Before the High Court

Sport and the Law: The South Sydney Appeal

SAUL FRIDMAN*

To what extent is the management of a professional sports league entitled to set terms for entry into the competition? This is the practical question before the High Court in *News Limited & Ors v South Sydney District Rugby League Football Club Limited & Ors*[1] The appeal arises as a result of the legal action taken by South Sydney District Rugby League Football Club ('Souths') to resist being excluded from the competition organised by the National Rugby League ('NRL').

This is not the first time such a question has come before the Court. In *Wayde v New South Wales Rugby League Ltd*,[2] the Court was faced with the same question, in that case concluding that it was within the discretion of the League's directors to determine the identities of the teams admitted into the competition in a given year. In *Wayde*, the litigation arose as a result of a decision made by the New South Wales Rugby League ('NSWRL') to reduce the number of teams in the competition to 12, and further, to exclude the Western Suburbs District Rugby League Football Club ('Wests') from that 12. In Wests' case, ultimately the High Court ruled that it was within the power of the directors of the NSWRL to exclude Wests, and that Wests were not entitled to relief from this decision. Given that Wests' application for relief was refused by a unanimous New South Wales Court of Appeal as well as a unanimous High Court, some might be surprised that Souths' attempt to resist similar exclusion has, thus far, been successful. Can it be that the circumstances of Souths' case are substantially different from Wests? Perhaps the law has changed substantially since 1985, when *Wayde* was decided? In fact, in a material sense, neither of these propositions is true. Indeed, to the extent that the material facts surrounding the Souths application are distinguishable from Wests', I would argue that Wests might be thought to have had a stronger application! How then can one explain the difference? The answer is purely one of legal form, a matter which often determines the outcome of a dispute. One of the many interesting questions the Court will resolve is whether form will prevail over substance and Souths' attempt to resist being ousted from the competition will be successful.

* Senior Lecturer, Law School, University of Sydney.

1 High Court of Australia Transcript, *News Limited & Ors v South Sydney District Rugby League Football Club Limited* S34/2002 (6 August 2002), viewed at: <http://www.austlii.edu.au.html> 17 September, 2002.

2 (1985) 180 CLR 459; 61 ALR 225; 10 ACLR 87.

1. Wayde's *Case: Why Wests Lost in the High Court*

In *Wayde*, the litigation was commenced by way of application under what was then s320 of the Companies (NSW) Code, now 232 of the *Corporations Act* (Cth). This provision provides that a Court may make an order under s233 in a case where it is established that the conduct of the company's affairs is 'oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in that capacity or in any other capacity.'[3] At that time, professional Rugby League in Australia was organised by the NSWRL, which itself was established as a company limited by guarantee. Wests was a member of the company. The company's constitution provided that the objects of the NSWRL were (amongst other things):

> To determine which clubs shall be entitled to enter teams in the Rugby League Premiership and other competitions conducted by the League and the terms and conditions upon which and the manner in which clubs shall make and renew such applications.[4]

The constitution also provided that:

> The League may conduct such competitions between teams … as the board of directors may from time to time determine provided that the board of directors may at its discretion invite other clubs to participate in any competition conducted pursuant to the provisions of this clause.[5]

Wests alleged that the decision not to invite it to participate in the competition constituted oppression, unfair prejudice or unfair discrimination and sought an order restraining the directors of the League from acting on their decision not to invite Wests to participate in the competition. A substantial portion of Wests' argument was that, in excluding it from the competition, the directors had acted in a discriminatory and prejudicial fashion with regard to it. In ultimately dismissing the application, Brennan J wrote:

> Section 320 [now 232] requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court's jurisdiction to intervene. In the case of some discretionary powers, any prejudice to a member or any discrimination against him may be a badge of unfairness in the exercise of the power, but not when the discretionary power contemplates the effecting of prejudice or discrimination … At a minimum, oppression imports unfairness and that is the critical question in the present case….
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> There is nothing to suggest unfairness save the inevitable prejudice to and discrimination against Wests, but that is insufficient by itself to show that reasonable directors with the special qualities possessed by experienced administrators would have decided that it was unfair to exercise their power in the way the League's directors did.[6]

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3 *Corporations Act* (Cth) s232(e).

