Federal Court of Australia **No NSD309/2019**

District Registry: New South Wales

Division: General

Jack de Belin

Applicant

Australian Rugby League Commission Ltd ACN 003 07 293 and another

Respondents

RESPONDENTS' CLOSING SUBMISSIONS

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A. INTRODUCTION AND SUMMARY

1. The first respondent is the governing body for rugby league in Australia (the **ARLC**). The second respondent (the **NRL**) runs, on its behalf, the national elite men's rugby league competition in Australia and New Zealand (the **NRL Competition**). The NRL Competition has recently witnessed a spate of incidents of its players being involved, or accused of being involved, in serious offences, including violence against women. The respondents rightly regard conduct of this nature as completely unacceptable.

2. In response to growing condemnation from fans, sponsors and the public alike, the NRL has decided to stand down (on full pay) players charged with serious criminal offences, particularly those involving violence against women and children, until their charges are determined in court, in an effort to disassociate itself from and condemn acts of violence like those with which these players have been charged (the **New Rule**). As the evidence will show, the New Rule has received widespread approval.

3. In December 2018, the applicant, Mr Jack de Belin (a player for the St George Illawarra Dragons NRL Club), was charged with the violent rape of a 19-year-old woman in the

company of another man. His charge is captured by the New Rule and, consequently, he is (as matters presently stand) stood down from playing in the NRL Competition until the charges have been determined. The allegations against Mr de Belin have received extensive media coverage across the country.

4. Mr de Belin contends in these proceedings that the New Rule is unlawful as an unreasonable restraint of trade or a tortious interference with his playing contract and that this Court should require the NRL to allow him to play (and to compel its sponsors and broadcasters to be associated with him) in the new season.

5. The respondents submit that the Court should reject these claims. The analogous concept of standing down an employee on full pay pending the determination of criminal charges against that person is hardly a radical idea. Expressly or impliedly, there is a power stand down employees charged with serious criminal offences on full pay until their charges are determined in virtually every employment situation. To allow an employee to continue to work in those circumstances risks damaging the reputation of the business through association with someone who police and prosecutors consider may be guilty of such a serious offence. Such damage is particularly problematic in the present case, because without revenue from the NRL Competition, it would not be possible for Clubs to pay players the significant sums that, in the modern era, they now receive.

6. More specifically, the NRL does not wish to be seen, and cannot afford to be seen, in any way to condone acts of violence against women, to be lax or indifferent about doing something where players are charged with serious offences, particular those against women. The NRL has taken sensible and responsible action to uphold the values for which it stands, to protect its commercial relationships with sponsors and broadcast partners and to protect its image in the eyes of fans. Its position has received expressions of support from the fans, the Clubs, its broadcast partners, its sponsors, and community organizations whose sole focus is taking appropriate action in relation to allegations of violence against women. The action is no more than reasonably necessary to protect the legitimate interests and objects of the game of rugby league, the NRL Competition and the respondents. Any lesser response would not be adequate to protect those interests and objects.

7. In order to put this new policy into effect, the NRL has amended the NRL Rules. Mr de Belin's playing contract (and the contracts of all players) are subject to the NRL Rules, as amended from time to time. As the playing contracts expressly acknowledge the NRL's right to amend the NRL Rules, there is no basis for Mr de Belin's suggestion that there had been an interference with that contract, and this claim is therefore also unfounded.

8. Mr de Belin also makes various arguments that the respondents have behaved in a misleading or deceptive way, or unconscionably, contrary to the Australian Consumer Law (**ACL**). The misleading and deceptive conduct claim concerns what was allegedly said about Mr de Belin's guilt or innocence, and whether he had or had not then been stood down, prior to the adoption of the New Rule. Those statements are not said to have continued after 10 March 2019. Therefore, while it occupies pride of place in the Applicant's Outline of Submissions (**AOS**), this is something of a sideshow to Mr de Belin's core restraint of trade claim. The Court may legitimately question the utility of spending significant time analyzing what was or was not said in relation to Mr de Belin's case in the weeks preceding the announcement of the New Rule, in circumstances where, at least since its adoption, it has been absolutely clear (in public) that Mr de Belin has been stood down, and that stand down is expressly on a no fault basis. This is especially so where Mr de Belin has not given any evidence himself (even though he has been in Court during the majority of the proceedings) and has not led evidence from others (including his manager, Mr Gillis, who did give evidence) that would suggest that he suffered any loss in the period prior to 11 March 2019 as a result of the impugned conduct. The Court should draw the inference in such circumstances that such evidence would not have assisted Mr de Belin's case (*Jones v Dunkel* (1959) 101 CLR 298 at 320; *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418–419). Nevertheless, the claim is maintained by Mr de Belin, and it is therefore dealt with in these submissions after the core issues have been addressed. The claim of unconscionability is parasitic upon Mr de Belin's other allegations succeeding, and so is dealt with last. It is also unfounded.

B. EVIDENCE

9. The respondents rely on the following evidence for the purposes of this application:

(1) The Affidavit of Bart Campbell sworn and served on 1 April 2019 (the **Campbell Affidavit**) and the exhibits thereto.

(2) The Affidavit of Todd Greenberg sworn and served on 2 April 2019 (the **Greenberg Affidavit**) and the exhibits thereto.

(3) The first (non-confidential) Affidavit of Andrew Abdo sworn and served on 2 April 2019 (the **Abdo 1**) and the exhibits thereto.

(4) The second (confidential) Affidavit of Andrew Abdo sworn and served on 2 April 2019 (the **Abdo 2**) and the exhibits thereto.

(5) The affidavit of Kevin Alavy sworn and served on 2 April 2019 (the **Alavy Affidavit**) and the exhibits thereto.

(6) The third (non-confidential) Affidavit of Andrew Abdo sworn and served on 3 April 2019 (the **Abdo 3**) and the exhibits thereto.

(7) The oral evidence given by those witnesses.

(8) The documents contained in the respondents' tender bundle – Exhibit R1.

10. Each of the witnesses listed above has been cross-examined and gave his evidence honestly and impressively. It is not anticipated that there will be any attack on their credit but the respondents will address such an allegation orally if it is made by the applicant.

C. FACTUAL BACKGROUND

(1) The game of rugby league in Australia

11. The first respondent, the ARLC, is the governing body of rugby league in Australia. The ALRC is responsible for fostering and growing the game and ensuring that it is properly funded at all levels.[1]

[1] Greenberg, para. 9.

12. The second respondent, the NRL, acts on the ALRC's behalf in performing these functions. Critically, it manages, on the ARLC's behalf, the NRL Competition, the elite men's rugby league competition which is one of the leading sports in Australia.[2]

13. The vision of the ALRC for the game of rugby league in Australia is to bring people together for the best sports and entertainment experience possible. It does not seek to make profits to pay out to private shareholders;[3] rather, it wants to expose the sport to the greatest possible number of people, whether as fans or participants, and for those involved with the sport to enjoy themselves. All of the money it makes is invested back into the game, whether by making payments to Clubs, who in turn pay the players, or by funding grass roots and junior football and community programs.

14. In fostering and growing the game, the ALRC wants the game to reflect the diversity of Australian society, to uphold its values, and to ensure that all persons, no matter what their culture, gender, sexuality and social background are respected and feel welcome in rugby league.[4]

15. These values are particularly important where the players inevitably become role models for many younger fans or participants in the game. It is important that the values that fans, and parents of fans, associate with players of the game accord with the values of the ALRC.

16. Both intrinsically and practically, therefore, the ALRC wants the game to be attractive to, and to respect, women.[5] Women currently constitute approximately 36% of the NRL Competition's television audience, something that the respondents are seeking to improve upon.[6] 2018 also saw the launch of the inaugural season of the NRL Women's Competition,[7] and female participation in the sport overall was up 29%, something that, again, the respondents want to improve upon in future years.[8]

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2 Greenberg, paras. 8, 11.
3 Greenberg, para. 6.
4 Abdo 1, para. 5.
5 Greenberg, paras. 33, 35-36.
6 Abdo 1, para. 75.
7 Greenberg, para. 36. See also the NRL's Strategic Plan at Exhibit TG1, tab 2, p. 33.
8 Greenberg, para. 36.

(2) The NRL Competition

17. The continued success of the NRL Competition is critical to ensuring the success of the game as a whole in Australia.[9]

18. The NRL Competition, as it stands today, reflects more than 100 years of development and evolution as a professional sport. As an illustration of this, the position today can usefully be compared to the position in 1990, just before the Federal Court's decision in *Adamson v New South Wales Rugby League* (1991) 103 ALR 319 (where the "internal draft" system was found to be an unlawful restraint of trade). The total revenue of the competition in 1990 was almost $20 million of which approximately $8.5 million went to the Clubs.[10] In 2018, the total revenue was approximately $500 million,[11] of which $223 million went to the Clubs.[12] In 1991, the "salary cap" for each team was a maximum of $1.5 million. Today it is $9.3 million for each of the 16 Clubs.[13]

19. That is, in less than 30 years since *Adamson* was decided, there has been a 25-fold increase in the game's revenue, a 26-fold increase in the amount of money being paid out to Clubs, and a six-fold increase in the amount of money available for players' salaries. In contrast, in the period between 1990 and 2018, the cost of purchasing goods and services in Australia generally has risen by 97%.[14] There are now a number of players who earn over $1 million a year, and a significant number (including Mr de Belin) whose annual contract payments are in excess of $500,000.[15]

20. To be successful, and to ensure this continued revenue flow, the NRL Competition needs to be attractive to spectators, television viewers and commercial sponsors.[16] Further, the NRL Competition's position as the elite professional form of the game generates interest in the game of rugby league at all levels, and its capacity to continue to attract participants to the game at the junior and amateur levels will depend on its continued success.[17]

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9 Greenberg, para. 13.
10 *Adamson* at 358 per Gummow J.
11 Greenberg, para. 23; Abdo 3, para. 9.
12 Abdo 3, para. 9.
13 Greenberg, para. 27.
14 See, e.g. the printout from the Reserve Bank of Australia Inflation Calculator website – Exhibit R1.
15 Greenberg, para. 28.
16 Greenberg, para. 15. See also: T-217.40-T218.5, T-309.37-T309.45 (Greenberg).
17 Greenberg, paras. 19-21.

