(b) foster and develop the NRL Competition;*
> *(c) take such action as may be considered conducive to the best interests of the NRL Competition; and*
> *(d) encourage and promote rugby league players, coaches and administrators in the NRL Competition."*

The NRL competition was defined (cl 1.1) to be the competition "operated and managed by the Company pursuant to the NRL Services Agreement".

109 Each member of the company (a defined term) agreed (i) (cl 2.2(a)) to:

> *"cooperate and use its reasonable endeavours to ensure that the Company provides services for the NRL Competition pursuant to the NRL Services Agreement and in accordance with the Business Plan."*

and (ii) (cl 2.3):

> *"that the Company's principal business is the conduct of the NRL Competition pursuant to the NRL Services Agreement. Accordingly, the Company will not be involved in the conduct of any other rugby league competition without the prior approval of the NRL Partnership."*

The NRL Partnership was in turn defined (cl 1.1) to mean "the partnership between NRLI and ARL formed for the purpose of owning and operating the NRL Competition".

110 Clause 7 of the Members Agreement provided (inter alia):

> *"7.1 Business Plan*
>
> *The Members must ensure that the Board considers and adopts Business Plans in accordance with the NRL Services Agreement.*
>
> *7.2 Partner Approval*
>
> *The Board must ensure that the Business Plan is submitted to the Partners for approval in accordance with the NRL Services Agreement."*

(ii) The genesis of NRL

111 It is Mr Whittaker's evidence that by 1995 the premier rugby league competition (that previously had been conducted by NSWRL from 1908) had become ARL's competition but was conducted on its behalf by NSWRL. There is an agreed fact to similar effect.

112 After the commencement of formal discussions between ARL and News/Super

League in July 1997, Mr Whittaker took to the board of NSWRL on 31 July 1997, and to the ARL board on 4 August 1997, a draft "ARL/Super League Terms Sheet" that outlined "a proposal for a united game, for discussion with News". One element of that proposal was the formation of a joint venture company "NRLC Co" that would be the "grantor of licences to operate a team" (cl 4.2) in the proposed competition. The proposal envisaged (cl 2.1) that ARL would manage and operate a national game and, though deleted from later versions of the Terms Sheet, that NRLC Co would enter into "an operating contract so that the ARL operates all aspects of the NRLC competition" (cl 4.7).

113 By mid-August 1997 documents ("ARL/Super League Issues Paper") sent by Mr Whittaker to Mr Frykberg indicated that discussions were proceeding on the basis that a joint venture company would be formed ("NRLC Co") "to operate the unified competition". When the negotiations with News broke down, Mr Whittaker proposed in the report to the NSWRL board of 15 September 1997 that the "way forward" was to establish NRLC Co. If such was done it would be necessary (inter alia) to:

> *". revoke the ARL's 1993 appointment of the NSWRL as its agent to conduct the national competition, and instead the ARL appoints NRLC Co to undertake that task."*

114 After the resumption of negotiations in October 1997, documentary exchanges between News and ARL indicated that the formation of a joint venture company continued to provide the intended vehicle for the conduct of a merged competition. Moreover that company would license teams or clubs to participate in the competition. By early December draft "Competition Structure" documents were being prepared which were precursors of the clauses found in the MoU (also by now in draft) and the Merger Agreement. NRLC Co was central to that structure. Significantly, draft versions of the MoU considered by the boards of ARL and NSWLR on 11 December 1997 and sent to News on 23 December 1997 (ie *after* the 19 December understanding) refer in draft cl 2.1 to the partnership operating the competition but, in cl 2.4, to its appointing a management company (NRLC Co) "to operate the NRLC competition on a day to day basis". This, as will be seen, differs from the formula employed in the final version of cl 2.4 of the MoU of 18 February 1998, but seemingly provided the inspiration for Mr Whittaker's "Executive Summary" for the 19 December 1997 meetings. On 24 December an MoU, it seems, was orally agreed between News and ARL that contained the above clauses 2.1 and 2.4. It was superseded by that of 18 February 1998.

115 Minutes of the NSWRL board meeting of 11 December 1997 record that Mr Whittaker spoke to a chart that "indicated the current structure position on negotiations which included … that all Super League Clubs come under the partnership company and that all agreements are with the NRLC Co".

116 The documentation distributed by Mr Whittaker at the meetings on 19 December 1997 portrayed diagrammatically the place of NRLC Co in the merged structure, the relevant diagram suggesting there would be a "management agreement" between the proposed NRL partnership and NRLC Co. NRLC Co was described in the following dot-point fashion in the documentation:

> *" NRLC CO.*
>
> . *The Partnership will appoint NRLC Co. to operate the NRLC competition*
>
> . *50/50 joint venture company*
>
> . *Board - 3/3, with 1 non-voting CEO*
>
> . *Board to comprise persons with experience in administering the game of rugby league and who are not on the Partnership's Executive Committee*
>
> . *The first Chairman will be appointed by the ARL for a 1 year term*
>
> . *Subsequent chairmen will alternate between the shareholders each year*
>
> . *The Chairman will not have a casting vote*
>
> . *The CEO will be appointed by the Board of NRLC Co.*
>
> . *NRLC Co. responsible for management and administration of the NRLC competition*
>
> . *ARL responsible for managing:*
>
> - *representative and international matches on behalf of NRLC Co.*
> - *junior development*
> - *State leagues*
> - *international rules"*

117 Both the News and ARL media releases of 19 December refer to a new company

being formed "to administer" the new competition.

118 On 20 January 1998 a media release announced the ARL and News appointees to the proposed Partnership Executive Committee ("PEC") and to the board of the yet to be formed NRLC Co. It described the PEC as uniting "Super League and ARL interests on a commercial level". For its part the NRLC Co board was described as "oversee[ing] the operations of the National Competition and be[ing] responsible for the long term and day-to-day operational issues".

119 To anticipate reference to the 14 May 1998 documentation, the structure ultimately put in place gave significant financial control to the NRL partnership over NRL and reserved to the partnership revenue raising rights. In cross-examination Mr Macourt (who was at the relevant time Chief Financial Officer of News and a participant in the 1997 merger negotiations) indicated that it was his intention during negotiations to separate revenue raising from the actual operation of the football competition as they each involved different skills and that this would be reflected in the structural arrangements made. He was then asked:

> *"MR HUGHES: Well, that doesn't explain, does it, a decision if one was made on the part of News to insulate itself from financial liability to the third parties as a result of actions by National Rugby League Limited done in the running of the competition? -- I don't, in 1997 the decision about the structure wasn't made for the purpose of isolating News. The decision was made with the purpose of separating the two functions."*

120 The MoU of 18 February 1998 provided (cl 2.1) that ARL and Super League (or a wholly owned subsidiary of either) would enter into a 50/50 partnership "to operate the national rugby league ("NRL") competition" and (cl 2.4) that the proposed NRL partnership would "contract with a management company ("NRL Co") to conduct the NRL competition as an **independent contractor**": emphasis added. When ARL sent proposed franchise agreements to its loyal clubs in March 1998 (they were later withdrawn) confirming the opportunity to participate in the 1998 competition, that agreement purported to be with the as yet unformed NRL. It contained an acknowledgment and agreement by the proposed signatory (cl 5.3(e)) that:

> *"NRL Partnership has no liability to the Franchisee under this Agreement or otherwise, and the Franchisee agrees that NRL is not the agent of NRL Partnership and does not have authority to make NRL Partnership liable to the Franchisee."*

(iii) The 14 May 1998 documentation

121 Before examining the 14 May documents in some detail, I note the evidence given of them by News' Chief General Counsel at the relevant times, Mr Philip, in his first affidavit. Having stated that he had no responsibility in devising the two tier NRL partnership-NRL structure, he stated:

> *"In negotiating the Merger Agreement and associated agreements, I thought it was critical to make it clear that the NRL was not an agent of the NRL Partnership. I believed that running a rugby league competition was a risky business which could result in substantial claims for damages against the competition organiser. It was my intention in negotiating the Merger Agreement to create a structure which insulated the partnership and its assets from any liabilities that might be incurred by NRL."*

122 As indicated earlier in this Part, the Merger Agreement prescribed NRL's role in the competition structure. It had annexed to it a Franchise Agreement that was apparently intended to be used by NRL for the 1998 competition. That agreement's recitals are set out below. It in turn also contained a similar denial of NRL's agency of the NRL partnership to that contained in the abortive proposed franchise agreement of March 1998.

123 For its part the NRL Partnership Agreement recited that ARL and NRLI had agreed to establish the NRL partnership "to own and operate the NRL competition … on the terms and conditions of this Agreement". The objective (cl 3.1) of the partnership was "to conduct the Business on the terms and conditions of this Agreement". The term "Business" was defined in cl 1 to mean "the business conducted by the NRL Partnership of owning and operating the NRL Competition". The term "NRL Competition" was itself defined to mean "the national rugby league competition … operated and managed by NRL pursuant to the NRL Services Agreement". The Agreement constituted the PEC made up of equal numbers of ARL and NRLI appointees: cl 5.1. The PEC was the effective decision-making organ of the partnership (cl 5.7). I would also note that cl 3.2 of the Partnership Agreement at least envisaged the possibility of the partnership becoming liable on account of a contract, etc, of NRL. It provided:

> *"3.2 Liability between Partners*
>
> *Where any:*
>
> *(a) contract or agreement entered into for the Business, whether in*

the name of NRL, the NRL Partnership, the Partners or any of them; or

(b) act or omission of NRL, the NRL Partnership, the Partners or any of them.

involves the Partners in joint or joint and several liability, each Partner must indemnify and keep indemnified, the other of them so that no Partner is responsible for more than its Partnership Interest in relation to that joint or joint and several liability."

124 The formal engagement by the partnership of NRL's services was provided for in the Services Agreement. It is necessary to refer in some detail to its provisions. The recitals to the agreement reflect by now reasonably familiar language employed across the complex of documentation to which I have been referring:

"A. ARL and NRLI have established the NRL Partnership to own and conduct the NRL Competition.

B. The NRL Partnership wishes to appoint NRL, and NRL wishes to accept the appointment, to provide the Services to the NRL Partnership, as an independent contractor, on the terms and conditions of this Agreement."

125 In cl 2.1 NRL was appointed to provide "Services" to the partnership. Those services were specified in Schedule 1 as follows:

"The following services to enable the operation of the NRL Competition:

1. Preparing and approving a draft Business Plan for submission to the Partners in accordance with clause 4.

2. Conducting the NRL Competition in accordance with the Business Plan.

3. Determining the operational aspects of the game of rugby league in Australia including:

(a) structure of the NRL Competition;
(b) fixed allocation to clubs;
(c) administration and marketing policies; and
(d) scheduling.

4. Recommendations on judiciary and Rules for approval by the Partners.

5. Contracting with Franchisees for participation in the NRL

Competition.

6. Preparing draws for the NRL Competition."

The term "NRL Competition" was defined in the characteristic formula to mean the national rugby league competition "operated and managed by NRL pursuant to the Services Agreement".

126 Clause 2.2 provided, as I have earlier noted but will repeat because of its significance:

> *"In providing the Services, NRL will act solely as an independent contractor. Nothing in this Agreement will constitute, or be construed to be or create, the relationship of employer and employee, principal and agent, trustee and beneficiary, joint venturers or partnership between the Partners and NRL."*

127 Before dealing further with the substance of the agreement there is a number of defined terms to which I should refer to assist in understanding the terms of the agreement:

> *" '**Board**' means the board of directors of NRL.*
>
> *'**Budgeted Operating Costs**' means, in relation to any Financial Year, Operating Costs for that year specified in the budget contained in the Business Plan.*
>
> *...*
>
> *'**Business Plan**' means the rolling three year business program for the conduct of the Business during the following three Financial Years, prepared by the Chief Executive Officer, adopted by the Board, and approved by the Partners pursuant to **clause 4**.*
>
> *...*
>
> *'**Executive Committee**' means the executive committee of the NRL Partnership.*
>
> *'**Existing Intellectual Property**' means Intellectual Property (including logos and get-ups used by Franchisees) in existence on 18 February 1998 which is owned by ARL, NSWRL, Super League or a Franchisee, the use of which is licensed to the NRL Partnership.*
>
> *...*
>
> *'**Key Revenue Rights**' means all media, sponsorship and merchandising rights (other than Franchisee sponsors) in relation to the NRL Competition.*
>
> *...*

*'**New Intellectual Property**' means the Intellectual Property in the NRL Competition developed and owned by the NRL Partnership or NRL after the Commencement Date or developed specifically for the NRL Partnership or NRL before the Commencement Date including the NRL logo and trade mark applications.*

...

*'**NRL Partnership**' means the partnership between ARL and NRLI formed for the purpose of owning or having the right to use the Intellectual Property in the NRL Competition and licensing NRL to conduct the NRL Competition.*

...

*'**Operating Costs**' means all costs and expenses incurred by NRL in providing the Services."*

128 Though of some length, parts of the principal provisions of the agreement that relate to the respective functions of the parties require direct quotation:

*"**3. NRL'S DUTIES AND POWERS***

3.1 NRL acknowledges and agrees to provide the Services:

(a) in accordance with this Agreement and the Business Plan;

...

(d) in accordance with all reasonable and lawful instructions and directions given to it by the NRL Partnership from time to time;

...

3.2 NRL must:

*(a) prepare the Business Plan, for approval by the Partners in accordance with **clause 4**;*

...

3.3 NRL must:

(a) not use a franchise agreement other than the Franchise Agreement approved by the NRL Partnership in conducting the NRL Competition;

*(b) not enter into, vary or renew any Franchise Agreement if such entry, variation or renewal would be inconsistent with **clause 7** of the Merger Agreement;*

(c) not be involved in any business other than the Business;

(d) not be involved in rugby league other than by performance of this Agreement;

(e) not grant any more than 14 Franchises in 2000 or in any year thereafter (without the approval of the NRL Partnership);

...

(g) use its best endeavours not to take any action that could place the Partners in breach of any contractual obligation of the NRL Partnership to third parties; and

*(h) comply with **clause 7** of the Merger Agreement unless otherwise directed by the Partners.*

3.4 NRL agrees that:

(a) the appointment, and renewal of engagement, of NRL line managers require the approval of the Partners;

(b) the lines of reporting, and duty statements, of NRL line managers require the approval of the Partners; and

(c) in the conduct of the first two years of the NRL Competition it will integrate, and fairly allocate duties between, previous employees of ARL and Super League to the satisfaction of the Partners.

4. BUSINESS PLAN

Business Plans must be adopted in accordance with the following procedure:

(a) at least two months before the beginning of each Financial Year commencing after 31 October 1998, the Chief Executive Officer must submit to the Board a draft Business Plan for the following three Financial Years;

(b) the Board must promptly consider and, if appropriate, amend the draft Business Plan and then submit the draft Business Plan to the Executive Committee for approval within 10 Business Days of receipt from the Chief Executive Officer; and

(c) the Executive Committee must consider the draft Business Plan, may amend it by agreement with the Board, and will endeavour to approve a Business Plan before the beginning of the following Financial Year.

5. FUNDING

In consideration of the Services and for all rights and entitlements granted by NRL to the NRL Partnership, the Partners must provide NRL with an amount equal to the Budgeted Operating Costs, at the times and in the amounts specified in the budget contained in the Business Plan.

6. KEY REVENUE RIGHTS

NRL acknowledges and agrees that:

(a) the NRL Partnership is solely entitled (to the exclusion of NRL) to enter into contracts relating to Key Revenue Rights;

(b) the NRL Partnership is solely entitled (to the exclusion of NRL) to all revenue from Key Revenue Rights contracts; and

(c) NRL will perform the obligations of the Partners under the Key Revenue Rights contracts entered into by the NRL Partnership, provided always that NRL has first been consulted on the proposed terms of those contracts.

7. INTELLECTUAL PROPERTY

7.1 NRL acknowledges and agrees that:

(a) the NRL Partnership is entitled to the ownership of, and will own, any New Intellectual Property in the NRL Competition, whether developed by a Partner, or by NRL in the course of conducting the NRL Competition;

(b) it will not take any action to seek to secure for itself any Intellectual Property rights in the NRL Competition; and

(c) it will not take any action to upset or interfere with the Intellectual Property rights of the NRL Partnership in the NRL Competition.

7.2 The Partners grant to NRL a non-exclusive licence to use the Existing Intellectual Property and New Intellectual Property for the purpose of conducting the NRL Competition in accordance with this Agreement.

8. PAYMENTS TO PARTNERS

*8.1 In part consideration of the rights granted to NRL under **clause 7.2**, no later than 10 Business Days after the end of each Financial Year, NRL must pay to the NRL Partnership an amount equal to all revenue received by NRL in relation to the Business for that Financial Year.*

*8.2 The payment under **clause 8.1** must be made by telegraphic transfer or*

direct bank deposit to such bank account as the NRL Partnership from time to time directs in writing.

9. ACCOUNTS AND INSPECTION

9.1 After giving at least five Business Days notice to NRL, each Partner will be entitled to full access during NRL's normal business hours through an accountant, agent or employee of that Partner and at that Partner's cost to inspect all the books, accounts, records and facilities of NRL for the purpose of auditing NRL, making copies and any other reasonable purpose."

129 As noted above, one of the documents annexed to the Merger Agreement was the Franchise Agreement for use by NRL. It contained an express acknowledgment and agreement by the intended franchisee that NRL was not the partnership's agent. Because it purported to describe the framework within which the franchise was to operate, I would note the following provisions of this Agreement. Its recitals were in the terms that:

"A The NRL Partnership is engaged in the business of offering entertainment services and goods, and has established a system for a rugby league competition known as the NRL Competition.

B The NRL Partnership has authorised NRL to control the operation and management of the NRL Competition.

C The Franchisee wishes to engage in the business of offering entertainment services and goods in the form of rugby league competition matches, and associated services and goods, under a system controlled by NRL and the NRL Partnership.

D NRL has agreed to appoint the Franchisee as a franchisee of the System on the terms and conditions of this Agreement."

The NRL partnership was defined to mean:

"the partnership between NRLI and ARL formed for the purpose of owning and operating, and authorising the operation of, the NRL Competition."

The NRL competition was defined in the standard form to which I have previously referred. The "System" referred to in the recitals was defined as:

*"the unique system for rugby league football competitions referred to in Recital A, the general structure for which is set out in **clause 3** and includes, without limitation, any aspect of the System such as the NRL Competition and any trade mark, trade name, goodwill, get-up or other intellectual property in respect of it owned by, or the use of which is licensed to, the NRL Partnership*

and in turn licensed to NRL, and methods of operation and control."

Clause 3 was in the following terms:

"GENERAL STRUCTURE OF THE SYSTEM

3.1 NRL Competition

The NRL Competition will be a national (and international to the extent of Auckland) competition.

3.2 Rights of NRL

Subject to the grants of rights in this Agreement, the NRL Partnership will retain all rights in relation to the System."

130 The final factual matter to which reference should be made is the profit and loss statements of the partnership for 1998 and 1999. These show the receipt of revenue from finals games, sponsorship and from radio and television companies. The major expenses are described as "NRL transfer account", these relating to expenses incurred by NRL and paid by the partners through the transfer account.

(b) Applicable Principles

131 Before considering the parties' submissions it is appropriate that I state briefly what I consider to be relatively uncontroversial propositions of law that bear upon the particular agency issue that has been raised.

132 1. Those definitions of agency that take the principal and agent relationship itself as their particular focus: contrast *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; emphasise that that relationship "can only be established by the consent of the principal and the agent": *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137; see eg *Bowstead & Reynolds on Agency*, (16th Ed, 1996), §1-001; *Restatement, Third, Agency*, Tentative Draft No 1, §1.01; 3 Am Jur 2d, "Agency", §17.

133 2. The consents so given need not necessarily be to a relationship that the parties understand, or even accept, to be that of principal and agent: *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552 at 587. It is sufficient if "they have agreed to what amounts in law to such a relationship": *Garnac Grain Co Inc*, above, at 1137; *Nichols v Arthur*

Murray Inc 56 Cal Rptr 728 at 730-731 (1967); *Restatement, Second, Agency*, §1 comment b; notwithstanding that they may have "artfully disguised" it by express disclaimers: *Board of Trade v Hammond Elevator Co* 198 US 424 at 441-442 (1905).

134 3. It is legitimate for parties to avoid the "unwanted consequences" of a particular category of legal relationship by seeking to cast it in a form that takes it outside that category of relationship: *Colbron v St Bees Island Pty Ltd* (1995) 56 FCR 303 at 314. But whether or not they are successful in achieving that end does not depend simply upon whether, in an express provision of their agreement, they attribute or deny to their relationship a particular legal character - be this, for example, employer and employee: *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385; principal and principal or principal and agent: *Board of Trade v Hammond Elevator Co*, above; or partners: *Ex parte Delhasse; In re Megevand* (1878) 7 Ch D 511. The parties cannot by the mere device of labelling, no matter how genuinely intentioned, either confer a particular legal character on a relationship that it does not possess or deny it a character that it does possess: *Ex parte Delhasse*, above, at 532; see 2A Corpus Juris Secundum, "Agency", §7; see also the observations of Lord Denning in *Massey v Crown Life Insurance Co* quoted in the *Australian Mutual Provident Society* case, above, at 389.

135 4. Save where an express labelling provision is shown to be a sham, the provision itself (as a manifestation of the parties' intent) must be given its proper weight in relation to the rest of their agreement and such other relevant circumstances as evidence the true character of their relationship. This may lead to its being disregarded entirely: *Ex parte Delhasse*, above; *Board of Trade v Hammond Elevator Co*, above;: or to its being given full force and effect: *Australian Mutual Provident Society v Chaplin*, above. And such will depend upon whether, given the actual incidents and content of the relationship (ie "the factual relation") to which the parties have consented, they have consented "to a state of fact upon which the law imposes the consequences which result from agency": *Branwhite*'s case, above, at 587; *Restatement, Second, Agency*, §1 comment b.

136 5. Though there is no uniformly agreed definition of agency: see the discussion in Fisher, *Agency Law*, (2000), 8-11; the two whose authoritative character has resulted in their wide citation are those of the *Restatement, Second, Agency*, §1 and of *Bowstead and Reynolds*, above, 1-001 (the latter being based upon the *Restatement* provision). The

Restatement's definition is that:

> *" §1 Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."*

I would note in passing that the definition proposed in the *Restatement, Third, Agency*, Tentative Draft No 1, §1.01 proposes no material departure from the above. *Bowstead and Reynolds*' definition is that:

> *"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."*

The necessary consents apart, the required characteristics of the relation are that (a) one party acts on the other's behalf but (b) subject to that other's control or direction.

137 6. The second of the above characteristics (control or direction) does not appear to figure prominently as a decisive indicator of agency in common law case law save in two settings. The first is where it is contended that a company is an agent of its parent company, shareholders, or of particular officers because of the control it or they exercise over it. Here, and to accommodate the perceived demands of the principle established in *Salomon v Salomon & Co* [1897] AC 22 that a company is a legal person separate from its parent, officers and shareholders, the control characteristic has had to undergo a degree of refinement which it is not relevant to explore in this proceeding; but see *Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89; *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549; see also *Restatement, Third, Agency*, Tentative Draft No 1, at 50-52. The second setting in which resort has been had to the control characteristic is where a party that is expressed to stand in the relation of independent contractor to another is claimed as well to be the agent of that other. The two relationships are not mutually exclusive: see *CFTO-TV Ltd v Mr Submarine Ltd* (1994) 108 DLR (4^{th}) 517; affd (1997) 151 DLR (4^{th}) 382; *Lower Hutt City v Attorney-General* [1965] 2 NZLR 65 at 71; *Restatement, Second, Agency*, §14N. Though "[c]ontrol by itself is insufficient to establish agency": *Restatement, Third, Agency*, Tentative Draft No 1, at 49 - the "acting on behalf of" or "representative" characteristic must be able to be discerned in the factual relation of the parties: *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48-51 - where that characteristic can properly be inferred in circumstances in

which the alleged principal exercises, or is entitled to exercise, a significant degree of control over the contractor's performance of its services (and in particular over contracts entered into), the contractor is apt in consequence to be characterised as an agent: see eg *CFTO-TV Ltd v Mr Submarine Ltd*, above; *Northern v McGraw-Edison Co* 542 F 2d 1336 (1976); *Condus v Howard Savings Bank* 986 F Supp 914 (1997); 2A Corpus Juris Secundum, "Agency", §12; see also *Bowstead and Reynolds*, above, 1-028. It probably is the case that the control exercisable by one party can in some settings itself bear on the determination whether the other acts on its own account or on behalf of the former when dealing with third parties: cf the view expressed in *Royal Securities Corp Ltd v Montreal Trust Co* (1966) 59 DLR (2d) 666 at 684.

(c) Submissions and Conclusions

138 As I have earlier noted, Souths has pleaded that, insofar as the fourteen team term had the alleged purpose of preventing, etc, the supply or acquisition of services by NRL, such supply or acquisition was made, and was intended to be made, on behalf of the NRL partners. The case has been conducted on the basis that this is a pleading of agency. I would again note that NRL was not a party to any of the three arrangements noted.

139 Souths' contention can be shortly put. It is that notwithstanding the express denial of agency in cl 2.2 of the NRL Services Agreement, when one has regard (i) to what was, and was acknowledged by NRL to be (Services Agreement, recital A) the business of the NRL partnership (ie that of "owning and operating the NRL Competition": see Partnership Agreement cl 3.1, cl 1.1 "Business" and recital); (ii) to the functions to be performed by NRL under the Services Agreement (which included "the operation and management" of (cl 1.1 "Business"), or "conducting" of (Sched 1), the NRL competition); and (iii) to the factual character of the relation the partnership created with NRL (it was one that gave the partnership both significant powers of control and direction: see Services Agreement cll 3.1, 3.3, 3.4 and 4; and, subject to paying budgeted operating costs, the real benefit of all revenue received by NRL in relation to the business: cll 5 and 8) - the factual relation was that NRL was consensually conducting what it recognised to be the partnership's business and for the benefit of the partnership as its agent.

140 In this submission particular reliance is placed upon Lord Pearson's observation in *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd*, above, at 1137 that:

> *"The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it."*

141 Put compendiously the submission made by News, NRLI and NRL is that the denial of agency in cl 2.2 of the Services Agreement expressed what the parties intended. It was not a sham or a false label. The parties did not consent to what was an agency relationship. While there were provisions in the Services Agreement that might be consistent with an agency relationship, they equally could exist in a relationship that was not one of agency. In such circumstances there is no reason for not giving effect to the intention expressed in cl 2.2. That intention was merely the formal expression of what had been their intent since 19 December 1997. It was open to the partners to conduct the competition by contracting with NRL as an independent contractor to provide services to it which relevantly included conducting the competition and contracting with clubs for their participation in the competition.

142 As I understand it, it is no part of Souths' case that the cl 2.2 denial of agency was a sham: on the meaning of which see *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 453-454; or that it involved such impermissible use of the corporate form as would warrant lifting NRL's corporate veil. It is, rather, that while ARL and NRLI may not have intended to create an agency relationship, that in fact was what they did in the relationship they actually consented to being established. I should add that Souths places considerable and understandable reliance both on the dimensions of the control exercisable by the partnership over NRL, and on the allocation of benefits between the parties arising from the conduct of the competition that is provided for in the Services Agreement.

143 When one has regard to the circumstances leading to the formation of NRL it would seem that in the initial stages of the peace deal negotiations in July/August 1997, ARL did not contemplate an ARL/News entity partnership at all. The ARL/Super League Terms Sheet to which I have referred seems to have contemplated that the competition was to be ARL's, with Super League participating in the conduct of the proposed new competition via the proposed joint venture company NRLC Co. NRLC Co was to be the grantor of licences to operate a team in the competition. As the ARL/Super League Issues Paper of August 1997 suggests, the then focus of attention would seem to have been on the composition, etc, of the joint venture company.

144 The most that can be drawn from the evidence of what was being discussed at this early stage is that there was to be a joint venture company to operate the competition and that it was to be the licensor of teams participating in the competition. Those features of the proposed NRLC Co were carried forward and retained when negotiations resumed in October 1997. They were reflected in the 19 December Understanding, the 18 February MoU and the Merger Agreement.

145 While it is not clear on the documentation that has been tendered as to when and by whom the partnership proposal was made (a News document, "Key Points", of 2 December 1997 suggests that it was News' proposal), it is clear that in early December a 50/50 partnership was being negotiated to own and operate the competition but that NRLC Co would be appointed as "a management company … to operate the competition on a day to day basis" (to quote the draft December MoU documents). There is nothing in the documentation - and Mr Macourt's evidence in substance disavows the suggestion - that the two tiered structure was being erected in a manner designed to insulate the proposed partnership from a principal and agent relationship with NRLC Co.

146 When one has regard to the language of the Executive Summary for what it suggests of the character of the proposed partnership/NRLC Co relationship, it is reasonably clear in my view that its descriptions (so far as they go) of the NRL partnership and NRLC Co rely heavily upon the very language of the MoU drafts of 11 and of 23 December 1997. At least on the structural question with which I am concerned, those MoUs provide a better indication of what the then understanding of ARL and News was likely to be.

147 Though the materials are slender on the matter, it seems to me that the proper inference to be drawn is that the factual relation to which the parties were then intending to commit themselves as at 19-24 December 1997 had the characteristics of that of principal and agent. The partnership was to own and operate the competition. The company was to operate the actual competition part of the partnership business on a day to day basis. That NRLC Co was to be the licensor of the participating teams does not detract from this conclusion. Standing behind that company was, as the media releases made plain, the proposed partnership. It was to retain strategic control. NRLC Co provided the medium for licensee dealings with the partnership. So redolent of agency was the proposed partnership/company arrangement that if this was not then intended - if NRL was to have the

independence that the respondents contend for - this would have been made explicit not only as between the negotiating parties but also to all (public and clubs) who were being asked to believe in the new arrangement.

148 If the 19 December Understanding was one of agency what is clear is that, as negotiations continued thereafter(as they were expected to) greater attention was given to the precise structural arrangements to be put in place and to the respective roles of the parties in it. And as Mr Philip's evidence indicates, the lawyers came upon the drafting scene. An early indication of possible change was the 20 January 1998 media release in which NRL's responsibility was seemingly enlarged from the 19 December Understanding's role of operating the competition on a "day to day basis" to its being responsible for "long term and day-to-day operational issues".

149 The change in language from the draft MoUs of December 1997 to the executed MoU document of 18 February 1998 is more marked. The NRL partnership was now to "contract with a company … to conduct the NRL competition as an independent contractor".

150 The culmination of this process of change was in the 14 May 1998 documentation and, in particular, in the cl 2.2 denial of agency in the Services Agreement and in the cl 5.3(e) acknowledgment of no agency in the proposed form of Franchise Agreement annexed to the Merger Agreement. As Mr Philip indicated in his affidavit, he thought it was critical to make clear in the 14 May documentation that NRL was not an agent of the NRL partnership. An attempt was made in the drafting of the documents to achieve this. The question is whether it was effective in achieving its object.

151 Insofar as the MoU of 18 February 1998 is concerned, I am not satisfied that the evidence, such as it is, of what transpired in the interim since December 1997 - the respondents have in addition referred to minutes of a club CEOs' meeting of 22 January 1998 (not reproduced) - justifies my reaching a different conclusion as to the legal character of the intended partnership/NRL relationship from that which existed in December 1997. As I have indicated in the "Applicable Principles" above, the introduction of the term "independent contractor" is quite equivocal on its own. And in the setting in which it was then used it did not negate an agency characterisation.

152 The question as it arises in relation to the 14 May documentation is by no means so

easily answered.

153 Before expressing my views on the factual relation and then legal character of the relationship of the NRL partnership and NRL, I should comment briefly on each party. The partnership was established to conduct the partnership business on the terms and conditions of the Partnership Agreement: cl 3.1. The partnership business was that of "owning and operating the NRL competition": cl 1.1. The Partnership Agreement obliged the partners to enter into the NRL Services Agreement: cl 4.1. In consequence of the definition of "NRL Competition", the business the partnership owned and operated was the national rugby league competition that was "operated and managed" by NRL pursuant to the NRL Services Agreement. Importantly, though, how NRL "operated and managed" was itself prescribed. It provided the services contained in Schedule 1 to the Services Agreement. They were services "to enable the operation" of the competition and, at the risk of unnecessary repetition, are described (inter alia) as:

> *"1. Preparing and approving a draft Business Plan for submission to the Partners in accordance with clause 4.*
>
> *2. Conducting the NRL Competition in accordance with the Business Plan."*

Quite apart from its powers of direction, approval, etc, in the Services Agreement, the partnership had a direct strategic role in the conduct of the competition. Under the Services Agreement it "operated" its business in part directly, in part via the medium of NRL. One might in passing then question the completeness of the definition of "NRL Partnership" in the Services Agreement where the term is said to mean:

> *"the partnership between ARL and NRLI formed for the purpose of owning or having the right to use the Intellectual Property in the NRL Competition and licensing NRL to conduct the NRL Competition."*

154 For its part, not only was NRL a not-for-profit company, it was unable to conduct any business other than that of performing the Services Agreement. It was tied in this both by the Members Agreement (cl 2.3) to which NRL's articles of association were made subject, and by the Services Agreement itself (cl 3.3).

155 Turning to the relationship created between the two bodies by the Services Agreement, it is difficult to conceive of a relationship of purportedly independent parties that

involves so great a degree of dominance by one and subservience by the other. In this I agree completely with Souths' characterisation of the dimensions of control - both financial and by power of direction - enjoyed by the partnership. The cl 3.1(d) power of direction is pervasive and unqualified other than by the requirements of lawfulness and reasonableness - limitations I would note that characteristically are imposed on a principal's power of direction to an agent: see *Bowstead and Reynolds*, above, at 6-008; 3 Am Jur 2d, "Agency", §218. Telling because of their degree of intrusion into the internal affairs of NRL are the cl 3.4 powers of approval of appointments, etc, of NRL line managers, and of their lines of reporting and duty statements.

156 Looking at the relative positions of the parties, the level of autonomy formally left to NRL in the conduct of the competition is far from that one would expect of a party that professes to be acting in the matter as a principal. In this setting the term "independent contractor" in cl 2.2 of the Services Agreement is unilluminating of the question I have to decide. At least insofar as the control characteristic of the agency relationship is concerned, (see "Applicable Principles" 6, above), the Services Agreement creates a factual state of affairs which, so far as it goes, is archetypal of an agency relationship.