4 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 at 460; 61 ALR 225 at 226; 10 ACLR 87 at 88

5 Ibid.

6 *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459 at 465; 61 ALR 225 at 231; 10 ACLR 87 at 92.

In the final analysis, especially given the manner in which the case reached the High Court, the decision endorsed the ability of the directors of the NSWRL to make decisions, including decisions to exclude teams from participating in the competition, in what they honestly believed to be in the best interests of the NSWRL.[7] Surely this is a decision which is not only consistent with the law, but intuitively correct.[8]

2. The Souths Case and the Present Appeal

Now, let us compare the facts of the present appeal. In the mid 1990s, there were two professional Rugby League competitions in Australia, one organised under the auspices of News Limited, called Super League, and another, organised by NSWRL (later the Australian Rugby League). Attempts by the NSWRL to prevent its clubs and players from defecting to Super League led to litigation involving the same provisions of the *Trade Practices Act* 1974 (Cth) as the present appeal.[9] After two years of operating parallel competitions, News Ltd and the ARL decided to merge and create a new competition, the National Rugby League (NRL). Given the fact that both parties to this merger believed that Australia could support only a limited number of Rugby League franchises at professional level, it was not surprising that, in agreeing on terms for a merged league, the parties agreed that they should aim to reduce the number of teams playing in the competition. In similar vein, the parties also agreed that the new NRL should contain a balance between teams in the Sydney area and teams outside Sydney. ARL and News Ltd agreed to operate the NRL as partners. A joint venture company (owned equally by ARL and News Ltd) was established in order to run the competition and the parties agreed on criteria which would be applied by the NRL in determining which teams would be licensed to participate in the competition. Licences were, in most cases, for a one year period, renewable by the NRL. The merger agreement outlined a process whereby the number of the teams in the competition would gradually be reduced from 20, in 1998, to 14, in 2000. The agreement also provided for a prescribed 'split' between Sydney teams and non-Sydney teams. The merger agreement also prescribed the precise criteria that would be applied to determine which teams would be granted licences to participate (in the event there were more applications than there were openings in the reduced-team league). Further, the agreement established a priority for allocation of licences. It was hoped that the reduced number could be reached by establishing regional clubs outside of Sydney and encouraging several of the Sydney clubs to merge.

Souths, one of the oldest and most successful clubs in the competition (though having had far less success in recent years, both on the field and in financial terms), objected to the criteria from the outset. One might surmise that the objection was on the basis that Souths had no plan of merging with another Sydney club, nor did

7 See *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483 at 493 and s181 of the *Corporations Act* (Cth).

8 That is, I suppose, unless one is a loyal supporter of Wests!

9 *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447; ATPR 41–466 rev'd (1996) 64 FCR 410; 139 ALR 193; ATPR 41–521.

its management believe that it was likely to survive under the published criteria. Souths' representatives stated that '… 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.'[10]

In 1999, the competition consisted of 17 teams. Two of the teams merged during the year. A further two teams also agreed to merge after the end of the season. This left a total of 15 clubs vying for 14 places in the competition. Souths was eventually informed that it was not one of the clubs that met published selection criteria and would therefore be excluded from the competition for the following year. In late 1999 Souths commenced proceedings seeking an injunction to restrain ARL and News Ltd from excluding it from the 2000 competition. Originally, Souths' application relied on allegations of misleading and deceptive conduct contrary to s 52 of the *Trade Practices Act* 1974 (Cth) ('the Act') as well as causes of action in contract law, largely based on allegations of lack of good faith. In addition, Souths argued that the agreement to conduct a competition with a reduced number of teams was an 'exclusionary provision' within the meaning of s 4D of the Act and therefore, by entering into the merger agreement, ARL and News Ltd had contravened s 45(2)(a)(i) of the Act. An initial application for interlocutory relief was dismissed by Hely J.[11] A full trial was conducted before Finn J, also resulting in dismissal of the application. Souths appealed to the Full Court of the Federal Court, where, in a split decision, they were successful (Moore and Merkel JJ for the majority, Heerey J dissenting).[12]

3. The Trial Decision of Finn J

The substantial basis of Finn J's decision is that the merger agreement did not constitute an 'exclusionary provision' within the meaning of s 4D of the Act which defines 'exclusionary provision' as:

> (1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:
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> (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
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> (b) the provision has the purpose of preventing, restricting or limiting:
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> (i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or
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> (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;

10 *South Sydney District Rugby League Football Club & Ors v News Ltd & Ors* [2000] FCA 1541 at 1662 (2000) 177 ALR 611 at 737 (2001) ATPR 41–824 ('Trial decision').