21. This is especially so bearing in mind the highly competitive nature of the Australian sporting market. There are five professional codes – Australian Rules, Cricket, Rugby League, Rugby Union and Soccer – all of which conduct elite professional competitions of significant financial size. All of these codes compete with each other for spectators, viewers, sponsors and broadcasters.[18]

22. In 2018, the major sources of revenue of the NRL were:[19]

    (1) Broadcast revenue derived from free to air television, subscription television, radio and digital streaming rights, totaling approximately $363 million every year; and

    (2) Commercial revenue which totals approximately $160 million per annum derived from sponsorship digital advertising, major event revenue such as ticketing, licensing and retail revenue.

23. Fans of the game, and participants at the grassroots level of the game, obviously want to get pleasure from their enjoyment of the game. This means respecting the players and believing that the competition reflects their own values. This is particularly so for parents with children who may follow or play the game.[20]

24. Further, maintaining sponsorship value is dependent on spectators, viewers and commercial sponsors continuing to regard their interest in and association with the NRL Competition (and its players and clubs) positively.[21] This is particularly so in recent times; the focus is not simply brand exposure, but positive affiliation. Customers of sponsors increasingly require them to be associated with a sport brand that aligns to what their customers perceive as their own core values and beliefs.[22] Modern sponsors are highly sophisticated, and the focus that sponsors now have on seeking positive associations between their brand and values with those of the sport that they are sponsoring means that they are very sensitive to any negative perceptions that arise in relation to the sport generally, and to its players.[23] Similar considerations apply to broadcast revenue, with the value of those rights determined by a broadcaster's

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18 Greenberg, paras. 29-33; Alavy Affidavit, paras. 22-35.
19 Abdo 1, para. 16.
20 Greenberg, para. 129; Abdo 1, paras. 18, 81.
21 Greenberg, para. 32. See also: T-217.40-T218.5, T-309.37-T309.45 (Greenberg).
22 Abdo 1, para. 21. See also: T-345.46-T346.2 (Abdo), T-369.35-T-369.46 (Alavy).
23 Greenberg, para. 46; Alavy Affidavit, paras. 71-75. See also Confidential Exhibit R3.

assessment of the advertising or subscription revenue that rights to the NRL Competition will bring.[24]

25. It bears emphasis, particularly in the context of the present case, therefore, that the interests of players and those of the respondents are not opposed to each other. The respondents are not seeking to make profits from the players' labours that they can then extract and pay out to private shareholders. Rather, it is through the efforts of the respondents that the game continues to grow and to be attractive (at the elite level and down to grass roots football), and that huge sums are brought in to the game that not only provide the players with a livelihood but makes them amongst the highest earners in Australian society.[25] This applies not only to the current crop of players, but the many generations to come in the future. No one is forced to become a professional rugby league player. Those who choose to do so, and have success in that endeavour, reap considerable financial rewards as a result of the respondents' efforts.

(3) The problem of sexual and domestic violence against women within the NRL

26. From time to time, players in the NRL Competition have been accused or charged with serious criminal conduct, including those involving violence against women or have been alleged to have behaved in other ways displaying a lack of respect for women.[26]

27. In the past, the NRL has spent considerable sums on player education in an effort to prevent such behaviour. Under the Collective Bargaining Agreement (**CBA**) with the Rugby League Player's Association (**RLPA**), the NRL has committed to provide funding of up to $4.7 million per annum towards wellbeing and education initiatives, with minimum funding of $17.5 million over the five years 2018 to 2022.[27] A key focus of these educational programs is on the subject of respectful relationships with women.[28]

28. The 2018 NRL Season concluded in September 2018. Since then, there have been a series of allegations or charges in respect of NRL players physically or sexually assaulting or disrespecting women, which have received extensive media publicity, including:[29]

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24 Greenberg, para. 28; Abdo 1, paras. 19-20; Alavy Affidavit, paras.46-70.
25 Greenberg, paras. 25-28; Abdo 3, paras, 9-15; T-309.38-T-309.45 (Greenberg).
26 See e.g. Exhibits A10 and A11; T-295.8-T-297.3 (Greenberg).
27 Greenberg, paras. 51-56.
28 Greenberg, para. 54.
29 Greenberg, paras. 57-58. See also Exhibit A11.

(1) reports that Ben Barba, a player for the North Queensland Cowboys NRL Club, assaulted his partner;

(2) charges of domestic violence assault occasioning actual bodily harm against Dylan Walker, a player for the Manly Sea Eagles NRL Club;

(3) charges of recording and distributing intimate images of women without their consent against Tyrone May of the Penrith Panthers NRL Club; and

(4) charges of aggravated sexual assault in company against Mr de Belin.

29. At around the same time, Jarryd Hayne, a former high-profile player for the Parramatta Eels NRL Club (who played with the Club in the 2018 season but is now without a contract) was charged with aggravated sexual assault,[30] Scott Bolton, a player for the North Queensland Cowboys NRL Club, pleaded guilty to common assault in relation to an incident with a woman at a bar,[31] and Zane Musgrove of the South Sydney Rabbitohs NRL Club and Liam Coleman of the Penrith Panthers NRL Club were both charged with aggravated indecent assault.[32] There were also various other incidents of alleged or proven poor player behaviour.[33]

30. This was enough for the media – in articles on which Mr de Belin relies – to label this the NRL's "*Hall of Shame*"[34] and "*summer from hell*".[35]

31. This is properly a matter of significant concern for the respondents. Such behaviour plainly has no place in the game. It does not accord with the game's values, the nature of the competition that it wishes to promote or its financial interests. With each incident reported, further damage was inflicted on the game's brand and reputation.[36] Any suggestion that the respondents were not taking sufficient action in relation to allegations of such behaviour was also inconsistent (and was perceived by sponsors as being inconsistent) with the NRL's own "*Voice Against Violence*" education campaign.[37] It is obvious that a failure by the respondents to take sufficient action in relation to allegations

30 As reported at A5, pp. 210, 238. See also Exhibits A10 and A11.
31 As report at A5, p. 233. See also Exhibits A10 and A11.
32 As reported at RT-7, p. 238. See also Exhibits A10 and A11.
33 As reported at RT-7, p. 238. See also Exhibits A10 and A11.
34 Exhibit A5, p. 238.
35 Exhibit A5, p. 213.
36 T284.15-284.23, T-295.01-295.04 (Greenberg).
37 Greenberg, para. 76; Abdo 1, para. 52.

of such behaviour would affect the reputation of the NRL, the NRL Competition and the game of rugby league itself.[38]

32. A perception had been expressed, by sponsors at least, that rugby league seems to have more incidents of these sorts of charges than other sports.[39] This is a problem in and of itself, but particularly in the context of the very competitive nature of the Australian sporting market.

(4) The charges against Mr de Belin

33. The charges against Mr de Belin are of the most serious kind. It is alleged that, in the company of another man, he raped a young woman after inducing her to return to an apartment owned by his cousin under false pretenses.[40]

34. The particulars of these charges are set out in more detail in video of the Channel 9 coverage of Mr de Belin's Court appearance at Wollongong Local Court on 12 February 2019,[41] which is in evidence and the Court is asked to consider. Two typical news media reports are at Exhibit R2 tabs 4 and 5.

35. The charges have attracted widespread media publicity; there have been a total of 39,363 reports and posts mentioning Mr de Belin between the date of his charge and 26 March 2019, with a total audience/circulation of traditional media coverage of almost 242 million.[42]

(5) Reactions of sponsors, broadcasters and the general public

36. The conduct alleged against these players, including Mr de Belin, is – if true – plainly conduct that is unacceptable both from a moral perspective and in relation to those with financial interests in the game. The charges against Mr de Belin have damaged his reputation and caused him to be associated with the issue of sexual violence against women.[43]

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38 Greenberg, paras. 43-47, 50, 91, 120, 124-129.
39 Abdo1, para. 52; Abdo 2 (Confidential), para. 4; Greenberg, para. 82; Campbell, para. 14.
40 Abdo 1, paras. 38-39.
41 Greenberg, para. 62. See Exhibit R4.
42 Abdo 1, para. 34. Exhibit R6, tab 11.
43 Greenberg, paras. 43-47, 64; Abdo 1, paras. 39-40.

37. As outlined below, there has been a growing wave of outrage and condemnation about these matters and increasing calls for all those charged with such serious offences to be stood down until the charges have been resolved.

Fans of the game

38. The NRL has received many communications from members of the public urging it to take steps to have players in Mr de Belin's position stood down from playing until the charges against them are determined.[44]

39. Further, the NRL's Brand Health & Sponsorship Tracker, an independent survey commissioned by the NRL on fan's views on the sport, has shown a clear decrease in the view that player behaviour is getting better, and an increase in the view that rugby league needs to change the way it is governed. This changing view is particularly evident among female fans.[45]

The game's community partners

40. One of the NRLs' partners is White Ribbon, a non-governmental organisation working to end male violence against women and girls. On 18 December 2018, White Ribbon issued a press statement "*regarding the NRL and players' allegations of violence*". It stated:[46]

> *"White Ribbon Australia is concerned about the recent trend of allegations of abuse against multiple NRL players, and believe that the alleged behaviour is unacceptable.*
>
> *The disconnect between the NRL's expectations of players, and clubs' responses to the allegations of violence needs addressing. We welcome and support the NRL's upcoming review of all related policies in early 2019, to ensure that the way they address allegations of violence is improved, consistent, and sends a strong message of zero tolerance.*

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44 Greenberg, paras. 71-73; Exhibit R2. Tabs 6 and 7. See also T-266.11-T267.35, T-307.34-308.44 (Greenberg).

45 Abdo 1, para. 73; Alavy, para. 44; T-367.34-369.9 (Alavy).

46 Greenberg, paras. 76-78. Exhibit R3, tab 9.

We will be providing advice to the NRL during this review to ensure that they meet best practice guidelines when fostering a zero tolerance approach to violence against women…"

Broadcast partners

41. As noted above, broadcasters, sponsors and advertisers are seeking positive associations for their brands through their partnership with rugby league. The player misconduct and allegations of player misconduct outlined above have inflicted clear and increasing damage on the game's brand and reputation. The irresistible inference, therefore, is that broadcasters, sponsors and advertisers do not want to be associated with such conduct or alleged conduct and would – if nothing was done by the respondents in this regard – take steps to protect their interests.

42. Consistently with this, in face-to-face meetings and telephone conversations with Mr Greenberg, senior executives from New Limited and Nine Entertainment Ltd (the owners of the NRL's broadcast partners) expressed the view that they were concerned that the charges laid against Mr de Belin would have a negative effect on the upcoming season's ratings and would significantly dilute the NRL's future broadcast values.[47] Regardless of whether these concerns were honestly held by those expressing them or not, plainly a reasonable person in the respondents' position would take them seriously and act upon them, not least because the respondents could expect a substantially similar position to be adopted by broadcasters in future negotiations. As noted above, broadcast rights account for approximately two-thirds of the respondents' total revenue.