157 Nonetheless, as I also indicated in the Applicable Principles, "[c]ontrol by itself is insufficient to establish agency": *Restatement, Third, Agency*, Tentative Draft No 1, at 49. There must be more to the factual relation the parties have established than this.

158 It is Souths' contention that NRL, consensually, is carrying on the partnership's business for the partnership and that this, when coupled with the control characteristic, is sufficient to establish the relation of principal and agent inter se. One consequence of this, it is said, is that the form of acknowledgment of no agency in the franchise agreement is in reality an admission that without it the partnership would be liable to the clubs.

159 For my own part I am in substantial agreement with that submission. Reflecting the state of affairs sought to be created through the 14 May documentation, NRL has acknowledged in the recitals to the Services Agreement the partnership's ownership and conduct of the competition (recital A). And it was obliged to act on that premise in the Franchise Agreement (recitals, cl 1.1 "System", cl 3 and cl 5.1) which it was required by the Services Agreement to use (cl 3.3(a)) in conducting the competition.

160 In operating the NRL competition to the extent it was authorised so to do by the partnership, NRL was conducting not its own, but the partnership's business, granting rights of participation in not its own, but the partnership's business, on terms and conditions ordained not by itself, but by the partnership. The partnership was in the Services Agreement contracting as to the manner of its own operation of its business. It retained the key revenue rights; it secured for itself strategic power in relation to NRL's performance of its functions (through the Business Plan process, the powers of direction and approval); it designed a relationship in which, at the level at which NRL was to perform its part in the operation of the business, NRL represented the partnership's business, and invited participation in that business by, clubs etc. That relationship was, in my view, clearly a fiduciary one that was in substance one of agency.

161 In the context of the factual relation created by the parties I must give proper weight to the denial of agency contained in cl 2.2: see "Applicable Principles" above. A genuine statement of intention it may have been; an effective statement it was not. It simply misdescribed the relationship created inter se by the partnership and NRL: cf *Board of Trade v Hammond Elevator Co*, above.

162 Insofar as the Franchise Agreement acknowledgment is concerned, it did little to clarify the actual relationship between the partnership and NRL. The partnership had consensually put NRL in a position in which its actions in the performance of its services were capable of binding the partnership directly. It had sought to avert this consequence by securing third party agreement to what was in effect a surrender of rights. That agreement could only bind a signatory to it. In the TP Act setting where one is concerned with a purpose of preventing the provision of a service to a person, the fact that a person may have had to renounce rights if it was to have been supplied with the service seems to be of no moment in circumstances where the service was not provided to that person.

163 In the present matter, if it be the case that the purpose of the fourteen team provision was to prevent, restrict, or limit the supply or acquisition of services, the supply or acquisition so prevented, etc, was the supply or acquisition by the partnership of services in the course of the conduct of its business.

164 There are several ancillary matters to which I should refer briefly. First, I have not referred directly to an argument advanced by News and NRLI to the effect that the recitals in

the Services Agreement cannot in any way be used to contradict cl 2.2. I do not for one moment cast doubt on the long established proposition that in the construction of an instrument the recitals are subordinate to the operative part so that where the operative part is clear, it is treated as expressing the intention of the parties and it prevails over any suggestion of a contrary intention afforded by the recitals: see 10 *Halsbury's Laws of England*, 1st Ed, (1909), para 803; *Norton on Deeds*, (2nd Ed, 1928), 197. The question is not whether the intent of cl 2.2 was clear. It is whether, in the context of the factual relation consensually created, it was effective in its purpose.

165 Secondly, having found NRL to be the partnership's agent, I do not thereby suggest that any particular contract entered into by NRL did, or for that matter did not, bind the partnership. That question is one of fact in each instance and raises issues that go far beyond what is of present concern.

166 Thirdly, the conclusion at which I have arrived does not depend upon a particular construction being given s 4D(1) of the TP Act. For that reason I have not ventured upon the question whether, even absent a strict agency finding, the terms of the subsection could on their proper construction embrace supply or acquisition in circumstances such as the present.

167 My conclusion, then, is that for the purposes of the claims based on the fourteen team term contained in the 19 December Understanding, the 18 February MoU and the Merger Agreement, NRL was to be and then was the agent of the NRL partnership.

6. SERVICES

168 The services that Souths alleges were the subject of the fourteen team term exclusionary provision and in relation to which they were in competition (s 4D(2)) were (and I paraphrase):

(i) the services of organising and running top level rugby league competitions ("competition organising services");

(ii) the acquisition of the services of teams to play in those competitions ("team services");

(iii) the supply of entertainment services in the form of top level rugby league matches ("entertainment services"); and

(iv) the provision of funding to clubs ("funding services").

I will set out the precise terms of several of these as pleaded below.

169 News and NRLI have conceded in submissions that News and ARL were competitive with each other in relation to the first three of these (they deny the fourth), and accept that they were so competitive at the time of the 19 December Understanding. They do, though, contend that the fourteen team term does not relate to the supply of entertainment services to anyone. Accordingly they submit that the only relevant areas of competitive activity arising out of the fourteen team term are in the provision of competition organising services and in the acquisition of team services.

170 For its part NRL has (i) admitted that News and ARL were competitive in relation to entertainment services; (ii) accepted only in a qualified way that they were competitive in relation to competition organising services and team services *as pleaded*; but (iii) denied that they were competitive in relation to the provision of funding.

171 In light of the concessions made there are four issues that require address. The first two relate to the extent to which News and ARL were competitive in relation to competition organising services and team services as pleaded. The third relates to whether the funding of clubs was a service. And the fourth is whether the fourteen team term relates to the supply or acquisition of entertainment services.

(i) and (ii) Competition Organising Services and Team Services

172 These two services as pleaded were:

> *"(b) the supply of the services of organising and running top level rugby league competitions to Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL Optus Cup and the Super League competition including the Clubs, and to any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition;*
>
> *(c) the acquisition of services, being the provision of rugby league teams to play in the top level rugby league competitions organised and run by the ARL on the one hand, and News and SLPL on the other hand, from Souths, the clubs and franchisees which had participat[ed] in 1997 in the ARL Optus Cup and the Super League competition including certain of the Clubs and any other rugby league club willing and able to provide a team to participate competitively in a top level rugby league competition."*

173 NRL's concession is that, at its highest, the evidence establishes that prior to 19 December 1997 News and ARL were competitive with each other for the supply of organising services to, or the acquisition of team services from, only some of the existing twenty-two clubs that participated in ARL's Optus Cup competition and Super League's Telstra Cup competition.

174 To put this submission in context I need to refer briefly to the evidence on this matter. Mr Frykberg, who was at the relevant time News' Executive Director of Sport, gave evidence that (a) from early 1997 he was aware that some ARL clubs wanted to talk about the possibility of joining Super League; (b) he was authorised to talk to them on a no-commitment basis; (c) he had conversations to that end with representatives of Manly, St George, Illawarra, Newcastle and Sydney City; and (d) he was as a result of the view that it would be possible to convince some ARL clubs to join Super League. Mr Whittaker, then of ARL and NSWRL, gave evidence that he did not make any individual approaches to Super League clubs to join the 1998 ARL competition although, after the discussions to merge the two competitions broke down in August 1997, he invited the Super League clubs to participate in the new competition that ARL and NSWRL were proposing. His view of that offer was that it amounted to taking a negotiating position in the hope of precipitating further and more favourable merger proposals.

175 The NRL submission in my view inaccurately characterised the subject matter of competition as it related to the then existing twenty-two clubs. Those clubs at least provided the available pool of clubs for the two competitions. That News was, as a matter of judgement and/or accepted capacity to persuade, only interested in securing the services of some number of the clubs for its competition does not carry with it the consequence that it was only competitive with ARL in relation to those clubs in which it manifested an interest. For the purposes of determining whether ARL and News were in competition in relation to the provision or acquisition of services to or from the twenty-two clubs, it is sufficient in my view if it be shown, as was the case, that, in aggregate, they manifested an interest in all of the clubs and that they acquired or provided the relevant services from or to those clubs.

176 NRL further denies that there is evidence that ARL or News were ever in competition with respect to the supply or acquisition of the subject services to or from "any other rugby league club" willing and able to participate competitively in their competitions. This denial,

in my view, is properly made.

177 While the evidence could arguably support a possible inference that possible new entrants into the pool of available teams might have been countenanced by one or other of ARL and News, it clearly does not support that they were competitive in the manner pleaded. Indeed, as will be seen the size and characteristics of a rugby league competition were recurrent concerns across the 1990s and those concerns were manifest in the peace deal itself.

(iii) Funding Services

178 Souths' case as pleaded is that (a) prior to 19 December 1997 ARL and Super League provided the benefit or facility of funding to the clubs participating in their respective competitions; (b) it was a provision of the 19 December Understanding, the MoU and the Merger Agreement that, on the basis that there was a fourteen team competition from 2000, each such team would be entitled to an annual grant of $2 million; and (c) that provision had a purpose or purposes proscribed by s 45(2).

179 While News, NRLI and NRL admit that both ARL and Super League (hence News) provided funding to the teams that participated in their competitions, they deny that it was relevantly a "service" provided by them. It is said to have been simply "an aspect of the competition organising services" (News and NRLI) or "an incident of participation in [the] respective competitions" (NRL).

180 The evidence is that from 1995 to 1997 both Super League and ARL/NSWRL had paid in aggregate several hundred millions of dollars to provide funding to their respective clubs and, in the case of NSWRL, to pay for "player and coach contracts" as well. It is unnecessary to set out the precise details of these payments. It is clear that the Super League payments were made, initially, to entice ARL clubs to join Super League; that, as Mr Whittaker stated in cross-examination, in 1996 and 1997, NSWRL made substantial payments to its clubs in an endeavour to keep them loyal; and that ARL/NSWRL apprehended further attempts might be made by Super League to entice additional clubs to its competition through funding offers.

181 Mr Macourt agreed that in 1996 and 1997 News and ARL were competitive with each other in providing funds to clubs and players. Mr Frykberg agreed such was the case in

1997 (when he joined News). I would also note that Mr Whittaker, while acknowledging the strategic purpose of the funding paid by ARL/NSWRL to their clubs, also indicated that in 1997 it was also necessary to ensure clubs would be in a position to re-sign players in 1998. I take this to be a reference to the need to cope with the dramatic escalation in player payments that occurred in and in consequence of the Super League war.

182 The TP Act s 4 definition of "services" is one of "extravagant width": *Roberts v Murlar Pty Ltd* (1986) 68 ALR 62 at 72. Insofar as relevant for present purposes, the definition is as follows:

> *" 'services' includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:*
>
> *(a) a contract for or in relation to:*
>
> *(i) the performance of work (including work of a professional nature), whether with or without the supply of goods;*
>
> *(ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction."*

183 I would also note that s 4C(d) of the TP Act provides that for its purposes, unless a contrary intention appears:

> *"a reference to the supply or acquisition of services includes a reference to the supply or acquisition of services together with property or other services, or both."*

184 It is unsurprising that it has been suggested that the s 4 definition "should not be given an expansive meaning": *Queensland Aggregates Pty Ltd v Trade Practices Commission* (1981) 57 FLR 314 at 318; and that "a simple payment of money" should be excluded from the scope of the words "supply of services".

185 Nonetheless, when one has regard not merely to fact and dimensions of the funding provided by Super League and ARL/NSWRL but also to the purposes of the payments (one of which was, in the case of clubs, to secure their player base), the provision of funding itself can, in the very distinctive circumstances that obtained in this case, properly be characterised as a service provided by Super League and by ARL/NSWRL. It involved more than "a

simple payment of money". Mr Macourt and Mr Frykberg correctly characterised funding as being the subject of competition in 1997.

186 To characterise the provision of funding as a service does not, though, end the matter. While, as s 4C(d) indicates, one service can be supplied together with another service, that supply can be made in circumstances that indicate that their supply is not merely interdependent but is such that the supply of one is contingent upon the supply of the other.

187 In the present case the provision of funding prior to December 1997 cannot be characterised as a service independent of the competition organising services or team services supplied or acquired by Super League and ARL/NSWRL. Whatever the particular incentive it provided, it still properly can only be described as the handmaid of those services and as being inseparable from them. For this reason the fate of the funding provision in the year 2000 fourteen team competition and beyond stands or falls for s 45 purposes with those other services.

(iv) Entertainment Services and the Fourteen Team Term

188 In its pleading Souths describes the "entertainment services" provided by ARL and News in the following way:

> *"the supply of entertainment services, being top level rugby league matches, to persons interested in viewing top level rugby league matches at the grounds, on free to air television and on pay television, to persons interested in hearing radio broadcasts of top level rugby league matches and to persons interested in following top level rugby league matches in the media and otherwise."*

189 The respondents, while admitting this description, contend that for the purposes of s 4D(2) of the TP Act (which deems when persons will be in competition in relation to the supply of goods or services), the fourteen team term did not relate to the supply of entertainment services either at all or at least in the manner as pleaded as an exclusionary provision: see "Purposes and their Objects" below. In consequence these services could not be used for the purpose of characterising the fourteen team term as an exclusionary provision.

190 For convenience in exposition, I will defer treatment of the respondents' contentions until I deal with the purposes and objects of the fourteen team term below.

7. COMPETITION

191 A contract, arrangement or understanding cannot be said to contain an exclusionary provision unless the contract or arrangement was made, or the understanding was arrived at, between persons any two or more of whom were competitive with each other. As I previously indicated, s 4D(2) stipulates contingencies in which persons will be deemed competitive. Because of an argument raised by the respondents as to how s 4D(2) is to be applied to the various arrangements relied on by Souths, I have put the subsection in a recast form so as to highlight the contingencies.

192 Section 4D(2) can be said to deem one person to be competitive with another if, and only if, the first mentioned person:

(i) is in competition with the other; or

(ii) is likely to be in competition with the other; or

(iii) but for the provision of any contract, arrangement or understanding, would be or would be likely to be in competition with the other; or

(iv) but for the provision of any proposed contract, arrangement or understanding, would be or would be likely to be in competition with the other -

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

193 What is plain is that while the subsection requires the relevant persons to be "competitive", it does not require them to be so with each other at the time the contract, arrangement or understanding is entered into: *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410. It is enough that they are likely to be in competition, or but for an actual or proposed contract, etc, they would be or would be likely to be in competition. In other words the time when the parties are "in competition" for s 4D(2) purposes may pre-date or post-date the time of entry into the contract, etc. The subsection on its face, then, envisages a variety of possible times at which the parties can relevantly be competitive.

194 It is the respondents' case that even if the relevant services are of the types advanced by Souths, s 4D(2) requires that the two or more persons who are competitive (ie News and ARL) are to be, or be likely to be, competitive at the time the alleged exclusionary provision is stipulated to become operative, ie in the year 2000. In making this submission they advance a particular construction of the concluding words of s 4D(2) (ie "all or any of the

services to which the relevant [alleged exclusionary] provision … relates") such as makes any temporal limitation on the operation of the exclusionary provision itself intrinsic to the designation of the goods or services that are to be the subject of competition.

195 The respondents accept, as do Souths, that the question of whether the parties are competitive for s 4D purposes is to be determined at the time the impugned contract or arrangement was made, or the understanding was entered into: *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 at 74. But they say that, as the competition must be in relation to the supply or acquisition of the services to which the exclusionary provision relates, the "area of competition [must] coincide with the area of contractual regulation": *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 at 420. Hence it must relate to the supply of the relevant services in 2000.

196 Souths contends in contrast that s 4D(2) prescribes, via its various contingencies, its own temporal requirements (varying as between the contingencies) as to when the parties can actually be or be likely to be in competition - and hence be deemed to be in competition - in relation to the goods or services the subject of the alleged exclusion provision. Provided that parties are or are likely to be competitive in relation to those very goods or services at one or other of the times envisaged by s 4D(2), it matters not that the restriction, etc, on the supply of the goods or services takes effect when the parties are not likely to be competitive. A temporal limitation on when a restriction, etc, is to become operative may be a particular circumstance in which the supply of services or goods will be prevented, etc, for s 4D(1)(b)(ii) purposes. It is not a defining feature of the goods or services themselves. The relevant services here, it is claimed, are the four types of service that have been pleaded. At the time of the 19 December Understanding, ARL and News were then actually competitive in relation to those services for s 4D(2) purposes, these being the services to which the exclusionary provision related. In other words, the first of the contingencies envisaged by the subsection was satisfied. This was enough.

197 In the next section of these reasons I will refer to the apparent purpose of the s 45 prohibition of exclusionary provisions. I need only indicate here that that purpose lends no particular support to the respondents' contention. Once it be accepted, as it must, that the party the object of the exclusionary provision's purpose need not be in competition with any of the parties to the contract, arrangement or understanding, and that the contract need not

have, or have the potential to have, any anti-competitive effect as between two or more parties to the contract, there would appear to be no "purposive construction" reason for interpreting s 4D(2) as requiring that the relevant parties be in competition with each other at the time the alleged exclusionary provision is to take effect under the agreement.

198 The competition envisaged by s 4D(2) is to be in relation to relevantly identical goods or services and it is the function of the final words of s 4D(2) (ie "all or any of the goods or services to which the relevant provision … relates") to identify, by type, the subject matter of those services. Insofar as the subsection imposes a temporal requirement as to when the parties are to be in competition, that is to be found in the range of possibilities envisaged by the contingencies of s 4D(2) itself. Given that the subsection has in this fashion concerned itself with the "temporal dimension" of competition, it seems unlikely that the legislature would have intended that that be qualified by an implied requirement that the parties be competitive (in the s 4D(2) sense of "would be or would be likely to be") in relation to the relevant goods or services at the time that the provision was to become operative. This conclusion is reinforced by the consideration that it will often be adventitious when, as a practical matter, an agreed provision in fact becomes operative.

199 If, as here, the parties to the understanding were competitive in relation to services of the very types with which the alleged exclusionary provision was concerned at the time the understanding was entered into, that is sufficient to satisfy at least the competition requirement of s 4D(2). In saying this I should add I do not consider that I am saying anything inconsistent with what was said by Wilcox J in *Eastern Express Pty Ltd v TNT Management Pty Ltd*, above, or by the Full Court in the *News Ltd* case, (above, at 560). In each instance the Court's comments were directed to identifying the "very goods or services the subject of the alleged exclusionary provision" and not the time at which the restriction, limitation on, or the prevention of, their supply or acquisition was to become operative.

200 Underlying the respondents' submission was the contention that ARL was not likely to be in competition with News in relation to the services in question in 2000. A relatively large body of material was put into evidence in support of this and with either of two burdens. The first was to demonstrate that, if there had not been a merger of the two competitions agreed at the end of 1997, that would have occurred nonetheless at some time before 2000. The second was that if there had not been a merger before 2000, any competition conducted

by ARL at that time would have been a "second tier" competition and not a premier competition of the kind conducted by ARL in 1997. The reasons advanced for this projected dilution in the standing of ARL's competition related to what was said to be both the deteriorating financial circumstances of ARL and NSWRL and major sponsor (especially Optus) resistance to providing ongoing support.

201 Given the conclusion at which I have arrived it is unnecessary for me to embark on a consideration of that evidence and I refrain from so doing. Even if I am incorrect in the construction I have placed on s 4D(2), that would not alter the conclusion at which I have arrived in relation to the s 45 claims based on the fourteen team term.

8. PURPOSES AND THEIR OBJECTS

202 For a provision in a contract, arrangement or understanding to be characterised as exclusionary it must have, as s 4D(1)(b) of the TP Act prescribes:

> *"the purpose of preventing, restricting or limiting*
>
> *(i) the supply of ... services to, or the acquisition of ... services from, particular persons or classes of persons; or*
>
> *(ii) the supply of ... services to, or the acquisition of ... services from, particular persons or classes of persons in particular circumstances or on particular conditions."*

203 It is Souths' case that the fourteen team term had such purposes in relation to the supply or acquisition of each of the three services - entertainment, competition organising and team services - supplied or acquired by News and ARL prior to 19 December 1997. In respect of each such service separate and cumulative claims are made as to the purposes of the fourteen team term, and as to the particular person or classes of persons who were the objects of those purposes.

204 Before considering that case it is appropriate to refer first to the principles and statutory provisions that inform the application of s 4D(1) and then to the factual setting of the fourteen team term.

(a) Applicable Principles and Statutory Provisions

205 There are several respects in which the terminology of s 4D(1)(b) requires

elaboration.

206 1. Though the subsection refers to the purpose the "provision" has, I am obliged to accept that the purpose that has to be demonstrated is the "subjective" purpose of the individuals who included the provision in the contract, arrangement or understanding in question: *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460 at 476-477; and see *News Ltd v Australian Rugby Football League Ltd*, above, at 576.

207 2. By virtue of s 4F(1)(a) of the TP Act, a provision is deemed to have a particular purpose if it was included in a contract, arrangement or understanding for purposes that included that purpose and it was itself a "substantial purpose". It is unnecessary in this proceeding to consider what is the proper construction of the term "substantial" in s 4F.

208 3. While the purpose of a provision may be evidenced in the effects it produces, the purpose for its inclusion in a contract etc is not to be determined necessarily by, or simply by reference to, its effects: *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109. What is to be ascertained is the reason (or reasons) for its inclusion. And that reason, or those reasons, can be determined by ascertaining the effect or effects the parties subjectively sought to achieve through the inclusion of the provision in the understanding, etc: cf *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* at 475.

209 4. Section 45(2) proscribes entering into, or giving effect to, a contract, etc, containing an exclusionary provision irrespective of whether this has, or has the potential to have, an effect upon competition. The s 4D(1) definition has no requirement that the target of the provision, the boycotted party, be a competitor (actual or potential) of those conducting the boycott: Pengilly, "Trade Associations and Collective Boycotts in Australia and New Zealand" (1987) Antitrust Bulletin 1019 at 1030. To the extent that (a) the objects provision of the TP Act (s 2), (b) the frame of s 45 itself, and (c) the Second Reading Speech on the Trade Practices Amendment Bill 1977 that introduced the s 45(2) automatic prohibition on primary boycotts, throw light on the legislature's purpose in proscribing boycotts beyond those of actual or potential competitors, it would seem to be because such boycotts (in preventing, limiting or restricting the provision of services to, or acquisition of services by *a particular* person or *particular* classes of person), constitute a form of 'unfair trading': cf TP Act s 2; see Sullivan, "The Purpose of Antitrust: Policy Goals in the United States, the EEC and Australia" at 18, Trade Practices Workshop, 22-23 July 1989, Monash Law Faculty

and Law Council of Australia; or, as was said in the Second Reading Speech: (Hansard, House of Representatives, 3 May 1977, 1477) "boycotting the commercial activities of particular persons is generally undesirable conduct". What seems to be the vice in this particular form of boycotts is that they involve an unfair (usually collective: but cf *Pont Data*) exercise of power against a targeted person or class of persons: see Clarke and Corones, *Competition Law and Policy*, (1999), 252-253.

210 5. There is some controversy as to what the terms "particular … classes of persons" comprehend for s 4D(1) purposes. This stems in part from what it is said the Full Court of this Court held in *ASX Operations Pty Ltd v Pont Data Pty Ltd (No 1)* above, the complex facts of which may be paraphrased as follows. So as to preserve its position as a wholesaler of particular information that it alone controlled, the supplier of that information required acquirers to agree that they would not resupply that information to others, even though they were competitors of the supplier in the information services they offered third parties.

211 In resisting the claim that the "no re-supply" provision was an exclusionary one, the appellants contended that the restraint on re-supply could not have the purpose of preventing, restricting or limiting to supply of services to a "particular" class of persons or the acquisition of services by a "particular" class of persons. Of this the Full Court observed (at 488):

> *"It was said that the persons or classes excluded must still be "identified" if s 4D is to apply. That may be conceded, but they are identified, in the present case, by the characteristic that they may not be supplied with the information in question, unless they accept and become bound by the restraints imposed by the Dynamic Agreement. Such persons come within a particular category or description defined by a collective formula: cf* Pearks v Moseley, Re Moseley's Trusts *(1980) 5 App Cas 714 at 723. They ordinarily would be treated as constituting a particular class, even though at any one time the identity of all the members of the class might not readily be ascertainable. What distinguishes the class and makes it particular is that its members are objects of an anti-competitive purpose, with which s 4D is concerned."*

212 I have set out this holding in its totality. In my view it embodies three distinct propositions. First, a class for s 4D(1) purposes may be defined by a collective formula that embodies the characteristic that differentiates its members from those who are not members of the class. Secondly, the members of a class so defined are identified (in the sense of being differentiated from non-members) even though the identity of all of them may not be

ascertainable at any one time. Thirdly, because the existence and identity of the class for s 4D(1) purposes depends upon whether the provision of a contract, etc, has a particular purpose in relation to the alleged class, "[w]hat distinguishes the class and makes it particular is that its members are objects of an anti-competitive purpose, with which s 4D is concerned". In *Pont Data* the Court described the "identifying characteristic" of the class as being "that they may not be supplied with the information in question, unless they accept and become bound by the restraints imposed by the [agreement in question]". In other words, in that case the s 4D(1) purpose of discriminating between persons: cf *Trade Practices Commission v Garden City Cabs Co-Operative Ltd* (1995) ATPR §41-410 at 40,551; inhered in the definition of the class itself.

213 In the interlocutory application before Hely J in this matter, the issue of what could constitute a class for s 4D purposes was considered. Having observed ((1999) 169 ALR at 133) that the clubs that participated in the 1997 competition were identifiable as also were such of the fourteen teams as were selected from their number, his Honour continued:

> *"The respondents submitted that the distinguishing feature of the class cannot be the fact of exclusion itself. In other words, in order for persons the target of an exclusionary provision to be a class, there must be a common feature distinguishing those persons other than the mere fact of them being subjects of exclusion. It may be thought that there is some force in this submission. However,* Pont Data *provides otherwise: a class may be identified by reference to the fact that its members may not be supplied with services unless those members accept and become bound by restraints imposed by, in that case, the supply agreement.* ***This suggests that the unifying characteristic of a group can include the fact of exclusion itself****. Here, the unifying characteristic of the group is that the relevant clubs were participants in the 1997 competitions, and are not within the groups to be carved out therefrom.*
>
> *Accordingly, in my opinion, Souths has a reasonably arguable case that the 14 team term has the purpose of preventing the supply or acquisition of services to or from a particular class of persons":* [emphasis added].

214 In the sentence I have emphasised where reference is made to the "fact of exclusion itself", I do not take his Honour to be suggesting that that fact, which is simply an effect, is capable itself of providing the defining characteristic of a class for s 4D(1) purposes. While that fact clearly can identify a class in that it embodies a differentiating characteristic and to that extent can satisfy the first of the *Pont Data* propositions to which I have referred, it is in my respectful view insufficient to define a class for s 4D(1) purposes consistent with the third of the propositions from *Pont Data.* For the class to have significance for s 4D purposes it

must be the intended object of the discrimination envisaged by the section. If it is not so "aimed at" specifically: *News Ltd v Australian Rugby Football League Ltd*, above, at 577; the members of the alleged class do not constitute a "particular class" for s 4D(1) purposes though they may otherwise be said to constitute a class because they happen to share some differentiating characteristic be this the fact of exclusion or otherwise. The requirement that the class be the object or target of the discriminatory purpose accords with what I suggested above was the legislative purpose of s 45(2) as it applied to the boycott of a class of persons who were not in actual or potential competition with the parties to the boycott.

(b) Additional Factual Material

215 The size and national character of the ARL/NSWRL premier rugby league competition received some consideration by NSWRL after the competition had moved beyond the boundaries of New South Wales in 1988 to include two teams from Queensland, Brisbane and Gold Coast. In 1992 a commissioned report of an organisation review of ARL ("the Bradley Report") was presented to NSWRL. Its premise was that the competition conducted by NSWRL "needs to be expanded to include teams from throughout Australia and perhaps New Zealand as well".

216 At the time of the Bradley Report there were sixteen clubs in the competition, eleven of these being drawn from Sydney. It was Bradley's view that the problems facing the League were that the competition already had too many clubs to allow two complete rounds to be played and that too many of the Sydney based clubs were inner city based. The Report considered a number of possible solutions to the problem of the composition of a national competition. Its preferred long term solution was to "reduce the number of clubs in the National Competition to fourteen thus allowing clubs to play two complete rounds". It envisaged that there would only be five Sydney based clubs in that competition. It considered that "Sydney based clubs are going to have to move to new areas, merge or be relegated from the League. This is going to be a painful process". In August 1992, NSWRL distributed copies of the Bradley Report to all clubs.

217 By 1995 the decision to move to a national competition had been put into effect in some degree. While the competition had increased in size from sixteen teams to twenty teams, the four new entrants were all from outside New South Wales (South Queensland, North Queensland, Perth and Auckland).

218 During 1995 eight of the teams in the ARL/NSWRL competition agreed to join the Super League competition projected to begin in 1996. That competition did not actually commence until 1997 consequent upon the decision of the Full Court of this Court in *News Ltd v Australian Rugby Football League Ltd*, above. Two new teams were added to the eight that had already joined Super League - Adelaide and a Newcastle based team.

219 It is Mr Whittaker's evidence that by May 1997 it was clear to him (as it was to Mr McDonald, Chairman of ARL and Mr Lockwood, Chairman of NSWRL) that the conduct of competing rugby league competitions had caused substantial damage to the game. It had alienated fans leading to a downturn in spectator interest; it had damaged the ability of the game and of clubs to attract sponsors; it had led to an explosion in player salaries and other expenses that were unsustainable having regard to revenues generated; and, he believed, it had placed a number of clubs, both from the ARL and Super League competitions, in a precarious financial position.

220 It was his then view that the long term future of rugby league as a premier "spectator and television sport" was in doubt unless (a) there was a return to a single competition; (b) the number of participating clubs was reduced to a number that would allow the competition to be compelling to spectators, economically sustainable in the future and the clubs to be both financially viable and competitive; (c) there was a reduction in the Sydney teams to a number that was economically sustainable in the Sydney area; and (d) the competition had a significant national spread.

221 He did not believe that the two competitions could survive. Particularly he did not believe that the levels of funding received by the two competitions in 1997 ($140 million obtained primarily from News and Optus) was sustainable.

222 On 20 June 1997 Mr Whittaker made a presentation to the board of NSWRL on the future of rugby league in Australia. A report was distributed at the same time ("the June Report"). A copy of it as also of slides used in the presentation are in evidence. The Report described the then "current situation" in terms that reflected Mr Whittaker's evidence above. It saw three possible ways forward - do nothing ie "tough it out"; reduce the national competition to a Sydney competition; or negotiate a solution with News, Optus, Nine and others to rebuild the game. It recommended the third as it was "the only option that":

". allows the game of rugby league, as a unit, to be saved in the short term;
. minimises permanent damage to the game; and
. gives the game a chance to flourish in the long term."

223 A recommended model was put forward that was supported by financial modelling prepared by the accounting firm, Coopers & Lybrand, that had projected elite competitions of twelve, fourteen, sixteen and twenty-two teams. Insofar as the actual competition proposed was concerned, the Report proposed (in Part 3):

". introduce a national rugby league championship ("NRLC") comprising 12 licensees, licensed by the ARL on a tender basis (see Annexure "D"). The 12 licenses will be allocated for geographical areas: 5 in Sydney, 3 in Queensland and 4 in other regional areas."

Annexure D was a draft "Outline of Tender for National Competition Licence". Other elements in the eight point plan proposed included the introduction of a salary cap and permitting clubs to chose to participate in a State league competition.

224 The advantages of the recommended model were said to be:

". clubs have a choice in their destiny;
. there is a chance to return to real value in player contracts and payments;
. there are no forced mergers of clubs;
. tribal support for existing clubs is retained;
. value to TV and sponsors is maximised;
. financial sustainability is established that provides a secure future for grass roots rugby league (junior and senior);
. the State league competitions are well funded to encourage country players to stay in the country, ensuring a greater depth and quality of players in country areas."

Under the heading "Other Options" the Report stated:

"4.1 Other options considered included a full merger of the existing two competitions, and their respective clubs, to create:

. a 20 team competition;
. a 16/18 team competition;
. a 14 team competition.

The General Manager's presentation slides contain financial models for these options.

4.2 These options:

. *maximise the risk of sending clubs broke;*
. *are too expensive to maintain;*
. *will reduce the overall standard of games;*
. *are unlikely to be acceptable to News - News believes even a 14 team competition is not viable financially.*

A 12 team competition has the best chance of sustainable success, for the reasons set out in Part 3 of this Report."

225 Consistent with the tie of ARL and NSWRL to Optus and Nine as financiers of their competition, the Report noted that they would be kept informed of developments in the proposed model and that ARL had requested Optus and Nine to give written authorisation to commence negotiation with News.

226 The slides used in the presentation are suggestive both of the environment in which Mr Whittaker perceived he was working and of what were considered to be the financial and other imperatives to the course proposed. The financial issues for the game, as seen from an ARL/NSWRL perspective, were indicated under the heading "Burning Platform". Player payments were said to be "out of control" and depicted the following:

" 1994 $21 million*
** 1997 $63 million*
** 57% of total industry revenue*
** 127% of club revenue (excluding grants)*
** Total payment ARL/SL = $120 million"*

227 The slides dealing with the other options and the reasons why they may not have been acceptable to "other stakeholders" stated:

"	*KEY DRIVERS*	*12 teams*	*14 teams*	*16 teams*	*22 teams*
	Premium product for TV	□	□	…	□
	Sustainable community asset	□	□	□	□
	Financially sustainable (4 yr premium over rights at $65 million p.a.	□ *($101m)*	… *($118 m)*	□ *($141m)*	□ *($242m)*
	Maximise sponsorship/gate/ merchandising	□	□	□	□
	Secure and realistic player futures	□	□	…	□

> * *All TV operators want one competition delivering compelling product*
> * *They want to see short term financial sustainability*
> * *They want optimised TV market appeal*
>
> ……. ***and we can't survive without them****": emphasis in original.*

228 The minutes of the 20 June 1997 board meeting record that Mr Whittaker advised the board that "the 12 and 14 team models were more financially acceptable than other options". The minutes later recorded that the board "agreed in principle to a 14 team competition in 1998 should there be only one competition in place".