11 (1999) 169 ALR 120.

12 *South Sydney District Rugby League Football Club & Ors v News Ltd & Ors* [2001] FCA 862; (2001) 181 ALR 188; (2001) ATPR 41–824 (Full Court decision).

> 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.

Finn J held that parties did not need to be in competition with each other at the time the offending agreement comes into effect. However, his Honour also held that the agreement to conduct a 14-team competition did not constitute an exclusionary provision as its purpose was not to prevent the supply of goods or services to a 'particular person or class of persons' as required by the Act. Souths had argued that the purpose of the 14-team term was offensive as it was to prevent, restrict or limit the supply or acquisition of various services related to organising and operating a professional rugby league competition. However, Finn J held that there was no evidence to suggest that the criteria contained in the merger agreement had been drafted with the purpose of excluding Souths from the competition. As his Honour put it, referring to the criteria to be applied:

> One can envisage a size provision with its proposed ancillary criteria being designed with the substantial purpose in mind, not merely 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.
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> 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.[13]

Nor was there a recognisable 'class of persons' being excluded from the competition:

> In the present case while the purpose of having resort to the proposed selection criteria underpinning the 14-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.[14]

Accordingly, Souths failed on its arguments under the Act. Claims based on implied contract terms and misleading and deceptive conduct also failed. On appeal, Souths relied solely on argument under the Act.

13 Trial decision at [281] (2000) ALR 611 at 674.

14 Trial decision at [292] (2000) ALR 611 at 676.

4. The Decision of the Full Court

On the appeal, Justices Moore and Merkel (Heerey J dissenting) held that the merger agreement constituted an exclusionary provision and granted Souths the injunctive relief it sought. Both judges in the majority agreed that, in applying s 4D, it was appropriate to look at the 'subjective purpose' of the parties to the impugned agreement. Justice Moore concluded that the merger agreement was intended to limit the supply of organising services. As he put it 'it was proposed that supply or acquisition of goods would be reduced, by operation of the arrangement [contained in the merger agreement], on some but not all of the suppliers or customers because of events that had not yet occurred.'[15] Justice Merkel agreed, and in the process dealt with the argument that the ultimate purpose of the 14-team term was to benefit the sport. As he put it: 'The trial judge's conclusion that the 14-team term was only a means to an end [that being the betterment of the sport] did not absolve him from determining the purpose of the means selected; whether it was a substantial purpose and, if so, whether it was a proscribed exclusionary purpose.'[16]

Justice Heerey in dissent held that the merger agreement was not agreed for the purpose of exclusion of clubs. His Honour reached this conclusion on the basis that it was not evident at the time of the merger agreement that there would need to be any exclusion, given that it was hoped that the 14 team league could be reached by merger and consolidation. Or, as he put it, the exclusion of any team was 'two years in the future. It was something hypothetical and dependent on multiple, interacting contingencies.'[17]

Even if a proscribed purpose exists, the legislation requires that the relevant purpose is:

> 4D(1)(b) '… preventing, restricting or limiting:
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> (i) the supply of goods or services to, or the acquisition of goods or services from *particular persons or classes of persons*…' (emphasis added).