Sponsors

43. In November 2018, even before the allegations against Mr de Belin and others emerged, some of the NRL's sponsors were already asking why the NRL had not adopted a "*zero tolerance*" policy against players charged or accused of domestic violence against women or sexual assault.[48] Those sponsors asked why the NRL did not stand down players while their charges were before the courts.[49]

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47 Greenberg, para. 94. See also Confidential Exhibit R3, p. 4, point 2.
48 Abdo 1, para. 52.
49 Greenberg, para. 82.

44. The widespread and extensive public dissemination of the nature of the allegations against Mr de Belin and others pushed matters to a tipping point. Following Mr de Belin's charge, many of the NRL's existing sponsors wanted to know what the NRL was proposing to do to protect the reputations of the NRL and its partners given the nature and seriousness of these allegations.[50] Some stated that they considered that all such players be stood down. By way of example:

(1) The view stated by the NRL's major[51] and naming rights sponsor, Telstra, was that the NRL should automatically stand down from participation in the NRL Competition any player facing criminal charges.[52]

(2) On 20 February 2019, Mr Greenberg received an email from Mark Fitzgibbon, CEO of NIB, which is one of the principal sponsors of the New South Wales State of Origin team. Mr Fitzgibbon stated in clear terms that players subject to serious charges should be stood down to await the outcome of those charges.[53]

45. No sponsor offered any assurance to the respondents that the existing policy was adequate to protect the interests of the NRL, the game or the sponsors. The approach of sponsors is unsurprising. They sponsor the NRL Competition to obtain positive associations for their products or services.[54] The players who feature in broadcasts of the game are directly associated during the match, to both live spectators and television views, with the names and logos of sponsors (whether on the players' jerseys, at other places on the field or at the ground, or those connected with broadcasts of the game). The respondents have prepared examples of the use of sponsors' logos, in particular that of Telstra, on players' uniforms and at venues, to which the Court's attention is directed.[55] These provide striking examples of the connection between sponsors and the players during games, to those at the ground and those watching elsewhere. Clearly, these associations will not be positive ones where the player featured is subject to serious

50 Greenberg, para. 91.
51 T-338.29 (Abdo).
52 Abdo 2 (Confidential), paras 9.
53 Greenberg, para. 104; R2, tab 20, p. 609.
54 See paragraph 24 above.
55 Abdo 1, para. 48. Exhibit AA1, tabs 15, 16 and 17. See also T-338.29-T-338.39 (Abdo).

criminal charges, particularly a charge of the nature of that to which Mr de Belin is subject.[56]

46. These statements have not been limited to existing sponsors but have also been relied upon as a key factor in seeking sponsorship extensions and new sponsorship arrangements. As a consequence of the allegations, key partnership agreement extension discussions have been put on hold, there have been increased requests for the inclusion of termination rights for player behaviour incidents in contractual documents, and there has been a withdrawal of potential new partners from advanced discussions, with player behavior concerns being cited as the reason.[57]

47. It is estimated that the perceived failure of the respondents to take sufficient action in relation to allegations of player misconduct has already contributed to the loss of four sponsorship deals totaling $2.6 million per annum, as well as a grass roots sponsorship of $7.5 million over three years.[58]

48. There was, as a result, a clear and present danger to the respondents' financial position – and therefore the health of the whole game of rugby league – if no action was taken. There can be no serious doubt based on the documents before the Court that the respondents did not honestly and reasonably hold this view at the time.

Clubs

49. The NRL was also contacted by representatives from Clubs raising concerns about letting NRL players who are charged with serious criminal offences continue to play while their offences are before the Court, and the damage that this was causing to the game.[59]

50. One powerful example of this was from Bart Campbell, the Chairman of the Melbourne Storm NRL Club. In Mr Campbell's view it was critical that the NRL changed policy to stand down accused players,[60] and that the game was on a "*moral and financial precipice*".[61] From his discussions with potential sponsors for the Storm, it was clear that

56 Abdo 1, para. 49.
57 Abdo 1, para. 50. Confidential Exhibit R3. See also T-262.20-263.05 (Greenberg), T-334.27-T-340.41 (Abdo).
58 Abdo 1, para. 70. Abdo 2 (confidential), paras. 16-17. See also R7, tabs 4 and 5.
59 Greenberg, para. 97-103; Campbell, paras. 20-22. See also Board minute at R2, tab 21.
60 Campbell Affidavit, para. 17.
61 See Exhibit R2 tab 16, p. 601.

the game was being damaged by its failure to stand down the players until their charges were determined.[62] As the allegations against players emerged, Mr Campbell wrote to the Chairs of the other Clubs and the respondents in increasingly strident terms, noting that the NRL had a "*burning platform*" in relation to sponsorship, and that "*At the moment, we look like and [sic] enablers of violence/sexual or otherwise against women and it stinks*".[63] Dennis Watt, the Chair of the Gold Coast Titans NRL Club also spoke out in support of an automatic stand down policy.[64]

51. Ultimately, 15 out of 16 Clubs were supportive of a change to the respondents' policy in the terms ultimately adopted.[65]

52. In light of the above events, the respondents considered that they were left with no choice but to act, and to act promptly, firmly and decisively.

(6) The New Rule

53. The respondents gave extensive consideration to the question of how to address the problems outlined above before adopting the New Rule.[66]

54. It was clear to them that the current policy of not doing anything until a player's charges were determined, and relying on the player education programs outlined above, was not working, and was not in accordance with what members of the public, broadcasters, sponsors and clubs wanted or expected. Taking no action was not a sensible or realistic option.

55. One (theoretically possible) alternative would have been for the respondents to conduct their own investigation into the charges against the players and proceed accordingly.[67] This alternative is discussed in more detail below at paragraphs 89-108 below. It suffices at this stage to say that such an investigation would not be sensible or reasonable.

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62 Greenberg, para. 99.
63 Exhibit BC2, p. 15.
64 Exhibit R2, tab 19, p. 607. See also Board minute at Exhibit R2, tab 21 and press conference of 28 February 2019 at Exhibit R5.
65 Greenberg, para. 102.
66 See, for example, Greenberg, paras. 112-114.

56. The only sensible option left, if there was to be a change at all, was to stand down players charged with serious offences on a no-fault basis. Those players would continue to be paid and would continue to be able to train with their Clubs but would not be allowed to play.

57. As a consequence, on 28 February 2019, the Board of the respondents met and voted unanimously to bring in a policy whereby players charged with serious criminal offences are automatically stood down from playing in the NRL Competition until such time as the relevant charges have been dealt with by a court of law.[68] The relevant parts of the minutes of that meeting are at Exhibit R2, tab 21.

58. All players in the NRL are subject to the NRL Rules, as amended from time to time (as explained in Section D below). The New Rule, as embodied in the new rule 22A of the NRL Rules (which can be found at Exhibit R2, tab 24, p. 653), commenced on 11 March 2019.[69] The NRL Competition for 2019 commenced on 14 March 2019.

(7) Expressions of support for the New Rule

59. In accordance with the view and expectations expressed before the New Rule was adopted, as explained above, the reaction to the change of policy has been uniformly positive. Some examples are set out below.

60. Telstra, the NRL's naming rights sponsor, has stated that the changes "*are a huge step in the right direction*" and that they "*congratulate the NRL on their strong stance, reflecting community standards and moving closer to the values that Telstra upholds*".[70]

61. Other sponsors also contacted the NRL to say that they supported the policy that had been adopted.[71]

62. White Ribbon Australia issued a press release on 1 March 2019 in support of the new policy, saying:[72]

68 Greenberg, para. 115.
69 Greenberg, para. 117.
70 Greenberg, para. 121. Exhibit R6, tab 23.
71 Confidential Exhibit R7, tabs 3 (p. 5), 7 (pp. 19, 21, 25).
72 Greenberg, para. 122. Exhibit R2, tab 25.

"This decision by the National Rugby League (NRL) shows its commitment to zero tolerance of any kind of abuse, disrespect and violence against women,

NRL players are widely admitted by their loyal fans from all walks of life and with that comes a responsibility to lead by example by demonstrating equality and respect on and off the field.

White Ribbon's Senior Manager, Sports Engagement, Liam Dooley, said the NRL's move echoes White Ribbon's determination that there must be zero tolerance for men's violence against women.

"This is an important step not just for the great game of rugby league but for the broader community. It's great to see the NRL listen to community and take on board their feedback in making this decision…." Mr Dooley said".

63. The CEO of Our Watch (an organization aimed at changing attitudes in relation to violence against women) further stated in an email to the NRL:[73]

"I have been watching this matter closely and think your leadership has been courageous.

This is such a tricky issue, I feel you have come up with a proposal that is fair and serves to make a clear statement to all.

This type of action could only have been led by one of our leading codes, and I hope it serves as a catalyst for other sports in the country".

64. Mr de Belin contends that the approach of the respondents, and the views of broadcasters, sponsors, Clubs and community organisations set out above, were all unreasonable, and that the New Rule is, as a result, unlawful. He commenced his claim challenging the New Rule on 6 March 2019.

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[73] Exhibit R2, tab26.

D. THE CONTRACTUAL REGIME BETWEEN THE PLAINTIFF, HIS CLUB AND THE NRL

65. The respondents agree that each of the documents set out at [3] of the AOS, is a relevant contractual document. The effect of the various contractual documents is that there are contractual relationships between the player, the clubs and the NRL, which operate as follows:

(1) *The NRL's contract with the Club*: A club who wishes to participate in the NRL Competition enters into a NRL Club Licence Agreement with the NRL.[74] Pursuant to the Licence Agreement, the club agrees to be bound by and comply with the NRL Rules and the Licence Agreement acknowledges that those rules form part of the agreement, and that they can be varied, withdrawn or replaced by the NRL from time to time at its absolute discretion (see clauses 9.8, 9.9 and 24 of the Licence Agreement).[75] Further, the Club acknowledges and agrees that the NRL reserves the right to do whatever it considers necessary or desirable to develop and maintain a sustainable, vigorous and successful national rugby league competition (see clause 5.1(b)).