229 At an adjourned meeting on 24 June 1997 the board resolved that NSWRL work towards a single competition in 1998 within the framework (inter alia) of a national competition of fourteen teams and that:

> *"The league continue discussions with Super League and television companies to achieve an acceptable outcome in the interests of rugby league in Australia."*

230 On 25 June 1997 Mr Whittaker and Mr McDonald made reports to the ARL board which passed a resolution similar to that of the NSWRL board at its adjourned meeting with the exception that the national competition was to have, not fourteen teams, but "a sustainable number of teams". On 29 July 1997 the NSWRL board made a like amendment to its previous resolution. By the time of the ARL board meeting in June preliminary discussions had begun between Mr Whittaker and Mr Frykberg.

231 It is the evidence both of Mr Macourt and Mr Frykberg that, from the commencement of the 1997 Super League season, they had a number of meetings with Mr Lachlan Murdoch and, for a time, Mr Cowley ("the News meetings"). Mr Frykberg indicated at a number of those meetings that he did not consider Super League sustainable as a separate competition "in the medium to long term". He considered the split competition to be damaging to the game. Spectators were being lost and that would cause problems in attracting sponsors.

232 In May 1997 Mr Frykberg had discussions with Mr Geoff Carr, an ARL employee, in which he became aware that Mr Whittaker was prepared to discuss with News a possible merger of the two competitions. This was reported at a News meeting in June. Mr Murdoch later proposed that Mr Frykberg should meet with ARL to see whether agreement

could be reached on a merger. Mr Frykberg understood he was authorised to put to ARL the position of News that, to quote his affidavit:

> *". the competition would be called Super League;*
> *. the ARL would run representative and other football;*
> *there would be 12 teams in the domestic competition; and*
> *the competition would be jointly funded by News and the ARL."*

It should be noted that the Super League competition was, and was designed to be, a home and away one.

233 Mr Macourt, who was then Chief Financial Officer of News, has said he was concerned during the first half of 1997 with the large costs of running the Super League competition and about the viability of the competition in the long term. In about June 1997 he instructed Mr Jourdain to start preparing financial models in order to assess the financial impact of a number of alternative scenarios, including a continuation of the two competitions and a merger of the two competitions with a particular number of teams. Examples of that modelling are in evidence. Mr Macourt has deposed that the various models he considered made it apparent to him that the best solution would be to try to achieve a merger and that though a number of alternate solutions were not substantially worse than a merged competition of twelve to fourteen teams, there was a much greater risk that News could not bring about the assumptions on which those alternatives were based.

234 There was, according to Mr Macourt, discussion at a number of the News meetings of the maximum number of teams that should be permitted in the merged competition. He recalled Mr Frykberg proposing a fourteen team maximum and for a home and away competition. For his own part, he did not have a view as to the precise number of teams that should be permitted in a merged competition. He believed there should be a maximum set at a number that would make the merged competition sustainable in the long term. A maximum in any event was essential if agreements with Telstra, Nine and Optus in relation both to the release of existing broadcasting rights and to the grant of new rights were to be reached. He considered that the broadcasters would require to know the form of the new competition when negotiating releases and new arrangements.

235 The competition structure and number of teams were the subject of much discussion in the July 1997 meetings of the ARL/NSWRL representatives (Messrs Whittaker, Lockwood and McDonald) and those of News (Messrs Frykberg and Macourt and seemingly for a time,

Mr Cowley). As noted above, Mr Frykberg proposed twelve teams. ARL indicated it was unhappy with this and proposed sixteen teams. A possible compromise of a fourteen team home and away competition phased in over three years was proposed by Mr Whittaker. The compromise was taken back to News and Mr Murdoch and Mr Macourt agreed to it but with a phasing in over two, not three, years. The common assumption of the parties in this negotiating process, according to Mr Frykberg, was that the merged competition had to be a sustainable one.

236 On 31 July Mr Whittaker tabled the draft "ARL/Super League Terms Sheet" ("the Terms Sheet") at a meeting of the NSWRL board the purpose of which was to outline a proposal for a united game for discussion with News and to operate as an agenda in that discussion. The board determined that the timing of the clauses on number of teams in 1998 and 1999 would depend upon the progress of negotiations. The ARL board considered the draft Terms Sheet at its meeting of 4 August 1997. Mr Whittaker provided a copy of the Terms Sheet to Mr Frykberg at a meeting in August. The document by then no longer contained the annexure to which I will refer below.

237 The draft restated the ARL board's resolution to work towards a single national rugby league competition with a sustainable number of teams. In its ten point plan the draft contemplated a national competition comprising for 1998 (as a transitional year) sixteen licensees to be licensed on a tender basis reducing in 1999 to fourteen teams. As part of the transitional arrangements it was stated that the reduction in the number of teams for the 1998 competition would be determined by ARL and Super League clubs each contributing five "stand alone" teams that would be licensed in their own right. An annexure provided an indicative list of these clubs and contemplated, it would seem, joint ventures between the balance of Super League and ARL clubs to make up the remaining sixteen teams. Paras 3.3 and 3.4 of the transitional arrangements proposed that:

> *"If clubs enter into joint ventures to form a licensee to participate in the NRLC, those licensees will be granted a five year licence and guaranteed funding for five years (1998-2002 inclusive). This provides an incentive to clubs to undertake joint ventures.*
>
> *In 1999 the NRLC will be reduced to 14 teams. At least 2 'stand alone' clubs in 1998 will not be entitled to participate as a 'stand alone' club in the 1999 NRLC, based on financial and other performance benchmarks set out in the licences."*

238 On 17 August 1997 Mr Whittaker sent Mr Frykberg a document entitled "ARL/Super League Issues Paper" ("the Issues Paper"). The presentation of this document to News was endorsed by the board of NSWRL notwithstanding that it precipitated the breakdown of negotiations. Mr Frykberg considered that the Issues Paper re-opened several issues which News considered had been previously agreed. His objections he recorded in a document entitled "ARL/Super League - Discussion Paper". The Issues Paper itself did not mention the fourteen team term. It was by then, apparently, not considered to be an issue and seems not to have been regarded as such in Mr Frykberg's Discussion Paper.

239 After the breakdown of negotiations Mr Whittaker presented a number of papers to the NSWRL board on 20 August 1997 including one entitled "Key Reasons Why We Must Do a Deal". It reiterated the themes of concern of the June Report. Amongst the matters referred to in its dot point format it stated:

"Too many Sydney teams
- *everyone knows it*
- *yes we stuck together*
- *without the war Clubs would have gone now."*

On 21 August the same document was presented to a meeting of the ARL National Premiership Council.

240 In the late August-September period, ARL and NSWRL continued to develop their proposals for a National Rugby League Competition (NRLC). On 26 August, for example, it sent to Souths for comment its draft guidelines for entry into the NRLC. These proposed that "an applicant Licensee is to be able to meet designated requirements". The first was that each team was required to generate a minimum of $7.5 million per season in revenue which would be required to administer the operations of the team and to provide funding for a salary cap of $5 million.

241 On 15 September 1997 the board of NSWRL authorised Mr Whittaker to prepare a detailed proposal on the establishment of NRLC Co in the terms described in the Terms Sheet and Issues Paper and it approved and authorised for implementation the "way forward" set out in Mr Whittaker's written report to the board of that date. That "way forward", that had much in it of securing a negotiating advantage with News (including the convening of an "industry summit between ARL and Super League Clubs"), carried forward the general proposals previously made. Significantly the report again acknowledged the need for

approvals to be obtained from (amongst others) Optus and Nine to the establishment of NRLC Co and its proposed competition.

242 Negotiations resumed at the beginning of October 1997. By late November Mr Whittaker could report to the NSWRL board that there were "ten major issues to be further discussed prior to a 'Heads of Agreement' being reached".

243 On 2 December 1997 News prepared a "Key Points" paper to which ARL responded on 8 December addressing each point by way of a response that either agreed or disagreed "in principle only". News' paper proposed that in 1998 each existing non-Sydney Super League and ARL club be given licences variously of five and three years, with the Sydney clubs receiving one year licences. In 1999 only six licences were to be issued ("ie, a maximum of 14 teams").

244 ARL disagreed and advanced a counter-proposal:

> *"1998 - 20 teams, each on a 1 year licence. This ensures that all (Super League and ARL) clubs commence the unified competition with an equal opportunity to participate in the rationalisation process.*
>
> *1999 - 16 teams, on varying terms depending on the level of satisfaction of licence criteria (eg a merged Sydney team will obtain a 5 year licence, but a stand alone Sydney team will get a one year licence).*
>
> *The tender process and licence criteria (see attached outline) will determine the number, and term, of licences. For example, a five year licence will be granted only to those tenderers that can demonstrate sustainable compliance with the licence criteria. If clubs enter into joint ventures to form a licensee to participate in the NRLC, those licensees will be granted a five year licence and guaranteed funding for five years (1999-2003 inclusive). This provides an incentive to clubs to undertake joint ventures or mergers.*
>
> *2000-$28,000,000 of funding is available, with the number (not to exceed 16), and the term, of licences depending on the level of satisfaction of licence criteria.*
>
> *NRLC Co would need to decide how many licences should be issued in 2000, given the state of the game at that time. For example, in 2000 the NRLC could be reduced to 14 teams by at least two 'stand alone' clubs in 1999 not being entitled to participate as a 'stand alone' club in the 2000 NRLC, based on financial and other performance benchmarks set out in the licences, or alternatively, reduce the grant to the existing 16 teams and continue on that basis if the competition quality allows.*

This process ensures that Sydney clubs who wish to tender for a licence on a stand alone basis are taking a significant risk of missing out on a licence altogether unless the club merges or enters into a joint venture. Ultimately, the clubs must make the decision, in light of the financial incentives and the total number of licences available."

245 It is Mr Frykberg's evidence that when Mr Whittaker gave him ARL's response he said that if there was too much pain in getting the competition down to fourteen teams, ARL thought it should include up to sixteen teams in 2000 and beyond. Mr Frykberg's reply was that that was not acceptable. The fourteen teams by 2000 had been agreed and News' position was not negotiable on that issue.

246 By 10 December 1997 documentation entitled "Proposal for Competition Structure" had been prepared. It followed the twenty team (1998), sixteen team (1999) and fourteen team (2000) formula. It provided positive incentives to merger (as had the News Key Points paper and the ARL response). It provided that in the fourteen team competition there should be the 8-6/6-8 split. It prescribed the regions outside of Sydney until 2001. And it set out the priorities for licences in the event of too many teams meeting the criteria. These were (i) merged clubs (ii) regional clubs and (iii) stand alone clubs. Subsequent competition structure documentation including the December MoUs justified the priorities in the following terms:

"The parties recognise that it is in the best interests of rugby league to prioritize the grant of licences, for example, to encourage:

(a) mergers of Sydney clubs; and
(b) a national competition."

247 Though further changes were made to details of the competition structure over the next week, it had for present purposes reached its final shape and provided the basis of the 19 December Understanding and the 24 December MoU agreement.

248 The only change of significance that was to occur in the competition structure after 19 December was before the 18 February MoU when, at ARL's request, the 1999 sixteen team provision was varied to allow up to twenty teams. The purpose of the change proposal, as Mr Frykberg understood it, was to allow all clubs extra time in which to form mergers and joint ventures.

249 There is a number of additional matters to which reference should be made. The first is that, on Mr Frykberg's evidence which I accept, the subject of team mergers and joint ventures was a subject of discussion with Mr Whittaker from early in the negotiations and that both of them had identified possible merger/joint venture partners. Mr Frykberg had discussions with several club CEOs to canvas their respective club's views on mergers. He believed clubs should be given financial incentives to form joint ventures or to merge and he instructed Mr Jourdain to prepare a document entitled "Strategy for encouraging teams to form joint ventures".

250 Secondly, as noted in the General Chronology, ARL clubs had no general right to participate in the ARL/NSWRL competition at least after 1984, they being required to apply for admission on an annual basis until at least 1995 and the onset of the Super League war. In 1997 the ARL clubs made commitments to ARL and NSWRL initially for the 1997 and 1998 seasons and then later for the 1998 and 1999 seasons.

251 Finally I need to refer to the evidence of Mr Macourt, Mr Frykberg and Mr Whittaker to which some reference has already been made for essentially chronological purposes.

(i) Mr Macourt

252 Mr Macourt's reasons for adopting the fourteen team maximum have in part been referred to above. I would note, additionally, his evidence that he accepted Mr Frykberg's advice that the fairest and most attractive competition would be a home and away one and that fourteen teams was a maximum for such a competition. It was apparent from his financial modelling that a competition of that size would be viable and furthermore would allow the competition organiser to pay $2 million per year to the clubs in the competition, this sum being the amount that Super League was committed to paying its clubs under their existing licence agreements.

253 In cross-examination by Mr Hughes QC, he accepted that the process of reducing the teams in the competition to fourteen in 2000 had to be buttressed by some provision for excluding a club or clubs if there was one or more too many seeking selection. He agreed there had to be a way of choosing fourteen teams. He also accepted that the purpose of excluding by criteria a club or clubs, if more than fourteen applied for admission to the 2000 competition, was central to the operation of the peace deal announced on 19 December 1997.

254 On the distinct matter of clubs having particular supporters ("tribal loyalists") whose interest in the game was wrapped up exclusively or predominantly in following the fortunes of the club to which they attached themselves, Mr Macourt indicated he was aware of this phenomenon well before any involvement of his in rugby league.

(ii) Mr Frykberg

255 In his affidavit he deposed that his purpose in pursuing a merged competition was to ensure that rugby league was financially viable and sustainable in the future. A major factor in sustainability was to achieve the best possible competition that would rekindle public interest and support and which would offer sponsors and media companies access to a quality sporting competition. Three important aspects of such a competition were (a) the structure of the competition had to be the fairest and most attractive form of competition - a home and away competition constrained in its duration by climatic conditions and competing media demands between summer and winter sports provided this; (b) the competitors had to be financially viable - this required building a framework where teams would not rely on third party handouts and in an environment of limited club sponsorship opportunities; and (c) the quality had to be consistently high. He considered the best number of teams was fourteen. He considered that a fourteen team competition could be achieved without exclusion of any club and that a reduction to fourteen teams was likely to occur through mergers and joint ventures.

256 Mr Frykberg accepted in cross-examination that it was an essential element of the 19 December agreement that, in the absence of being able to reach a fourteen team competition naturally, there had to be a mechanism in place which would arrive at a fourteen team as agreed by both sides. The Admission Criteria would provide that mechanism. He also agreed that he was aware of the possibility of supporter loss should a club be excluded but that it was his "fervent view … that no club would be excluded".

257 In relation to "tribal loyalists", Mr Frykberg accepted all clubs had such supporters as a recognisable grouping. He accepted that there was a significant chance that, if a club was excluded from the competition, they would be lost to the game as spectators. He confirmed his belief that News' aim was to encourage joint ventures so that all clubs could continue to participate in the competition. This was to ensure the competition was sustainable by minimising the possibility of supporter loss.

(iii) Mr Whittaker

258 Mr Whittaker's evidence on why he agreed to a fourteen team term has in some measure been set out above in the chronological material. His purpose was to secure the future of the game through a merged competition. While he made a number of proposals either to NSWRL or to News between June and December 1997 as to the number of teams in a merged competition (twelve in the June Report, fourteen in the Terms Sheet and sixteen in the response to News' Key Points paper), he agreed to fourteen in December 1997 as News' position was that that figure was not negotiable.

259 In cross-examination he stated that he hoped to achieve a reduction in team numbers to fourteen through mergers and joint ventures and a reason for encouraging this especially among Sydney clubs was to preserve, so far as possible, the fan base of all of the Sydney clubs. He stated as well in his affidavit that in December 1997 and thereafter his view was that a fourteen team term could be achieved without clubs who wished to participate in the competition being excluded. Financial considerations, he believed, would lead teams to form joint ventures or mergers or to choose to play in a State based competition. He accepted that it was necessary to have a mechanism in place to determine, if necessary, which teams would gain admission to the competition from 2000 if there were more than fourteen seeking admission. He indicated that there was at the time a lot of people around who thought attrition should have been the way rationalisation occurred but his view was that competition rationalisation should not be based on who had the most money.

260 On the question of "tribal loyalists", Mr Whittaker acknowledged the existence of such supporters of clubs; he appreciated that if a club was excluded from the competition its fans could be lost to the game; he regarded such a loss of fans as an undesirable outcome but it was a price which, if it had to be paid, was unfortunate but which might have to be paid for the overall interests of the game; and there was accord in the negotiations that a loss of fans would be "a bad outcome".

(c) Submissions and Conclusions

261 Souths' case on the fourteen team term is a complex one in that it ascribes several distinct s 4D purposes to each of the services it says are comprehended by the exclusionary provision and it designates differing persons or classes of person for those distinct purposes. It will in consequence be necessary to consider the claims in a somewhat fragmented way.

Because of the similarity in the cases made on competition organising services and team services, these at least can be considered together.

(i) Preventing the supply of competition organising services to, and the acquisition of team services from, particular classes of persons

262 In the case of each service the designated persons or classes of persons that were the alleged objects of ARL's and News' purpose of preventing the supply, or acquisition of these services were, according to Souths' pleading:

> *"(i) the clubs which participated in the 1997 ARL and Super League competitions and who had not withdrawn from those competitions before that date, other than the 14 clubs (including merged clubs as a single club), who would be selected to participate in the competition from the year 2000; and*
>
> *(ii) all rugby league clubs which were willing and able to participate competitively in a top level rugby league competition other than the 14 clubs (including merged clubs as a single club) who would be selected to participate in the NRL competition from the year 2000."*

It is sufficient to consider the first of these in any detail.

263 Souths' submission in relation to these clubs, or to this class of clubs (to view them collectively), can be put simply. Both ARL and News had the purpose that from 2000, the competition would be reduced to fourteen teams with no more than eight teams and no fewer than six teams from Sydney. The fourteen team term was a fundamental term of the merger agreement. Each of Mr Macourt, Mr Frykberg and Whittaker gave oral evidence supporting the existence of a subjective purpose to reduce the number of the teams in the competition to fourteen in 2000 by the formulation of a provision for excluding a club or clubs if there were more than fourteen applicants for participation in that year. Notwithstanding that News and ARL had the purpose of encouraging mergers or joint ventures to avoid exclusion of clubs from the services, it was one of their purposes that, if the requisite reduction in numbers could not be achieved by joint ventures and mergers, then one or more of the clubs that had participated in the 1997 season in either competition would be denied entry in 2000. That purpose was a substantial purpose (see s 4F of the TP Act) even if it was a subsidiary and immediate purpose and not the dominant and ultimate purpose for the inclusion of the fourteen team term: *Jewel Food Stores Pty Ltd v Amalgamated Milk Vendors Association Inc* (1989) 24 FCR 127 at 134-135.

264 Consistent with *Pont Data*, it is submitted that the criterion for exclusion created by the fourteen team term was that an entity desiring inclusion in the NRL competition would be refused such inclusion if adjudged non-compliant with entry criteria that were to be, and ultimately were, formulated. Entities that were to be, or were, so refused entry constituted a class. Further, Souths places considerable reliance upon the observations of Hely J in the interlocutory proceedings both in relation to *Pont Data* to which I referred above in "Applicable Principles and Statutory Provisions", and in relation to "purpose" to which I will refer below. It was submitted, additionally, that as the *News Ltd* case in the Full Court demonstrated, an exclusionary purpose is not saved by a good motive.

265 The respondents case, put primarily by News and NRLI, is that the evidence of Mr Macourt, Mr Frykberg and Mr Whittaker does not support a finding that their purpose in including the fourteen team term in the 19 December Understanding (and later the MoU and Merger Agreement) was to exclude any team from the 2000 competition. Each gave their own reasons for agreeing to the fourteen team term. It was never suggested to any of these witnesses that a competition of more than fourteen teams was achievable or that it would be sustainable in the long term.

266 It was contended that the exclusionary purpose attributed by Souths to the criteria that underpinned the fourteen team term confused purpose and effect. Exclusion was neither a necessary or desired consequence of having a fourteen team competition and all parties desired that that competition would be achieved without exclusion and there was real likelihood that that would happen.

267 In relation to the requirements of s 4D(1), it was submitted first that that purpose must refer to the effects sought to be achieved by the inclusion of the fourteen team term and secondly that the purpose has to be directed at a particular person or class of persons. In the present case no one sought by the fourteen team term to prevent the provision or acquisition of services to or from clubs who put forward a team that was a losing team in the application process. Insofar as the person or class requirement was concerned, the fact of being prevented from supplying or acquiring a service was of itself insufficient to constitute a s 4D(1) person or class. What distinguishes a s 4D(1) person or class is that the person or the class members is or are not only prevented from supplying or acquiring the service but also is or are the object(s) of the anti-competitive purpose. In the present case there was no

s 4D(1) class. There was at best a class defined only by the characteristic of not being selected to participate in the 2000 competition.

268 For my own part I am not satisfied on the evidence that the fourteen team term is an exclusionary provision of the type alleged by Souths. My reasons for this conclusion are as follows.

269 A clear and intended effect of the fourteen team term was that the NRL partnership would not provide its competition organising services to, or acquire team services from, a greater number of teams than the number so fixed. This was a fundamental element of the peace deal. A foreseeable and, for ARL and News, a foreseen consequence of the term was that if more than the stipulated number sought participation in the NRL competition, the excess over the stipulated number (howsoever determined) would be denied the provision of the partnership's competition organising services and would not have its (their) team services acquired by the partnership. There can be no controversy about both the effect and the consequence I have described. The real matter in issue is whether the term was included in the 19 December Understanding and its successor documents for the purpose, or for purposes that included the purpose, alleged by Souths. To resolve this it is necessary at the outset to place the 19 December Understanding and the fourteen team term within it, in their respective contexts.

270 The objective the 19 December Understanding was working towards was to bring together in one competition the separate competitions of ARL/NSWRL and Super League, the latter at News' instigation having broken away from the former. The parties to the Understanding clearly appreciated and, for somewhat varying reasons, accepted the need for a united competition. As the evidence of Mr Macourt, Mr Frykberg and Mr Whittaker indicates, as also did contemporary documentary evidence, a variety of factors informed that need. For present purposes I need mention only three and in general terms. First, positively, there was the perceived need to establish a financially viable and sustainable competition. Secondly, negatively, there was the wish to avert continuing damage to the game. And thirdly, there was the need both to satisfy and to respond to the pressures and demands of the media companies on whose financial support both the several and the proposed competitions had relied or would rely for their survival.

271 The competition that was negotiated was not simply a unified competition and no

more. Rather, it was, and was understood both by the negotiating parties (and by those persons or boards to whom they reported) to be, a quite distinctive one designed with particular, often interrelated, objectives in mind. Consistent with thought on the appropriate competition structure for a premier rugby league competition dating back at least to the Bradley Report, it was to be a national competition. It had to be financially viable and in a climate in which both sides agreed that club expenditure (particularly on player salaries) had to be reined in significantly. It would have to be of a design and quality that would sustain community interest in the game and be attractive to television broadcasters. Though ARL vacillated on the matter and sought in early December 1997 to dilute what previously had been agreed, it needed to be a smaller competition with a fixed number of teams rather than a competition composed by the aggregate of the teams then competing in the two competitions that wished to continue in the unified competition. For reasons relating both to the viability and to the national character of the competition, the number of Sydney teams needed to be reduced. Seemingly this factor, plus the need for a smaller competition, prompted the early recognition in negotiations of the need for a policy of positive incentives for mergers and joint ventures. The merger/joint venture option came to be seen, as both Mr Whittaker and Mr Frykberg attest, as the means available to clubs to avert the foreseeable consequence of the fourteen team term should there be more than that number of teams wishing to participate in the 2000 season.

272 The vehicle chosen to realise these various objectives was that contained in the competition structure documentation agreed in December and which had its definitive expression in cl 7 of the Merger Agreement. For present purposes the noteworthy characteristics of that structure were (a) a progression from no more than twenty, to no more than sixteen, to no more than fourteen teams in 1998, 1999 and 2000 respectively - the 1998 figure giving all of the by then continuing ARL and Super League clubs (two had already dropped out from the 1997 number) an equal opportunity to participate in the rationalisation process; (b) provision for the national character of the competition - this to be secured through the 8-6/6-8 split; (c) the positive incentives given for entering mergers and joint ventures; and (d) the priority order in the grant of franchises, this being merged clubs, regional clubs and "stand alone" Sydney clubs.

273 Clearly, at the time of the 19 December Understanding no club had any right to have its team participate in the new competition's 1998 season, though it was envisaged that all

available clubs would be offered participation. Thereafter for the 1999 and 2000 seasons there was to be a selection process in which clubs could participate. No club was in December 1997 given, or intended to be given, a right to have its team participate in 1999 and 2000 other than as a result of the admission process. Between the dates of the December Understanding and the February MoU the need to undergo a selection process for 1999 was abandoned. As I will later indicate, though it is not strictly relevant for present purposes, Souths at no time had any right (contractual or otherwise) to participate in the 2000 competition. In this respect at least, it was in no different position from that it was in from 1984 to at least 1995 in the ARL competition in that it had to apply each year for participation in that competition.

274 Against this background, the purpose or purposes for which the fourteen team term was included in the 19 December Understanding become(s) more apparent. The primary purpose of the Understanding itself was to constitute a partnership to own and conduct the proposed NRL competition. I need not further consider the reasons that led to the proposed formation of the partnership. I would note, though, that the proposed NRL competition structure served an important role in defining the scope of the partnership's business both in providing competition organising services and in acquiring team services. While the NRL competition has variously been described as a "merged" or "unified" competition, it was in my view a new competition that supplanted the two competitions it was designed to replace.

275 As with the 8-6/6-8 split, the fourteen team limitation on team numbers for 2000 provided one of the defining characteristics of the new competition. And the competition itself was structured with these characteristics for the purpose, as I have noted, of achieving a range of objectives. News in the event dogmatically, and ARL in the end somewhat reluctantly, considered that, at least insofar as competition size was a contributing factor, fourteen teams provided the appropriate maximum number to settle upon to achieve those objectives. It is noteworthy that both News' economic modelling, and recommendations made to NSWRL and ARL both prior to (the Bradley Report), and during the Super League war (the June Report and the Terms Sheet), opted for twelve or fourteen teams for a national, single premier competition.

276 I have not repeated the individual reasons given by Mr Macourt, Mr Frykberg or Mr Whittaker for their agreeing to the fourteen team term. They are consistent with what I have

said above. Equally I have not referred to the authorisations etc given by News and ARL/NSWRL for such light as they throw on what were their respective purposes in the matter. I am, however, satisfied that the fourteen team term (including the 8-6/6-8 split) was included in the 19 December Understanding for the purpose of achieving the objectives to which I have referred.

277 Can it be said, though, that this was the only (hence only substantial) purpose for the inclusion of the term? In his judgment in the interlocutory proceeding when responding to the submission that the term was not included for the purpose of excluding anyone but that exclusion was an incidental and unwished for outcome, Hely J said ((1999) 169 ALR at 132):

> *"I do not agree. One of the motivations behind the inclusion of the 14 team term in the arrangements was to restrict the supply and acquisition of the services to which the term relates to 14 clubs, in order to establish a viable and sustainable competition. This is not to confuse purpose with effect. It is merely an acknowledgment of the reality of the situation. The purpose of the 14 team term was not merely to achieve the desired "end", but to do so by particular means. For this reason it cannot be said that the only purpose of the provision is the establishment of a viable or sustainable competition."*

278 For my own part I cannot, with respect, so readily accept this conclusion, or at least its implication. My reasons for this reticence relate to the quite particular character of the purpose required to be shown to attract s 4D and to that purpose's targeting of particular persons or classes of person. Though these two matters - the required purpose and the targeted class - are parts of a composite whole, I will for convenience in exposition consider each separately.

279 The fourteen team term limited, and was intended to limit, the number of teams to which the partnership would provide its services and from which it would acquire services. It equally had the foreseeable, and foreseen, consequence to which I earlier referred. But does that intended effect with its foreseeable consequence necessitate the conclusion that a purpose for including the provision was to prevent the supply to, or acquisition of services, to teams in excess of the stipulated fourteen?

280 Unlike Hely J, I am not satisfied that this question can be answered by differentiating ends from means. ARL and News proposed to create a new business running a new competition having particular characteristics. One characteristic was that it would have a maximum number of teams. For present purposes it would not matter what that number was

- twelve, fourteen, sixteen, eighteen. What is important is that the competition so designed embodied a limit to the number of teams to or from which the partnership would provide or acquire services. Given the objectives it was intending to pursue in creating the competition, this number was selected as Mr Frykberg put it "as the best number of teams".

281 The competition was to draw its participants from the pool of teams that had participated in the ARL and Super League competitions. While those teams would have to release their respective competition organisers from their commitments to them if the new competition was to become a reality, the clubs in the pool (apart from being offered the opportunity to participate in the 1998 and later the 1999 NRL competitions), were to be offered at least the opportunity to participate in the selection process for participation in the 2000 competition. If a particular club was successful in that, the partnership would provide services to it and acquire services from it. If it was unsuccessful, no services would be made available to it or be acquired from. But this, in my view, would not necessarily mean that a purpose of the relevant competition size provision was to prevent the supply etc to or from that club. That may or may not have been the purpose for including the particular size provision. One can envisage a size provision with its proposed ancillary criteria being designed with the substantial purpose in mind, not simply of limiting the size of the competition for reasons that are considered to be in the interests of the game and its stakeholders, but of specifically targeting a club or clubs that is or are anticipated to be applicants for selection. Such is far from the present case. A selection process having more applicants than positions necessarily results in there being winners and losers. What for s 4D purposes is important for those who lose is the manner of their losing.

282 There is a significant difference between being merely an unsuccessful contender for selection in a process not designed to preordain that particular outcome and being a target for exclusion in a selection process designed to that end. The latter, but not the former, if otherwise the product of a s 4D understanding, is capable of being found to be an exclusionary provision.

283 In the present case the evidence concerning the adoption of the fourteen team term is bereft of any indication that its purpose was to prevent the supply of services to, or acquisition of services from, any person or class of persons. The term had an intended effect and foreseen consequences. But these do not in my view require it to be found that a

purpose of the term's inclusion in the 19 December Understanding, etc was a purpose proscribed by s 4D(1).

284 I accept the evidence of Mr Whittaker that he believed the fourteen teams for 2000 could be, and of Mr Frykberg that they would be, achieved without resort to exclusion. And I consider the early and continuing significance they attributed to the formation of mergers and joint ventures as being consistent with the absence of a proscribed purpose. The significance so attributed to mergers, etc, evidenced a form of recognition of both the wish and the need to maintain some level of participation of the established clubs in a competition not designed to accommodate them all individually.

285 Further, while it may be said that the fourteen team term was only a means to achieving the objectives I have mentioned, the evidence (i) does establish that that term was fundamental to the 19 December Understanding and (ii) does not establish that there was another means available not involving the fourteen team term (or for that matter any maximum size stipulation) that would have been likely to secure either the merger itself or the objectives sought to be achieved in the competition structure. In these circumstances I am unable to conclude that a variety of means was available to the parties such that the adoption of the fourteen team term was merely a means to an end and as such had another purpose as well as that of securing the objectives sought.

286 For these reasons I conclude that the term does not fall within s 4D(1) in that it was not included in the 19 December Understanding for a purpose that included the prevention of the supply of competition organising services or of the acquisition of team services.

287 Even if I am incorrect in this conclusion and that, as Hely J suggested as a possibility, the term embodied as one of its purposes preventing the supply or acquisition of services to more than fourteen teams, I am satisfied that Souths' claim must fail for a related reason. On the evidence before me, the person or class said to be prevented from supplying or acquiring the relevant services is not a "particular class of persons" for the purposes of s 4D(1).

288 There has been considerable argument here as to why the classes that have been pleaded, but particularly the first (ie the residue of 1997 clubs being those that had not withdrawn and that would not be selected for the 2000 competition), did or did not fall within

the holding in the *Pont Data* case.

289 As I understood Mr Hughes QC's ultimate submissions on the matter, it was that in *Pont Data* the criterion for exclusion of the putative members of the class in question identified them as a class. I would agree with this proposition subject to the important rider that the proscribed purpose for the inclusion of the provision in question was directed at that class or, to put the matter the other way, that that class was the object of the proscribed purpose: see "Applicable Principles and Statutory Provisions" above.

290 The next proposition put was that the position in the present proceeding was not different in substance or in principle from *Pont Data*. The criterion for exclusion created by the fourteen team term was that an entity desiring inclusion of its teams in the NRL competition would be refused such inclusion if adjudged non-compliant with entry criteria to be formulated in the future.

291 I am unable to agree with this. In substance it is a submission that a class for s 4D(1) purposes can be constituted simply by the defining characteristic of failing to secure selection for entry into the 2000 competition. As a matter of language usage, where resort is had to a selection process that, as applied, could result in the failure of a number of persons (or teams) to be selected, those who might so fail could quite properly be described as a class in that in their failure they share a defining characteristic. But, in the setting of s 4D(1) of the TP Act, to be able to say that one belongs to a class (whatever its defining characteristic) is of no practical significance unless that class is the object of the proscribed purpose - unless it is "aimed at specifically": *News Ltd v Australian Rugby Football League Ltd*, above, at 577; *Pont Data* at 488.

292 In the present case while the purpose of having resort to the proposed selection criteria underpinning the fourteen team term was to differentiate between those who would and those who would not be selected for participation in the 2000 competition, it did not on the evidence before me have or have as well the purpose of discriminating against a particular applicant or class of applicants for selection. (It is unnecessary in this to consider the priority order provision which is not the subject of challenge and which is, in my view, inoffensive in any event.) Not having that purpose, the fact that a group could exist that could be said to constitute a class by reason of the fact of their not being selected is without significance or consequence for s 4D purposes.

293 In the event then, I am not satisfied that Souths has made out its claim. I would, though, make this additional comment. If Souths' contention is correct it seemingly would carry the consequence that, if competitors later enter into partnership and define the scope of the partnership business in a way that curtails the range or extent of services they will now supply compared with those they supplied competitively when sole traders, no matter how justifiable their reasons for so doing, they will have agreed to an exclusionary provision.