Both Justices Moore and Merkel concluded that the merger agreement involved the purpose of excluding a class of persons within the meaning of this provision. In the case of Moore J, his Honour held that the appropriate interpretation of the

15 Full Court decision at para [203], (2001) 181 ALR 188 at 236.

16 Full Court decision at para [274], (2001) ALR 188 at 253. It is interesting to note yet another parallel with corporate law principles here. Section 181(1)(b) of the *Corporations Act* (Cth) requires directors and officers of companies to act 'for a proper purpose'. While it has long been established that it is improper for directors to use their power to issue shares to ensure control of the general meeting, Courts have had some difficulty applying such a standard where the directors contend that their 'ultimate' or overall purpose is to benefit the company. In *Whitehouse v Carlton Hotel Pty Limited* (1987) 162 CLR 285; 70 ALR 251; 11 ACLR 715; 5 ACLC 421 the High Court ruled that an overall 'honest motive' would not save an act done for an 'improper purpose'. Nonetheless, the New South Wales Court of Appeal, in *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260; 15 ACLR 230; 7 ACLC 659 the presence of an allegedly improper purpose (to defeat a hostile takeover bid) did not invalidate a decision of the directors of the target company to issue shares as part of a commercial venture. See also the Canadian case of *Teck Corporation Ltd v Millar* (1973) 33 DLR (3d) 288.

17 Full Court decision at para [76], (2001) 181 ALR 188 at 204.

above language was too see '… the provision as having a wide operation in circumstances where the identity of each of the persons on whom the alleged exclusionary provision might operate was neither ascertained nor ascertainable at the time the agreement was entered.'[18]

Justice Merkel dealt more specifically with the argument put by counsel for the League that the arrangement was not an exclusionary provision as it was neither directed to a particular person (that is, Souths) nor to a defined or 'particular' class of persons. It was argued that the only definable class involved here was that class made up of those who might be excluded, and that this definition, being entirely tautological, was inappropriate. Merkel J held that '[t]he fact of exclusion, without more, may not be a sufficient formula or distinguishing characteristic to identify the particular class intended to be excluded.'[19] However, in this case, following an earlier decision of the Federal Court,[20] his Honour decided that 'where the subjects of the exclusionary provision were aimed at for a reason or purpose, the reason or purpose [is] … of assistance in defining or distinguishing the class excluded.'[21]

Heerey J dissented, not only on the basis of attribution of a proscribed purpose, but also on the ground that the facts of this case did not, in his Honour's view, fit into the common sense understanding of what a boycott involves. As his Honour put it:

> The whole point of a boycott is that the conduct or interests of some person or class of persons is seen as being inimical to the interests of the boycotters. The boycott is adopted as a means of inflicting some adverse consequences on that person or class. A boycott necessarily involves a target, a person or persons "aimed at specifically": *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 577; 139 ALR 193. It is hard to see how this notion can apply to a class not defined in advance but only defined in an essential respect by the fact of exclusion, if and when it happens.[22]

Later on, his Honour noted that, as the respondents had argued that the *Pont Data* case was distinguishable, this Court did not need to consider whether that case should be followed. His Honour's reasons for judgment suggest quite strongly that he believes that *Pont Data* ought not be followed.

5. The Argument in the High Court

Essentially, the heart of argument in the High Court was the meaning to be given to the words 'particular person or class of persons' in s 4D of the Act. Much of the argument centred on techniques of statutory interpretation to be applied, along with a review of previous authority interpreting the meaning of an exclusionary provision.

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18 Full Court decision at para [207], (2001) ALR 188 at 237.
19 Full Court decision at para [292], (2001) 181 ALR 188 at 258.
20 *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460; 97 ALR 513
21 Ibid.
22 Full Court decision at para [90], (2001) 181 ALR 188 at 207.

Though there was some argument on whether the Court should look at the subjective purpose of the parties or the objective determination of purpose when considering whether an arrangement amounts to an exclusionary provision, it is submitted that the heart of the matter is whether the purpose of achieving a 14-team league involves restricting the supply of league organising services to 'a particular person or class of persons.'

The appellants argued that the Act requires the Court to look at the subjective purpose of the parties to the merger agreement and that further, in order to constitute an exclusionary provision, the necessary purpose must involve restricting the supply of goods or services to *particular* persons or *particular* classes of persons. Though the appellants advocated techniques of statutory interpretation that produced the desired interpretation, I submit that it is implicit within the meaning of the word 'class' that there must be some defining characteristic. Furthermore, given the context in which the phrase 'class of persons' is used, it seems apparent that the class must be defined by something more than the mere fact of exclusion. Thus, to the extent that the *Pont Data* decision is authority for defining a 'class of persons' for this purpose by the mere fact of exclusion, the correctness of that authority must be doubted.