(2) *The player's registration with the NRL:*[76] A person wishing to participate in the NRL Competition must first complete an NRL Player Registration Application. Pursuant to that application, the player agrees that in return for his registration, he will (*inter alia*) comply with the NRL Rules, as amended from time to time. The player also acknowledges that it is "*a fundamental requirement of my registration and my NRL Playing Contract that I maintain at all times a reputation for high standards of personal conduct, including a reputation for respect for women and children, the responsible consumption of any alcohol that I drink and for lawful and good behavior generally*".[77]

(3) *The player's contract with the Club (**Playing Contract**):* The Licence Agreement requires the Club to enter into a playing contract with a player in the form required

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74 See, for example, the Licence Agreement at Exhibit A5 (RT-2), pp. 10-45.
75 Exhibit A5 (RT-2), pp. 22-23, 34.
76 There is a dispute between the parties as to whether the registration has contractual effect as between the player and the NRL. The respondents submit that it plainly does, but nothing turns on this.
77 Greenberg, para. 49. Mr de Belin's application is at Exhibit A5 (RT-3), pp. 95-102.

by the NRL Rules (see clause 12.1), and sets out a particular form for that playing contract.[78] That contract contains an express acknowledgement that the player agrees, amongst other things, to be bound by and comply with, the provisions of the NRL Rules, as amended from time to time, and whether or not those amendments are effected before or after the contract is entered into (clause 3.1(g) of the Playing Contract). Mr de Belin's playing contract is in this form.[79]

66. The right to amend the NRL Rules is contained in Rule 2(1) of the NRL Rules, which states:

> "*The provisions of these Rules may be amended by the Board from time to time in such manner as the Board thinks fit…*"[80]

67. As is evident from the above summary, the NRL Rules – as amended from time to time – are a key component of this contractual structure. It is impossible to see, as a result, how any player could have any expectation that the NRL Rules would not be amended from time to time in accordance with this power.[81]

E. OUTLINE OF THE APPLICANT'S CLAIMS

68. The applicant claims:

(1) First, that the respondents engaged in certain conduct prior to the adoption of the New Rule that was misleading and deceptive contrary to s. 18 ACL. This alleged conduct ceased on 10 March 2019. Mr de Belin does not contend that any conduct since the adoption of the New Rule has been misleading or deceptive;[82]

(2) Secondly, that the respondents have behaved unconscionably in relation to Mr de Belin contrary to s. 21 ACL;[83]

(3) Thirdly, that the New Rule is an unlawful restraint of trade;[84] and

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78 Exhibit R2, tab 23, p. 622.
79 See Exhibit A5 (RT-3), pp. 47-94.
80 Exhibit R2, tab 23, p. 622.
81 As appears to be suggested at [4], [38] and [61] of the AOS.
82 ASOC, paras. 15-24.
83 ASOC, paras. 25-28.
84 ASOC, paras. 29-39.

(4) Fourthly, that the imposition of the New Rule constitutes a tortious interference with Mr de Belin's playing contract.[85]

69. As noted above, the allegation of unconscionability is, as pleaded by Mr de Belin in the ASOC, parasitic upon him succeeding in his other claims. It is therefore dealt with last. Similarly, the misleading and deceptive conduct claim is something of a sideshow relevant only to a short period prior to the formal implementation of the New Rule. The Respondents therefore address, first, the core of this claim, which is the allegation of an unlawful restraint of trade and, secondly, the claim of tortious interference with contract. They will then deal with the other two matters.

F. ALLEGED UNLAWFUL RESTRAINT OF TRADE

(1) The legal framework

70. Any restraint of trade is prima facie void. To be lawful, a restraint must be "*reasonable…in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public…*" see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Limited* [1894] AC 535 at 565. A convenient and accurate summary of the general principles is set out in the judgment of Perram J in *McHugh v Australian Jockey Club Ltd* (2014) 314 ALR 20; [2014] FCAFC 45 at [4] (with whom Griffiths and White JJ agreed).

71. Despite the reference to the "*interests of the parties*", the critical focus is the position of the covenantee, i.e. the person for whose benefit the restriction was imposed: *Adamson* at 340-341 per Wilcox J.[86] That person, in this case the respondents, must show that the restraint affords "*no more than adequate protection*" to the interests of the league and the clubs, or (to put the same point another way), that the restraint is no more than is "*reasonably necessary*" to protect those interests: *Adamson* at 365 per Gummow J.

72. The lawfulness of a restraint is to be determined at the time at which it is imposed. However, the court may take into account future probabilities which could have been

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85 ASOC, paras. 40-41.

86 See also Heydon, *Restraint of Trade*, 4th ed (2018), p. 43.

foreseen at that time, and events occurring after the relevant date may throw light on the circumstances existing at that date: *McHugh* at [4].

73. At common law one did not look at the particular circumstances of each person subject to the restraint in making an assessment of reasonableness: *Adamson* at 365 per Wilcox J. However, this is affected, to an extent, by s. 4(1) of the Restraints of Trade Act 1976. This provides that "*A restraint of trade is valid to the extent to which it is not against public policy, where it is in severable terms or not*".

74. The result of s. 4(1) is that the Court is not concerned with possible or "*imaginary*" breaches of a restraining rule or clause. Rather, it is concerned with "*the actual breach*" (i.e. the specific facts which trigger the restraint). If the restraint is reasonable when triggered in those circumstances, then it survives, even if it might be said that it would also be triggered by other facts and, in that context, would be unreasonable: see *Orton v Melman* [1981] 1 NSWLR 583 at 587-588. As McLelland J explained:

> *"In applying s 4(1) the court should consider the circumstances of the particular case before it and determine the validity of the restraint of the extent that it purports to operate in those circumstances, and it is unnecessary to consider its purported operation in other conceivable sets of circumstances".*[87]

75. To take an example: if an ex-employee is restrained by contract from competing with his former employer for a period of 2 years, but seeks to do so after 3 months, the question will be whether it was reasonable to restraint the ex-employee from competing for a period of 3 months in the particular circumstances of that case (the so-called "actual breach"), not whether it was reasonable to restrain any person from competing for 2 years.

(2) The effect of the New Rule on players such as the applicant

76. The respondents accept[88] that, in preventing a player in Mr de Belin's position from playing, they have restrained him in the carrying out of his trade to a certain degree.

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87 Approved in *Kosciuszko Thredbo Pty Ltd v Thredbonet Marketing Pty Ltd* [2013] FCA 563 at [255]-[257] by Cowdroy J; *Woolworths Ltd v Olson* [2004] NSWCA 372 at [37]-[47] per Mason P (with whom McColl and Bryson JJA agreed).

88 For present purposes, although they reserve their position if this matter goes further.

77. However, the nature of this restraint should not be overstated:

(1) The respondents agree (in response to [9] of the AOS) that the effect of the application of the New Rule is that the player is stood down from playing in the NRL Competition until his criminal proceedings are finalized. However, the player will remain on full pay and able to train with his Club. In Mr de Belin's case, his salary for the 2019 season is $545,000.[89] There is no evidence that Mr de Belin has suffered any financial loss at all as a result of being stood down under the New Rule, for example, relating to sponsorship. This is unsurprising: it is common sense that a sponsor is likely to be far more concerned with the fact of the criminal charge rather than the fact of the stand down. Mr de Belin's manager, Mr Gillis, stated that he had not even bothered to seek to negotiate a new contract with St George Illawarra or to enter into negotiations with any other club at this stage because such negotiations would be futile whilst the criminal charge was outstanding.[90]

(2) Anyone charged with an offence like that to which Mr de Belin is subject will have their charge determined at trial in a finite period, namely the period that will be required to determine the criminal charge. The stand down is not indefinite (contrary to what is asserted in [54] AOS). As a result of the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* which commenced on 30 April 2018 (i.e. prior to the alleged conduct which has led to the criminal charge against Mr de Belin) committal procedures have changed in NSW for such offences. The purpose of the reforms, as they relate to committals, is to reduce delays in indictable cases being finalised in the District Court. The new procedure is summarised in an extract from the Local Court Bench Book helpfully provided by the Court to the parties. Prior to these reforms, the aim of the District Court was stated to be to resolve sexual assault charges (such as those to which Mr de Belin is subject) within 8 months of committal or other even that gives rise to the need for trial.[91] On average, it took approximately 12 months from that date.[92] Whilst the new reforms, to which Mr de Belin is subject, will not necessarily reduce the time it takes for the District Court to resolve the charges once the case is referred

89 Mr de Belin's playing contract (p. 38) at Exhibit A5 (RT-3), p. 84.
90 T-76.25-T-77.12 (Gillis).
91 District Court NSW Annual Review 2017, p. 15 (R1, tab 3).
92 District Court NSW Annual Review 2017, p. 16 (R1, tab 3).

to it, nevertheless, it can be reasonably anticipated that there will be less delay in the case getting to the District Court than there was in previous years.

(3) It is not correct to say (see [52] of the AOS) that Mr de Belin's career will be ended by being stood down. Although it is not possible to state with certainty precisely when Mr de Belin's charges will be determined, it appears that the estimate made by the respondents at the time the decision was made – namely that Mr de Belin could miss one to two seasons – remains accurate.[93]

(4) In contrast to the present case, in *Greig v Insole* [1978] 1 WLR 302 (relied on at [47] AOS) and *Hughes v West Australian Cricket Association* (1986) 69 ALR 660 (relied on at [49] AOS) the bans imposed on the players concerned were indefinite (see *Greig* at 308 and *Hughes* at 702-703).

(5) There are no guarantees, of course, that Mr de Belin (or a player in his position) would have played in these games had he not been stood down. There is no evidence as to what stance his Club or the NSW Rugby League, which is responsible for choosing the NSW State of Origin team, would have taken in relation to his charge had the NRL not taken action. Mr de Belin contends that he would have been available to be selected for all of these games but for the stand down in his ASOC[94] but has not led evidence to support that allegation. Further, players are – of course – regularly injured in a high contact sport such as rugby league and as a consequence cannot train or play regardless of the governing body's stance.

(6) The New Rule does not (as alleged in [9] and [51] AOS) directly and peremptorily prevent the Club and de Belin from performing the obligations owed to one another under the Playing Contract. The obligations that are owed under the Playing Contract are only owed to the extent permitted by the NRL Rules. The effect of the New Rule is that during the period that Mr de Belin is stood down neither he nor his Club have any obligation to each other in respect of Mr de Belin's participation in the NRL Competition.

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93 Greenberg, para. 113(o).

94 ASOC, para. 34.

(7) There is nothing in the New Rule that would prevent Mr de Belin (or a player in his position) negotiating contracts with his current or other clubs (in contrast with *Adamson* or *Buckley v Tutty* (1971) 125 CLR 353).