(ii) Restricting or limiting the supply of competition organising services to, or the acquisition of team services from, particular persons

294 As pleaded the particular persons said to be the objects of the proscribed purposes were the clubs that had participated in the ARL and Super League competitions prior to December 1997 and that had not withdrawn from those competitions before that date.

295 The finding I have made above as to the purpose of the parties in including the fourteen team term in the 19 December Understanding is fatal to this claim as well. Nonetheless there is a number of matters I should address in relation to it specifically.

296 Souths' contention is that the effect and purpose of the fourteen team term was to "limit or restrict the supply" by ARL and News of their services as competition organisers to "particular persons", being the twenty clubs that participated in the 1997 competitions, by their stipulating that such services would not be supplied to more than fourteen teams from 2000. Conversely, the effect and purpose of the provision was to "restrict" or "limit the acquisition" of teams' services from "those particular persons" by being willing to acquire the services of only fourteen teams.

297 In the interlocutory proceedings Hely J rejected the argument in the following way ((1999) 169 ALR at 131):

> *"The case sought to be made by ASC paras 20(a) and 21(a) is misconceived. It alleges a purpose of restricting or limiting the supply of competition organising services to, and the acquisition of team services from, clubs which had participated in the 1997 competitions and who had not withdrawn from those competitions prior to 19 December 1997. But there was to be no restriction or limitation (in the sense of a partial supply or acquisition) of services to the 1997 clubs. Some would be fully supplied, and would fully supply NRL, and others not at all. Further, the pleaded case does not accommodate the factual situation, in as much as Melbourne Storm, and three new clubs coming into existence as a result of mergers, are to participate in*

the year 2000 competition."

298 Souths now contends that his Honour was in error as the words "restricting or limiting" qualify supply or acquisition, not services. Supply or acquisition relates both to the service to be supplied or acquired and the persons to or from whom the services would be supplied or acquired. "Restriction" or "limitation" is not confined to the supply or acquisition of only part of the services. It extends to the supply or acquisition of services to or from some only of the particular persons.

299 For my own part I agree with the construction placed on s 4D(1) by Hely J. The concern of the provision for present purposes is with the partial supply to, or acquisition from, particular persons or classes of persons. Equally I agree with his Honour that the pleading does not reflect the known and anticipated facts as at 19 December 1997. Though not a club participating in the 1997 competition, it was envisaged (as happened) that Melbourne would be a team in the 1998 competition and would be involved in the selection process for 2000. To ignore Melbourne, or for that matter merged or joint venture teams, simply contrives artificially the particular persons at whom the proscribed purpose is alleged to be directed.

(iii) Preventing, restricting or limiting the supply of entertainment services to particular classes of persons.

300 This claim can be dealt with shortly. Of the various classes of persons said to be the objects of the proscribed purpose, the class that is said to provide the real substance to this claim is, as pleaded:

> *"the class of persons being supporters of, and spectators at the matches played by, any particular team which might play in the NRL competition in 1999 and who would be unable to continue such support or continue to be such spectators if such a team were eliminated from the NRL competition for the year 2000 by the process of reducing to 14 the number of teams to participate in such lastly mentioned competition."*

301 Even if one were to concede (a) that a club's supporters were capable of being described as a class by virtue of the defining characteristic of their support for a particular club; (b) that they would be prevented etc from continuing such support and to be spectators and would be likely in numbers to be lost to the game if their team was not selected for the 2000 season; and (c) that such was admitted by the parties to be a recognised possibility

should a club be excluded in 2000 - one is still far from a finding that the fourteen team term was an exclusionary provision.

302 In common with Hely J in the interlocutory proceedings, I am satisfied on the evidence that, insofar as the term embodied considerations relating to the provision of entertainment services (and it clearly did), the intention of the parties was to secure an enhancement in the quality of those services. One dimension of the concern with the sustainability of the competition was directed to this matter.

303 Even though the parties foresaw a loss of fans should it be necessary to exclude a team, a purpose of the inclusion of the fourteen team term in the December Understanding was not to deprive those fans of the supply of entertainment services. On the contrary such an outcome was viewed as a bad one to be avoided if possible. The parties, on the evidence, did not have the purpose Souths seeks to ascribe to them. Neither in my view were supporters of a club a class of persons for s 4D(1) purposes. They were not the objects of a proscribed purpose. The fourteen team term was not aimed at them.

(iv) Preventing, restricting or limiting the provision of funding to particular persons for classes of person/preventing any other club from participating in the NRL competition by withholding such funding

304 I have already indicated that I do not consider the provision of funding to be a service independent of, and separable from, the competition organising services supplied and team services acquired. In consequence if the fourteen team term is not an exclusionary one for reasons related to the provision or acquisition of those services, it will not be so in relation to the provision of funding.

305 In common with Hely J in the interlocutory proceeding, I regard the suggestion that the funding provision has the purpose alleged, to be "an exaggeration or distortion of the factual situation": 169 ALR at 137. The purpose was to pay $2 million to the fourteen teams to which competition organising services were provided and from which team services were acquired. It did not go beyond that. That the sum to be paid was $2 million may have had its own justifications relating to cost reduction in the conduct of the competition. But in no realistic sense can it be said that the purpose for including in the 19 December Understanding the $2 million funding provision was itself aimed at any particular person or classes of persons in a way contemplated by s 4D(1).

9. THE "CEASE ALTOGETHER" TERM

306 This term is relied upon as a true alternative to the fourteen team term. The claim Souths makes was prompted by aspects of NRL's defence to the alleged exclusionary character of the fourteen team term. It is put in the following way.

307 If (a) the relevant services were supplied and acquired by NRL and not the NRL partners; or (b) the supply and acquisition by the partnership of services with respect to the NRL competition was a relevantly different supply and acquisition of services from those formerly supplied and acquired by ARL and News (or Super League) as the former is joint supply and acquisition while the latter is several; then ARL and News made a contract or arrangement containing an exclusionary provision because they agreed, and each had the purpose that from 1998 neither of them, nor a related body corporate of News, would supply or acquire the services which each had previously supplied and acquired to or from any of the clubs, nor would they supply such services to fans. This would itself be an exclusionary provision in contravention of s 45.

308 Assuming the correctness of the assumptions on which this claim is made and acknowledging that the MoU and the Merger Agreement expressly (cl 4.12 and cl 13 respectively) obliged each of News and ARL (subject to an exception) not to be involved in conducting a rugby league competition in Australia other than through the partnership and NRL, I am not satisfied that Souths' claim is made out.

309 The clear intent of the provision in the MoU and Merger Agreement was to preclude News and ARL from severally supplying to, or acquiring from, anyone the services they previously had supplied or acquired. It is the case that, in given circumstances, parties might agree to such a provision for the very purpose of preventing a particular targeted person or classes of persons from acquiring or supplying those services. Such, however, is far removed from the present factual setting. The purpose for the inclusion of the cease altogether provision in the MoU and Merger Agreement was to facilitate the creation of a unified competition for the reasons I have earlier indicated and no more. It is unnecessary to retraverse that territory. Even if a purpose for its inclusion in the MoU and Merger Agreement was to prevent supply to or acquisition from any person who would have wished to avail of services severally provided by ARL or News, it applied without discrimination to the world at large. But the world at large is not a class of persons for s 4D(1) purposes:

Trade Practices Commission v Garden City Cabs Cooperative Ltd, above, at 40,551. It has not been shown that the inclusion of the provision had a more targeted purpose than that.

10. THE SERVICES AGREEMENT

310 The premise of this claim is that even if (contrary to my finding and Souths' principal contention) NRL acted as a principal both in acquiring team services from the clubs and in providing entertainment services to club supporters, etc, the Services Agreement pursuant to which it acted was caught by s 45(2) of the TP Act as it also contained a provision to the effect of the fourteen team term: see cl 3.3(e) and also cl 3.3(h). The respondents concede there was such a term, but deny that it was an exclusionary provision either at all, or because of the defence provided by s 45(6) of the TP Act: as to the latter, see "Defences" below.

311 I have already held the fourteen team term not to be an exclusionary provision as contained in the 19 December Understanding, the MoU and the Merger Agreement. Its character was in no way changed by its reiteration in the Services Agreement for the purpose of giving effect to the 19 December Understanding, the MoU etc. I would dismiss this claim.

11. DEFENCES

312 The respondents rely upon two statutory defences to the s 45 claims. The first, the "exclusive dealing defence", is based on s 45(6) of the TP Act. The second, the "merger of assets defence", is based on s 45(7) of the Act.

(a) The exclusive dealing defence

313 The premises of this defence are, as noted above, that (i) the relevant services were intended to be and were acquired or provided by NRL on its own account pursuant to the Services Agreement; and (ii) that Agreement, in giving effect to the fourteen team term, fell within the exclusive dealing provisions of s 47(4) of the TP Act.

314 Section 45(6) of the TP Act provides that the making of a contract, etc, "does not constitute a contravention of [s 45(2)] by reason that the contract, [etc], contains a provision the giving effect to which would, or would but for the operation of subsection 47(10) … constitute a contravention of s 47". As Hely J noted in the interlocutory hearing ((1999) 169 ALR at 135), the traditional view, which he accepted because of s 45(6) as do I, is that s 45

does not apply to exclusive dealing arrangements, exclusive dealing being regulated by s 47.

315 Section 47(4) insofar as presently relevant provides:

> *"A corporation ... engages in the practice of exclusive dealing if the corporation:*
>
> *(a) acquires ... services;*
>
> *on the condition that the person from whom the corporation acquires ... services ... will not supply ... services ....*
>
> *(c) to particular persons or classes of persons or to persons other than particular persons or classes of persons."*

316 For present purposes I have held already that the relevant services were supplied by the NRL partnership and that, in any event, the fourteen team term was not an exclusionary provision in the Services Agreement. In these circumstances it is unnecessary to consider this defence. I would, though, indicate my own tentative view on the defence in the event that I have erred in my agency finding.

317 As I have indicated in the preceding section, Souths has pleaded that the Services Agreement required NRL to comply with the fourteen team term of the Merger Agreement, but that term is pleaded as an exclusionary provision only in relation to the acquisition of team services from clubs and the provision of entertainment services. Importantly no claim is made in respect of the provision of competition organising services to clubs.

318 The significance of the pleading for present purposes is said by Souths to be this. Team services, as distinct from competition organising services, are *acquired from*, not supplied to, clubs. Section 47(4) is concerned solely with NRL's supply of services. In consequence it does not apply to NRL's acquisition of team services so that s 45(6) would provide no defence to the claim based on s 45(2).

319 In my view the pleading is contrived. When viewed in the context of the particular (ie fourteen team) competition structure ordained by cl 7 of the Merger Agreement to which the Services Agreement committed NRL, the competition organising services envisaged by the Services Agreement embodied as an indispensable and inseparable element the acquisition of the team services envisaged by cl 7 for that competition. In consequence the

acquisition of team services could not and should not be viewed otherwise than as an element in the provision of competition organising services.

320 If, for s 47(4) purposes, the partnership acquired services from NRL under the Services Agreement on condition that it not supply competition organising services to particular persons or classes of persons, an incident of that condition would be that team services not be acquired from those same particular persons or classes of persons. I incline, then, to the view that s 47(4) would provide a defence to Souths' case in relation to its team services claim.

321 The same defence should also be available against the claim based on the provision of entertainment services under the Services Agreement.

(b) The merger of assets defence

322 Section 45 of the TP Act does not apply to or in relation to a contract, arrangement or understanding "insofar as the contract, arrangement or understanding provides … directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of any person": s 45(7).

323 On the assumption that the fourteen team term was an exclusionary provision, the respondents have submitted that it formed an integral part of the acquisition by the partnership of assets previously owned by ARL and News/Super League so as to form the new competition.

324 Souths' response has been that there is a real question as to the extent to which "assets" actually have been acquired or were intended to be acquired as a result of a provision in the 19 December Understanding and its successor agreements. But in any event, it is contended, the fourteen team term is not a provision for the acquisition of assets. Section 45(7) excludes the operation of s 45 only "insofar as" the contract etc provides for the acquisition of assets.

325 Because of my earlier findings it is again unnecessary for me to express a view on the availability of this defence in this proceeding. I should, though, indicate my tentative view which is one of agreement with Souths' submission on the meaning to be ascribed the words

"insofar as the contract [etc] provides for" in s 45(7): see also *SA Brewing Holdings Ltd v Baxt* (1989) 87 ALR 134 at 146. As von Doussa J there noted, s 45(7) does not protect the whole of a contract from s 45 just because one of its many provisions provides for the acquisition of assets. Here, even if it be said that the fourteen team term was fundamental to the formation of the NRL partnership for the purposes for which it was formed, it cannot be said that that term is to be insulated from the force of s 45 because assets were to be acquired for the purposes of the partnership's business.

12. RELIEF

326 Though Souths has sought relief by way of general damages, the principal remedies sought are injunctions directed to News, NRLI, ARL and NRL (i) restraining them from giving effect to the fourteen team term by excluding Souths from the NRL competition; and (ii) requiring them to do all things necessary on their part to enable Souths to participate in the NRL competition. I do not, given my findings, intend to consider the question of damages. I should, though, comment on the injunctive relief sought.

327 Even if Souths had made out its s 45 claims, the injunctions sought ought not be granted. At best, in the circumstances, declaratory relief should be given. My reasons for this conclusion can be put shortly. The fourteen team term may have provided an impermissible basis for not allowing Souths to participate in the 2000 NRL competition. But it remains for the NRL partnership via NRL still to determine what teams it will admit now into its competition. Souths has no right to be admitted. Its s 45 claims go no further than that it cannot lawfully be excluded in reliance on the fourteen team term. But it can be excluded for any other lawful reason. If Souths sought and was refused admission into the 2001 competition this of itself would not necessarily involve any impropriety on NRL's, hence the partnerships', part. It would be a purely factual question as to why it was so refused. Was NRL continuing to give effect to the 19 December Understanding and its successor arrangements? Or did it have different reasons for the refusal? There would be no reasonable basis for apprehending impropriety on NRL's part in this.

328 In these circumstances the prohibitory injunction sought would in substance involve no more than a declaration of right cast in injunctive form. As Pincus J remarked in *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275 at 318 in terms recently endorsed by the New South Wales Court of Appeal in *Health Services for Men Pty Ltd v*

D'Souza (2000) 48 NSWLR 448 at 461, it is in general undesirable to frame an injunction that does little more than repeat the enjoined party's general legal obligations or so to frame an injunction that the question whether a breach has occurred is likely to be very debatable until settled by an order in contempt proceedings.

329 I would add there is no conceivable basis in Souths' s 45 claims for the award of what are in effect mandatory injunctions to enable Souths to participate in the NRL competition. In the end I did not understand Mr Hughes QC to be submitting to the contrary.

13. CONCLUSION

330 The s 45 claims should be dismissed.

PART III: THE CONTRACT CLAIMS

331 In the interlocutory proceeding before Hely J, Souths' then contract claims were characterised by his Honour as being weak or not seriously arguable. Though refined, expanded and placed in a very detailed factual setting for this proceeding, the deficiencies in the claims have not been dispelled. Such contract as there was between Souths and the NRL partnership (its existence is disputed) was incapable of sustaining the burden Souths seeks to place on it.

332 Souths alleges that on 24 March 1998 it entered into a contract with the NRL partners that was partly written and partly oral. Under that contract, in consideration of Souths agreeing to participate in the 1998 competition, the partners are alleged to have agreed that Souths would be offered participation in the 1999 season if it was solvent and abided by the rules of the NRL and would be considered for participation in the NRL competition in and from the year 2000 onwards. Souths further claims that it was an express term of this agreement that, subject to any successful legal challenge Souths might make, the competition from the year 2000 would consist of fourteen terms. It claims as well that there were some number of implied terms which related primarily to the manner of setting of, to the content of, and to the manner of application of, the criteria that would determine participation in the competition in 2000 and beyond. The breaches of contract complained of relate, primarily, to the implied terms.

333 Because of its importance to the relief sought, I note one other alleged implied term.

It was that Souths would not be refused the right to participate in the NRL competition in and from 2000 unless it failed to qualify as one of the fourteen teams in accordance with the admission criteria to be adopted and announced by NRLI, ARL and NRL.

334 The primary relief sought is an injunction restraining NRLI, ARL and NRL from proceeding to exclude Souths from the NRL competition. The one matter I would emphasise about Souths' claim for injunctive relief is that Souths has disclaimed any intention to seek the removal of any club from the competition. Nor has it sought to have the criteria process reapplied if it is successful in its contract claims. The club respondents (ie the fifth, seventh, ninth to thirteenth and fifteenth to twenty-third respondents) have not in consequence actively contested the contract claim as such. They have, however, put in short submissions on the injunctive relief sought as they may still be affected by its award.

335 There is almost no common ground between Souths and NRLI and ARL (a) as to the parties to, and the terms (express and implied) of, the alleged contract or (b) even if the contract is as Souths alleged, as to whether it has been breached in any event. For ease in exposition I will deal initially with the two principal issues raised by the respondents' defences. They are, first, was there a contract with the NRL partners (which is denied); and, secondly, what were the terms of that contract. My conclusions on the second of these render it unnecessary to consider the major part of the claims advanced by Souths. I will, nonetheless, and despite my conclusions, deal in some detail with such of Souths' claims as would otherwise be arguable.

1. WAS THERE A CONTRACT WITH THE NRL PARTNERS?

336 The NRL partnership was not formally established until the execution of the Partnership Agreement on 14 May 1998. Nonetheless it is Souths' case that the contract made on 24 March 1998 (as a result of exchanges between, variously, Mr Bampton and Mr Piggins of Souths and Mr Whittaker of ARL) was one that bound the NRL partners. It is claimed that on that date ARL was acting in the conduct of the partnership's business with the authority of the partners (ie ARL and NRLI) when it contracted with Souths.

337 I emphasise that Souths' case is one of contract with a partnership resulting from a partner's acting with actual authority so to contract. Importantly, I would note, Souths has not based its claim (i) on a contract resulting from the doctrine of partnership by estoppel:

Lindley & Banks on Partnership (1995, 17th Ed), §5-43ff; *Uniform Partnership Act* 1997 §308 (US); 59A Am Jur 2d, "Partnership", § 673ff; or (ii) on a pre-partnership contract that became effective when adopted by the partnership on formation. Further, Souths expressly disavows that the contract was with ARL alone, or that it was a pre-incorporation contract with NRL, NRL being formed on 25 March 1998.

338 The two questions Souths' case presently raises are (i) was a partnership in existence and carrying on business on 24 March 1993? (ii) Was ARL acting on behalf of that partnership when contracting with Souths? To answer these it is necessary, first, to refer at some length to the events leading up to, and to the context of, the dealing in question.

(a) Additional Factual material

(i) Factual setting

339 When considering the s 45 claims I indicated that, notwithstanding that NRL was to be and did become the agent of the NRL partnership when formed, ARL's constant position in negotiations with News (from at least the "Terms Sheet" of early August 1997) and ultimately agreed to by News was that NRL was to license the teams that were to participate in the proposed NRL competition (see Part II, "The genesis of NRL", above). I will not repeat the evidence to that effect.

340 As the prospect of an in principle peace deal became more realistic, the negotiation documentation began to address both the termination of the contractual commitments that ARL and Super League had with their respective clubs and the bringing of those clubs into the proposed NRL competition. News' "Key Points" paper, the ARL response to it and the draft MoUs of December 1997 to which reference has previously been made are illustrative of this concern. The solution agreed upon was reflected in the December MoUs which provided the formula for both the 18 February MoU and the Merger Agreement. It was that:

> *"2.6 The ARL and Super League will:*
>
> *(a) use their best efforts to ensure that their respective clubs participate in the 1998 NRLC competition; and*
>
> *(b) satisfy their respective club and player contract obligations."*

341 Those MoUs also indicated the then intended composition of the proposed NRL

partnership. It was to be constituted by ARL and Super League. By the time of the MoU of 18 February 1998, this had been changed to ARL and Super League or, importantly, "a wholly owned subsidiary of either of them". On 25 February 1998 NRLI was incorporated. It is a subsidiary of Super League. Draft documentation brought into existence around that date (eg the draft Merger Agreements of 26 February 1998 and 5 March 1998) refer to ARL and NRLI as being the NRL partners. By 20 March 1998 NRLI had fixed its seal to the memorandum of association and articles of association of NRL and to the Members Agreement (on these documents see Part II, "The NRL company" above). I would infer that, at about that time, ARL also signed the same documentation. I would note in passing there is controversy as to the precise date by which the Members Agreement was executed by the parties to it. A version that is handdated 12 March 1998, has been put in evidence. Though it is unnecessary to resolve this controversy, in light of the uncontested evidence that the agreement was not sent to News for signing until 17 March 1998, the 12 March date is clearly inaccurate.

342 From early January 1998 steps commenced to be taken to carry forward and give substance to what had so far been agreed by News and ARL in December. On 19 January a meeting of what the minutes thereof described as the "Executive Committee" was held with Mr Macourt as Chairman. The minute recorded (inter alia) that:

> *"The Chairman opened the meeting and welcomed the attendees. He noted that the Executive Committee could not formally decide matters as the partnership was not formally in existence. He stated that the purpose of the meeting was to set out current intentions.*
>
> ...
>
> *Appointment of CEO*
>
> *The Chairman indicated that the appointment of Neil Whittaker as CEO of the new organisation (NRL) would be formally accepted by the partnership when the partnership was formalised. He advised that News Ltd formally agreed to the appointment.*
>
> ...
>
> *Appointment of General Manager*
>
> *It was agreed that Peter Jourdain would be appointed the General Manager of NRL on a two year term. Peter Jourdain's salary package will be circulated to the Executive Committee members.*

Neil Whittaker indicated that he and Peter Jourdain would provide a recommendation on their respective roles and authorities as soon as possible.

Update

Neil Whittaker gave a brief update of the activities being undertaken in preparation for the upcoming season. He tabled an organisation chart which he indicated was consistent with the current budget outline.

It was noted that the finalisation of the draft Memorandum of Understanding and further legal agreements would be completed as soon as possible.

The Chairman indicated that a press release agreed by all members of the Executive Committee could be made announcing the appointment of the respective persons to the Executive Committee and the Board of NRL."

343 A media release of 20 January announced these appointments as also those to the Executive Committee (later to become the PEC) and to the NRL board, though acknowledging that NRL had not yet "officially" been incorporated. Mr Whittaker was reported in the media release as saying:

"We are trying to bring two completely separate organisations into one, and that by necessity takes a little time.

The key thing to remember is that by March 13 everyone will be playing each other in a united premiership."

344 Both Mr Whittaker and Mr Jourdain have deposed that as from early January 1998 work began on preparing for the new competition. Those ARL employees who were to join NRL worked for a time out of ARL offices; the Super League employees, out of the Super League office. In late February when what was to be NRL's office was opened all the "NRL employees" were located in the one building.

345 By late January, according to the minute of a meeting of 22 January 1998 of "National Rugby League (NRL) Club Chief Executives" (being the CEOs of the likely participant clubs), the Selection Criteria for the 1999 and 2000 seasons were being prepared and were expected to be completed by 28 February 1998.

346 On 18 February the MoU was executed. This outlined the then current understanding of ARL, NSWRL, News and Super League on a merger of the two competitions. I have elsewhere referred to aspects of the MoU. Here I would note first that cl 2 in its references

to the NRL partnership uses the future tense for the most part: ARL and Super League or their subsidiaries "will enter into a 50/50 partnership"; etc. Secondly, the dependency of the parties on the broadcasting media in prosecuting the proposed merger is evidenced in cl 15:

> *"This MOU is intended to be legally binding on the parties until superseded by the Agreements. However this MOU will not take effect unless and until:*
>
> *(a) each of [Nine] and Optus gives its written consent to the terms and conditions of this MOU, and the Agreements; and*
>
> *(b) each of [Nine] Optus and FOXTEL enter into binding television rights contracts as contemplated by clause 6.1,*
>
> *on or before 13 March 1998."*

347 13 March was the day upon which the first round of the NRL competition was scheduled to commence. On 23 February 1998 a match schedule for the first five rounds was distributed to CEOs. It noted that "match times and scheduling is subject to ongoing negotiation with television networks". To anticipate matters, it is Mr Macourt's evidence that by the commencement of the competition verbal agreements had been made with television companies, though formal agreements with them were not executed until 14 May 1998 as part of the signing on that day of the interlocking documentation to achieve the merger. The 14 May agreements included the period from 1 January 1998 in the fee structure provisions.

348 On 25 February 1998 a further meeting of the "National Rugby League (NRL) Club Chief Executives" was held that dealt with matters as diverse as "Designer Drugs - Player Education Program", "NRL Magazine" and "Jersey Numbering".

349 On the same day a meeting of the "Proposed Partnership Executive Committee" was held, Mr Macourt as Chairman again noting, as recorded in the minutes, that the partnership was still not "formally established". Along with preliminary consideration of NRL's ten year business plan, the "Process for Determination of Criteria for Club Licences" was discussed, the minutes recording:

> *"Neil Whittaker noted that a number of long form agreements would be provided by the ARL's lawyers later in the day. This would include the Franchise Agreement which it was noted must be executed by all clubs by 13 March 1998.*

Neil Whittaker noted that the club grants will be made between March and the end of October, preferably on a monthly basis.

The sequence for distribution of the performance criteria will be:

(i) comprehensive legal advice to be provided and agreed by respective legal representatives;
(ii) legal advice (by way of summary) and draft criteria to be provided to the Partnership members for approval;
(iii) criteria to be distributed to NRL board;
(iv) criteria to be distributed to clubs.

A summary of the key commercial points of each of the long form agreements would be provided to the Partnership members. It was agreed that early drafts would not be distributed until initial negotiations between the parties' lawyers had concluded."

350 I would note in passing in relation to the club grants mentioned in the minutes that on 1 April 1998 Mr Whittaker wrote on behalf of NSWRL to the CEOs of the eleven ARL clubs in the following terms:

"Given the delay in formalising the NRL Partnership documents, the NSW Rugby League Limited ("NSWRL") has agreed to advance the sum of $250,000 to each of the eleven ARL clubs.

We require the ARL clubs to acknowledge that the advance constitutes an advance against the grant of $2 million otherwise due by NRL to the clubs under the terms of the arrangement for 1998.

Please sign the attached copy of this letter to confirm your agreement that the advance to your club will be treated as such and return it to us as soon as possible."

351 On 27 February a pre-incorporation meeting of the NRL board was held. As the minutes recorded, Mr Whittaker noted that "the partnership was not formally established and the company not formed". The members were advised that because the company was not formed, decisions could be made but would need to be ratified after incorporation. The matters dealt with at the meeting included the details of television coverage of matches, NRL's ten year business plan and a range of sub-committee reports.

352 On 6 March the first, and in the event superseded, communication was made by Mr Whittaker on ARL letterhead to Mr Bampton offering Souths participation in the 1998 competition. Because it provides useful contrasts with the later contractual correspondence,

the substance of the letter should be reproduced. It stated:

> *"I am pleased to confirm to South Sydney DRLFC ('Club') the opportunity to participate in the NRL Competition in 1998.*
>
> *We are faced with many exciting challenges as we enter a new era of rugby league in Australia. To make a success of the new NRL Competition, we need to get the 1998 season started as efficiently as possible. To do that all Clubs must enter into a Franchise Agreement with the NRL.*
>
> *This requires two things to happen:-*
>
> *1. The Club to sign the enclosed Franchise Agreement.*
>
> *2. The Club, by signing the enclosed copy of this letter, to release the ARL and NSWRL from all obligations and liabilities (known or unknown) to the Club.*
>
> *As the NRL Competition kicks off on 13 March 1998 it is important that your Club sign and return these documents by Thursday 12 March 1998. These documents are confidential, and should be treated as such."*

353 For present purposes it need only be noted that the Franchise Agreement related only to 1998; its commencement date was stipulated to be 13 March 1998 (cl 1.1 and Schedule 1); and it recited that the NRL partnership "has established a system for a rugby league competition known as the NRL Competition" and "has authorised NRL to control the operation and management of the NRL Competition". I note again that NRL was not incorporated when this agreement was sent to the clubs.

354 Between 11 and 24 March correspondence passed between Mr Whittaker and Mr Bampton which it is said contains the written part of the Souths-NRL partnership contract. This correspondence is referred to separately below.

355 A meeting of the Proposed Partnership Executive Committee was held on 12 March 1997. Mr Macourt again opened by noting that "the partnership was not formally established". Under the item "Franchise Agreement", the minutes record that:

> *"Ian Philip noted that the Franchise Agreement as contained in the board papers had been replaced with a short form letter in order that the company could make commitments to third parties such as television broadcasters.*
>
> *There was a discussion on the reasons behind the clubs' reluctance to quickly commit to the proposed arrangements."*

356 As I earlier indicated, on about 20 March the Members Agreement had been executed. The recitals refer to NRLI and ARL having formed the NRL partnership. Mr Macourt's evidence is that when he executed the agreement he did not pay much heed to its contents, relying on News' general counsel, Mr Philip. He also gave evidence that on 12 March the partnership owned the competition that was to begin on the thirteenth. As that evidence could well be based upon his being referred to the recital to the Members Agreement, I am not prepared to attribute any particular weight to it. For his part, Mr Philip gave evidence that the recital was incorrect.

357 Though it post-dates the alleged contract by one day, at the meeting of the NRL Club CEOs of 25 March 1998 the Selection Criteria were discussed and the minutes record that "due to delays in the legal process, the deadline on the MoU has been extended to no later than 31 May 1997".

358 On 14 May the Partnership Agreement was executed. I merely note of it that its stipulated "Commencement Date" (cl 1.1) was "13 March 1998 or any other date agreed by the Parties".

359 The final matter to which I should refer is that draft versions of the Merger Agreement that were exchanged in late February and early March indicate that detailed negotiations on the merger were still in train between the parties.

(ii) The contractual communications

360 On 11 March Mr Whittaker wrote in his capacity as CEO of ARL to Mr Bampton. The substance of the letter was as follows:

> *"I enclose a letter that replaces my 6 March letter and the long form Franchise Agreement.*
>
> *I understand the concerns that some Clubs have expressed about the long form Agreement, and the enclosed letter is designed to meet the Club's needs and to facilitate the establishment of the NRL Competition for play this year.*
>
> *You will note that this letter confirms the agreements reached on 19 December 1997 and the meeting of Club Chairmen on 18 February 1998.*
>
> *Please return the enclosed letter, signed by your Club, before 10.00am Friday 13 March 1998."*

The enclosed letter, formal parts omitted, stated:

> *"This letter confirms the Club's agreement to:*
>
> *1. participate in the 1998 NRL Competition using NRL owned, licensed or controlled intellectual property;*
>
> *2. release ARL and NSWRL from all obligations and liabilities, known or unknown, arising from the Super League dispute, prior to the date of this letter, provided that this release will not otherwise effect [sic] the Club's membership of NSWRL, and through that League to the ARL by virtue of that membership;*
>
> *3. discontinue current legal proceedings against Super League Pty Ltd, the former Super League Clubs and News Limited in relation to use of intellectual property and any other claims;*
>
> *4. grant intellectual property rights to NRL to permit NRL to control and organise merchandising rights for the NRL competition while the Club participates in the NRL competition;*
>
> *5. negotiate and sign a long form agreement for 1998; and*
>
> *6. the NRL competition having no more than 14 participating Clubs in 2000.*
>
> *On this basis, the ARL confirms:*
>
> *(a) if the Club is solvent and abides by the rules of NRL (which are being promulgated in consultation with the Clubs), the Club will be offered participation in the 1999 season.*
>
> *(b) subject to (a), grants of $2 million from NRL, and $1.5 million for each of 1998 and 1999, will be available.*
>
> *This agreement takes effect upon NRL notifying you that the NRL competition is established and the merger documentation has been executed."*

361 On 13 March Mr Whittaker again wrote to Mr Bampton indicating that as some clubs sought to amend or clarify the 11 March letter he would address common concerns in the schedule he attached to the letter. He went on to say:

> *"Ultimately, each club must decide whether or not to play, and whether or not to sign the letter. However, in making that decision you should know that funding and other commitments of News, Nine and Optus are conditional on all clubs agreeing to participate in the NRL competition. This means that:*
>
> *(a) funding is not available until all clubs commit to the NRL competition;*

(b) the NRL competition is not formally established until all clubs commit to that competition."

362 Insofar as presently relevant the schedule stated:

"1. Releases by the ARL and NSWRL - the purpose of these mutual releases is to expunge any promises or obligations arising from the Super League war that have been made between the ARL Clubs and the ARL/NSWRL. This allows the ARL/NSWRL to proceed to a new era with a 'clean slate'. The release is not intended to apply to existing loans Clubs may have from the NSWRL, or to player loyalty or merchandising royalty payments that are due from the Leagues to the Clubs and players.

2. Discontinuance of legal proceedings by Super League Pty Limited, the former Super League Clubs and News Limited - it is a term of the merger agreement with News and Super League that current legal proceedings be discontinued on the basis that parties pay their own costs. Under the current proceedings, the ARL Clubs are not likely to receive any damages, and are indemnified from any costs by the ARL/NSWRL. Super League Clubs must commit to discontinue their Club's trademark proceedings, without prejudice to their right to reinstate these proceedings if they wish, at their own cost. This matter would be between the Club and the NSWRL.

3. Long form agreement - the intention is to negotiate this agreement in good faith, and upon settlement of a document, to the satisfaction of NRL and the Clubs, sign a long form agreement for 1998.

4. Number of participating Clubs in 2000 - it was agreed on 19 December 1997 that the competition structure in 2000 would comprise no more than 14 participating Clubs. It is not possible for the Clubs to unwind this commitment which is now a fundamental term of the merger agreement with News."

363 Mr Piggins, on being informed of the 11 March letter, advised Mr Bampton not to sign it. On 17 March 1998 he had a telephone conversation with Mr Whittaker in which he indicated that Souths would not sign until its solicitors had had a look at the letter. He was concerned that by signing "Souths might be agreeing to a 14 team competition. We want the right to challenge the criteria". Mr Whittaker is said to have replied using words to the effect that Souths would not be giving away its rights; there was nothing to it; it was not going to hinder Souths in any way. In cross-examination Mr Piggins said he made plain to Mr Whittaker in the conversation that Souths was not agreeing to go to a fourteen team competition.

364 A meeting of Souths' board of directors on 20 March 1998 confirmed the signing of the 11 March letter. The minutes record that the Chairman (Mr Piggins) made clear that Souths "would demand the right to challenge the criteria from the NRL".