On this point, Professor Pengilley has previously observed that part of the problem in this case is the fact that the 'collective boycott' provisions of the Act were never (or ought never have been) intended to be applied to actions taken that affect non-competitors. In other words, s4D was not properly designed to apply to actions such as those taken by two rival leagues to rationalise the operations of a professional sport, unless the target of those actions was a competitor (rather than a constituent team).[23] Professor Pengilley made similar observations when News Limited and the NSWRL litigated over efforts taken by the NSWRL to prevent its teams from joining the upstart Super League competition:

> Clearly, in excluding a club from a competition, the excluding clubs are acting under a contract, arrangement or understanding. They are also, in accordance with the views of the Full Federal Court 'in competition' with each other. Further, they are limiting the supply of services to the excluded club. But these things are not illegal either singly or in combination. The action must be done for 'the purpose of limiting the supply of services to the excluded entity if an illegal collective boycott is to be found …there can quite properly be a substantial purpose of furthering the competition and its benefits. The expulsion of a club from a competition, if bona fide made, comes within those objectives. Furthering the objects of a competition, even to the extent of expelling a club from the competition involves no competition law illegality. There is nothing in the *News Ltd v ARL* case which can fairly lead to the conclusion that it changes the law in this regard.[24]

23 See Warren Pengilley, 'Fifteen into fourteen will go: the Full Federal Court defies the laws of mathematics in the South Sydney Case' (2001) 17 *Australian and New Zealand Trade Practices Law Bulletin* 25 at 35.

24 Warren Pengilley, 'Restraint of Trade and Antitrust: A Pigskin Review Post Super League' (1997) 6 *Canterbury LR* 631 at 638.

One perhaps unintended implication of the Full Court decision is that a potentially wide range of arrangements might fall afoul of the collective boycott provisions. As Finn J observed:

> 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.[25]

Finn J might have made a more appropriate analogy if he had referred to two competing franchisors, seeking to end destructive competition between themselves choosing to combine their operations and, in the process, limiting the number of franchisees in overlapping areas. To be sure, such a transaction might involve the application of s 50 of the Act, as indeed might the merger agreement in this case, but that is a different question from those raised by the application of s 4D. Indeed, Justice Gummow, in his questioning, led counsel representing the ACCC to that observation.[26] In so far as a rationalised competition (as a result of the partnership of two former competitors) is concerned, the argument was put that, because the NRL was, following the merger, a jointly provided competition with a jointly provided set of organising services, the parties could not be said to be in competition with each other in relation to those services, and therefore s 4D ought not apply in the first place.[27]

One of the clear implications of Souths' argument is therefore that, under its preferred construction of ss 45(2) and 4D, a potentially wide range of business arrangements might be unlawful as a result of containing exclusionary provisions. Indeed, this was what Finn J was alluding to in the passage quoted above. From the transcript, it appears as though the respondents' answer to this objection was that, as the Act contains a procedure for authorisation of otherwise unlawful conduct where it is in the public interest, then the widest possible interpretation of the prohibition must be preferred. In support of this counsel noted that Merkel J has noted that the parties had considered the possibility of seeking authorisation from the ACCC. [28] With respect, it should be noted that the only reason that the parties considered seeking authorisation was in relation to s 50 and the potential that the merger itself might be seen as substantially lessening competition. Clearly then, the parties could see the potentially anti-competitive effects of the merger, but it seems rather obvious that neither considered the possible application of s 4D. I submit this is so because the application of 4D to these facts is not only counter-intuitive, but requires considerable strain in interpretation to reach the desired result. A further point is that if such an approach were taken to all similar statutory

25 Trial decision at para [293], (2001) 177 ALR 611 at 676.

26 High Court of Australia Transcript, *News Limited & Ors v South Sydney District Rugby League Football Club Limited*, above n1 at 43 (hereinafter 'High Court Transcript').

27 This was the argument put by the ACCC, see High Court Transcript at 43.

28 High Court Transcript at 53.

provisions, then the outcome would be unduly restrictive to business, large or small, as well as to place considerable strain on the resources of the ACCC.