(8) Mr de Belin's playing career may well extend for many more seasons. For example, Paul Gallen of the Cronulla Sharks NRL Club is 37; Cameron Smith of the Melbourne Storm NRL Club is 35; Cooper Cronk of the Sydney Roosters NRL Club is 35; Robbie Farah of Wests Tigers NRL Club is 35; and Michael Gordon of the Gold Coast Titans NRL Club is 35.

78. Mr Gillis, Mr de Belin's agent, suggests that Mr de Belin's negotiating position will be affected by his stand down under the New Rule.[95] Even if he had not been stood down by the NRL, of course, it seems highly unlikely that his Club, or any other Club, would have been willing to negotiate with Mr de Belin on terms acceptable to him with a long jail sentence potentially hanging over his head. Mr Gillis conceded this in cross-examination.[96] In any event, Mr de Belin's contract with the Dragons does not expire until the end of the 2020 season. Even on the basis of the information belatedly provided by the applicant on 17 April 2019, it appears likely that his charges would be determined well prior to the end of the 2020 season.

(3) The reasonableness of the New Rule

79. The restraint imposed in this case is a legitimate and reasonable one, and thus lawful.

80. An ordinary and reasonable member of the public will likely conclude, from the fact that a person (like Mr de Belin) is charged with a serious offence, that that prosecuting authority suspects the person of committing the offence and had a reasonable basis to bring the charge: see *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293; [1982] HCA 50; 56 ALJR 808; 42 ALR 487 at [18] per Mason J with whom Wilson J agreed; see also paragraphs 89-108 below. Inevitably, in these circumstances, anyone with knowledge of the charge will view the person subject to it with at least some degree of suspicion: at [17] per Mason J. In this context it is worthy of being borne in mind that if the charges were brought in the absence of reasonable and probable cause and for an improper purpose the person bringing the charges would be liable to an action in damages

95 Gillis Affidavit, paras. 15-16.
96 T-76.25-T-77.12 (Gillis).

for the tort of malicious prosecution (see, generally, Fleming's Law of Torts, 10th ed, 2011, at [27.10]-[27.90]).

81. On being charged, therefore, Mr de Belin's reputation is immediately tarnished and he becomes associated with the conduct with which he is charged. This is anathema to the values that the NRL seeks to uphold, and the interests of its sponsors and other commercial partners. The NRL's failure to act on this issue has already caused it significant financial damage, as explained above.

82. It is absolutely correct, of course, that Mr de Belin is, at law, presumed innocent until proven guilty before a criminal court. But this misses the point. As a result of the charge, Mr de Belin is now clearly associated with an act of serious sexual violence against a woman. A reasonable person may think there is a reasonable and probable basis for the charge and therefore a risk that he is guilty. The NRL cannot allow itself or its sponsors to be associated with such conduct. To do so would inevitably involve an element of acquiescence or indifference to that conduct, and at worst active promotion of it. Mr de Belin would play with a uniform featuring the NRL logo, and logos of its sponsors. The fans at the game and those watching at home would see him do so. Other sponsors of the game, whether at the ground, on television, online, on radio or in print media would also be associated with him. He would be portrayed as a role model for those watching the game, especially younger fans.

83. This is, in short, unacceptable to the interests of the sport and its stakeholders. More practically, it is very likely to lead to a significant loss of sponsorship revenue, and to fans ceasing to follow the game. As explained above, if this action is not taken it has the potential to be financially disastrous for rugby league in this country. Mr de Belin's suggestion that the evidence establishes only that administrators and sponsors might be concerned about the reputation of the game (at [54.2] AOS) bears no relationship to the evidence properly before the Court.

84. All of this holds true even if Mr de Belin is ultimately found not guilty of the charge. But there is at least some prospect – based on his charge – that he will be found guilty. The NRL simply cannot risk a position where Mr de Belin is allowed to play on, to be watched and cheered on by fans, to bear the logos of its sponsors, and then for it ultimately to be found that he is guilty of a very serious crime of sexual assault. If this occurs it will, by

implication, have facilitated, protected and promoted his interests in the worst possible circumstances and way.

85. Moreover, if the standing down of Mr de Belin while his criminal charge is determined were to be found to be unreasonable, it is difficult to see why it would not also be unreasonable for the NRL to refuse to register a player who was subject to the same criminal charge. If that was the result, the NRL would be forced to register a player who, at that stage, lacked the reputation for respect for women that is a fundamental requirement of his registration. The respondents submit that this would be a very odd outcome.

86. The need of the NRL and its sponsors to completely dissociate itself from conduct of this nature means that, in some circumstances, the interests of a person who is found not guilty will be prejudiced to the extent set out above. But this, unfortunately, is the price that must be paid to stamp out any perception of tolerance, acquiescence or endorsement of this conduct and to ensure victims and alleged victims are properly supported and protected.

87. Mr de Belin claims that the New Rule unjustifiably infringes on his liberty to work and pursue his profession (see [46] of the AOS). But Mr de Belin's ability to pursue that profession in the NRL Competition in the manner that he has enjoyed to date and at the salary he is being paid relies on that competition being attractive to fans, broadcasters and sponsors and commercially successful. As noted above, unlike many other restraint of trade cases, in the present case the interests of the person imposing the rule are aligned with the interests of those subject to the rule. The respondents do not seek to make money at the players' expense; they seek to make money <u>for the players</u>. Consistent with this, pursuant to the CBA the NRL guarantees the provision of payments, benefits and allowances of $980 million to players over the term of the CBA.[97] The CBA provides for a revenue partnership between the NRL and the players whereby the players receive 25% of the profits derived by the NRL above projections[98] (by payments made into their retirement accounts) but are liable to a reduction in the guaranteed amount of player payments if NRL revenues fall.[99] The CBA also guarantees that, in the event of

97 CBA, p. 5, Exhibit A5 (RT-4), p. 112.
98 CBA, pp. 7-8, Exhibit A5 (RT-4), p. 114-115.
99 CBA, pp. 8-9, Exhibit A5 (RT-4), p. 115-116.

insolvency of a Club, the NRL shall assume the payment obligations of that Club to its players.[100] This is a mutually beneficial and dependent relationship. Mr de Belin should not be entitled to force the respondents to continue to provide him with those benefits, while at the same time fundamentally undermining their continued ability to provide them to him and others. He cannot take the smooth without the rough.

88. Moreover, Mr de Belin's right to work must be seen in the context of the right to work not only of the other 500 or so players in the NRL Competition, but of many future generations of those players. He is but a single plaintiff challenging a rule designed for the benefit of the game as a whole and therefore the benefit of thousands of other players, present and future. The respondents are the custodians of all players' interests, not just those of Mr de Belin, and the imposition on his ability to work must be weighed against the continuing rights of many others.

(4) Possible new rule incorporating an investigation, hearing and finding by the NRL

89. The applicant suggests that Rule 22A of the NRL Rules is unreasonable to a player in his situation because it does not provide for an investigation by the NRL into the allegations made against him, does not provide him with a right to be heard in respect of such allegations and provides for his automatic standing down without a finding by the NRL as to his probable guilt. The applicant also suggests, apparently as an alternative, that the New Rule is invalid because it does not provide for submissions to be made as to hardship or other (unidentified) circumstances which could lead to a decision not to stand the player down even if no finding is made as to whether or not he is probably guilty of the charges laid against him.

90. These submissions should be rejected. For the reasons which follow it would be unreasonable, lacking utility and improper to have a rule which incorporated the features urged by the applicant.

91. First, it is necessary to bear in mind that, in Mr de Belin's case, the aspect of the rule which is attacked is the automatic no-fault stand down aspect, applicable only to players such as himself who have been charged with criminal offences carrying a maximum term of imprisonment of 11 years or more.

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100 CBA, p. 12, Exhibit A5 (RT-4), p. 119.

92. Of all criminal charges which can be laid against a person, only a comparative few – the most serious ones – carry a maximum sentence of 11 years or more. Examples of these are:

(1) Murder – s. 18/19A of the NSW Crimes Act.

(2) Manslaughter – s. 18/24 of the NSW Crimes Act.

(3) Assault causing death – s. 25A/25B of the NSW Crimes Act.

(4) Supply of drugs causing death – s. 25C of the NSW Crimes Act.

(5) Wounding/grievous bodily harm with intent – s. 33 of the NSW Crimes Act.

(6) Discharge fire arm with intent – s. 33A of the NSW Crimes Act.

(7) Aggravated driving causing death - s. 52A of the NSW Crimes Act

(8) Sexual assault – ss. 61I, 61J, 61JA of the NSW Crimes Act.

(9) Robbery – ss. 94, 95, 96 of the NSW Crimes Act.

(10) Armed robbery ss. 97 and 98 of the NSW Crimes Act.

(11) Supply commercial quantity of prohibited drug/trafficking – ss. 25 – 29 of the NSW Drug Misuse and Trafficking Act

93. Next, it is crucial to bear in mind that in NSW the decision to lay charges of the type laid against Mr de Belin is that of the Director of Public Prosecutions (**DPP**) which is an independent professional service for the prosecution of serious criminal offences (*Director of Public Prosecutions Act 1986*). Pursuant to s. 13 of the Act, guidelines for the proper performance of the DPP's functions have been issued. As to these:

(1) Guideline 1, after emphasising the independence of the DPP, specifies that:

> *"Staff of the ODPP and Crown Prosecutors carry out their duties in compliance with the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors promulgated by the International Association of Prosecutors (Appendix A)."*

(2) Guideline 4 deals with the decision to prosecute and sets out many factors to be taken into account.

(3) Appendix A requires prosecutors, amongst other things, to:

(a) At all times exercise the highest standards of integrity and care (para. 1(c)).

(b) Strive to be, and be seen to be, consistent, independent and impartial (para. 1(e)).

(c) Always serve and protect the public interest (para. 1(g)).

(d) Respect, protect and uphold the universal concept of human dignity and human rights (para. 1(h)).

(e) To act with objectivity (para. 3(c).

(f) To have regard. To all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect (par. 3(d)).

(g) In accordance with the local law or requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whethere that points towards thee guilty or innocence of the suspect (para. 3(e)).

(h) Always search for the truth and assist the Court to arrive at the truth, to do justice between the community, the victim and the accused according to the law and dictates of fairness (para. 3(f)).

(4) Notably, in respect of the DPP's role in criminal proceedings, it is stipulated in Appendix A as follows:

> *"4.2 Prosecutors shall perform an active role in criminal proceedings as follows:*
>
> ...
>
> *(d) In the institution of criminal proceedings they will proceed only when a case is well-founded upon evidence reasonably believed to be*

reliable and admissible, and will not continue with a prosecution in the absence of such evidence."