365 On 23 March Mr Bampton wrote to Mr Whittaker concerning the 11 and 13 March letters. Insofar as presently relevant the letter stated:

> *"In order to avoid any confusion about Souths' understanding of the terms, I take this opportunity to reiterate our understanding of the basis upon which we are signing your letter of 11th March.*
>
> *Firstly, in relation to point 2 of your letter of 11th March, which sets out a release from Souths to the ARL and NSWRL I note the advice of David Gallop to our solicitor that it is not intended that this release in any way affects the right of Souths to challenge any aspect of the rules of the NRL (which have not yet been promulgated) particularly in relation to Souths' rights to participate in the NRL competition from the year 2000 onwards. Obviously this is important to us as we do not yet know what the NRL Rules will be.*
>
> *I also note that it has been confirmed to us that the release in point 2 of the letter in no way affects the indemnity which the ARL/NSWRL provided to Souths in relation to the News Limited/Superleague proceedings and I note that you have confirmed this at point 2 of your schedule dated 13th March 1998.*
>
> *Secondly, I also confirm that we are agreeing to participate in the 1998 and 1999 season on the basis that the funding set out on point (b) of your letter of 11th March is available and guaranteed to Souths. I have been concerned by the reference in point (b) of the letter that funding is subject to compliance with point (a) which in turn makes it a condition that Souths abide by the rules of the NRL. Obviously we have to reserve our rights in relation to this point as we do not yet know what the rules of the NRL are as no rules have yet been promulgated.*
>
> *I also take this opportunity to convey the Board's concern at the short notice we have been given to consider the 11th March letter and our rights generally in relation to the NRL competition. We are signing the letter with some reluctance but in the spirit of getting on with what is in the best interests of the game of Rugby League and to play our part in making the 1998 season a success.*
>
> *If any of the assumptions which I have set out in this letter which are the basis upon which we have signed your letter of 11th March are incorrect please advise me without delay."*

366 Mr Whittaker replied on 24 March to Mr Bampton's letter. It confirmed the following:

> *"1. The release set out in paragraph 2 relates to obligations and liabilities arising from the Super League dispute prior to the date of the letter. The indemnity provided by the ARL/NSWRL in relation to those proceedings is not affected.*
>
> *2. The rules of the NRL will govern the day to day conduct of the competition. Souths and all other clubs will be consulted in relation to those rules.*
>
> *3. On 19 December 1997, the NSW Rugby League, the ARL and the general committee of the NSW Rugby League voted to participate in a partnership with News Limited which would include a 14 team competition in the year 2000 and beyond. As you are aware, the agreement in relation to the 1999 season was subsequently amended to provide for a maximum of 20 teams. Souths have been asked to agree to the NRL competition having no more than 14 participating clubs in the year 2000. However, Souths have not relinquished any rights to challenge the make up of the 14 team competition in the year 2000 if it is established that any decision made in relation to the 14 team competition is made improperly or illegally.*
>
> *4. While we accept that in different circumstances more time might have been provided in relation to the execution of the letter, we have asked all clubs to accept that the NRL required the commitment of all clubs prior to the commencement of the competition so that commitments with third parties, such as television broadcasters, could be met."*

Souths did not subsequently express to Mr Whittaker any dissent from what was so confirmed.

367 It is Mr Whittaker's evidence that when he wrote the March letters they were being sent for ARL so that ARL could carry out its obligations under the MoU. He did not write those letters on behalf of the NRL partners.

(b) Applicable principles and statutory provisions

368 Save, apparently, in relation to one matter there was not, and could hardly be, disagreement between the parties as to the applicable rules of law.

369 1. The starting point is the definition of a partnership. It is the relation which exists between persons carrying on business in common with a view to profit: *Partnership Act* 1892, s 1(1) (NSW).

370 2. As was said by Lord Lindley (see *Lindley and Banks*, above, at §2-09):

> *"Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon."*

If a future commencement date is agreed, but the parties begin to carry on business together at an earlier date, they will be partners from that earlier date: *Lindley and Banks,* §2-09; see also 59A Am Jur 2d, "Partnership", §80. However, if all that is done by one prospective partner is some preparatory act prior to entering into the partnership, the other prospective partners will not be bound: *Lindley and Banks*, §13-21.

371 3. Section 5 of the *Partnership Act* 1892 provides:

> *"Every partner is an agent of the firm and of the other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which the partner is a member, binds the firm and the other partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner."*

372 4. Where partners agree that their partnership is deemed to have begun on a date earlier than the actual date at which they commence to carry on business, that agreement while binding on the parties *inter se* will not render the partners liable to third parties in respect of claims attributable to the period prior to the actual commencement date: see *Lindley and Banks*, §7-24. As Rowlatt J said in *Waddington v O'Callaghan* (1931) 16 TC 187 at 197: "You cannot alter the past in that way". *Lindley and Banks* further suggest that as regards third parties such a retrospective agreement is of no evidential value. That proposition, though, presupposes that the agreed earlier commencement date is not the actual commencement date. Where the question is as to when the actual commencement date was and where the objective facts indicate that it was at the earlier date, the agreement will, in my view, have evidential value.

373 I noted above that there was one area of disagreement between the parties which in my view is more apparent than real. It relates to the preceding paragraph. The respondents rely upon the proposition that a retrospective commencement date has no evidential value. Souths, in my view correctly, asserts that that proposition presupposes that the retrospective commencement date is not the actual commencement date. Where that date is in issue and there is objective evidence to support its being the agreed date, then the agreed date provision

can have evidential value as "an accurate statement of fact": *Saywell v Pope* [1979] STC 824 at 834. The cases relied upon by *Lindley and Banks* are, in my view, not inconsistent with Souths' contention in this.

(c) Was there a partnership as at 24 March 1998? Submissions and Conclusions

374 Souths' case is that at least by 13 March when the first match was played, but probably for some period prior to this, ARL and NRLI had commenced to conduct a partnership business as partners. NRLI was a subsidiary of Super League (as was contemplated by the 18 February MoU) and as such could and did become ARL's partner; it was so regarded by the parties (as was reflected in draft agreements); and it took steps consistent with its status as a partner (eg executing both the memorandum and articles of NRL and the Members Agreement). Whatever might have been the intended structural arrangements that the parties previously envisaged would be in place to conduct the competition at the time the 1998 season commenced, NRLI and ARL were from at least 13 March, and probably for some time prior thereto, conducting a business in partnership that business being the competition that was from that time described as the "NRL competition". Even though the NRL partnership was not "formally established" until the execution of the 14 May documentation, and even though the partnership may never have been so formally established, a partnership business was commenced by ARL and NRLI as partners and it was that partnership that contracted with Souths. It was no less so a partnership because the risk was there that there may have been a later breakdown in negotiations resulting in the abandonment of the formal merger arrangements of 14 May 1998. A significant number of actions were taken in and around 24 March which were indicative of a partnership business (ie that of owning and operating a competition) being carried on not the least of which were (a) the conduct of the competition itself; (b) on Mr Macourt's evidence, the verbal agreements with television companies; (c) securing the commitment of the clubs to participate in the competition; and (d) the actual character of the business conducted at the meetings of the "Proposed Partnership Executive Committee". The contrary "no partnership" view of what was being done in the conduct of the competition as of 13 March 1998 is simply divorced from reality.

375 The respondents' case is that it was never intended that the partnership be formed until the formal execution of the Partnership Agreement on 14 May. Until then anything done by an intended partner was done in anticipation of a partnership to be formed. If close regard is

had to the documentation there was never a business being carried on in common with a view to profit. The parties were merely putting in place a structure for the later conduct of the partnership business, should the partnership which was still being negotiated actually came to fruition. Souths can draw no comfort from the commencement date of the Partnership Agreement being "13 March 1998 or any other date agreed by the Parties". It has no evidential value: see "Applicable Principles and Statutory Provisions", above.

376 The respondents further contend that the actions evidenced in the ARL March letters (Super League took a parallel course in relation to its clubs) were no more than the several actions of the two entities putting into effect both the "best efforts" provision of the 18 February MoU by which each was bound and, in relation to the releases, the provision to that effect that was to be included in the Merger Agreement.

377 For my own part I am satisfied that, as events unfolded from 19 December 1997 with the intended structural arrangements taking longer to establish than was envisaged (especially in relation to the formulation of the criteria and the formation of NRL), it was necessary for ARL and NRLI to commence the conduct of the partnership's business in a way not previously envisaged. That partnership business was the precursor of that which was to be formally established on 14 May 1998 - and which might never have been established had negotiations for the merger broken down before that date.

378 I am unable to accept the respondents' submission that NRLI was only nominated as, and became, a partner in May 1998. It had acted otherwise earlier both directly and via the "Proposed Partnership Executive Committee". The latter body was itself an instrument in the positive conduct of the partnership's business. The minuted acknowledgments that the partnership had not been "formally established" were correct, but not to the point. I likewise cannot accept that all that was being done was the erection of a structure, or the taking of several actions by ARL and Super League, in anticipation of 14 May. The "big bang theory", if I might so describe it, was belied by the press of events and the need to respond to them. The event that had to be accommodated was the commencement of the 1998 season on 13 March in a united competition. This is what Mr Whittaker is reported as stating to be the objective in the 20 January media release. It is what the parties were prepared to deliver even if it meant taking action in common before the projected formalisation of their relationship. That action in common was not necessarily undertaken in relation to all matters

relating to the competition (see eg NSWRL's April letter concerning advance payments to the "loyal" clubs). Whatever may have been the case in January-February 1998, there was action in common being taken, first, from at least sometime in early March in relation to the conduct of the competition scheduled to commence on 13 March and, then, in the conduct of the competition on and from that date.

379 Further, I would infer that that action was intended to be, and was, undertaken with a view to profit. The verbal agreements with television companies to which Mr Macourt referred are reflected both in the licensing agreements executed on 14 May that had commencement dates of 1 January 1998 and in licence fee structures that covered the period prior to 14 May.

380 I am in substantial agreement with Souths' submissions. By at least 13 March and for some time prior to that the partners (ARL and NRLI) were carrying on the business of conducting the very premier rugby league competition that was destined to become the competition to be formally established in the 14 May documentation, save if negotiations broke down. To use a familiar legal allusion, such a breakdown may have been a determining event for the partnership so established. The 14 May documentation was not a condition precedent to its establishment.

(d) Did ARL Contract for the Partnership? Submissions and Conclusions

381 Souths' submission is that the 11-24 March correspondence had dual contractual effects. In part, it dealt with Souths' relationship with ARL and NSWRL to the exclusion of the partnership. Clauses 2 and 3 of the 11 March letter relating to the grant of releases to ARL and NSWRL and the discontinuance of legal proceeding against Super League, its clubs and News, fell into this category. But it also dealt with Souths' relationship with the partnership this being manifest in cll 1, 4, 5 and 6 of the 11 March letter which related to the NRL competition and to Souths' rights to participate, and obligations arising from its agreeing to participate, therein.

382 The securing of commitments by ARL from ARL clubs to participate in the NRL competition, it is said, was clearly conduct engaged in for the purposes of the business of the partnership. And that is so even if what ARL was doing was in discharge of its "best efforts" obligation under the MoU. The contract so made was not with ARL alone. The

correspondence, properly construed in its setting, conveyed an offer to Souths by ARL on behalf of the partnership, to participate in the NRL competition when the agreement became effective. Acceptance by Souths gave it corresponding rights against the partnership to participate in the competition. It was not an offer by ARL alone that, if Souths agreed to participate in the competition, ARL would then as a partner procure that participation in the future.

383 The respondents contend that, even if ARL and NRLI were partners, ARL was not then purporting to contract on behalf of the partnership. Rather, both it and Super League were, in tandem, discharging severally their respective obligations under the 18 February MoU. Those same obligations were carried through in drafts of the Merger Agreement of early 1998, to the final Merger Agreement. In the concluded Merger Agreement those obligations remained several obligations and not partnership obligations. Mr Whittaker's evidence supports this in that he considered he was carrying out ARL's obligations under the MoU.

384 The letters, furthermore, do not refer to, or purport on their face to be sent on behalf of, the partnership. Insofar as they refer to NRL they clearly are referring to the NRL company not the NRL partnership (Souths has submitted to the contrary). Properly construed, what ARL was seeking was Souths' agreement to participate in the NRL competition once it was established. The respondents point particularly to the concluding sentence of the 11 March letter which stated that the agreement to be evidenced by the letter only took effect on NRL notifying Souths that the NRL competition was established and the merger documentation executed. What ARL was promising was to secure Souths' participation in the competition if it was established etc.

385 Against the background of the partnership finding I have made, and with NRL not being the available instrument on 11 March to engage in a licensing process with the clubs, it is in my view clear that what ARL was doing in the 11 March letter (to the extent it related to the NRL competition) was to offer Souths at least a right to participate in the 1998 competition and a contingent right to participate in the 1999 competition. It could and did make that offer because it was a partner in the partnership that was to own and control the competition and which was already carrying on its business. That ARL was also discharging its obligation under the MoU does not affect this conclusion. Super League's in tandem

action under the MoU necessarily took a somewhat different course. It was not a partner. Its letter to its clubs in consequence stated that "in relation to participation in the NRL competition, [this agreement] is entered into by Super League on behalf of NRL". The right to participate was seemingly being secured via a pre-incorporation contract: cf *Corporations Law*, s 183 (1996 reprint) this being the operative provision at the time. That Mr Whittaker did not fully appreciate the significance of the effect of his actions on ARL's behalf did not affect their essential character. Neither was that character affected by the deferral of the agreement's taking effect (as provided in the last sentence of the 11 March letter).

386 This direct contract with the partnership was a necessary interim measure for the reasons relating to funding and the establishment of the competition to which the 13 March letter referred. In form at least, it was acknowledged to be an interim measure, as the 11 March letter contemplated the later negotiating and signing of "a long form agreement for 1998".

387 I have not referred to the arguments of the parties based on the commencement date stipulated in the Partnership Agreement given that I have found that the partnership began to conduct the partnership business prior to that date.

388 I should also indicate that I do not accept Souths' contention that the references to NRL in the 11 March letter are references to the partnership. It is quite clear, as the respondents submit, that they are to the company NRL even though then not yet formed.

389 Accordingly I find that on 24 March 1997 Souths entered into a contract with ARL and NRLI.

2. THE TERMS OF THE CONTRACT

390 The twin issues here are: did the contract impose any obligations on the partnership and create any rights in Souths in relation to 2000? If it did then: what were those rights and obligations? Souths' case is premised on an affirmative answer to the first question and, for the second, is based essentially on implied terms. It will be necessary to refer relatively shortly to additional factual material in dealing with some of the alleged implied terms. But before turning to a consideration of the two questions I should first refer to the principles to be applied when implying terms into the Souths/NRL partnership contract.

The Implication of Terms

391 1. Where a term is implied in fact rather than in law, the implication is based upon the presumed or imputed intentions of the parties. Where the contract is a formal one complete on its face, if a term is to be implied it must be reasonable and equitable; necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; so obvious that "it goes without saying"; capable of clear expression; and must not contradict any express term of the contract: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 441-442. Where the contract is an informal one that has not been reduced to any complete written form, the test for implying a term is whether the implication of it is "necessary for the reasonable or effective operation of the contract" in the circumstances of the case: *Breen v Williams* (1996) 186 CLR 71 at 123-124. In such a case, though, it is necessary to arrive at some conclusion as to the actual intention of the parties before considering any presumed or imputed intention: *Byrne v Australian Airlines Ltd*, above, at 422; on the apparent differences between the tests for formal and informal contracts see Tolhurst and Carter, "The New Law of Implied Terms", (1996) 11 CLJ 76; Tolhurst and Carter, "Implied Terms: Refining the New Law" (1997) 12 CLJ 152; and see generally Cheshire and Fifoot, *Law of Contract*, 7th Aust Ed, 1997, para 10.43ff.

392 2. Distinct from implication in fact, a term may be implied as a matter of law as a legal incident of a particular class of contract: see *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 122-123. This implication does not depend upon the intention of the parties: *Breen v Williams*, above, at 103. Its imposition can in the end be explained as resulting from when "the law thinks that policy requires it": *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322 at 348; on this form of implication see generally Cheshire and Fifoot, above, at para 10.39ff.

393 3. Australian law has not yet committed itself unqualifiedly to the proposition that every contract imposes on each party a duty of good faith and fair dealing in contract performance and enforcement: cf *Restatement, Second, Contracts*, §205; and see generally the discussion in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 263ff; *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84 at 95-97; *Hughes Aircraft Systems International v Airservices Australia*

(1997) 76 FCR 151 at 191ff. Such a duty has been accepted as an implied legal incident of particular classes of contract: *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Hughes Aircraft Systems International v Airservices Australia*, above; and particularly contracts of a commercial character: *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* (1999) ATPR §41-703 at 43,014; notwithstanding the supposed uncertainty in defining the concept of "good faith and fair dealing": see generally *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at 255ff. I would note in passing that the supposed uncertainty with "good faith" terminology has not deterred every State and Territory legislature in this country from enacting into domestic law the provisions of Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods: eg *Sale of Goods (Vienna Convention) Act* 1986 (NSW).

394 4. Importantly for the purposes of the present case, recent decisions suggest that the implied duty of good faith and fair dealing ordinarily would not operate so as to restrict decisions and actions, reasonably taken, which are designed to promote the legitimate interests of a party and which are not otherwise in breach of an express contractual term: *Alcatel Australia Ltd v Scarcella*, above, 369-370; *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd*, above, 43, 014; see also *Asia Television Ltd v Tau's Entertainment Pty Ltd* [2000] FCA 254 at para 77; *Advance Fitness Corporation Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 at para 122; *Far Horizons Pty Ltd v McDonald's Australia Ltd* [2000] VSC 310; and see further below, "Other Possibilities".

The terms as pleaded

395 The express terms pleaded by Souths are that -

(i) Souths agreed to participate in the 1998 NRL competition on terms that the NRL partners would (a) offer Souths participation in the 1999 season if it was solvent and abided by the rules of NRL and (b) Souths would be considered for participation in the NRL competition in and from 2000; and

(ii) subject to any successful legal challenge which Souths might make, the NRL competition from 2000 would consist of fourteen teams.

396 The implied terms are multiple and in the alternative. As pleaded in paras 31 and 31A of the Third Further Amended Statement of Claim, they are.

"31 (a) the NRL Partners would evaluate fairly and in good faith

which clubs would be offered participation in the 2000 season and beyond;

(b) pursuant to the term alleged in (a), or alternatively as further implied terms, in determining which clubs would be offered participation in the 2000 season and beyond:

(i) all clubs would be dealt with equally and consistently;

(ii) criteria for qualification to participate in the NRL competition from 2000 would be set and applied fairly and reasonably;

(iii) such criteria would be fair and reasonable and would be such that all clubs were dealt with equally and consistently;

(iv) each club would be told by NRL or the NRL Partners how information submitted by it was assessed against the criteria, what information was submitted by each other club and how such information was assessed against the criteria;

(v) criteria for qualification to participate in the NRL competition from 2000 would not be set so as to favour clubs in which News or a related company of News was a member or lender or otherwise had a pecuniary interest;

(vi) Souths would not be refused the right to participate in the NRL competition from 2000 except pursuant to a determination made in accordance with the terms herein alleged.

Particulars

The term alleged in paragraph 31(a) is implied by law and the terms alleged in paragraph 31(b) are incidents of that term. Alternatively, each of the terms alleged is implied as a matter of fact as being necessary to give the agreement referred to in paragraph 29 a reasonable or effective operation.

31A. Further or alternatively to paragraph 31, it was an implied term of the agreement referred to in paragraph 29 that Souths would not be refused the right to participate in the NRL competition in and from 2000 unless it failed to qualify as one of the 14 teams in accordance with the admission criteria to be adopted and announced by NRLI, the ARL and NRL."

397 For the purposes of considering the alleged implied terms I am prepared to assume, contrary to NRL's submission, that the contract propounded by Souths was an informal contract and hence it attracts the implication rules of *Byrne v Australian Airlines Ltd*, above, and *Breen v Williams*, above. Consistent with those rules, it is necessary first to arrive at some conclusion as to the actual intention of the parties as embodied in the actual terms of the contract, before considering any presumed or imputed intention said to be reflected in

implied terms: *Byrne* at 422.

The actual terms of the contract

398 Before considering the parties' submissions there is a number of additional factual matters to which it is necessary again to refer. These are:

(i) the Executive Summary distributed to loyal club CEOs and Chairmen at the 19 December 1997 meeting stated that "All clubs given opportunity to participate in rationalisation process" (it is Mr Piggins evidence that no explanation was then given of this) and, in the context of the competition structure, that "applicants must satisfy licence criteria determined by NRLC Co" and that "14 teams will be licensed to play in 2000";

(ii) at the 19 December meeting, either Mr Whittaker or Mr Lockwood said that the criteria that would be used to determine the teams that would be licensed to participate in 2000 had to be worked out but they would be "fair to all clubs";

(iii) with the change in the competition structure for 1999 in the 18 February MoU from a maximum of sixteen teams to one of twenty teams, the need for a competitive selection process for that year was actually avoided through natural attrition; and

(iv) the date for release of the selection criteria in both the December MoUs and that of 18 February was before 1 May 1998 and no change in that date was notified to club CEOs until 25 March 1998.

399 As to the express terms pleaded, I am satisfied Souths was offered and accepted (a) the right to participate in the 1998 competition and (b) the contingent opportunity to participate in the 1999 competition, Souths having the right to insist upon being accorded that opportunity in 1999 (subject to its satisfying the contingencies stipulated). I am not satisfied, however, that there was a term that the NRL competition in 2000 would, subject to successful legal challenge by Souths, consist of fourteen teams. Because of the manner in which Souths has advanced its case in relation to that alleged term, and because it blurs the express and implied terms pleaded, it is necessary to deal in a little detail with the 11-24 March letters.

400 The 11 March letter sought Souths' agreement to "the NRL competition having no more than 14 participating clubs in 2000". It probably was the case (despite Mr Whittaker's later disclaimer in separate correspondence with Wests which it is unnecessary to reproduce) that, when sent, it was intended that cl 6 have contractual effect. Para 4 of the schedule to

the 13 March letter rather suggests that the reason for the clause's inclusion in the 11 March letter probably was so as to secure that very effect. But cl 6 was robbed of its intended contractual character by subsequent events.

401 As of 11 March it was unnecessary for ARL and the News interests to secure Souths' agreement to the fourteen team term. By that time that term was what they had agreed for the 2000 competition. That was what was going to be offered to the clubs, with participation being through a selection process if necessary. Unless Souths could challenge the very validity of the fourteen team term (eg under s 45 of the TP Act) there was nothing Souths could do to prevent the partnership from running a fourteen team competition in 2000 if it so wished.

402 In light of (i) Mr Piggins repeated disclaimers to Mr Whittaker that Souths would not agree to the fourteen team term; (ii) the confused reservation of rights in Mr Bampton's 23 March letter "to challenge any aspect of the rules of the NRL … particularly in relation to Souths' rights to participate in the NRL competition from the year 2000 onwards" and (iii) the understandably not entirely congruent response in Mr Whittaker's 24 March letter, ie -

> *"Souths have not relinquished any rights to challenge the make up of the 14 team competition in the year 2000 if it is established that any decision made in relation to the 14 team competition is made improperly or illegally."*

- it cannot properly be said that it was the actual contractual intention of the parties that there be a fourteen team competition in 2000. Rather there was merely the mutual acknowledgment that such would be the case unless Souths was able successfully to challenge the validity of the term itself.

403 The 23 and 24 March letters appear, though, to encompass more in relation to the fourteen team competition in 2000 than the fourteen team term as such. It is this that Souths seeks to exploit in its submission which is put in the following way.

404 The 24 March contract, it is said, was made against the mutually known background that criteria would be developed which would determine who would be granted licences to participate from 2000 and that all clubs would have an opportunity to participate in the process of determining which clubs would be granted a licence. The letter of 11 March provided a right to Souths to participate in the NRL competition in 1998 and 1999. Participation in those years carried with it the right to participate in the rationalisation process

by which fourteen clubs would be admitted to participate from 2000. That process, it was known, would depend upon the formulation and application of criteria to be applied to all clubs. In the 24 March letter ARL acknowledged Souths' right to challenge the make up of the fourteen team competition if it was made improperly or illegally. It was known at the time that the decision which would be made in relation to the fourteen team competition would include decisions as to the formulation of criteria and their application. The promise of the right to challenge was not an empty one. The acknowledgment of the right to challenge carried with it an acknowledgment that there were standards of legality and propriety to which decisions in relation to the fourteen team competition had to conform.

405 Further, Souths contends that the right to challenge any decision in relation to the fourteen team competition if made improperly or illegally also implied a conditional right to participate in the competition from 2000. If there were no such right there would be no grounds for challenge. Even if a challenge were made before fourteen licences were granted for 2000, it would be a good answer to any challenge to the setting, content or application of the criteria that the issue was moot because the respondents had an unconfined discretion whether to invite Souths to participate from 2000 or not. Nor could damages be recovered if there was no right (even conditional) to participate from 2000. Damages will not be awarded for not doing that which there is no legal obligation to do: *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 92-93; *NSW Cancer Council v Sarfaty* (1992) 28 NSWLR 68 at 81.

406 Finally, ARL's stipulation in its 24 March letter that the competition from 2000 would consist of fourteen teams was itself qualified by Souths' acknowledged right to challenge the make up of that competition if it were established that any decision made in relation to it was made improperly or illegally. It is not a reasonable construction of such a right to challenge that the challenge should be exercised and determined before 14 licences to participate in 2000 were given.

407 This submission is as adventurous as it is untenable. Even if one was to accept the "mutually known background" to the contract, ie that criteria would be developed to determine the clubs to participate in 2000 and that all clubs would be given an opportunity to participate in "the rationalisation process", this goes no distance towards indicating that in the March correspondence the parties were then intending in any way to deal with Souths'

opportunity to participate either in the selection process for 2000 or in the 2000 competition. The assertion that the rights granted for 1998 and 1999 carried with them the right to participate in the rationalisation process in 2000 simply begs the question to be answered.

408 The offer as made in the 11 March letter and as explained in the 13 March schedule was limited expressly to 1998 and 1999. If that offer was accepted without more it could not properly be inferred that the parties actually intended to confer and to acquire rights in relation to 2000. Nor would terms be implied to that end as they would not be "necessary for the reasonable or effective operation" of that contract.

409 The correspondence of 23 and 24 March 1997 did nothing in my view to change things. As at those dates, Souths could reasonably expect that it would be offered the opportunity to participate in the 2000 selection process, just as prior to the 11 March letter it could have reasonably expected it would have been offered the opportunity to participate in the 1998 and (after the February change to the 1999 competition structure) the 1999 competition. The transformation of those expectations into rights as against the NRL partnership is altogether a different matter. It cannot be conjured out of being afforded "an opportunity to participate in the rationalisation process". Even if the partnership could be held responsible for the 19 December representation to that effect - and it has not been demonstrated how it should be - there was no basis as of 24 March to give that representation a promissory character. It remained a representation partially put into effect in the 11 March letter, but requiring further steps to be taken for its fulfilment (as they actually were in fact).

410 I have already indicated that the 23 and 24 March correspondence, insofar as it related to the fourteen team term as such, had no contractual effect. It was simply an acknowledgment that there would be a fourteen team competition unless Souths was able successfully to challenge the validity of the term. Insofar as the criteria for the 2000 selection process were concerned, the letters ought likewise be interpreted as confirming that, by signing the 11 March letter, Souths was not relinquishing any rights it might have or later acquire to challenge any decision made in relation to the make up of the fourteen team competition that was made improperly or illegally. The correspondence, though, did not itself confer any such rights. Whether they already existed (doubtfully) or would be later acquired (probably), their provenance lay, or would lie, elsewhere.

411 Viewing the exchanges objectively in their setting, the correspondence should be

taken as proceeding on the premise that Souths could reasonably expect to be afforded an opportunity to participate in the selection process (if it proved to be necessary) and that, when that opportunity was given and was availed of, such rights as Souths might then have (both under the NRL criteria and in consequence of its participation in the selection process) to challenge decisions illegally or improperly made were not being relinquished on 11 March. As with the fourteen team term itself, all that was being given in the correspondence was an acknowledgment of a likely future state of affairs. What the correspondence did not do was recognise that any rights had been created by the March correspondence to participate in the selection process for 2000.

412 Rights in relation both to participation in the 2000 selection process and in the 2000 competition itself were matters for the future. The setting was one in which (a) the initial 6 March letter was made for 1998 only, though it was changed in the 11 March letter to include 1999 but not 2000; (b) there were clear and immediate reasons for dealing with 1998 (as the 13 March letter suggests); (c) in consequence of a natural attrition, licensing for 1999 would not involve some competitive selection process; (d) positive incentives were being given for clubs to merge or form joint ventures which might obviate the need for a selection process in 2000; (e) the criteria for 2000 were still being developed and drafts had not been shown to the clubs; (f) the 11 March participation offer itself contemplated further negotiations between Souths and the partnership even for 1998 (ie in relation to the long form agreement); and (g) there was no demonstrable need for the partnership or the partners to make commitments in March 1998 that related to 2000.

413 The proper character to be attributed to the 24 March contract was that it was simply one stage, albeit an important one, in what was understood to be an evolutionary and transitional process leading to the establishment of the fourteen team competition in 2000. It was unnecessary at that stage to settle for all time participation rights relating to 2000. Souths might reasonably have expected that it would in the future be offered participation in the 2000 selection process (as did occur in fact) and that accepting that offer could well, then, have had contractual consequences (eg through a selection process contract similar in character to a tender process one: *Hughes Aircraft Systems International v Airservices Australia*, above; *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (1999) 170 DLR (4th) 577). It is unnecessary for me to make any finding as to this last matter as Souths has not pleaded and has disclaimed reliance upon a later, process contract.

414 My conclusion then is that the parties had no actual intention in relation to participation in the 2000 selection process or the competition itself.

Implied terms

415 All of the implied terms asserted by Souths relate to the 2000 competition and its selection process. They could only be implied (on the assumption I am making that the 24 March contract was an informal one), if and to the extent that they were (or any one of them was) "necessary for the reasonable or effective operation of that contract in the circumstances". For the reasons I have given when negativing any actual intention in relation to 2000 participation, it likewise cannot be said that that necessity is there. The contract could operate reasonably and effectively in relation to its intended subject matter without the intrusion into it of terms that related to a quite distinct subject matter. Far from enhancing the contract, the implied terms would have changed its intended character by anticipating a contractual relationship for which, even if likely in the future, there was no present need to create. They similarly could not properly be implied as a matter of law in relation to 2000.

416 I should refer to one particular matter that Souths has relied upon as necessitating the implication of terms that the criteria should be fair and should be set and applied fairly. This was that the clubs to be selected to participate from 2000 would be drawn from two previously warring factions between whom there was great mistrust and bitterness.

417 It should not be overlooked that, in their composition, both the NRL partnership (and its PEC) and NRL replicated in their own ways similar, previously warring factions. The NRL partners, furthermore, were still at that time negotiating their own differences with a view to the May 1998 merger. Though the "loyal clubs" and ARL did not have the same interest in the NRL competition, those clubs could reasonably have expected that ARL would not unfairly sacrifice their interests to News in the transition to a fourteen team competition. The converse could in all probability be said of the Super League clubs.

418 More fundamentally, though, the merger of the two competitions quite obviously depended upon retaining the cooperation and participation of what Souths calls the "warring factions", the clubs having almost unanimously supported the peace deal in December 1997. It cannot, in my view, be said that the only reasonable vehicle to which resort could be had to retain that support was the offer of a contract that dealt with the entire transition period

(including 2000). The 11 March offers in relation to 1998 and 1999 went some distance down that contract path in any event. As I previously indicated, while there were good reasons why offers could be made for these years, there were prudential ones for the offer not being extended to the 2000 selection process - not the least of which being that the Admission Criteria for 2000 were still in a relatively embryonic state. Nearly a month was to pass before Mr Jourdain was to distribute a first draft to NRL management. In these circumstances, whether the clubs would continue to give support for 2000 would obviously depend upon both the content of the draft criteria and the consultative and other processes that might be put in place. But as at 24 March 1998, there was not the need to anticipate these matters. They were for the future.

Conclusion

419 My finding that the 24 March contract was concerned only with participation in the 1998 and 1999 seasons is fatal to Souths' contract claims which must be dismissed. It should come as no surprise. It was anticipated in Hely J's reasons in the interlocutory proceedings: (1999) 169 ALR at 138. I am conscious that my conclusion will result in it being unnecessary to consider a large volume of material the significance of which is premised upon my having arrived at a contrary conclusion in relation to implication of terms into the 24 March contract. I do not intend to enter upon any consideration of that material against the contingency that my conclusion is erroneous. For reasons I will go on to give, even if I am in error and the 24 March contract does address participation in 2000 in some fashion, the alleged implied terms would still not be implied into that contract.

3. OTHER POSSIBILITIES

420 Even if one were to disregard my conclusion, there are some number of difficulties involved in engaging in any reasonable speculation as to the terms express or implied in the March contract that potentially could be found to relate to participation in the 2000 selection process and competition. I will refer to three such difficulties, though I would preface what I have to say with this comment. As at March 1998, it was not certain that a selection process would need to be undertaken for participation in the 2000 competition, but as a matter of prudence selection criteria were being developed. For that reason any offer to participate in the selection process would necessarily have been conditional upon the need for it.

421 (i) As at March 1998, the selection process and the criteria to be employed in it

had not been settled. The legal right to settle the criteria belonged to the NRL partnership (whether or not the partnership left it to NRL to do this in fact). It has not been suggested, nor could it be, that the partnership stood in a fiduciary relationship with the clubs such that it had to act in their interests in setting the criteria. Unless some contract between a club or clubs and the partnership gave that club or clubs rights in relation to the content and manner of setting of the criteria, the partnership could set the criteria in the manner of its own choosing, in its own interests (which might and predictably would involve its having regard to the interests of the clubs for prudential reasons), and for its own purposes.

422 Souths claims such rights in setting the criteria by virtue of its right to participate in the selection process, that process necessitating the formulation and application of criteria to be applied to all the clubs. The rights claimed again are said to be evidenced in the 24 March contract reservation of rights to challenge any decision in relation to the make up of the fourteen team competition that was made unlawfully or improperly.