In a case such as this, where parties formed a joint venture because in their estimation the market would not support two competitions, the practical effect of applying s4D to the 14-team term is to subject the management of the NRL to a form of 'implied access' regime. In effect, applying s4D to such a term means that the league organisers need to seek authorisation from the ACCC prior to implementation of such a term. In other words, access to the services of a 'league organiser' in the case of rugby league would be controlled by the ACCC, much in the same way that access to services governed by Part IIIA of the Act is controlled by the National Competition Council (the 'Council') through the legislation of an Access Regime. This would require the ACCC to decide on matters such as the optimum number of competitors and the terms for admission into the competition (or at least consider such matters on their merits). Interestingly, the question of the optimum number of competitors only entered into argument in the High Court when Justice Kirby asked counsel to explain, as he put it, 'what was the magic in 14 which was a non-negotiable number, given that it came down from 16?'[29] The only answer to that question appears to be that the parties, being in the position to make such a judgment and in possession of all the material facts and experience needed for that purpose, made such a decision, in what they considered to be the best interests of the sport. Presumably, this is exactly the sort of decision that one would expect league organisers, rather than Courts or Commissions, to make.[30]

Returning to the Access Regime, the Council is given the power to 'declare' that a service should be subject to a regime of controlled access. The circumstances where the Council is entitled to make such a declaration are set out in s44G of the Act, which provides that:

> (2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:
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> (a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
> (b) that it would be uneconomical for anyone to develop another facility to provide the service;
> (c) that the facility is of national significance, having regard to:
> (i) the size of the facility; or
> (ii) the importance of the facility to constitutional trade or commerce; or
> (iii) the importance of the facility to the national economy;

29 High Court Transcript at 9.

30 Not surprisingly, this sounds much like the preferred approach taken to review of management decisions in corporate law, where Courts often cite the language of the High Court from *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL*, above n7 at 493: 'Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.'

(d) that access to the service can be provided without undue risk to human health or safety;
(e) that access to the service is not already the subject of an effective access regime;
(f) that access (or increased access) to the service would not be contrary to the public interest.

It is certainly by no means clear that the service of organising a rugby league competition would satisfy all of these criteria, though perhaps that is what the Souths representatives had in mind when they wrote that '… Rugby League is an icon to be preserved for the people who love and support it'. If that is the case, then perhaps it ought be a case made more explicitly.

6. Concluding Observations

In the final analysis, it seems as though the application of s4D to an arrangement such as the one before the Court in the Souths case was never intended to attract the operation of s4D. Indeed, the ACCC intervened in the High Court hearing for the purpose of making precisely that point. Furthermore, the approach taken by the majority in the Full Federal Court required, in this writer's estimation, considerable stretching of statutory language.

One is minded to compare the result, as well as the approach, in this case with the previous case in the High Court in *Wayde*. Unfortunately, due to the reorganisation of the sport in Australia, the precise legal issues in this dispute were not governed by the oppression provisions in the *Corporations Act* (Cth).[31] At least one writer has previously opined that 'the test of oppressive conduct under the *Corporations Law* and that of exclusionary purpose under the TPA are similar.'[32] While that may be so, at present the decision of the Full Court in this case is inconsistent with this assertion. More broadly, it would be unfortunate if the High Court were to dismiss the appeal, thus prompting observers to note that the victory would be one of form over substance.

31 Principally ss232 and 233.

32 Warren Pengilley, 'Rabbitohs Can't Run on the Rugby League Grass' (2001) 16 *Australian and New Zealand Trade Practices Law Bulletin* 70 at 75. Presumably, Professor Pengilley is referring to the fact that what is 'oppressive, unfairly prejudicial or unfairly discriminatory' under s232 is largely treated as a question of commercial unfairness. Indeed, there are striking similarities between the observations of Brennan J in *Wayde*, above n2 that the mere fact of discrimination against Wests did not establish oppression and the observations by both Justices Finn and Heerey in the lower courts that the establishment of a 'class' for purposes of s4D requires some unifying characteristic beyond the mere fact of exclusion.