94. In considering the situation of players charged with criminal charges to which the automatic stand down rule relates, it must be presumed that the DPP has acted regularly and properly in accordance with its own guidelines (see, generally, *Cross on Evidence*, 10th ed (2015) [1175] at pp. 29-32). It seems evident that considerations such as those just referred to found the reasoning of the High Court in cases such as *Mirror Newspapers Ltd v Harrison*, discussed in paragraph 80 above.

95. Accordingly, the fact that the DPP has instituted legal proceedings in respect of a very serious crime against Mr de Belin carries with it the irresistible inference that the prosecution believes that the case is one well-founded upon evidence reasonably believed to be reliable and admissible.

96. Further, bearing in mind the coercive and compulsive powers invested in police and prosecuting authorities by states in respect of investigations of possible crimes and obtaining evidence in respect of them (both oral and written) obviously the police or the DPP are much better placed than an organization such as the NRL, whose powers lie in contract only, to conduct a proper investigation into an alleged crime and to form a view as to whether or not a charge is well-founded. To take one obvious example, in a sexual assault case the police and/or the prosecutor will have the benefit of obtaining statements from the alleged victim of the crime and any witnesses to it. A body in the position of the NRL can only require the player to give such a statement, it cannot require the alleged victim (even if was, as is highly unlikely, to know the identity of the alleged victim) or other witnesses to do so unless those persons happen also to be registered players. Further, of course, unlike the prosecuting authorities, the NRL will not have access to any medical or other forensic testing which can be carried out by the police and/or prosecuting authority.

97. In these circumstances, it is inevitable that any investigation of the alleged criminal conduct by the NRL would necessarily be much less complete, much more unreliable, inexpert and much more prone to error and injustice than one carried out by the police and/or DPP.

98. Moreover, there is a real danger of contempt of a court if the NRL seeks to investigate and then make determinations in a tribunal hearing as to the conduct the subject of the criminal charge. It is likely to receive such wide publicity that prospective jurors may be prejudiced, or a party or witnesses will come under pressure to make admissions or be prevented from giving vital evidence for fear of damaging a case in court (see Forbes, *Justice in Tribunals*, 4th ed, at [12.37], p. 199 and the cases cited at fn 350-352).

99. It is undoubtedly the case where an elite player such as Mr de Belin is charged with a serious criminal offence, any hearing by the NRL, and any finding by it consequent upon such a hearing, would be one which would receive extremely wide publicity (as the present case demonstrates) so that there is a danger of contempt of court in embarking upon such a process.

100. Further, of course, assuming the player decided to participate in such a hearing, and give evidence and/or to foreshadow his defence, such matters would not be protected in any subsequent criminal trial by some form of privilege or "right to silence". The player would effectively lose that right to silence in the criminal proceedings.

101. Moreover, in such a scenario, assuming the NRL found that the player had engaged in the conduct which is the subject of the criminal trial and given the inevitable publicity that such a finding would attract in the general community from whom the pool of jurors will be selected the procedure would necessarily imperil the player's right to a fair criminal trial.

102. Similarly, a determination that the player had not engaged in the conduct, or that there was insufficient credible evidence to support the allegations, is just as prejudicial to the proper conduct of the proceedings. It would strongly suggest to potential jurors that the complainant's evidence was not credible.[101] It would also likely place pressure on the complainant and other prosecution witnesses and may deter them from giving evidence.

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[101] See, in this regard, *Director of Public Prosecutions (Cth) v Wran* (1987) 7 NSWLR 616 at 626-631 where a public statement about the innocence of a defendant was held to be a clear contempt in the face of a jury trial.

103. In these circumstances it would be wrong and improper for the NRL to conduct a hearing into the conduct which is the subject of the criminal charges which have been laid, even if the player is prepared to participate in such a hearing.

104. If, as is more likely, the player chooses not to participate so as to preserve his right of silence then a finding by the NRL following its own investigation that the player has been guilty of the conduct which is the subject of the criminal charge will inevitably imperil his right to a fair criminal trial.

105. Therefore, it is submitted that it would be unreasonable, rather than reasonable, to have incorporated into the New Rule an obligation to investigate and make findings about the conduct which is the subject of the criminal charge.

106. The applicant also suggests, it seems as an alternative, that there could be an investigation, hearing and determination by the NRL which does not seek to examine the conduct the subject of the criminal charge, but rather provides the player with the opportunity to seek to avoid the automatic stand down by reason of matters of hardship or the like.

107. This suggestion should be rejected. First, it is hard to imagine how any responsible decision-maker, acting reasonably, could possibly decide not to stand down a player who is charged with a serious criminal offence where presumptively (see above) the charge is well-founded on admissible and credible evidence. This is especially so in the context of the present case, where the player continues to be paid and is able to train with his club as the New Rule provides.

108. Various other options are also inadequate:

    (1) The respondents have endeavoured to use their wellbeing and educational program to stamp out any improper conduct by its players, and to dissociate the game from such conduct when it is alleged. This, however, has not prevented the present problem arising.

    (2) The standing down could not be for a lesser period than that required to determine the criminal charge. It would be senseless to stand the player down for any period other than that required to have the criminal charges determined.

(5) Standing down in related contexts

109. Mr de Belin's position would, were it accepted, have a number of surprising consequences. If it is not reasonable to stand down (on full pay) a person subject to a serious criminal charge in the present context, then it is difficult to see why it would be reasonable in any context. If an actor is charged by police with rape, and is therefore stood down from working on a movie on the basis that, as a result of the charge it will be boycotted at awards ceremonies and no one will pay to watch it, is the production company to be forced to use the actor in the movie, and to continue to make and distribute it? If a candidate for election is stood down from that candidacy as a result of a charge of rape, on the basis that no one will vote for him as a result, is the party in question to be forced to continue to associate itself with and support that candidate? This makes as little sense in those contexts as it does in the present.

110. Indeed, the idea of suspending or standing down a person charged with a serious crime from their occupation is not a radical concept.

111. There are a number of examples, in other contexts, of standing down a person when he or she is charged with a serious criminal offence:

    (1) Regulation 3.10 of the *Public Service Regulations 1999* (Cth), made under s. 28 of the *Public Service Act 1999* (Cth), provides that an APS employee (namely, someone employed by a Government Agency) may be suspended from duty if the Agency Head believes on reasonable grounds that the employee may have breached the Code of Conduct (as set out at s. 13 of the *Public Service Act 1999* (Cth)) and the suspension is in the public interest. Pursuant to s. 13(4) of the Code of Conduct, it is a breach of the Code of Conduct for an APS employee not to comply with Australian law.

    (2) Section 98(1) of the *Defence Force Discipline Act 1982* (Cth) provides that a member of the Defence Force that has been charged with a service offence, a civil court offence or an overseas offence is liable for suspension from their duties. Pursuant to s. 2 of the Act, a "*civil court offence*" means an offence against the law of the Commonwealth or a State or Territory. It is notable that there is no right to an investigation or discretion to order an investigation in respect of a "*civil court offence*". Rather, s. 98(2) of the Act only allows an authorized officer under the

Act, to order an investigation into the offence and suspend the member for the period of the investigation if the offence in question is a "service offence" rather than a "*civil court offence*".

(3) Section 120A of the *Health Services Act 1997* (NSW) provides that if a member of staff is charged with having committed a serious criminal offence (being an offence punishable by a term of imprisonment of 5 years or more), the Health Secretary may suspend the member of staff from duty until the criminal charge has been dealt with. That piece of legislation does not provide for any investigation or right to be heard or finding to be made before the Health Secretary may impose a suspension.

(4) The rules of each of the National Basketball Association (**NBA**),[102] National Football League (**NFL**)[103] and the Australian Football League (**AFL**)[104] provide for a discretionary stand down where players are charged with certain serious criminal offences. The Football Federation Australia (**FFA**) deems a criminal charge to be a breach of its Code of Conduct which authorizes the standing down of a player.[105]

(5) Each of these sets of rules differs in significant respects from each of the others. They apply without distinction to the criminal offences irrespective of the maximum term of imprisonment potentially involved and, in the case of the NBA and NFL rules, appear to be drafted in the light of a different legal regime to that existing in Australia. It appears that in the United States, the legal position is that the Fifth Amendment protection against self-incrimination (which is the equivalent of the common law "right to silence") does not apply in a workplace investigation. The consequence of this is explained at p. 4 of the NFL Personal Conduct Policy contained at tab 5 of Exhibit R1 where it is stated:

> *"Because the Fifth Amendment's protection against self-incrimination does not apply in a workplace investigation, thee league will reserve the right to*

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102 NBA/NBPA Joint Policy on Domestic Violence, Sexual Assault and Child Abuse, p. F-7 (under hearing "Administrative Leave" at Exhibit R1, tab 1.

103 National Football League, Personal Conduct Policy, p. 4 (under heading "Leave with pay") at Exhibit R1, tab 5.

104 Australian Football League Rules, Rule 2.3(g) at Exhibit R1, tab 2.

105 Football Federation Australia Code of Conduct, Clause 2.2(j) and Article 21.5 of the Constitution at Exhibit R1, tab 4.

compel an employee to cooperate in its investigations even when the employee is the target of a pending law enforcement investigation or proceeding. An employee's refusal to speak to a league investigator undere such circumstances will not preclude an investigation from proceeding or discipline from being imposed".

(6) Thus, in many respects, the NFL rules are much more onerous than Rule 22A because the American equivalent of the right to silence can be ignored and the person charged with a criminal offence can be compelled to co-operate in the investigation even if he were otherwise unwilling to do so.

(7) Further, contrary to the suggestion put to Mr Greenberg in his cross-examination,[106] the policies of the NFL, AFL and FFA do not require a finding of misconduct before a suspension can be imposed. Further, while the player has a right to be heard under the FFA Policy as to sanction he has no such right in the NFL or AFL policies. The suggestion to the contrary made by Counsel for the applicant in relation to the NFL policy[107] refers to a disciplinary process that takes place after the criminal proceedings have concluded.

(8) The NFL rules also do not permit a player while suspended on leave without pay to continue to train with the team.