423 This claim is untenable. Contrary to my earlier findings, and for the purposes of testing Souths' alleged implied terms, I am prepared to make the following two assumptions. These are (i) that it was a contractual term of the 24 March contract that Souths would be offered the right to participate in the selection process for the 2000 competition; and (ii) that the NRL partnership had obliged itself to establish selection criteria for that process (notwithstanding the process itself might never be needed). I should note that, for reasons I will give below, I have excluded from these assumptions any question of the partnership having then incurred an obligation in relation to *the application* of the criteria set. But even making the above assumptions, and absent any express term giving Souths rights in the setting of the criteria, was it nonetheless "necessary for the reasonable or effective operation" of that contract that any term be implied relating to the content and manner of setting of the criteria?

424 Subject to a qualification I will note below, the answer to that question is clearly no. As I noted above, it was for the partnership to settle (or to secure the settling of) the criteria. In so doing it could act in the manner of its own choosing, pursuing its own interests for its own purposes in establishing its own competition. No term needed to be implied to render any of that effective. The partnership simply had to provide criteria (as it in fact did). And there is no reason why it should have been obliged positively to sacrifice its own legitimate

interests when setting the criteria. There is less reason why it should have been positively obliged in the circumstances to act in any way in the interests of a club or the clubs.

425 The partnership, for its own reasons, might actually have sought to set criteria "in a fair and reasonable manner" (a stated "aim" of the draft criteria of 8 May 1998 that was circulated to the clubs). But such a post-contractual representation did no more than evidence the partnership's purposes in setting the criteria. It did not evidence any prior assumption of an obligation as to its purposes. And it contributed nothing, in my view, to the question whether a term should be implied in the 24 March contract giving Souths positive rights in the manner of setting and the content of the criteria. I should also add that I do not consider the 24 March letter acknowledging Souths' non-relinquishment of rights provided any support for the implication sought. That letter did not presuppose that Souths had any particular rights to challenge decisions but rather that it was not relinquishing such rights, if any, that it might then or later have to make such a challenge.

426 The qualification I foreshadowed is this. I am prepared to assume that the 24 March contract was of a type into which a duty of good faith and fair dealing would be implied. That duty would extend to the performance of all of the partnership's obligations under the contract including the obligation to set criteria. As I noted in "Implication of Terms" above, that duty would not operate so as to restrict decisions and actions, reasonably taken, which were designed to promote the legitimate interests of the party taking them. This, though, does not mean the implied duty would be without content. What it would require in the circumstances I am assuming was that NRL would not intentionally set the criteria for the purpose of rendering the opportunity illusory for a particular club or clubs, so defeating the contract made with that club or clubs. I emphasise the element of intended purpose in this. At least in a setting such as was envisaged in the 24 March contract, the positive content of the good faith requirement was what Professor Lücke has described as "loyalty" to that which actually had been promised and agreed: see Lücke, "Good Faith and Contractual Performance", in Finn (ed), *Essays on Contract*, (1987), 162-164; see also the normative view of Fried, *Contract as Promise*, (1981), 85ff; or, to put the matter negatively, was to preclude what the *Restatement, Second, Contracts* refers to as "evasion of the spirit of the bargain"; see §205 comment d; Farnsworth, *Contracts*, (2nd Ed, 1990), §7.17 at 551. It is probably correct to say that in this particular context the implied duty was "simply a rechristening of fundamental principles of contract law": *Tymshare Inc v Covell* 727 F2d

1145 at 1152 (1984). Unsurprisingly, there is more than a distant resonance between the curb good faith would here place on an abuse of power directed at a club or clubs and that imposed by s 45 of the TP Act on an exclusionary provision directed at a club or clubs.

427 Selection criteria set in good faith in furtherance of NRL's legitimate purposes may have been such as preordained that a club's participation in the selection process was doomed to failure. That, in my view, could not properly be made the subject of complaint as a breach of an implied duty of good faith and fair dealing. In the present case it has not been suggested, and the evidence does not support in any degree, that there was an intentional "bad faith" setting of the criteria: cf *Far Horizons Pty Ltd v McDonald's Australia Ltd*, above, paras 120-124.

428 When one turns to the alleged implied terms relating to the application of the criteria, the difficulties confronting Souths' claim are only magnified. Again making the two assumptions I have, it is difficult to see how the application of the Selection Criteria would fall in any way within the province of the 24 March contract. That contract gave Souths a contractual right to be given the opportunity to participate in the 2000 selection process. If Souths availed of that opportunity (it, probably, would not have been contractually obliged to), such rights as it would then have had in relation both to the conduct of the selection process and to the manner of application of the Selection Criteria would have been in consequence of the stated requirements of the process itself and of Souths' participation in it. If, as would seem likely, that participation itself constituted the acceptance of a selection process contract (a contract somewhat akin to a tender process contract: cf *MJB Enterprises Ltd v Defence Construction (1951) Ltd* above; *Hughes Aircraft Systems International v Airservices Australia*, above), Souths would have had the rights to have had that contract performed according to its terms, and the partnership would probably have been subject to an implied duty of good faith and fair dealing in its performance. As I have previously indicated such a contract has not been pleaded by Souths and I do not enter upon whether Souths had any claims available to it in respect of such a contract. The point to be emphasised, though, is that the conduct of the selection process itself was a matter that was quite foreign to the 24 March contract. There was no conceivable reason why it would have been necessary for that contract to have dealt with it. Its day had not yet come.

429 (ii) Some of the implied terms advanced by Souths, or else the alleged

circumstances of their breach, seek to "piggy back" (if I can so describe it) on matters that more properly would seem to be of concern to the NRL partners inter se and about which it might have been appropriate for one or other of them to make complaint if such was considered to be warranted. I refer in particular both to the implied terms which it is said would preclude, and the circumstances alleged to give rise to, the favouring of clubs in which News or a related company had a pecuniary interest. Likewise the question of openness (or transparency) as it related to News' financial interests in, and support of, Super League clubs was essentially a partnership matter.

430 I have already indicated my own view as to the autonomy the partnership enjoyed in setting the criteria. Even if, contrary to my own conclusion, Souths was contractually entitled to have criteria set, I am unable to accept that it was necessary for the reasonable or effective operation of that aspect of their contract with the partnership that there be implied into it terms, the essential character of which was to police the conduct of the partners inter se and to obtain derivative advantage from the alleged impropriety or lack of fair dealing inter se by one of the partners and the alleged neglect of the other in the circumstances to make proper inquiry etc of its co-partner. This is not to say that in an appropriate case a third party could not have a direct and legitimate separate interest in the conduct of partners inter se. The present is not such a case.

431 By way of illustration of the process of implication I have described and rejected, Souths has advanced the following as constituting a lack of good faith in the setting of the Admission Criteria. In light of the level of News' funding to Super League clubs and of the particular focus of the Selection Criteria, Souths submitted that News did not act in good faith because it did not give necessary and available information to those who were setting the criteria, or to ARL which was reviewing the criteria, or to its own representatives, Mr Frykberg and Mr Philip. Good faith required that it should act fairly and reasonably in the circumstances having regard to the interests of *all* of the clubs. Its reticence was calculated to advantage the Super League clubs that were being bankrolled or which reasonably anticipated large settlements. Its representative gave misleading information to the PEC on 30 July 1998. Its representative who had the information did not consider whether the criteria were fair. For its part, ARL did not act fairly and reasonably in the circumstances having regard to the interests of all clubs because it did not pursue the necessary line of inquiry to obtain information of News' funding. It called no evidence to justify or explain its

position.

432 I do not intend to comment further on this type of submission other than to add that, to the extent that the above submission uses News' alleged wrongdoing to demonstrate the content of the implied duty of good faith proposed, it propounds a version of good faith that has distinctly, and in my view unacceptably, fiduciary undertones.

433 (iii) One of the proposed implied terms is that "the criteria would be fair and reasonable". This, on Souths' contention, imposes an objective standard against which alleged unfairness is to be judged. It does not impose the subjective standard of what is fair and reasonable *in the opinion of* the NRL partners (or their agent, NRL). So problematic is the proposed term itself that I consider it an impossible one to imply into a contract in circumstances such as the present.

434 The determinants of objective fairness in this setting are anything but self-evident and are made the moreso by the context in which this objective judgment is to be made. The NRL partnership was not in a fiduciary relationship with the clubs. In consequence, in its dealings with them it did not have to favour their interests over its own, nor did it have to act in its own and their mutual interests. The partnership could act in its own interests and pursue its own purposes when contracting with the clubs. And it could and did for its own purposes treat them differentially as was manifest in the 8-6/6-8 split, the preference to Auckland, Brisbane and Newcastle and the priority order for selection. In having criteria set it was engaged in a process of tailoring a series of measures to further its own purposes. Those measures, moreover, were meant to be elements of a composite package. For their part, the clubs themselves were not equals. They differed in histories, circumstances, strengths and weaknesses. In this setting it is difficult to divine in what degree and to what end the NRL partnership was positively to have regard to the interests of the clubs in setting the criteria. And yet it is Souths' contention that it was necessary for the reasonable or effective operation of the partnership's contract with Souths that such criteria as NRL was minded to set to effectuate the partnership's purposes were nonetheless required to be objectively fair and reasonable.

435 Again by way of practical illustration both of what this requirement is alleged to countenance and of the dilemma it would have created for NRL and the partnership if Souths' contention were correct, Souths has claimed that the criteria were rendered unfair by the

following *omission* (to quote the written submissions):

> *"the criteria adopted no adequate measure of the value to the competition as it stood in 1998 of the relative contributions made by the clubs throughout the history of the game. The criteria were unfair in this respect because the approach adopted favoured newly admitted clubs."*

It is unnecessary for me to comment upon this.

436 The difficulty in insisting upon the objective standard proposed becomes exaggerated when one has regard to the actual setting of the criteria. Notwithstanding that NRL engaged in an elaborate process involving a sustained consideration of the matter, the exercise of considerable judgment and reasonably wide consultation with the clubs and others, it is nonetheless contended that if it can subsequently be shown (ie after the event) that objectively the criteria unfairly favoured or burdened a club or clubs (be this through error or omission), the partnership would be in breach of its contract to a club or clubs even though it considered in good faith (via NRL) that the criteria when set were fair given the purposes they were designed to further.

437 For my own part, I find it inconceivable that, had it adverted to the matter, the NRL partnership would have subjected itself to so onerous and uncertain a burden (even assuming that the term "fair" itself could be given proper content in this setting). It would take quite anomalous circumstances before the partnership could properly be presumed to have intended so to have subjected itself. The implied term clearly was not necessary for the reasonable or effective operation of the contract that is being assumed. On the contrary.

4. OTHER MATTERS

438 There is one other feature of Souths' contract claim about which I should comment. It relates to the alleged implied right to participate in the 2000 competition and beyond unless Souths was refused participation in accordance with the Selection Criteria. I have earlier set out Souths' submission on this. It turns critically on what Souths describes as the "right to challenge" preserved by the 24 March letter. I have already indicated that that letter did not have the effect Souths sought to attribute to it and that the 24 March contract in any event did not deal with participation in the 2000 competition. The additional matter I wish to refer to is this.

439 Whether or not Souths would agree to there being a fourteen team competition in

2000, it knew from 19 December 1997 that the fourteen team term was fundamental to the peace deal struck. It knew prior to March 1998 that all that the partnership intended to, and was going to, offer in 2000 was a fourteen team competition and that that was the end point of the transitional arrangements for 1998 and 1999. One could not imagine a more unpropitious environment for the implication of the right alleged. It simply flies in the face of what all knew would be on offer for 2000.

440 It may have been the case (assuming all else in Souths' favour in relation to the 24 March contract) that, if it had been refused participation otherwise than in accordance with the criteria, it may have had avenues of legal redress against the partnership including, possibly, that of restraining the conduct of the competition itself: cf *Willow Grange Pty Ltd v Yarra City Council*, (SC of Vic, Byrne J, 1 December 1997, unreported); *Zusman v Royal Western Australian Bowling Association (Inc)* [1999] WASC 86. What Souths could not do was to make a failure to act in accordance with the criteria the occasion for its acquiring a right to participate in a competition of indeterminate size (but likely to be greater than fourteen teams) that it knew the partnership had no intention of conducting.

441 My rejection of the alleged implied term for the above reasons is of some consequence in any event as will be seen in the next section of these reasons.

5. RELIEF

442 Though no question of relief arises given my conclusion, there is one matter to which it is appropriate to refer. The principal relief sought in the contract case, as I have noted, is an injunction restraining ARL, NRLI and NRL from proceeding to exclude Souths from the NRL competition. The premise of this relief is that Souths had a right to participate in the competition unless properly excluded.

443 Even if one assumed that the 24 March contract not only applied to the 2000 competition but also entitled Souths to have fair and reasonable criteria, fairly and reasonably set and applied (to paraphrase imprecisely the implied terms), a breach of that contract resulting in the exclusion of Souths could not ground the relief sought unless, as well, the contract contained the crucial implied term that Souths was entitled to participate in 2000 unless excluded in accordance with the criteria. As I have indicated in the previous section of these reasons, such an implication could not in any event be made. In consequence, even

if a breach or breaches of contract had been proved, Souths would not have been entitled to the injunctive relief sought. I need not consider whether there is other injunctive relief to which, subject to discretionary considerations and defences, Souths might have been entitled.

444 My final comment relates to the use of the terminology of "exclusion". Considered historically from the standpoint of the 2000 competition, the transitional years from 1998 could be described as ones of reduction in the number of teams, the desired competition size being achieved ultimately by exclusion. Considered prospectively, the 2000 season was one for which a designated number of licences was to be granted and a selection process for the award of such licences was to occur if there were more applicants than licences. An unsuccessful applicant could, in colloquial terms, be said to have been "excluded" from the 2000 competition (even though it never had any right, conditional or otherwise, to participate in that competition). The reality is, though, that that applicant failed to secure a licence to participate in, ie admission to, the competition that was being conducted. This difference between "exclusion" and "failing to secure admission" is of obvious importance when one comes to consider such rights as Souths may have had when it agreed to participate in the selection process for 2000.

PART IV: THE S 52 CLAIMS

445 Souths' claims as finally prosecuted are based on four separate representations, two of which were express and two, allegedly, implied. The express representations and one of the implied representations were with respect to what at the time of their making were future matters. For that reason, as I will note, they raise their own concerns. In varying ways the representations are said to relate, if I can put the matter somewhat inaccurately at this point, to the fairness and reasonableness of the setting, the content and the application of the Admission Criteria for the 2000 competition. Before dealing with each of the representations I should make brief reference to the applicable principles and statutory provisions.

446 I should note additionally that, for understandable reasons given severe time constraints, Souths' written submissions on the s 52 claims are brief and draw heavily on the material canvassed in the contract claims. This necessarily has resulted in my having to infer in some degree the particular matters that are being relied upon in support of each of the claims given the quite distinctive proof required to make out the s 52 claims. In saying this I

imply no criticism of Souths' counsel and of the assistance they have been able to provide me.

Applicable Principles and Statutory Provisions

447 1. The familiar formula of s 52 of the TP Act is that "a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

448 2. Where the conduct complained of is a representation with respect to a "future matter" the provisions of s 51A of the Act can, as here, be brought into play. That section provides, for present purposes, that:

> *"(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.*
>
> *(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation."*

A usual consequence of the section, as Heerey J noted in *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 at 514, is that in contrast with the ordinary s 52 case, "liability is avoided … if the representor had reasonable grounds for making the representation". However, where the representation is of a continuing character and the representor later becomes unwilling or unable to make good the representation prior to the time or event fixed for that to occur, then, absent effective disclosure of the changed circumstances, the representor may have contravened s 52 notwithstanding it had reasonable grounds for making the representation: see *Hughes Aircraft Systems International v Airservices Australia*, above, 198-202. Furthermore, and irrespective of s 51A, where an unqualified representation as to a future matter was made in circumstances where it should have been qualified, it can contravene s 52 for want of qualification at the time of its making: see *Bowler v Hilda* (1998) 80 FCR 191 at 203-206; *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR §40-940 at 50,251.

449 3. A representation as to an event or conduct in the future is not robbed of its character as a representation with respect to a future matter "merely because it implies a

representation as to the maker's present state of mind": *Ting v Blanche* (1993) 118 ALR 543 at 553. The language of s 51A is wide. Nonetheless a representation containing a "future element" will not for that reason always be one with respect to a future matter. It may properly be characterised in a given instance as being no more than one of present belief, intention, etc: *Miba Pty Ltd v Nescor Industries Group Pty Ltd* (1996) 141 ALR 525 at 536.

450 4. A representation as to a future matter that proves to be mistaken or false in the event, is not necessarily misleading or deceptive for that reason alone: *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347 at 372.

451 5. Section 84 of the TP Act deems any conduct engaged in on behalf of a body corporate by (inter alia) an agent within the scope of its authority, to have been engaged in also by the body corporate. In the present case, though the representations in question were made by NRL, its agency for the partnership has been pleaded and s 52 claims have in consequence been made against the NRL partners.

1. THE FIRST REPRESENTATION: 28 APRIL 1998

452 On 28 April, Mr Whittaker for NRL wrote to the NRL board, the PEC and the CEOs of the NRL clubs attaching a revised timetable for the preparation of the Competition Structure Documentation. It warrants quotation in full. It stated:

> *"TIMETABLE IN RELATION TO NATIONAL RUGBY LEAGUE COMPETITION STRUCTURE DOCUMENTATION*
>
> *Background*
>
> *1. The NRL must create and sustain a vigorous and sustainable competition.*
> *2.* ***All clubs will be dealt with equally and in a consistent manner.***
> *3.* ***Although the NRL will consult with each club, ultimately the NRL will make the final decision on the basis of what is best for the NRL competition.***
>
> *Definition*
>
> *Competition Structure Documentation ("CSD") means:*
>
> *(i) the criteria for admission to the competition in the year 2000;*
> *(ii) the Franchise Agreement;*
> *(iii) the NRL Rules.*

Critical Path

21 April 1998 Draft timetable to Partnership Executive Committee
22 April 1998 Draft timetable to NRL Board and NRL Council
24 April 1998 Submissions on draft timetable from Executive Committee/NRL Board/CEO Council
29 April 1998 Draft CSD to Executive Committee
4 May 1998 Executive Committee Meeting
5 May 1998 Executive Committee draft CSD to NRL Board
8 May 1998 NRL Board Meeting
8 May 1998 NRL Board comments to Executive Partnership
11 May 1998 CSD to NRL Clubs (embargoed)
12 May 1998 CSD to player representatives
13 May 1998 Press briefings on criteria only
21 May 1998 ***Final date for all submissions***
31 May 1998 Final CSD distributed to clubs
30 June 1998 Final date for signing of Franchise Agreements."
[Emphasis added].

453 The representation Souths seeks to derive from this is, as pleaded, that NRL represented that "its aim was that in making a final decision on the basis of what was best for the NRL competition, all clubs would be dealt with equally and in a consistent manner." I would note immediately that this representation (i) is based on a recasting of propositions 2 and 3 in the "Background" section of the Timetable; and (ii) is a representation of an "aim" and not of future conduct as such.

454 The falsification of the representation lay, as pleaded, (a) in the adoption of criteria (that are particularised) which "did not treat all clubs equally and consistently"; and (b) in not dealing with all clubs equally and consistently when purporting to apply the criteria. By way of illustration, the first particular of the "adoption falsification" was:

> *"The NRL partners adopted admission criteria which treated the Auckland, Brisbane and Newcastle clubs differently from other clubs in that those three clubs received a seven year licence from 1999 to 2005 provided only that they met certain "qualifying criteria" which criteria did not apply to other clubs or Souths."*

455 Reference should be made to some additional evidentiary material before considering this claim.

456 (1) The question of a timetable for the preparation of the Admission Criteria had been before meetings of the CEOs of the NRL clubs on a number of occasions prior to the

letter of 28 April. Significantly for present purposes, the minutes of the CEOs' meeting of 22 April record that:

> *"The Chairman [Mr Whittaker] tabled a paper titled "Timetable in relation to NRL Competition Structure Documentation".*
>
> ***In response to a question by Bernie Gurr, the Chairman advised that, should they be able to meet specific requirements, Auckland, Newcastle, and Brisbane would be provided with 5 year licences, however, all Clubs would be issued with the same criteria.***
>
> *David Gallop asked that any comment in respect to the paper be provided by Friday, 24 April, 1998. The Partnership and Board of the NRL will meet in early May to discuss the Competition Structure Documentation ("CSD").*
>
> ...
>
> ***The Chairman offered assistance to all Clubs in working through the documentation after 11 May when Clubs would receive same.***
>
> *Danny Munk asked that Club Chief Executives and Chairmen (at least receive the opportunity to meet as a group with the NRL to discuss the "CSD"). The Chairman advised that, provided this is an information sharing meeting and not a policy-making exercise, this could be supported. With the exclusion of Canberra, all Clubs agreed with the proposal. The Chairman suggested that the NRL Board may wish to attend such a meeting. (Proposed - Thursday, 14 May 1998)."* [Emphasis added].

457 (2) As I noted earlier in these reasons, the preparation of the Admission Criteria began in early 1998 and the criteria themselves were to be the subject of comprehensive legal advice. After the draft criteria document was distributed, it was considered at three meetings of the CEOs of NRL clubs. Independent consultants were retained for comment from whom four reports were received. And, as envisaged by the Timetable itself, the clubs made written and oral comments on the draft.

458 Souths' case can be put shortly. It is that (i) the representation made did not relate only to the process of setting the criteria, it related to their content and, at least as pleaded, to their application; (ii) though in form a statement of aim, it was a representation that the clubs would be dealt with equally and in a consistent manner; (iii) there were no reasonable grounds that the clubs would be so dealt with because the draft criteria that were at the time being prepared by NRL contained selection criteria that advantaged some clubs against others in a variety of respects; and (iv) the representation was falsified by the published criteria that contained like criteria.

459 The respondents' case is that the reference in the Timetable to dealing with the clubs "equally and consistently" ("proposition 2") was no more than a reference to the process to be followed in finalising the Competition Structure Documentation ("CSD") against a background of discussion of timetabling at previous meetings. The third point made in the "Background" part of the document, ie that "NRL will make the final decision" etc ("proposition 3"), was a distinct representation that related both to process (to the extent it referred to "consultation") and to content insofar as the "final decision" was concerned. Accepting that both representations were with respect to future matters, there were reasonable grounds for making them. Alternatively, it is said that the discretion NRL reserved to itself in proposition 3 qualified proposition 2 with the consequence that it was representing it would form its own opinion on those matters and would act accordingly. No one could have been misled by that. (I have found it unnecessary to consider this alternate submission.)

460 My own view is that this document does not go the distance Souths asks of it. The principal purpose of the document was clear enough. It was to establish a timetable for consultation about, and approval of, the CSD. The function of the "Background" section of the Timetable and the interrelationship (if any) of the three propositions it contains, are far from self-evident. If it be said that the reference to clubs being "dealt with equally and consistently" referred to the content of the criteria, not only was it known by the clubs from as early as the 19 December 1997 meeting that there would be both a 8-6/6-8 split and a priority order, it was also known from that date and from what was reiterated at the CEOs' meeting of 22 April when the proposed timetable was being considered, that three clubs (Auckland, Newcastle and Brisbane) were to receive differential treatment.

461 The minuted answer given by Mr Whittaker at that 22 April meeting when indicating the different position of the three clubs does, perhaps, suggest a possible meaning of "dealt with equally and consistently". He is reported as saying "however, all Clubs would be issued with the same criteria".

462 I have no direct evidence of anybody ascribing any particular meaning to the formula in proposition 2 let alone relying on it. In its setting and against the background of the 22 April meeting, the formula's likely meaning could be one or other of the following, ie that, save for already known exceptions, the clubs were to be subjected either (i) to the same criteria without differentiation, or (ii) to the same criteria that would be applied consistently.

It is unnecessary that I express a concluded view on which of the two probably was the proper meaning. Evidence of Mr Whittaker to which I will refer in relation to the "second representation" suggests he at least was intending the second of these. What is clear, in light of proposition 3, is that the clubs were to be consulted (as in fact occurred) before the CSD was finalised.

463 Turning to Souths' contention, I cannot accept that proposition 2 impliedly contains a representation as to the content of the proposed criteria. The clubs had different qualities and attributes, strengths and weaknesses. They were not, as Mr Whittaker said in evidence, "on an equal footing". I note in passing though it post-dates the representation that the 20 May 1998 report of the consultant statistician was to like effect in stating the obvious. In the proposed admission process it could only be envisaged by likely participants that any criteria to be adopted would highlight such of those differences as were brought into focus by the chosen criteria themselves. It was not an environment in which the criteria could reasonably be expected to treat clubs equally. The selection process was self-evidently to be one of differentiation not of equalisation. Moreover from what the clubs already knew, there was, designedly, to be unequal treatment of clubs in some matters (eg the priority order and the preference to Brisbane, Newcastle and Auckland). As Hely J noted in the interlocutory proceeding ((1999) 169 ALR at 138), "[some] differential treatment was an integral part of the merger proposals from its inception".

464 There remains, though, the question whether, insofar as proposition 2 was a representation with respect to process, it related only to that involved in settling the competition structure documentation (as the respondents contend) or whether it related also to the application of the proposed criteria (as Souths has pleaded).

465 Souths in its oral submissions has not sought to demonstrate the representation was with respect to the application of the criteria. Indeed in submission, the matters relied upon to demonstrate falsification related to the adoption of the criteria. I assume that the claim has been abandoned but against the contingency that it has not I will consider the matter briefly. For present purposes I am prepared to assume that the representation related to the application of the criteria, though there is great force in my view in the respondents' submission. There are three reasons why the submissions must fail.

466 The first is that, for reasons I will give below, this representation as also that of 8 May

should properly be characterised as an *aim*. As such it would not be falsified merely because in the event the aim was not fulfilled. It would, though, have been falsified for s 52 purposes if it ceased for whatever reason to be the aim before the criteria were finalised or applied. In such circumstances a question might arise whether disclosure of that change would be necessary to avoid a contravention of s 52: see *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; *Hughes Aircraft Systems International v Airservices Australia*, above, 198-202. Such is not, and has not been said to be, the present case.

467 Secondly, irrespective of whether the representation be characterised as an aim, or as a representation that the clubs would be dealt with equally and consistently in the application of the criteria (whatever their content), I am satisfied that NRL had reasonable grounds for the representation. In saying this, I would interpret the word "equally" as adding little to "consistently" in the context of criteria application in that it would seem to signify that the same criteria, when applied to different clubs, would be applied in the same way. Not only is there no evidence to suggest in any way that NRL did not intend, or would not be able, to apply the criteria "equally and consistently", the evidence is replete with indications of its intent - and capacity - to secure the integrity of the processes it was beginning to erect at the time of the representation.

468 Given (a) the attention that had been given the criteria from early January 1998, (b) the resources that were and were able to be brought to bear, (c) the advice sought and to be sought and (d) the consultative and explanatory processes that were by 28 April envisaged (and later put into effect) in relation to the setting of criteria, I am prepared to infer that the NRL and the partnership had both the intention and the capacity as of 28 April to continue to prosecute their aim and to take whatever were later considered to be proper steps to assist in this. The representation was (on the assumption being made) about conduct across time. The process of equal and consistent treatment in relation to the process of setting the criteria had begun to be put in place. There is nothing to suggest that such treatment would not be continued and there is every reason to believe that it was intended it would be. I will enlarge on this further when considering the second representation.

469 Thirdly, if the representation had any possible force at all for s 52 purposes beyond that of a statement of aim, that force was spent as a result of the document sent to the clubs on 8 May 1998. It left no room for what preceded it.

2. THE SECOND REPRESENTATION: 8 MAY 1998

470 Mr Whittaker for NRL sent the NRL board, the PEC and all clubs the draft criteria document on 8 May 1998. The document was prefaced with the following which was in much larger typescript than the explanation and statement of the criteria:

> *" AIMS*
>
> *1. Create and maintain a viable national competition.*
>
> *2. To set and apply criteria for inclusion in the competition in a fair and reasonable manner.*
>
> *METHOD*
>
> *1. Provide draft criteria to stakeholders for the purpose of developing and maintaining a sustainable, vigorous and successful competition.*
>
> *2. Objectively evaluate suggestions from stakeholders during a consultative period.*
>
> *3. Set final criteria.*
>
> *4. Communicate final criteria as soon as possible."*

The statement of "Aims" constituted the representation relied upon by Souths.

471 The letter also attached a draft media release which it said was to be "a guide to the only comment that will be made on this issue". The media release said, amongst other things, that:

> *"The NRL Executive Committee has today issued the first working paper in the discussion process to formulate admission criteria for the year 2000 Rugby League season.*
>
> *This working paper will be circulated to the NRL Board and NRL clubs in advance of any media comment from the NRL.*
>
> ***It is to be stressed that it is a working paper which will be the subject of input from any NRL club before the Executive Committee makes a final decision on the admission criteria.***
>
> *The process will involve a media briefing next week, subject to feedback from the NRL Board and its clubs."*: [emphasis added].

(a) Additional Factual Material

472 I have included a deal of evidence in this section which, though not strictly relevant to

this particular representation, provides background and setting to the s 52 claims generally.

473 (1) It was not until 12 May 1998 that the board of NRL considered the 8 May documentation. It resolved to endorse it "as a working document".

474 (2) In late August 1997 after the breakdown in the ARL-Super League merger negotiations, ARL prepared and distributed to its clubs a draft document entitled "Guidelines for entry into the National Rugby League Championship". It took the form of a statement of "requirements" to be met by an "applicant Licensee". Those requirements (which it is unnecessary to reproduce) related to finance (ie annual revenue plus a five year business plan), administration, junior development, player strength and playing stadium. A copy of this document was given to Mr Jourdain in early 1998 by Mr Frykberg who in turn had obtained it from Mr Whittaker during the merger negotiations. Those "Guidelines" provided an initial model for Mr Jourdain and its influence is apparent in both the Basic Criteria and Qualifying Criteria of the Admission Criteria.

475 (3) As indicated in "Part I: General Chronology", work on the formulation of the Admission Criteria began in January 1998 with the appointment of a team of prospective NRL employees headed by Mr Jourdain. In the period January-March 1998, Mr Jourdain had discussions about the proposed criteria with others within the NRL management team (some of whom were then ARL, and some Super League, employees) and with Mr Whittaker.

476 (4) In early April 1998 Mr Jourdain distributed to NRL management a first draft of the Admission Criteria. Mr Jourdain's evidence is that its content arose largely out of what was contained in the draft ARL criteria and out of his discussions with Mr Whittaker. Though later subject to considerable variation in its detail, weighting, etc, the proposed Selection Criteria contained the same six criteria that were in the end agreed to by NRL. The final version of the Selection Criteria, ("the September Version") is set out in the "General Chronology". Here I would note that the six criteria were (1) Crowd Numbers (Home Games); (2) Crowd Numbers (Away Games); (3) Competition Points; (4) Gate Receipts (Home Games); (5) Sponsorship; and (6) Profitability. In the April draft Profitability was to be measured for the 1998 season only and had the highest rating of "4". In the September Version, Profitability was to be measured over 1998 and 1999 and had the equal lowest rating of "1". That change had in fact occurred before the draft criteria were distributed.

477 (5) The 18 February MoU expressly envisaged (cl 7) that the Admission Criteria would be "determined by NRL Co, and approved by the Partnership". The approval requirement was not repeated in the Merger Agreement of 14 May 1998: see cl 7.2(b). In the interim it had been agreed with the partnership that NRL would set the criteria, though the formal powers of direction of the partnership under the Services Agreement were such that it could have imposed its will on NRL in relation to the content of the criteria had it so wished. Mr Macourt and Mr Frykberg gave evidence that, as PEC members, they left the setting and approval of the criteria (including judgments as to their fairness) to NRL as it was a matter for experts. Mr Philip's evidence was that, while he believed NRL had to act reasonably and fairly and to give the clubs an opportunity to make submissions to it, it ultimately was a matter for NRL to devise the appropriate criteria and apply them. He was responsible for negotiating the deletion of the "approval" requirement referred to above. At the one PEC meeting at which the content of the draft criteria appears to have been addressed directly (30 July 1998) - though it does appear from Mr Frykberg's evidence that the criteria may have been considered on other occasions - the minutes recorded:

> *"Criteria*
>
> *Mr Philip stated that all decisions in relation to the criteria should be at the sole discretion of NRL. Those provisions dealing with independent auditing of club figures should be adjusted accordingly. In line with this, the cost of independent audits (if any) will be borne by NRL.*
>
> *In relation to the Selection Criteria section, there was a discussion regarding the complicated appearance of the calculations. It was agreed that attempts should be made to present the material more clearly."*

478 (6) The December MoUs, as also that of 18 February, required that "ARL and Super League … (b) will satisfy their respective existing club and player contract obligations". In Super League's case, its clubs had received significant funding in 1996 and 1997 and they had contractual entitlements to receive on-going funding in the form of grants and sponsorship underwrites in 1998 and 1999 as also prescribed benefits (eg funding for screens and sound systems). Loans in significant amounts had been made to the clubs and were still outstanding. Mr Macourt was responsible for approving the terms of the releases of Super League's contractual obligations to its clubs. The negotiation process for releases appears to have begun in January 1998. Mr Jourdain was delegated this task which he retained until the commencement of the NRL competition in March 1998. Mr Jourdain's evidence is that the negotiations did not progress very far during his time and that for the rest

of the period in which he was with NRL he had no knowledge of the progress of negotiations and of their ultimate outcome. The first deed of settlement with a Super League club (Penrith) was executed on 3 December 1998, the last (Cronulla), on 23 April 1999. Though there was considerable variation between the clubs in the settlements reached, their common, though not invariable components, were a funding grant, a forgiveness of loans and provision for a video screen and multi-point sound system for home matches in 1999. Simply by way of illustration (though it contains the largest loan forgiveness), the settlement terms with Canterbury were for the following amounts/benefits:

> *"1. Funding Grant - total of $9,518,914 made up as follows:*
>
> | | | |
> |---|---|---|
> | *(a)* | *Outstanding 1998 Grant* | *$ 387,314* |
> | *(b)* | *Outstanding 1998 Underwrite of Club* | *$4,065,500* |
> | *(c)* | *1999 Jumper Underwrite* | *$1,705,100* |
> | *(d)* | *1999 Fighting Fund* | *$ 435,000* |
> | *(e)* | *Additional Grant* | *$2,000,000* |
> | *(f)* | *Player Payment Grant* | *$ 926,000* |
>
> *2. News will forgive all existing loans as at 31 October 1997, being $6,812,685 to the Club and AH CT [the franchise holder entity for the Club].*
>
> *3. To the extent not provided by the NRL, News or Super League will provide a video screen at all the Club's home matches in 1999 and will pay the video production costs."*

479 (7) The NRL payment apart, the payments made to ARL clubs by way of transitional funding in 1998 and 1999 were $1.5 million per club per year, and loyalty payments to clubs or players of differing amounts. The latter were to expire, for the most part, after the 1999 season and were in large measure paid well in advance of the period to which the payment related. It would seem that for the years 1998 and 1999, the total sums paid by way of cash were $4,353,000 and $1,951,000 respectively, while the actual loyalty payment expenses for those years totalled $18,909,000, most of which was met by pre-payments made primarily in 1995.