112. Further, a power of stand down is consistent with the courts' approach to the reasonableness of a direction (under an express or implied contractual power) that an employee be stood down on full pay pending an investigation into his or her conduct.[108]

113. Thus, in *Downe v Sydney West Area Health Service (No 2)* [2008] NSWSC 159; (2008) 71 NSWLR 633, Rothman J said (at [413]-[414]):

"…where a serious allegation is made against an employee, the employer ought (assuming the complaint is not manifestly vexatious) investigate the complaint. It is unnecessary to discuss issues as to whether procedural fairness is required. In circumstances where an employer, bona fide, takes a view that during the course

106 T-233.36-T-224.09.
107 T-224.04-34.
108 *Stewart's Guide to Employment La*w (6th ed., 2018), para. 12.18.

of such an investigation, the continued performance of duty by an employee is inconsistent with its interests, it is entitled, under the terms of the contract of employment, to direct the employee not to perform work. Not surprisingly, such a right is not dissimilar to the disciplinary policy promulgated by the [defendants]. Nothing in the disciplinary policy is unreasonable in its general application.

As a consequence of the foregoing, I conclude that it is a concomitant of one or other of the aforesaid implied duties that an employer has the right to direct not to perform work for a closed period during the course of an investigation into allegations of misconduct. Assuming that the duty is exercised in good faith, such a direction not to perform work is not a breach of a contract of employment. It is unnecessary and unwise to express a view as to other circumstances in which such a direction may be appropriate."

114. In the present case, the investigation and prosecution in respect of Mr de Belin is being carried out by the proper criminal authorities, rather than the respondents. But that does not make these considerations any less applicable: see the broad approach adopted in *Avenia v Railway & Transport Health Fund Ltd* [2017] FCA 859 at [150]-[174].

115. In *Downe*, Rothman J went on to conclude that an alleged right of "*indefinite*" suspension, i.e. one not tied to an investigation into the conduct, was not to be implied into an employment contract (see [415]-[429]). Such an indefinite suspension does not arise, of course, in this case, because the stand down will only apply to a finite period, being the duration of the criminal proceedings against Mr de Belin.

116. The Supreme Court of Canada has also expressly confirmed that it is legitimate to suspend an employee on full pay pending the determination of a criminal charge against him: *Cabiakman v Industrial Alliance Life Insurance Co* [2004] 3 SCR 195, 2004 SCC 55. In that case, the suspension was for 2 years and the employee in question was ultimately found not guilty. The Court noted, in particular, the importance of considering the impact on the employer's reputation were the employee not to be suspended: see [65], [77]. The Court also stated expressly that an administrative suspension in these circumstances was consistent with the presumption of innocence: [68].

(6) Supposed retrospective effect

117. Mr de Belin complains about the supposed "retrospective effect" of the New Rule and contends that this renders it – automatically – unreasonable (see [47] and [49] of the AOS). The New Rule is not a retrospective one. It operates prospectively, only authorizing the standing down of a player after it comes into effect. It is true that the stand down may be imposed in respect of circumstances that arose prior to the New Rule coming into effect but that does not make it retrospective.

118. Changes in the rules governing the game will, necessarily, affect factual situations or legal relationships that exist prior to the new rule coming into force. There is nothing improper in this, especially where there is an express power to make such changes. The position was well articulated by the United Kingdom Supreme Court in *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46; [2012] 1 AC 868, in the context of interference with property rights under the European Convention on Human Rights, as follows (at [120] per Lord Reed):

> *"In the criminal sphere, the Convention allows only a limited scope for retroactive legislation: the principles encapsulated in the maxim nullum crimen sine lege, nulla poena sine lege are reflected in article 7 [of the ECHR]. The position is different in the civil sphere. Changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even though the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment. The same point could be made in respect of other types of right and obligation of a civil character. As Lon L Fuller observed in The Morality of Law (revised ed 1969), p 60: "If every time a man relied on existing law in arranging*

his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."[109]

119. It is correct that in two cases – *Greig* at 352-354 and *Hughes* at 703 – courts have criticised the retrospective effect of a restraint and cited it as a factor undermining the reasonableness of that restraint. But the assertion that a rule is "retrospective" does not, by incantation, make the rule unreasonable. All depends on context.

120. For example, in both *Greig* and *Hughes* the vice of the new rule was that it applied penalties consequent upon the existence of contracts that had been entered into before those penalties were adopted. So, for example, Mr Greig had already entered into a contract with World Series Cricket before the ICC decided to ban him from playing Test Matches as a result of it. This was seen as being unfair.

121. There is no analogue to this situation in the present case.

122. As explained above, the Playing Contracts make clear that any changes to the NRL Rules apply to them, even if the change is made after the Playing Contract has been entered into. To the extent that any rule made after the Playing Contract has been entered into can sensibly be described as "retrospective" therefore (because it applies to a contract entered into before it was adopted), then it was manifestly clear at the time the Playing Contract was entered into that this was a possibility. It is hardly unfair to the player in question if the rules are then changed in accordance with what is contemplated by the contract. Were it otherwise, it would <u>never</u> be possible to change the rules after the Playing Contract had been entered into. This would turn the express provisions of the Playing Contract on their head.

123. It is correct, of course, that the New Rule applies to charges that were laid prior to it coming into effect. But this bears no sensible comparison with the situation in *Greig* and *Hughes* either. Logically, there are only two possibilities. The first is that, consistent with his plea, Mr de Belin is innocent of the charges against him. If this is the case, his position cannot be to complain that this effect of the New Rule is unfair because otherwise he would not have engaged in conduct that led him to be charged. He maintains he did not do anything wrong. Conversely, if he is guilty of this serious conduct (contrary to his

[109] See, further, the subsequent discussion at [121]-[122].

plea), then it lies ill in his mouth to say that he would not have committed this conduct if he had known about the stand down policy, with the result that to apply it to him is unreasonable and unfair. If he is guilty, he should not only be stood down on an interim basis but should be banned from the game forever. In short, the submission of retrospectivity is a red herring because it is fatuous to suggest that Mr de Belin would have acted any differently had he known that the New Rule might be implemented. Thus, there is no inherent unfairness.

(7) Other points raised by Mr de Belin

124. As to the other points raised by Mr de Belin:

(1) Mr de Belin asserts that the length of his stand down period is "*indeterminate*".[110] This is not correct. The length of that period is determined by the time it will take the District Court process to play out. It is not possible to identify the period of time that this will be to the precise day or month, but it is not open-ended.

(2) Mr de Belin asserts without any evidence that the stand down may extend beyond October 2020.[111] As explained above, this is not theoretically impossible, but it is unlikely.

(3) Mr de Belin asserts that the New Rule is inconsistent with his Playing Contract.[112] As noted below, this does not get past first base. The Playing Contract (and all other contractual documents) expressly contemplate that the NRL Rules may be changed (and changed after the date of the contract). Such changes are therefore necessarily consistent with his contract, not inconsistent with it.

(4) It is true, as Mr de Belin alleges, that he will be restrained from playing football for a period, and as a result will not be able to play in some matches.[113] This is a necessary consequence of the New Rule. Mr de Belin is, of course, already a very experienced player. The respondents note that Mr de Belin will continue to be paid and will continue to be able to train with his Club.

110 ASOC, para. 38(a).
111 ASOC, para. 38(b).
112 ASOC, para. 38(i).
113 ASOC, para. 38(a), (b), (e).

(5) It is also true that Mr de Belin is not permitted by his Playing Contract to play football for any other code outside the NRL Competition.[114] However, Mr de Belin has not suggested – in evidence or anywhere else – that he would choose to do so or that, if he did so choose, his Club would prevent him from doing so. It is noted that, regardless of the New Rule, he could not play overseas as his passport has been confiscated as a result of the serious criminal charges against him.[115]

(6) Mr de Belin asserts that he will be precluded from obtaining sponsorship by reason of the New Rule.[116] This is nonsense. Mr de Belin will be precluded from obtaining sponsorship because he has been charged with the violent rape of a women in company with another man. It is notable that Mr de Belin has advanced no evidence of any proposed sponsorship relationship that would supposedly be affected by his stand down, but not by his charge. It is fanciful to think that there would be any such relationship.

(7) Mr de Belin notes that his Club will continue to pay him and that they will be required to do so without receiving the benefit of his services for a period.[117] However, he has advanced no evidence whatsoever from his Club that they object to this course of action. Indeed, as explained above (at paragraph 112), his Club could probably itself stand him down from playing pending the determination of the criminal charges. Even if his Club – the Dragons – did so object, it is clear (as explained above) that the other 15 out of the 16 clubs in the NRL Competition support the respondents' approach.

(8) Mr de Belin suggests that there was no proper consultation with the RLPA before the New Rule was adopted.[118] However, the evidence suggests that there was extensive consultation with the RLPA.[119] Moreover, the applicant called Mr Tim Lythe, the COO of the RLPA, as a witness in his case. Mr Lythe could have given evidence as to the extent of consultation with the RLPA or any complaints which the RLPA had with the consultation process. He was not asked by the applicant to

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114 ASOC, para. 38(c)
115 See the report at Exhibit R2, tab 4, p. 50.
116 ASOC, para. 38(g).
117 ASOC, para. 38(h).
118 ASOC, para. 38(l).
119 Greenberg, paras. 130-133.

give such evidence. The inference is that Mr Lythe's evidence would not have assisted the applicant's case concerning proper consultation and, also, his failure to give such evidence means that the Court may more safely draw an inference available from the other evidence, namely that there was adequate or proper consultation with the RLPA.[120] In any event, that it is a question of process that does not go to the objective reasonableness of the New Rule.

125. The respondents therefore submit that it is clear that the New Rule is a reasonable one and respectfully submit that the Court should uphold it.

G. ALLEGED TORTIOUS INTERFERENCE WITH CONTRACT

126. As appears to be common ground (see [56]-[57] of the AOS), for the tort of interference in contractual relationships to be made out, it must be shown that:

(1) The tortfeasor interfered with the contractual relations of another.

(2) This was done knowingly and intentionally.

(3) The conduct was not justified.

(4) The victim has suffered loss as a result.

127. Mr de Belin's claim fails at each stage of this analysis.

128. First, there is nothing which could constitute interference or inducement to breach in this case. As explained above, Mr de Belin's Playing Contract, and his arrangement (contractual or otherwise) with the NRL through his registration application, require that he comply with the NRL Rules, as amended from time to time (even if amended after the date of his contract). By definition, therefore, a change in the NRL Rules is not a breach of, or interference with, the plaintiff's Playing Contract or any other contractual arrangement the plaintiff is party to. Rather, it is simply the working out of the process expressly provided for and contemplated by that contract. Mr de Belin has no right or obligation to play in matches in the NRL Competition without being subject to the NRL Rules (compare [58] AOS).