480 (8) On 25 April 1998 an article appeared in the "Sport" section of "The Sydney Morning Herald" under the heading "Sydney Super clubs await million-dollar News payout". It read, in part, as follows:

> *"Sydney Super League clubs expect to receive a settlement of up to $13 million each from News Ltd to compensate them for the loss of independence promised under the initial plans for an elite competition.*

> *It is understood Sydney clubs such as Penrith, Canterbury and Cronulla will receive more generous terms than Auckland and Townsville which are better positioned to join the National Rugby League's 14-team competition in 2000.*
>
> *The proposed settlement has angered Australian Rugby League clubs which see it as a back-door way of guaranteeing News Ltd's Sydney clubs will meet the solvency criterion when the number of clubs is cut next year.*
>
> *However, the compensation is consistent with the peace agreement made in December 19 last year, and only half the monies received would be cash.*
>
> *While refusing to comment on any figures, News Ltd director of sport, Ian Frykberg said: "Clearly News Ltd has contractual obligations with these clubs and has no intention of not meeting those obligations. However, it would be wrong to assume this means clubs aligned with the former Super League will be automatically better positioned to meet the NRL's criterion."*
>
> *"A considerable amount of the money will be used to meet excess payments above the level of salary cap payments." "*

Mr Whittaker read this article. He was aware that News was negotiating the release of all of its contractual obligations with Super League clubs: "[t]hat was part of the MoU that I had negotiated". He knew it was likely there would be cash payments. He discussed the article at a meeting with those involved in formulating the criteria. His recall of the meeting was clearly quite imperfect and for that reason, in my view, unreliable. But he said he was "left with the suggestion that the orders of magnitude were higher in the article than would actually be the case". He was told by Mr Jourdain that the settlements had not been finalised.

481 Mr Jourdain confirmed there was such a meeting and he said there had been "a long conversation" on the article. He had ceased to be involved in the settlement negotiations about two months before the publication of the article. His recollection was that when he read the article he thought that with the exception of Canterbury the other figures mentioned were higher than were the actual figures he believed were being negotiated at that time. He believed that Mr Whittaker had asked him whether the numbers referred to in the article were close to the numbers being discussed by way of settlement. He could not remember the specific question. Nor could he remember the specific answer he gave. He could recall telling Mr Whittaker that the proposed settlement numbers, so far as he was aware, were not as high, for most clubs, as those suggested in the article. He agreed that he had no specific recollection of telling Mr Whittaker that in respect of at least one club the order of magnitude of settlement discussed was about right. He agreed that if all that he had said to Mr

Whittaker was that the numbers proposed by way of settlement were not as high as those suggested in the article then that would have been misleading, but that was not all that he had said to Mr Whittaker.

482 (9) In selecting the various criteria for the Selection Criteria, Mr Jourdain indicated that it was important to him that the categories which were included were capable of being measured objectively. He also considered that it was important that the categories adopted were those which provided the best prospects of ensuring that the teams which were selected were those which would help NRL create and maintain a viable national competition. Both he and Mr Whittaker indicated that the profitability criterion was one that was debated at length within NRL. Mr Whittaker, who considered that the criteria should contain financial measures, gave evidence of one such meeting of NRL at which he advanced a counter-argument against profitability being one of the financial measures. He could recall two of the points made in favour of profitability being included in the criteria, but that there may have been others. One was that the Australian Accounting Standard could be used as part of the measure of profitability. Another was that the NRL competition needed to have clubs which were profitable either by their own operations or because of a major backer. Profitability was also seen at the time to operate as counter balance to the other measures. With the other criteria elements the financial input of News/Optus/ARL/Leagues clubs was limited.

483 For his part, Mr Jourdain's advocacy of the profitability criterion was because he considered it was important to include such a measure to ensure that the clubs acted in a financially responsible fashion during the period in which the Selection Criteria would be in operation. He believed that there was a risk that clubs would be tempted to spend excessively on players. He believed that there needed to be a form of counter-balance so that if a club incurred a large trading loss it would be penalised by performing poorly in the profitability category. I should add that the theme of a needed counter-balance to deter clubs spending beyond their means recurred in cross-examination. As Mr Whittaker commented of clubs so spending, they "were good at it".

484 I would again note that by early May, while deciding to retain the profitability criterion, Mr Whittaker and Mr Jourdain had reduced its weighting from "4" to "1".

485 (10) Mr Whittaker, particularly, but also Mr Jourdain gave evidence as to the

concentration in the criteria on the years 1998 and 1999. I would note the following passages of re-examination of Mr Whittaker:

> *"Mr Meagher, SC:*
>
> *To the extent that you participated in the adoption of the criteria, why was it that the selection criteria for the most part fixed upon events which were to happen in 1998 and 1999? -- Because it was about an opportunity for the clubs to see themselves and to perform against the other clubs in the competition during that period. The only departure of that was on field performance where we felt it appropriate to measure over a longer period of time, but if you're creating a viable and sustainable competition, and you want the clubs to be given the opportunity to see how they fitted into that, then it was best to do it in the 1998 and 1999 period.*
>
> *Was there discussion between you and any of the other persons who had a say about the content of the criteria as to whether they should only deal with matters which had occurred in the past, or should deal more substantially with matters that had occurred in the past? -- Yes, it was discussed.*
>
> *Can you tell me as best you can, the effect of the discussion? -- Yes. The effect of the discussion was that it would be very difficult in the environment that had occurred in, at least, the previous 3 years. Certainly the split year and a couple of years prior to that, to be going back and attempting to measure clubs against each other in that period so it was essentially for that reason. Some clubs didn't exist during that period, some clubs were very new, and the whole game - we were more focused on how they performed once the game was put back together."*

Mr Whittaker later said:

> *"The selection criteria was designed to select out of the teams that were participating in 1998 and 1999 on a raft of performance measures. We'd designed that the teams to go forward would position the game generally in that sustainable position. They were numbers that we could actually measure that were good lead indicators that the game would be in a healthy position from 2000 and beyond."*

I would also note his statement in cross-examination.

> *"The reference to […] that all clubs had the opportunity to participate in the rationalisation process, was about having two years to understand what the criteria was and to understand how they performed within that context. We didn't say that it would depend on the level of support that the club may have from any particular source. It was - that wasn't part of the requirements. As we sat down to put it together, we knew that it would vary. The two years was what the - the equal opportunity to participate was all about, to play for two full seasons and to have their performance in all areas including financial, compared over those two years. We weren't able to go back and*

say that back in 1997, everyone must start from an equal position. We didn't have that luxury."

486 In giving evidence of the general limitation of the criteria to 1998 and 1999, Mr Jourdain said in cross-examination by Mr White SC:

"We considered as the NRL team, I guess, what would be the fairest way to, in the circumstances, come up with a criteria and one of the things we were concerned about that if we went backwards, people would say, you already knew the results, so you rigged it. So, we said, well let's make it prospective because we don't know what the answer is going to be and that seemed to be the fairest way and it also gave clubs an opportunity, once they saw the criteria to try to react to them.

There would be no rigging, would there, of the results of how much sponsorship moneys the clubs had been able to attract before the super league war started? --- There were suggestions that a lot of the numbers previously weren't audited but secondly, to come up with the right criteria if it would be - we believe we come up with the right set of criteria but if you brought the criteria in retrospectively, then there would be an argument that you only brought that criteria in to advantage some clubs because you knew the answer already."

487 (11) As to the main purpose of the criteria, Mr Whittaker's view was that it was to enable a selection to be made of the teams that would best position the game's viability into the future. Cross-examined on his intention at the time of the 19 December meeting of loyal clubs as to the proposed selection process by reference to criteria, he had this to say:

"MR WHITE SC: And it was your intention, wasn't it, that such criteria to be formulated should be fair to all clubs? --- Would be - yes, the process would be fair and reasonable, yes.

The process would be fair and reasonable, and the criteria, themselves, would so far as possible be fair to all clubs. That was your intention, wasn't it? - So far as possible, yes."

As to the formulation of the criteria Mr Whittaker said:

"MR WHITE SC: Now, it's the case, isn't it, that at all times when you were considering the formulation of the criteria you believed that it was necessary to be fair that they measure the relative ability of clubs to best position the game's viability into the future from 2000? --- I guess the criteria was really - it had to come back to the fact that it was there for us to - we had to apply it in the fairest way we possibly could and we gave the clubs two years in which to all participate together and then apply the criteria if we needed to at the end of that process. I guess that's the concept, with respect.

...

And what I ask you is whether you believed at all times when considering the formulation of the selection criteria, that to be fair they should measure the relative ability of clubs to best position the game's viability into the future from 2000? -- Yes, that's right.

And for criteria to measure that ability, that is to say the ability of clubs to best position the game into the future from 2000, it was necessary was it not for the criteria to be fair that they address the relative ability of those clubs to do that from their own resources or the resources likely to be available to them from 2000? -- Yes, and I guess the thing that hasn't come out is that it needed, the criteria also needed to be sensitive to the fact that it was, there was a regional and Sydney split and there was a structure to the criteria to provide for that as well."

In re-examination by Mr Meagher SC, the following was said:

"Mr Whittaker, you said the process would be fair and reasonable, what did you mean by the process and what did you mean by fair and reasonable? --- The process I meant by the process of developing the criteria and then applying the criteria.

And what did you mean by fair and reasonable?--That it would in the context of what we had at that - at that stage we had somewhere between 20 and 22 teams. We needed to get it to 14. Each of those teams would be - each of those teams were in a different financial state and that. It was impossible for everyone to start from an equal footing so from that - from the context of we were starting this process with clubs at different I guess financial health and performance ability. We would apply this fairly and reasonably as we could given that we'd decided to do it this way.

How did you propose that the criteria would be fair to all clubs, if at the starting point, the clubs were unequal in their resources or finances? -- Fairness was about giving the clubs - it was having the one set of rules, having it done consistently, applied consistently and that everyone would get a chance over the two year period to assess where they fitted into all of that. That is what fairness was about. It was impossible to say that we could change the past, we had to come up with a process that was acceptable over that two year period."

The counterpart cross-examination and re-examination of Mr Jourdain were as follows:

"MR WHITE SC: And as you understood it, it was an essential purpose of the selection criteria, that they assess which teams would best help the NRL maintain a viable national competition from 2000, correct? -- Yes.

And it was essential, was it not, from your point of view, that the criteria which were adopted should be fair to all clubs? -- Yes.

> *And to be fair to all clubs, it was also essential, wasn't it, that the criteria - the selection criteria assess the long term potential of the individual clubs? -- As best as could be done given the timeframe that we had."*

He was re-examined by Mr Meagher SC on the second of those questions:

> *"When you answered that question, what did you understand by the expression "should be fair to all clubs"? -- We had 20 teams in the competition at that time, which was to come down to 14 teams in two years. I believed that we should devise criteria that gave all the teams that existed at that time an opportunity to be in the competition in 2000."*

488 (12) Of the likelihood or otherwise of News' manipulation of the profitability criterion by making inflated settlement payments to its clubs, Mr Whittaker's evidence was that he had no reason to believe that News would so act to favour Sydney based Super League clubs. He knew News was settling its obligations; he did not know "what the numbers were"; and he did not believe that he needed to know. I would also note that those working on the criteria were aware that over the two year period "unknown amounts of money would come into the game" whether via Super League settlements, Leagues clubs or from "benefactors"; that some clubs (ARL and Super League) but not others had Leagues clubs; and that some but not others of those Leagues clubs did provide significant support to their respective club. Mr Jourdain, while aware of the settlement negotiations, and of the capacity News had to pay significant sums of money, did not believe that News would pay more than was necessary to settle its contractual obligations.

489 (13) Both Mr Whittaker and Mr Jourdain accepted that differential funding could impact on the profitability measure. There was considerable cross-examination of both as to the possible/likely flow-on effects of such funding on performance against other of the selection criteria. I need not recount this evidence almost all of which I found to be quite unhelpful. The Super League settlements only began to be made in December 1998 (ie after the 1998 season) by which time players etc for the 1999 season had already been signed. I would, though, note that Mr Piggins readily accepted that "the relationship between money and success is very, very speculative". The objective evidence, such as it is, confirms this view.

490 (14) Apart from being a member of the PEC, Mr Frykberg was a board member of NRL. His evidence is that the board approved the criteria without any objection from any of its members. At no stage during the discussions he attended was there any mention of

particular clubs or of the effect that the criteria would have in relation to particular clubs. For his own part, he believed that profitability was an appropriate criterion to be included in the Selection Criteria and that that criterion did not unfairly advantage Super League clubs. One of the purposes of a merger was to develop a sustainable competition with financially stable clubs. Consequently, he believed that it was fair and appropriate to consider the profitability of clubs in selecting the participants in the competition. After advice from NRL officers, he did not consider that the profitability criterion would unfairly advantage Super League clubs. There were financially strong and weak clubs in both camps. He did not know what settlement amounts would have to be paid by News at the time the criteria were chosen. However, he did not think that those settlement amounts would unfairly advantage Super League clubs having regard to the different sources of funding available to ARL clubs, including Nine, Optus, New's contribution and, in some cases, amounts available from Leagues clubs. He conceded that he did not have specific knowledge of the financial position of the clubs.

(b) Submissions and Conclusions

491 Souths' submission is that the 8 May statement of NRL's aim (ie "to set and apply criteria for inclusion in the competition in a fair and reasonable manner") was a statement as to a future matter. Though not pleaded in these terms, it is claimed that it was a representation that the criteria would be set in a fair and reasonable manner. They were not so set and applied and there were no reasonable grounds for making the representation. Bearing in mind the date of the representation and that at the time of its making, the draft criteria had not been seen, let alone considered by the NRL board or the PEC, the absence of reasonable grounds had to relate to such grounds as NRL had at the time (via Mr Whittaker and Mr Jourdain).

492 Souths' complaint would seem to be predicated upon an alleged unfairness in the Selection Criteria themselves. The cause of that unfairness was that the criteria did not measure the relative ability of clubs to best position the game's viability into the future from 2000 from their own resources or the resources likely to be available to them from 2000. The criteria were positively unfair in their focus on the clubs' performance in 1998 and 1999 when some clubs were, or were likely to have been, significantly advantaged in their performance against the Selection Criteria by the receipt of non-recurrent funding from News.

493 The antecedent unfairness in setting the criteria was that it was impossible for Mr Jourdain and Mr Whittaker to assess whether any Super League club might receive an advantage in its performance against the Selection Criteria through receiving a generous settlement from News because they didn't know what settlements were proposed. The same was true in respect of their lack of knowledge of what the ARL clubs were receiving by way of loyalty payments. They were unable to assess whether the clubs' performance against the Selection Criteria might be significantly affected by different levels of short term funding.

494 News and NRLI have submitted that the 8 May documentation was no more than a representation by NRL as to what in its opinion as at that date were fair criteria which it was distributing for the purposes of inviting comment. The related media release described the draft as a working document "to be subject to" input by the clubs and the NRL board. There was no representation as to a future matter.

495 NRL's submissions are differently directed. The stated "Aims" were the intended, or desired, objectives of NRL. It was able to make the statement because it was NRL that was setting and would be applying the criteria. The statement correctly reflected the intentions of the persons involved, Mr Whittaker and Mr Jourdain. To the extent that the aims contained an implied representation that the aim was achievable, they had reasonable grounds so to believe. What the statement was not, was a representation that the criteria would be set and applied in a fair and reasonable manner. At its highest it was a statement that NRL would seek so to set and apply the criteria because that was what its aim was. It was an objective to be pursued, not a designated, promised, or warranted outcome.

496 Before considering whether what was stated was an aim or was a representation as to an outcome, it needs to be emphasised that the statement related to the *manner* of setting and *manner* of applying the criteria. That manner was to be "fair and reasonable". The statement was not concerned with whether the criteria set and applied were "fair and reasonable" as such. The manner of setting the criteria could, though, bear on whether they were "fair and reasonable" (I defer, for a moment, the meaning to be attributed to these terms) in that setting criteria in an unfair and unreasonable manner could (though need not necessarily) result in the criteria themselves being unfair and unreasonable.

497 The terms "fair and reasonable" are not altogether free from difficulty. "Fair", I would emphasise, could not properly be said to evidence in any way the assumption of some

fiduciary obligation to act in the interests of all of the clubs. Neither could it properly be said that it would preclude setting criteria that were designed to discriminate between the clubs. But it would, in my view, preclude the intentional setting of criteria for the very purpose of discriminating against a particular club or clubs, or so as to advantage a particular club or clubs. It likewise would preclude the adoption of a process in setting the criteria that was intended to favour, or to disfavour, a particular club or clubs.

498 Given that the fairness requirement was to qualify the manner in which decisions and actions were to be taken, the term "fair" in my view signified in this setting that decision and action would not be taken in bad faith; that conscious bias would not exist; that favouritism would not be practised.

499 The term "reasonable" as used here had an inevitable puffing quality about it. It could do no more than signify that the decisions and actions to be taken were ones that a reasonable person could take in the circumstances.

500 Turning to the parties' submissions I would have to say that I am in complete agreement with NRL's submissions. Aims were being stated which it was intended would be pursued. The very process of consultation that the 8 May 1998 letter initiated was a step being taken in the pursuit of that objective. Comments were being invited on the draft. The "input of any club" was being sought. Though the clubs had no rights in the setting of the criteria, they were being engaged in the process.

501 The aims themselves were interconnected, with the first ("the viable national competition") being paramount. The achievement of both aims involved matters of complex judgment in novel circumstances. NRL in fact sensibly intended to (and did) seek assistance in making its judgments in relation both to the setting and the application of the criteria. But it did not represent itself as promising or warranting that its judgments would be the correct ones. It would be surprising if it had. Rather its objective was that its decisions would secure the aims pursued.

502 If NRL at some point decided or realised that it was no longer willing or able to achieve either or both of its objectives, the question may then have arisen, as I have previously noted, as to whether it would need to disclose such was the case if it was to avoid contravening s 52. This is not in issue in this proceeding. But the failure to achieve either

of the objectives (if such was the case) would not of itself falsify the representation made. It merely would signify that the aims were not pursued successfully.

503 Did NRL have reasonable grounds for making the statement of aims? The statement clearly reflected the contemporary intentions of Mr Whittaker and Mr Jourdain. Neither of them at that time considered the aims were not achievable. Their draft was being distributed as a working paper for consultation and "input". A statistician was to be engaged as a consultant to report on it. NRL was setting in train processes designed to facilitate the realisation of the stated aims. No matter how controversial any particular proposed criterion might be, the process that was being both engaged in and proposed provided reasonable grounds at this early stage of setting the criteria for the making of the statement of aims.

504 Even if I am incorrect in treating the statement simply as one of aims and that, rather, it would be treated as a representation as to an outcome (ie that the criteria would be set in a fair and reasonable manner), can it still be said that there were reasonable grounds for making the statement? Again I would answer affirmatively. In saying this I would emphasise the seductive error of criticising with the advantage of hindsight. What needs to be considered are the circumstances as they existed and could be envisaged at the time the representation was made.

505 There clearly is no evidence which remotely suggests that decisions (actual or prospective) as to the processes by which the criteria were to be set were taken in bad faith. Nor could it be suggested that, from that time, there was an intention to demonstrate favouritism in the criteria to be set. On the contrary both Mr Whittaker and Mr Jourdain were conscious of the need for fair processes and, within the confines of the competition structure and the need to create a viable national competition, for fair criteria. Nonetheless could it be said in light of their decisions and actions in preparing the draft criteria, that there were no reasonable grounds for making the representation?

506 There are two separate complaints made, one in relation to the existence of reasonable grounds for the "setting" representation, the other for the "applying" representation. As the second of these raises the same issue as that in "Representation Four", I will defer consideration of it at this stage. The complaint in relation to setting the criteria, as I understand it, is that by then Mr Whittaker and Mr Jourdain had already acted unfairly and unreasonably in not seeking information concerning Super League settlement payments and

ARL loyalty payments for 1998 and 1999 when using those years as the focus of club performance in the Selection Criteria. Consistent with what I have already said, this complaint must be one of unreasonable as distinct from unfair (ie bad faith) conduct.

507 In my view it cannot properly be said that without making the inquiry Souths assert ought to have been made, Mr Whittaker and Mr Jourdain took decisions that no reasonable person could take in the circumstances. Each of them ascribed appropriate reasons both for selecting the types of criteria that were adopted and for focussing on 1998 and 1999; each was concerned with objectively measurable criteria; each understood the need for some financial measure to be adopted consistent with the objective of creating a viable competition; the profitability criterion itself was a matter of regular discussion, particularly after the "Sydney Morning Herald" article and its weighting was reduced around this time from "4" to "1"; each was aware of the quite unequal positions of the clubs in respect of their histories, circumstances and finances; it was appreciated that "unknown amounts of money … would come into the game" in 1998 and 1999 from the settlements, from Leagues clubs, sponsors and benefactors; both Mr Jourdain and Mr Whittaker considered that News in effecting releases would do so in the proper settlement of its obligations and they had no reason to believe that such would not be the case; the profitability criterion itself had its own purpose as a counterbalance to club profligacy; when including that criterion in the draft, it was with the knowledge that the draft itself would be the subject of comment and criticism by clubs and others - it was a "working paper" for which "input" was being invited; and the criteria had to be formulated and applied within a distinctly finite period.

508 Whether or not, with hindsight, Mr Whittaker and Mr Jourdain would have made such inquiries as Souths suggest is not a matter about which it is necessary or profitable to speculate (although I do have sympathy with NRL's criticism that Souths, in effect, is requiring them to have sought the answer that the application of the criteria might give before they were able to formulate and distribute those criteria). What is clear is that they had reasonable grounds at the time for making the representation. They were not acting and had not acted, in the circumstances, in ways that no reasonable person could act. They were making complex judgments in novel and difficult circumstances in which they knew they could "not please everyone". There were clearly justifiable reasons for their concentration on performance in the years 1998 and 1999. It was appropriate to adopt one criterion that focussed on the profitability of clubs. There was a clear sensitivity about the proposed

profitability criterion. While the level of Super League settlements was an unknown (and could not be known accurately until much later), it was not the only financial unknown. The criteria were being set in an environment of well understood inequality between clubs, irrespective of whether they were loyal clubs or Super League clubs. And there was the immediate prospect of constructive club and other criticism of the draft.

509 I am unable to accept the claim made by Souths.

3. THE THIRD REPRESENTATION: 8 SEPTEMBER 1998 (I)

510 On 8 September 1998, NRL published the final version of the Admission Criteria. Souths claim that by so doing NRL represented by conduct that the criteria had been set in accordance with the representation in the Timetable of 28 April 1998 and the aim in the draft criteria documentation of 8 May 1998. As the criteria did not deal with the clubs "equally and in a consistent manner" (28 April) and were not "set … in a fair and reasonable manner" (8 May), the representation was false at the time of its making. As such it contravened s 52 of the TP Act.

511 I would again note at the outset that the claim is that the representation was made by NRL for which the NRL partnership was responsible by virtue of s 84(2) of the Act.

(a) Additional Factual Material

512 There are several matters of evidence to which I should refer relating to events occurring between 8 May 1998 and 8 September 1998.

513 (1) As indicated in the "General Chronology", a consultant statistician was engaged to analyse the Selection Criteria. Four reports were later provided to NRL. The NSWRL Boundaries Committee provided its report to NRL that aimed in part "to dissect and discuss the draft criteria". And written comments were provided by the clubs. While a number of clubs suggested that the profitability criterion was an inappropriate one for a not-for-profit organisation and should be deleted, only three appeared to have characterised it as manipulable (Norths, Sydney City and possibly Illawarra). Norths' comment was:

> *"(f) Profitability*
>
> *Because most of the football clubs participating in the NRL competition are*

non profit organisations, and because the Leagues Clubs were set up to subsidise the football club industry with grants, and because of that particular structure from the Leagues Clubs to the football clubs, some could finish up with a huge profit by manipulating Leagues Club grants, we would recommend that this section of the criteria should be deleted."

Sydney City in turn commented:

"(6) Profitability

The concept of profitability for most rugby league clubs is not realistic; the rugby league business has been, and continues on be, a very highly subsidised industry, with grants from Leagues Clubs/News Ltd/ARL.

The profitability of many football clubs could be subject to much manipulation.

The key financial issue is solvency which is addressed in the Basic Criteria.

We recommend the deletion of this component from the criteria."

None of the non-club reports appears to have called the profitability criterion as such into question.

514 (2) The loyal clubs did register concern that the Super League clubs were likely to be better off than most ARL clubs. On 26 May 1998, Manly wrote to Mr Whittaker a letter the purpose of which was to reinforce some of its concerns in relation to the Club Agreement document and the Admission Criteria document. Under the heading "Club Agreement Document", the letter stated:

"(4) There has to be a 'level playing field' for all clubs who sign documents to enter the NRL competition. This applies to funding, influence in policy matters, equitable consideration of prospects for the future.

At present the perception is that this may not be the case. Some Superleague clubs seem to be getting settlement deals from News Ltd which will make them much better off financially than most ARL clubs.

Also, some Superleague clubs have gained a head start over ARL clubs as a result of the money News Ltd invested in their clubs' facilities (grounds, gymnasiums, other infrastructure items) as a condition of their jumping from the ARL to Superleague.

An item in the merger document which we voted on December 19 1997, was transparency. It said:

- *All arrangements will be transparent.*

- *Superleague to disclose all interests which Superleague or News Ltd has in any of the Superleague clubs.*

We have brought up the question of transparency before this and have been told that as soon as the documents on the partnership and the NRL were signed, this transparency would apply.

These documents have now been signed, and now we are looking for this transparency. The ARL has to state what interests it has in its clubs, and News Ltd has to state what interests it has in its clubs. Included in the latter, has to be the information of what News Ltd has provided for their clubs which they have already exited from, or are planning to exit from."

515 Mr Gallop replied to Manly in terms that, rather than answer its concerns, it would be more appropriate to wait until the next meeting of NRL Chairmen/CEOs on 10 June 1998 and then decide what were still live issues. On 17 June 1998 Manly again wrote to Mr Whittaker commenting (inter alia) that "none of the items of transparency in our [26] May letter were addressed at the meeting on 10 June". That same letter referred separately to "profitability" but did not impugn it on "transparency" grounds. The evidence does not suggest that Manly ever obtained the information it sought.

516 Mr Jourdain, in cross-examination, indicated that "a lot of clubs" said to him that News could if it chose advantage its former Super League clubs by making generous settlements with them. He also said he explained to Manly that it could get the information it sought from News through ARL.

517 (3) The minutes of the meeting of the PEC on 30 July 1996 record that:

"News Funding

It was noted by Mr Politis that the chairmen of the former ARL clubs had met to discuss a range of issues.

Mr Politis advised that the ARL clubs had requested information on News' level of funding of the former Super League clubs.

The Chairman indicated that News was still negotiating the termination of the Super League arrangements but essentially was endeavouring to pay each club the difference between the salary cap valuation and the true salary under Super League contracts. He also outlined News' equity position with the former Super League clubs."

518 It was the case, as Mr Macourt readily conceded in cross-examination, that his answer

gave only a limited disclosure of the funding that News was negotiating to provide under the settlements with Super League clubs. He disclaimed though that he was deliberately or even accidentally telling a part truth. The question Mr Politis asked was, in his view, specific in nature and made in the context of concerns raised about guarantees said to have been given to the Adelaide club. He considered his answer "went to the substance of the question being asked". For reasons I give below, it is unnecessary to recount the evidence on this issue (other witnesses were cross-examined on it). I should, though, indicate as a matter of basic fairness that I accept that Mr Macourt did not attempt deliberately to mislead Mr Politis.

519 Both Mr Whittaker and Mr Jourdain were in attendance at the 30 July meeting and heard the exchange between Mr Macourt and Mr Politis. Mr Whittaker has given evidence to the effect that nothing said by Mr Macourt changed his understanding of what the Super League settlements encompassed. It was not limited to paying the difference between the salary cap valuation and true salary. As Mr Whittaker said:

> *"there were issues to do with the clubs as well.*
>
> ...
>
> *They had a whole series of relationships in place with clubs and players and that they had to get out of it and it was taking a lot longer than they expected and costing a lot more."*

Mr Jourdain's evidence likewise demonstrated that the Super League settlement proposals went beyond what Mr Macourt suggested.

520 (4) On three occasions (21 May 1998, 10 June 1998 and 5 August 1998) the criteria were discussed at NRL meetings with the Chairmen and CEOs of the clubs. In addition Mr Jourdain had a number of other discussions with club representatives, both in person and by telephone, as to the content of the criteria. On 18 June Mr Whittaker submitted a "Competition Rationalisation Briefing Paper" to the PEC. That report, presented prior to the closing date for the written responses of the clubs, but after the first two of the meetings with the clubs referred to above, noted (inter alia):

> *"Clubs are anxious about the selection criteria. Their main concerns are:*
>
> - *Accuracy and measurability*
> - *Financial weighting*
> - *Affect of special causes*
> - *Exposure to litigation*
> - *No measurability of media value*

I believe the criteria, as amended, would be acceptable as a last resort to force rationalisation."

The concern about financial weighting was addressed when the weighting attributed to "Gate Receipts" and "Sponsorship and Other Income" was reduced.

(b) Submissions and Conclusions

521 Souths' claim, as I have indicated, is that by publishing the final version of the Admission Criteria, NRL represented by conduct that the criteria had been set in accordance with the representation in the Timetable of 28 April 1998 and the aim in the draft criteria documentation of 8 May 1998. As the criteria adopted by NRL did not deal with the clubs "equally and in a consistent manner" and were not "set … in a fair and reasonable manner", the representation was false at the time of its making and so contravened s 52 of the TP Act.

522 There is, in my view, a distinct air of unreality about this claim. There is no evidence that anyone considered such a representation had been made, let alone relied upon it. I am simply being asked to draw an inference in the circumstances from the fact of publication.

523 I have indicated already that I do not consider that the representations had the warranty-like character that Souths has sought to attribute to them. There was no objective standard being held out against which the manner of criteria setting was to be judged. All that there was were statements of aim.

524 If the publication of the criteria by NRL embodied any representation by it as to the manner in which the criteria had been set, it was that NRL had pursued the stated aims. There is nothing in the evidence to suggest that Mr Whittaker or Mr Jourdain - hence NRL - at any stage knowingly abandoned or deviated from those aims or had concluded that they could not be pursued. Their conduct from the distribution of the draft criteria until the 8 September publication suggests fidelity on NRL's part to the pursuit of the objectives.

525 Though they relate more to the content of the criteria than the process of their setting, the evidence of both Mr Whittaker and Mr Jourdain on the Admission Criteria is itself suggestive of that fidelity to which I have referred. In both affidavit and oral evidence Mr Whittaker stated he believed that, when the criteria document was approved and distributed, "it was fair and reasonable and the best that could be formulated at that time". It was Mr

Jourdain's evidence that, as of 8 September 1998, the Admission Criteria as finalised would provide a fair basis for selecting which clubs would be invited to participate in the 2000 NRL competition in the event that more than fourteen teams sought admission, having regard to NRL's overall objective of creating and maintaining a viable national competition. I am satisfied that these beliefs were honestly and genuinely held at that time. The representation I have described was not misleading or deceptive.

526 If more could be eked out of the 8 September publication by way of implied representation- and I do not suggest it could be - it could only be a representation that it was NRL's own opinion that it had set the criteria in a fair and reasonable manner. I readily infer that Mr Whittaker and Mr Jourdain had such a belief at the time. And I am satisfied that there were in any event reasonable grounds for such a belief. I have previously indicated that they had reasonable grounds for making the 8 May representations. Nothing that transpired subsequently ought reasonably have suggested to them that they could not set, and were not setting, the criteria in a fair and reasonable manner. They consulted the clubs widely and took expert advice. The responses they received were not such as to call into question in basic ways the course they were pursuing. This was particularly so in relation to the profitability criterion. The club responses adverted to its inappropriateness and manipulability. NRL nonetheless had its reasons for including that criterion and I cannot say that those reasons were not ones that a reasonable person could have. I would again emphasise that neither Mr Whittaker nor Mr Jourdain considered that they had any reason to believe that, in effecting settlements with its clubs, News would act improperly. It may well be that a fairer process for setting the criteria could have been devised. But that is not the issue.

527 I should comment on two matters upon which Souths have placed particular emphasis. The first is the allegedly misleading character of Mr Macourt's minuted comments at the 30 July PEC meeting. Those observations did not in any way affect the understandings of Mr Whittaker and Mr Jourdain as to the true character of News' releases. They, thus, provided no reason for pause insofar as NRL was concerned. Even assuming the observations actually misled the ARL members of the PEC, this may have had the potential to have consequences for the partners inter se. But that provided no basis for calling into question NRL's representation about its own conduct. It is noteworthy that ARL has not complained of Mr Macourt's observations at the 30 July meeting.

528 Secondly, there was the "transparency" issue raised by Manly. A lack of openness might create the apprehension of unfairness. It does not necessarily create unfairness as such. It was a matter for the partnership to determine the extent to which disclosures of the financial arrangements of the partners were to be made and to make such disclosures accordingly. It was not a responsibility of NRL, though it may have been a matter NRL should have raised with the partnership given the knowledge it had of the loyal club apprehensions. Its failure to do so, though, cannot be said to have rendered the beliefs of Mr Whittaker and Mr Jourdain in the fairness of the criteria setting process unreasonable, given that they were of the considered view that a knowledge of the likely Super League settlements was not necessary for the fair setting of the criteria.

4. THE FOURTH REPRESENTATION: 8 SEPTEMBER 1998 (II)

529 Distinctly, it is claimed that, by publishing the Admission Criteria, NRL represented by conduct that the criteria would be applied according to their terms in determining teams to participate in the NRL competition from 2000; that NRL failed to apply them and by reason thereof Souths failed to qualify as one of the fourteen teams. It is accepted by Souths that this representation was as to a future matter but that, for reasons I will note below, there were no reasonable grounds for its making.

530 News and NRLI deny there was any such representation made. All that the publication of the Admission Criteria conveyed by way of representation was to the effect that the criteria were ones which in the opinion of the relevant officers of NRL were fair and reasonable, and nothing more.

531 NRL's submission is that the criteria document on its proper construction does not contain such an implied representation. Even if it did, it would be a statement of intention for the making of which there were reasonable grounds.

532 Because it bears on the content of the factual material to which it will be necessary to refer, I should indicate the precise form that the s 52 claim takes. It is that the representation (a) was made without reasonable grounds for its making and (b) was false in the event. The claim is *not* one that the representation was a continuing one for which reasonable grounds existed at the time of its making but that NRL later changed its intention to apply the criteria according to their terms and failed to disclose this to the clubs: cf *Hughes Aircraft Systems*

International v Airservices Australia, above, at 198-202. I would note that Souths has submitted positively that there was no such change of intention. It likewise is *not* a claim that an unqualified statement as to a future matter, was nonetheless misleading or deceptive because in the circumstances the representation itself should have been qualified: cf *Wheeler Grace & Pierucci Pty Ltd v Wright*, above at 50,251; and see *Bowler v Hilda Pty Ltd*, above at 203-206.

533 I should also emphasise that Souths has not pleaded or relied upon any selection process contract that may have come into existence by virtue of its actual participation in 1999 in the selection process itself. Neither, I would emphasise, does Souths rely upon any representation made at or around the time when the selection process was put in train in 1999, that related to the application of the criteria according to their terms. It does, though, make reference to one such representation as confirming the implied representation of 8 September 1998.

(a) Additional Factual Material

534 I need now refer to a significant body of factual material before I can consider the submissions made on this matter. I would note that some part of it relates directly to that part of the Basic Criteria that relates to "Solvency". Souths claim that this was not applied according to its terms in the selection process.

535 (1) The Admission Criteria document had, insofar as presently relevant, the following introduction:

> *"* *AIMS*
>
> *1* *Create and maintain a viable national competition.*
>
> *2* *Apply criteria for inclusion in the competition in a fair and reasonable manner.*
>
> *PRINCIPLES*
>
> *1* ***The Admission Criteria set out NRL's current intention as to how NRL will determine those Clubs with whom NRL will enter into agreements for participation in the NRL competition:*** *[emphasis added].*
>
> *2* *All Clubs must meet the basic criteria (see section 1.1).*

[3] - [6] *...*

IMPORTANT NOTE

NRL reserves the right to verify the validity or appropriateness of any information submitted to it as part of, or in connection with, the Admission Criteria. ***The final decision on the application of the criteria rests with NRL. NRL may obtain an independent opinion, at its cost, on any aspect of the information supplied as part of the Admission Criteria, or the application of the Admission Criteria:*** *[emphasis added].*

1 OVERVIEW

1.1 Basic Criteria

Clubs should demonstrate the ability to meet Basic Criteria. If Clubs currently do not meet the Basic Criteria, they must indicate a plan to achieve the necessary improvements to do so.

The Basic Criteria consists of four parts:

...

(c) Solvency

Each Club must, in the opinion of NRL, be solvent.

...

1.2 Qualifying Criteria

Brisbane, Auckland and Newcastle (each a "Qualifying Club") are to be measured against Qualifying Criteria. If these are satisfied, each Qualifying Club will be granted a 7-year licence (1999-2005).

1.3 Selection Criteria

This section of the criteria outlines the mechanism to differentiate between Clubs, other than a Qualifying Club and merged entities that are approved by NRL.

This is intended to provide an objective basis for ranking Clubs, though a calculation of measurable criteria, appropriately weighted.

Those Clubs that are selected for admission in 2000 will be granted a licence for a minimum of 5 years."

536 The Basic Criteria's solvency requirement was in the following terms:

"A.3 Solvency

(a) Each Club must, in the opinion of NRL, be solvent. This will be determined by a review of the following:

(i) Balance sheet as at 31 October 1998;
(ii) Balance sheet as at 30 April 1999;
(iii) Balance sheet as at 31 October 1999; and
(iv) Profit and Loss Account for the year ending 31 October 1998;
(v) forecast profit and loss account for the year ending 31 October 1999 (to be provided by 31 July 1999); and
(vi) five-year Business Plan.

(b) Whether or not a Club is solvent will be determined based on meeting the following requirements:

(i) there are sufficient current assets at 31 October 1998 (cash at bank, cash on hand, trade debtors, loans receivable, grants receivable within the next 12 months) to make good current liabilities on their due dates (trade creditors, accruals, loans payable within the next 12 months). Current liabilities includes commitments to pay an external party or contingent liabilities being a liability to incur a payment to an external party should certain events occur within the next 12 months.

In determining current assets, any guarantee provided to a Club by a third party to underwrite certain liabilities, will be treated as a current asset, but only to the extent that the third party can prove that it has the capacity to meet the guarantee and to the extent that the guarantee is legally binding.

(ii) Five-year Business Plans should show sustainable operating cashflows sufficient to indicate an ability to repay any long term liabilities or commitments as and when they fall due. A long term liability is a requirement to pay an external party, where that requirement falls due in a period greater than 12 months from the date of the balance sheet. Liabilities will include commitments to third parties and contingent liabilities.

In determining an ability to repay any long term liabilities, any guarantee provided to a Club by a third party to underwrite certain liabilities will be taken into account, but only to the extent that the third party can prove that it has the capacity to meet the guarantee and to the extent that the guarantee is legally binding.

(c) Where a Club is a merged entity of two or more existing clubs,

the merged entity must satisfy the solvency requirements."

537 In the "General Chronology" I set out the introduction to, and the principal provisions of, the Selection Criteria. I will not repeat them here.

538 (2) NRL prepared a document entitled "NRL Admission Criteria Process" with an accompanying "Information Booklet". It was dated 21 April 1999 and was distributed to the CEOs of the NRL clubs either on that date or shortly thereafter. Its opening paragraphs were as follows:

"INTRODUCTION

Under the terms of the National Rugby League (NRL) Merger Agreement, the NRL competition will consist of no more than 14 teams in 2000 and beyond. The NRL has prepared an Information Booklet for the clubs participating in the 1999 competition which provides the following:

. *The Admission Criteria Timetable*
. *The Basic Criteria Spreadsheet*
. *The Selection Criteria Spreadsheet*

OBJECTIVES

The 14 teams that will be selected to participate in the Year 2000 NRL competition, will be determined by the NRL by application of the Admission Criteria.

A timetable has been prepared which specifies dates by which the NRL and the clubs must perform various tasks to assist in the application of the Admission Criteria in October 1999.

There are two key objectives in devising the process detailed in the Information Booklet. These are:

. *It is critical that all clubs understand all sections of the Admission Criteria and particularly when the requirements must be met; and*

. *Discussion of the process by which information is collected, verified and analysed will clarify any uncertainty which may exist.*

PROCESS

The cornerstone of the Admission Criteria process is the provision of timely information in respect of the Basic and Selection Criteria Spreadsheets. It is important to recognise that the NRL will only use the data provided in the spreadsheets contained in the Information Booklet for the purposes of selecting the 14 teams to participate in the 2000 competition.

The spreadsheets provide the templates for clubs to simply "plug" in data and information. It is acceptable to attach additional information. All information is to be returned by the date specified in the Timetable. Clubs are encouraged to respond fully.

Throughout the process the NRL welcomes inquiries which will assist the clubs in meeting their requirements. A project team has been appointed to facilitate the clarification process. The team members are:

Neil Whittaker - Chief Executive Officer
David Gallop - Legal Affairs Manager
Mark Powell - Business Manager
Edwin Farish - Financial Controller

The NRL intends utilising the services of an external consultant (at its cost) to assist with the verification process. Clubs will be notified of the appointment and the NRL will seek co-operation in the scheduling of club visits and interviews."

539 (3) The minutes of the meeting of CEOs of the NRL clubs on 22 April 1999 recorded:

> *"No 18 NRL Legal Affairs Manager, David Gallop provided an update of Club Agreements and advised that the NRL had a commitment to apply the criteria to select the 14 teams from season 2000."*

540 (4) On 17 May 1999, the firm of chartered accountants, Ernst & Young, was awarded the tender to assist NRL in the Admission Criteria process. A partner of the firm, Mr Richard Fisher, performed a number of services for NRL. He attended by invitation most of the meetings of the committee established to conduct the admission process - the Admission Criteria Committee ("the ACC") - and provided advice and recommendation on (inter alia) the meaning and application of the solvency criterion. The ACC, I would note, was established for the following purposes:

> *"(a) ensure that the Admission Criteria have been and are applied in accordance with their terms, fairly, reasonably and consistently;*
> *(b) ensure that a clear documentary trail is established to provide evidence of the decisions made by the Committee, and the reasons for those decisions; and*
> *(c) report and make recommendations to the chief executive officer of the NRL ('CEO') in relation to the Admission Criteria."*

541 Mr Fisher indicated both in his affidavit and in cross-examination that sentences in

para (b) of the solvency criterion were difficult to understand in terms of normal solvency criteria; he recommended to NRL management after discussions about the paragraph, that it not be applied according to its terms; he advised that as the criterion required that every club must in the opinion of the NRL be solvent, this should be determined by reference to its definition in the *Corporations Law* and accounting standards and the normal procedures for testing solvency; he advised management that para (b) was inappropriate and, particularly in relation to para (b)(ii), was impossible to apply, the latter seemingly because every single club would have to redefine its liabilities to accommodate "long term liabilities" and all their information would have to be resubmitted in order to consider the para (b)(ii) issue; but he could not recall any formal resolution of the ACC accepting his recommendation. In re-examination by Mr Meagher SC, he said that the test actually applied was stricter than that in the solvency criterion in that, for its purposes, solvency was required to be applied as at 31 October 1998 whereas he considered all information available up to 1 October 1999.

542 (5) In his affidavit Mr Farish, who was a member of the ACC, drew attention to the minutes of the first meeting of that committee which stated:

> *"BASIC CRITERIA SOLVENCY* *The Committee noted that 'solvency' in the context of the Basic Criteria involved consideration of whether:*
>
> *(a) a club had sufficient current assets as at 31 October 1998 to make good current liabilities on their due dates; and*
> *(b) the club's five year business plan adequately demonstrates sustainable operating cashflows sufficient to indicate an ability to repay any long term liabilities or commitments as and when they fall due.*
>
> *Therefore, to assess 'solvency', the NRL needs to consider both the financial statements and business plans of clubs.*
>
> *RESOLVED that the NRL will be assisted by Ernst & Young when determining the 'solvency' of clubs for the purposes of the Basic Criteria."*

Mr Farish went on to say he could not recall a single occasion when the ACC, having received advice or guidance from Ernst & Young, made decisions contrary to that advice or guidance.

543 In cross-examination in the interlocutory proceeding before Hely J on para (b)(ii) of

the solvency criterion (it related to what the five year business plan should show), Mr Farish said:

> *"To the extent that you were considering future solvency beyond 1 October 1999 which was the date you took for solvency, was it not? --- Yes, 1 October.*
>
> *To the extent that you looked to future solvency of the applicant clubs beyond 1 October 1999 what use, if any, did you make of the 5-year profit and loss budgets that were forward by each club? --- Is this commercially or for the criteria?*
>
> *For purposes of the criteria? --- It was not a major factor.*
>
> *Was it a factor at all? - No."*

These answers were the subject of extended cross-examination in this proceeding. He said that the evidence quoted above was unclear; the five year business plans were reviewed by the ACC for the purposes of para (b)(ii) of the solvency criterion; there was a lot of discussion as to what the definition entailed but an "absolute clear resolution" was not arrived at; he had discussions with Mr Jourdain who was "close to it"; and while Mr Fisher gave an opinion to the ACC on the application of the solvency criterion, he did not believe that he advised the committee not to apply the criteria according to its terms although he had reservations about it and he advised that the para (b)(i) and (b)(ii) tests would be difficult to apply.

544 (6) Of the club responses to the draft criteria document, only three clubs adverted to the definition of solvency. Penrith asked "[w]hat does 'solvent' mean". Balmain made the general comment that solvency "[n]eeds a clear definition and requires a framework that does not allow manipulation of facts and figures". And Canterbury provided several drafting suggestions (one of which appears to have been adopted) and proposed that in the criteria document it "should be clearly stated that the solvency requirements are to be determined in accordance with Australian Accounting Standards". The Boundaries Committee in its report on the draft criteria suggested that the requirements as to guarantees were "onerous" and the expression "should certain events occur" was uncertain, but otherwise did not comment adversely on the solvency criterion.

(b) Submissions and Conclusions

545 Souths' case, as I have indicated, is that the publication of the criteria was a representation by conduct that the criteria would be applied according to their terms and that

representation was false in the event as there were no reasonable grounds for making it. The oral submissions as to there being no reasonable grounds were (i) in relation to the solvency criteria, the difficulties identified by Mr Fisher were inherent in the document at the time of its release and they indicated the absence of reasonable grounds with respect to the making of the representation; and (ii) in relation to the "profitability criterion" (not reproduced here but see "General Chronology") which was part of the Selection Criteria, there is no suggestion that anyone ever intended to apply the profitability criterion in the way which Souths contends it was properly to be applied.

546 I have not referred to the evidence and argument on the meaning of the profitability criterion. While that evidence would have been of great significance to the question whether it was properly applied, it contained nothing that helps in answering whether there were reasonable grounds for the representation itself. Even if NRL misconstrued and therefore misapplied the profitability criterion (I do not so find), this of itself would provide no proper basis for negativing that NRL had reasonable grounds for making the representation it allegedly did - the moreso given that the criteria document itself envisaged that NRL could obtain "an independent opinion on ... the application of the Admission Criteria". For reasons I give below I am satisfied that there were reasonable grounds for making the representation.

547 Before expressing my own views I should indicate that not only were Souths' submissions on this s 52 claim sparse, but also there was little in the cross-examination that was directed at establishing there were no reasonable grounds for the representation. In making the latter comment I am not suggesting Souths bore the onus of proof in the matter: see s 51A of the TP Act.

548 There is a very real question whether the publication of the Admission Criteria on 8 September 1998 impliedly represented that those very criteria would be applied according to their terms. That they would be so applied may have been the expectation generally entertained, if both resort to the selection process was necessary and no revision for whatever reason was made of the criteria. It should be recalled that Principle 1 of the criteria provided that:

> *"1 The Admission Criteria set out NRL's **current intention** as to how NRL will determine those Clubs with whom NRL will enter into agreements for participation in the NRL Competition:"* [emphasis added].

549 Whatever may have been the case had NRL either (a) bound itself by contract at or after 8 September 1999 to apply those criteria; or (b) invited reliance upon them (hence representing that they would be applied according to their terms) by setting in train the admission process, I am not satisfied that, as at the date of publication, NRL represented more than what was stated in Principle 1. On the evidence before me, the actual representation that the criteria would be applied according to their terms (unless a change of intention was notified: cf *Hughes Aircraft Systems International*, above, at 198ff) was probably made at the time of circulation of the 21 April 1999 "NRL Admission Criteria Process" document or of Mr Gallop's minuted statement to the 22 April 1999 meeting of NRL club CEOs. It is not necessary that I express a concluded view on that matter. No s 52 claim has been made based on the 21 April document or the 22 April representation.

550 My conclusion above is sufficient to dispose of this claim. But even if the publication of the criteria document had such a "future element" as to contain an implied representation as to the future application of the document according to its terms, the claim would still fail.

551 NRL has submitted that, if there was such a representation, it would include the reservation stated in Principle 1. In consequence, the non-application of the criteria at a later date would not mean that the criteria document had not been applied according to its terms because of the liberty reserved by Principle 1.

552 I cannot accept this submission in the broad form in which it is put. Whatever may have been NRL's right to change the criteria prior to its initiation of, and the consequential participation of the clubs in, the selection process based on the Admission Criteria, there is a very real question as to whether Principle 1 would justify any departure from the criteria after the process has begun - at least without disclosure of that departure: see *Hughes Aircraft Systems International*, above. As I have not been addressed directly on this, I refrain from expressing a concluded view on this submission of NRL.

553 Secondly, NRL has submitted that there were reasonable grounds in any event for the implied representation. I entirely agree with that submission.

554 The intent to "determine by strict criteria" the teams that would participate in the 2000 competition was publicly expressed as early as News' media release of 19 December 1997.

The protracted processes engaged in from January until August, involving not only in-house discussions but also the engagement and use of consultants and the involvement of the clubs in providing input, are consistent with the prosecution of a purpose of setting criteria that could be used to determine participation in the 2000 competition. The particular character that Mr Jourdain said he sought to give to the categories in the Selection Criteria (ie they were "capable of being measured objectively"), likewise pointed to the criteria being able to be used effectively to discriminate between clubs.

555 There is nothing in the evidence to suggest that those in NRL who were responsible for setting the criteria apprehended that the criteria settled upon could not be applied according to their terms. The "input" from clubs and consultants did not reasonably suggest otherwise. Even the most detailed comments, which came from Canterbury, may well have improved the criterion if adopted but they did not suggest they could not be applied according to their terms. The criteria document itself reserved to NRL the right to obtain an "independent opinion … on … the application of the Admission Criteria", a right that was availed of in the engagement not only of Ernst & Young (acknowledging the significance of accounting expertise to the application of the criteria) but also of legal advisers.

556 There was, likewise, no question of there not being access available both to sufficient staff and consultants and to adequate resources to enable NRL to apply the criteria. Given that the implied representation was one of declared intention, and given the matters to which I have referred, I am satisfied that the respondents have made out that they had reasonable grounds for their representation. In these circumstances it is unnecessary for me to determine whether either the solvency criterion or the profitability criterion were not applied according to their terms. My conclusion, I would note, is also an answer to the second aspect of the representation made on 8 May 1998 consideration of which I there deferred

557 In reaching this conclusion I have taken account of the evidence of both Mr Farish and Mr Fisher on the solvency criterion. Even if it be accepted that para (b) of the solvency criterion would be difficult to apply (I do not interpret Mr Fisher's reference to "impossible" as signifying more than that it would involve a costly, difficult and possibly unproductive process given the primary concern was with solvency), this provides no basis for inferring there could not be reasonable grounds for intending it would be applied. There was, furthermore, the facility reserved to obtain advice on it. And even if it transpired that the

advice obtained was that para (b) should not be applied and that advice was acted upon, that would not have the consequence that there could not have been reasonable grounds for the representation at the time it was made.

Other matters

558 I have indicated that, though the representations in question were made by NRL, it is claimed that the NRL partnership engaged in conduct in contravention of s 52 as NRL was its agent: see TP Act, s 84. I have already made such an agency finding. The one additional matter to which I would again refer is that while, under the Services Agreement, the PEC could have exercised considerable control over the setting and application of the criteria, the evidence is that it refrained from so doing. At least in relation to the setting of the criteria, the view apparently taken was that the relevant experts were the NRL officers. And it was represented to the clubs from 19 December 1999 that NRL would set the criteria (as it subsequently did). It was not envisaged that the PEC would be engaged in the selection process itself. That was to be NRL's function.

5. RELIEF

559 The injunction sought under s 80(1) of the TP Act, in the event of my finding a contravention or contraventions of s 52, is one restraining NRLI, ARL and NRL from "proceeding to exclude [Souths] from the NRL competition". Though it is strictly unnecessary for me to consider the matter, I would indicate that even if I had found contravening conduct I would not have made an order in the terms sought.

560 Souths' submission (in paraphrase) was that s 80(1) allows the Court "to grant an injunction in such terms as [it] determines to be appropriate". In an appropriate case it is within the scope and purpose of Part V of the TP Act to grant an injunction to restrain a representor from acting inconsistently with the representation made: see *Marks v GIO Holdings Ltd* (1998) 196 CLR 494 at 525. The fourteen team term was not a defining characteristic of the NRL competition and this is reinforced by the 24 March reservation of rights to challenge the make up of the fourteen team competition. Hence the order sought is appropriate in the circumstances.

561 The terms of the order go far beyond what I would grant - and probably would have power to grant: see *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992)

38 FCR 248 at 264-268. The fourteen team limit was absolutely fundamental to the NRL competition for 2000. Several years had been spent in bringing it to fruition. It was, contrary to Souths' submission, very much a defining characteristic of the competition. To make the order sought would significantly exceed giving full effect to the representations in question. It would require, not the conduct of the fourteen team competition being restrained until the representations were made good, but rather that the partnership and NRL conduct a competition that was never proposed and to which the partners had never agreed inter se - nor NRL to conduct. Souths understood that to be the true state of affairs, even though it did not consent to it. Furthermore by casting the injunction sought in the terms it has, Souths has in substance sought relief for its unsuccessful s 45 claims under the guise of relief for its s 52 claims: *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197.

562 Even if the above obstacles were not insuperable, there would be a very real question (which I need not here explore but which is the burden of the Club respondents' submission) whether such injunctive relief ought be refused because of its adverse effects upon the clubs currently participating in the NRL competition.

6. CONCLUSIONS

563 There are two matters to which it is appropriate to refer. First, I have decided this application on the basis of the case that has been pleaded. On a number of occasions in these reasons I have referred to claims that have not been made. I imply no criticism in that. One consequence of the conclusions I have reached on the pleaded case is that it has been unnecessary to consider a significant range of matters going particularly to the application of the Admission Criteria. What I would emphasise is that my failure to refer to those matters does not imply a rejection of them. They simply have not been considered.

564 Secondly, it probably is the case that the real matter of contention between the parties as perceived by Souths existed at some distance from the specific subject matter of this proceeding. As I apprehend it, that matter was whether commercial interests should be permitted to commodify something that Souths considers is valued in a section of the community. Souths' view as put in correspondence with NRL was that:

> *"[i]n our view Rugby League is an icon to be preserved for the people who love and support it, not a product to be carved up to the media for their own*

financial gratification."

It usually is only fortuitous that some legal principle can be found that could provide such preservation as is sought. Often enough such a principle will not even have been designed for so basic a purpose. I have not been able to arrive at the conclusion in the present proceeding that such a principle is available to Souths. This is not one of the fortuitous cases.

565 The order of the Court will be that the application be dismissed. I will set the matter down for further directions on the issue of costs.

I certify that the preceding five hundred and sixty-five (565) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 3 November 2000

Counsel for the Applicant:	Mr T E F Hughes QC with Mr R W White SC, Mr M G Scheib and Ms A Silink
Solicitor for the Applicant:	Nicholas G Pappas & Company
Counsel for the First and Second Respondents:	Mr N C Hutley SC with Ms S J Goddard
Solicitor for the First and Second Respondents:	Allen Allen & Hemsley
Counsel for the Third Respondent:	Mr D Campbell with Mr S Hughes
Solicitor for the Third Respondent:	Colin W Love & Co
Counsel for the Fourth Respondent:	Mr A J Meagher SC with Mr J E Marshall and Mr P J Brereton
Solicitor for the Fourth Respondent:	Minter Ellison
Counsel for the Fifth,	Mr A Coleman

Seventh, Ninth, Tenth,
Eleventh, Twelfth, Thirteenth,
Fifteenth, Sixteenth,
Seventeenth, Eighteenth,
Nineteenth, Twentieth,
Twenty-first, Twenty-second,
Twenty-third Respondents.

Solicitor for the Fifth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third Respondents.	Henry Davis York
Date of Hearing:	16, 19-23, 26-30 June; 3-6, 10-13, 24-28 July; 3-4, 7-11, 29-31 August; 1, 4-8 September 2000.
Date of Judgment:	3 November 2000

SCHEDULE
Terms, Acronyms and Abbreviations

ACC	Admission Criteria Committee. An NRL committee formed for the purpose of applying the Admission Criteria.
Adelaide	Former Super League club.
Admission Criteria	Criteria comprising Basic Criteria, Qualifying Criteria and Selection Criteria for determining which clubs would be granted licences by NRL for 2000.
ARL	Australian Rugby Football League Limited. In partnership with NRLI. The third respondent.
Auckland	Former Super League club.
Balmain	Former loyal ARL club. Entered a joint venture arrangement with Wests to form an NRL club.
Basic Criteria	Criteria required to be met by all clubs and concerned with, inter alia, solvency.
Boundaries Committee	A committee of NSWRL that offered to provide informal comment on the competition rationalisation process and the proposed competition structure.
Bradley Report	Report of an organisation review of ARL prepared for NSWRL in 1991 and distributed to clubs in 1992.
Brisbane	Former Super League club.
Canberra	Former Super League club.
Canterbury	Former Super League club.
CEO	Chief Executive Officer.
Club Agreement	Standard form document drawn up for the purposes of establishing contractual relationships between participating clubs and NRL.
Competition Organising Services	A subject of the alleged exclusionary provision, these services involved the organising and running of top level rugby league competitions and were services in relation to which ARL and Super League were allegedly in competition at the relevant times.

Cronulla	Former Super League club.
CSD	Competition Structure Documentation being the Admission Criteria, the Franchise Agreement and the NRL rules.
December MoU	Draft MoU document the substance of the terms of which were agreed to on 24 December 1997.
December MoUs	Collective term for draft MoUs of 11 and 24 December 1997.
19 December Understanding	The understanding reached on this date between ARL/NSWRL and News/Super League for the in principle merger of the two rugby league competitions.
8-6/6-8 split	Term of proposed competition structure relating to distribution of participation licenses as between Sydney based and regional clubs.
Entertainment Services	A subject of the alleged exclusionary provision, these services involved the provision of the entertainment spectacle of top level rugby league matches and were services in relation to which ARL and Super League were allegedly in competition at the relevant times.
Ernst & Young	Accountancy and consulting firm; appointed by NRL in 1999 to assist with the verification of information provided by clubs as evidence of their fulfilment of certain of the Admission Criteria.
Executive Summary	Summary of competition merger proposals presented to ARL club leadership at a meeting in Sydney on 19 December 1997.
Fourteen team term	A fundamental provision agreed upon by the relevant parties relating to the maximum size of the new competition from the 2000 season.
Franchise Agreement	Document intended to be sent to each participating club defining its relationship with NRL. Later catered for by the Club Agreement.
Funding Services	A subject of the alleged exclusionary provision, these services involved the provision of funding to rugby league clubs and were services in relation to which ARL and Super League were allegedly in competition at the relevant times.
Gold Coast	Former loyal ARL club. Withdrew before the 1998 season.
Hunter	Former Super League club. Dissolved in late 1997.

Illawarra	Former loyal ARL club. Entered a joint venture arrangement with St George to form an NRL club.
Issues Paper	ARL/Super League Issues Paper. A negotiating document produced in August 1997 shortly before the breakdown in negotiations.
June Report	Report dated 20 June 1997 made to NSWRL on the future of rugby league in Australia.
Key Points paper	News negotiating document of December 1997.
Loyal clubs	Name generally given to ARL clubs during the Super League war.
Manly	Former ARL club. Entered a joint venture arrangement with Norths to form an NRL club.
24 March contract	Contract between ARL and Souths formed on 24 March 1998.
March letters	Correspondence between ARL and Souths in March 1998 said to give rise to contractual relations.
14 May documentation	Documents, including the Merger Agreement, the Partnership Agreement and the Services Agreement, executed on 14 May 1998 by various parties.
Melbourne	Newly formed club. First participated in premier rugby league competitions in 1998.
Members Agreement	Document executed about 20 March 1998 by ARL and NRLI and nominees, relating to NRL.
Merger Agreement	Document executed on 14 May 1998 by ARL, NSWRL, News, NRLI and Super League.
Millennium Management Plan	Business plan prepared for Souths and provided to NRL on 31 July 1999.
Minter Ellison	Legal firm appointed to advise NRL during admission process.
MoU	Memorandum of Understanding. Document executed on 18 February 1998 by ARL, NSWRL, News and Super League. Also described as "18 February MoU". Various drafts of the executed form existed after at least 11 December 1997, see "December MoUs".
Newcastle	Former loyal ARL club.
News	News Limited. The first respondent.

News meetings	Series of in-house meetings of News personnel in 1997 where the possibility of merging the competitions was discussed.
Nine	Nine Network Australia Pty Limited. At one time a corporate sponsor of the ARL competition.
North Queensland	Former Super League club.
Norths	Former loyal ARL club. Entered a joint venture arrangement with Manly to form an NRL club.
NRL	National Rugby League Limited. The fourth respondent.
NRL competition	The premier rugby league competition that commenced in 1998 run by NRL for the NRL partners.
NRL partnership	Partnership between NRLI and ARL formally entered into on 14 May 1998.
NRL partners	NRLI and ARL.
NRL Services Agreement	See "Services Agreement".
NRLC Co	Early name of the envisaged entity that became NRL. As used in negotiations and draft documents.
NRLC	National Rugby League Competition. The title used in negotiations towards the proposed new competition.
NRLI	National Rugby League Investments Pty Limited. A wholly owned subsidiary of Super League. In partnership with ARL. The second respondent.
NSWRL	New South Wales Rugby League Limited. Conducted a premier rugby league competition in New South Wales from 1908 and, after 1995, conducted a competition for ARL.
Optus	Optus Vision Pty Limited. A one time corporate sponsor of the ARL competition.
Optus Cup	Name given to ARL rugby league premiership competition from 1996.
Parramatta	Former loyal ARL club.
Partnership Agreement	Document executed on 14 May 1998 between ARL and NRLI.
Peace deal	See 19 December Understanding; descriptive term for the 19 December Understanding as bringing about a resolution of the Super League war.
PEC	Partnership Executive Committee. Comprises three members

	from each partner of the NRL partnership.
Penrith	Former Super League club.
Perth	Former Super league club. Closed at the end of 1997.
Profitability criterion	One of the Selection Criteria.
Qualifying Criteria	Criteria which, if met by Auckland, Brisbane or Newcastle, would entitle them to a licence to compete in 2000.
Selection Criteria	Criteria applied to clubs to produce a ranking for the purposes of determining which would be granted remaining licences for 2000.
Services Agreement	NRL Services Agreement. Document executed on 14 May 1998 by ARL, NRLI and NRL.
Solvency criterion	One of the Basic Criteria required to be met by all clubs.
South Queensland	Former loyal ARL club.
Souths	South Sydney District Rugby League Football Club Limited. The applicant.
Souths Juniors	South Sydney Junior Rugby League Club Limited. Junior rugby league club associated with Souths.
St George	Former loyal ARL club. Entered a joint venture arrangement with Illawarra to form an NRL club.
Super League	Super League Pty Limited. Wholly owned subsidiary of News. Also, the name of a rival professional rugby league competition to the competition formerly conducted by or on behalf of ARL.
Super League war	The name (also the popular / media name) given generally to the period during which two premier rugby league competitions, those of ARL and Super League, came into being and operated.
Sydney City	Former loyal ARL club.
Team Services	A subject of the alleged exclusionary provision, these services related to the acquisition of the services of rugby league teams to participate in top level rugby league competitions and were services in relation to which ARL and Super League were allegedly in competition at the relevant times.
Terms Sheet	ARL/Super League Terms Sheet. A document produced in mid 1997 the purpose of which was to outline proposals for a united game and to operate as an agenda to assist in discussions

	with News.
Timetable	Document distributed to club CEOs in April 1998 relating to timetable for completion of Competition Structure Documentation.
TP Act	*Trade Practices Act* 1974 (Cth).
Tribal loyalists	Groups of supporters whose interests in rugby league relate to a particular club only.
Wests	Former loyal ARL club. Entered a joint venture arrangement with Balmain to form an NRL club.

THE SCHEDULE

CANBERRA DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 008 568 634)

Fifth Respondent

CANTERBURY-BANKSTOWN RUGBY LEAGUE CLUB LTD (ACN 001 869 405)

Sixth Respondent

CRONULLA-SUTHERLAND DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 002 692 186)

Seventh Respondent

NEWCASTLE KNIGHTS LIMITED (ACN 003 363 228)

Eighth Respondent

ST GEORGE ILLAWARRA RUGBY LEAGUE FOOTBALL CLUB PTY LIMITED (ACN 085 008 340)

Ninth Respondent

BRISBANE BRONCOS RUGBY LEAGUE CLUB LIMITED (ACN 010 769 025)

Tenth Respondent

COWBOYS RUGBY LEAGUE FOOTBALL LIMITED (ACN 060 382 961)

Eleventh Respondent

MELBOURNE STORM RUGBY LEAGUE CLUB LIMITED (ACN 081 369 468)

Twelfth Respondent

MANLY WARRINGAH DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 003 348 436)

Thirteenth Respondent

NORTH SYDNEY DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 003 009 158)

Fourteenth Respondent

EASTERN SUBURBS DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 002 687 416)

Fifteenth Respondent

PENRITH DISTRICT RUGBY LEAGUE FOOTBALL CLUB LIMITED (ACN 003 908 583)

Sixteenth Respondent

PARRAMATTA DISTRICT RUGBY LEAGUE CLUB LTD (ACN 002 254 980)

Seventeenth Respondent

WESTS TIGERS RUGBY LEAGUE FOOTBALL

PTY LIMITED (ACN 090 076 403)

Eighteenth Respondent

AUCKLAND WARRIORS RUGBY LEAGUE LIMITED (Registered in NZ No. 508 646)

Nineteenth Respondent

MANLY-NORTHS RUGBY LEAGUE FOOTBALL CLUB PTY LTD (ACN 090 093 833)

Twentieth Respondent

VALIMANDA PTY LTD (ACN 002 639 778)

Twenty-first Respondent

AH CB PTY LIMITED (ACN 068 819 152)

Twenty-second Respondent

BRISBANE BRONCOS CORPORATION PTY LTD (ACN 057 607 208)

Twenty-third Respondent