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120 *Jones v Dunke*l (1959) 101 CLR 298 at 320; *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418–419.

129. Indeed, Mr de Belin seems to accept that if he was suspended from playing pursuant to the NRL Rules prior to amendment (e.g. because of an act of deliberate violence on the field), this would not be an interference with his Playing Contract (see [59] of the AOS). The position is, logically, no different when he is stood down from playing as a result of a permitted amendment to the NRL Rules. There is no basis for Mr de Belin's assertion (at [61] AOS) that the intention of the parties when entering into these contractual arrangements was that the NRL's rule-making power was somehow limited or constrained so as to prevent it from introducing an additional provision allowing players to be stood down or suspended from matches in particular circumstances.

130. Mr de Belin appears to contend that the alleged request that he stand down voluntarily prior to the adoption of the New Rule was an interference with his Playing Contract (see [60] AOS). While it is denied that this would constitute a relevant interference, because Mr de Belin refused this alleged request (and therefore could not possibly have suffered any loss as a result), it is not necessary to consider this question further.

131. Secondly, there was certainly no knowing and intentional interference by the respondents, who have at all times proceeded on the basis that they have the power to amend the NRL Rules consistent with the players' Playing Contracts. The fact that the respondents were aware of the terms of the Playing Contract (as noted in [57] AOS) is plainly not enough.

132. Thirdly, even if there were an interference of some (unknown) sort, then the respondents' conduct is justified for the reasons set out above and therefore lawful.

133. Fourthly, as considered in the context of the misleading and deceptive conduct and unconscionability claims, below, no evidence has been put forward by Mr de Belin that he has suffered any loss as a result of the respondents' conduct.

134. There is therefore nothing in this claim and it should be dismissed.

H. ALLEGED MISLEADING AND DECEPTIVE CONDUCT

135. Mr de Belin contends that, prior to the adoption of the New Rule on 11 March 2019, the respondents made various misleading and/or deceptive statements, falling into two categories:

(1) First, the so-called "Conduct Representations".[121] In essence, it is alleged that the respondents stated publicly between 17 December 2018 and 27 February 2019 that they had formed the view that Mr de Belin was guilty of the offence with which he had been charged and/or had breached the NRL's Code of Conduct and/or that Mr de Belin had brought the game into disrepute.

(2) Secondly, the so-called "Suspension Representation". In essence, it is alleged that the respondents stated publicly between 28 February 2019 and 10 March 2019 that Mr de Belin had been suspended or stood down from playing in the NRL Competition.[122]

136. These Representations are said to have been misleading or deceptive and to have caused Mr de Belin loss and damage.

(1) Utility of the present claim

137. There is no utility in Mr de Belin's claim under s. 18 ACL, even if it were a good one (which it is not).

138. First, Mr de Belin has not suffered any loss because of the alleged conduct which is recoverable under ss. 236 or 237 ACL. In his ASOC, he alleges that he has suffered (a) "*irreparable damage to his reputation*"; (b) "*hurt and stress*" and (c) "*financial loss*".[123]

139. As to (a) and (b), the assessment of damages pursuant to ss. 236 and 237 ACL does not mirror that of the law of defamation, and there is no scope for damages merely to "vindicate" a person's reputation: see *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 112 ALR 511 at 526-527. Rather, the court endeavours to ascertain the amount in money required to compensate the applicant for any loss or damage they have suffered.

140. In the present case, in any event, there is no admissible evidence that Mr de Belin's reputation has been harmed in the period from 17 December 2018 to 10 March 2019 as a result of the Representations. *A fortiori* there is no evidence that the Representations caused any harm beyond the inevitable harm to his reputation caused by the fact that it is

121 ASOC, para. 15 and [5], [18] of the AOS.
122 ASOC, para. 19.
123 ASOC, para. 24.

widely known and reported in the media that he has been charged by police with aggravated sexual assault in company. Nor is there any admissible evidence that he has suffered hurt and stress as a result of the Representations.

141. In respect of (c), again there no evidence of financial loss during this period, whether as a result of the supposed damage to reputation or hurt or stress or otherwise.

142. It is noted that Mr de Belin has chosen not to give any evidence on his behalf that might go some way to supporting such a claim, and no effort is made in the AOS to articulate the loss or damage that Mr de Belin is said to have suffered. In those circumstances, no loss or damage for which Mr de Belin should be compensated has been made out.

143. Further, and in any event, there is no entitlement to aggravated or exemplary damages (as claimed in [67] of the AOS) under the ACL: *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251 at 262 per French J; *Seafolly Pty Ltd v Madden (No 4)* (2014) 320 ALR 763; [2014] FCA 980 at at [55] per Tracey J. It is noteworthy that the applicant cites no authority in support of his supposed entitlement to such damages.

144. Mr de Belin suggests that, even if he has suffered no loss, he should get a declaration as to the alleged infringement of s. 18 ACL (see [63] AOS). However (and even if there was a contravention, which there is not, as explained below), such a declaration would also be devoid of any utility. A declaration will be devoid of utility where, for example, the conduct did not result in damage to the applicant and/or there is no reason to believe that the offending conduct will be repeated: *Mikaelian v Commonwealth Scientific & Industrial Research Organisation* (1999) 163 ALR 172 at [87] per Hill J.

145. Mr de Belin appears to accept that, from the imposition of the New Rule on 11 March 2019, it is undoubtedly correct that he <u>has been</u> stood down under the Rules and also that it is also clear that he has <u>not</u> been stood down because of any conduct which the respondents say he committed, but as an operation of the no-fault automatic stand down provisions applicable where serious criminal charges have been laid. Moreover, that this is the position will be overwhelmingly clear from the judgment of this Court (and was also clear form the respondents' submissions at the hearing before Rares J on 7 March 2019). Any proposed declarations as to what the position was or was not in the limited period between his charge and the adoption of the New Rule therefore have no utility.

146. Additionally, a bare declaration that ACL s 18 or one of its counterparts has been contravened is generally inappropriate: *ACCC v Global One Mobile Entertainment (No 2)* [2011] FCA 670 at [5]-[15] per Bennett J. This is precisely the declaration sought by Mr de Belin in paragraph 3 of his Amended Originating Application (and reaffirmed in [63] and [64] of the AOS).

(2) The Conduct Representations: whether misleading or deceptive

147. The respondents accept that, were the Conduct Representations actually made, these would have been misleading. The respondents had not formed the view that Mr de Belin was guilty of the charges against him or had breached the Code of Conduct or had brought the game into disrepute.

148. However, it appears to be common ground that the respondents never <u>expressly</u> stated the matters that are said to constitute the Conduct Representations. Rather, Mr de Belin contends that this was the natural implication arising from things they did say.

149. The actual statements said to have been made are not addressed in the AOS, which unhelpfully rolls Mr de Belin's allegations up into generalized assertions not tied to particular documents.[124] The Court plainly cannot consider Mr de Belin's allegations when presented in that way.

150. Mr de Belin's pleaded case on this point is articulated in Schedule A to his response to the respondents' request for further particulars on this matter dated 25 March 2019. This Schedule sets out the statements of the respondents – which are all contained in newspaper reports collated by Mr de Belin's legal team – on which he relies. It is these statements that must be considered to see if the implied representations alleged by Mr de Belin are established. In short, however, none of these statements are sufficient for the Court to be satisfied that a reasonable reader of these statements would have attributed to them the meaning for which Mr de Belin contends.

151. In relation to the statements relied upon in Schedule A:

(1) **17 December 2018, Exhibit A5 (RT-7), p. 209:** The Chair of the respondents, Mr Peter Beattie, stated that "*reports like those recent scandals*" involving high-profile

[124] See, by way of example, [18], [22] AOS.

players (including Mr de Belin amongst others) were an embarrassment to the NRL and were killing its reputation. Plainly, is a reference to the reports of the allegations. There is no suggestion that Mr de Belin is guilty of anything.

(2) **16 February 2019, Exhibit A5 (RT-7), p. 210:** A statement from the ALRC stated that "*The ALRC is strongly opposed to anyone in Rugby League being involved in violence of any kind, especially domestic violence and any behavior which brings the game into disrepute*" and "*The ARLC has instructed the NRL to take the strongest possible action against any player engaged in such behaviour from serious fines, to suspension and de-registration*". Again, there is nothing here that suggests Mr de Belin is guilty of anything. Indeed, the headline of the newspaper report is that "*ARL Commission could move to stand down <u>accused</u> NRL players*" (emphasis added).

(3) **16 February 2019, Exhibit A5 (RT-7), p. 211:** Mr Beattie stated that "*We need to get to a point where – as a matter of principle – we know what we would do with a particular player after they commit a particular offence*". Again, there is nothing here that suggests any particular player, including Mr de Belin, is guilty of any offence.

(4) **17 February 2009, Exhibit A5 (RT-17), pp. 10-11:** This is a further report of the ALRC statement referred to in sub-paragraph (2) above. It takes matters no further.

(5) **19 February 2019: Exhibit A5 (RT-7), p. 214:** Mr Beattie stated that "*If I was in a position like this [i.e. if charged with a serious offence] I would stand myself down*" and "*If I was involved in a matter like this [i.e. being subject to a serious criminal charge] – which I wouldn't be – but if I was, I would stand down*" and "*We'll make certain that any offences involving women, any issues involving violence are just simply unacceptable for rugby league*" and "*You'll hear more about it after the 28th, but there will be a clear decisive position going forward because frankly, we've had enough of this bad behaviour*". Again, there is nothing here that suggests any particular player, including Mr de Belin, is guilty of anything. Even if it was being suggested that Mr de Belin had engaged in "*bad behaviour*", that is not the pleaded misleading and deceptive conduct case. Rather, it is asserted that representations were misleading or likely to mislead because they

suggested that the respondents had formed the view that Mr de Belin was guilty of the alleged offence, or that he had engaged in conduct that warranted his immediate suspension as a player or that he had breached the NRL Code of Conduct or that he had, by his conduct, brought the game of rugby league into disrepute.

(6) **21 February 2019, Exhibit A5 (RT-7), pp. 216-217:** Mr Beattie stated words to the effect that the behaviour of the code's star players is likely to force a change in policy over player behaviour by the ARLC. Mr Beattie also said words to the effect that poor behaviour would not be tolerated and there would be consequences for those who misbehave. Again, there is nothing here that suggests Mr de Belin is guilty of anything. Indeed, the article is plainly discussing "*up to 15 off-field scandals which have rocked the code in the last three months*", including the case of Ben Barba, who was sacked after an incident involving his partner.

(7) **21 February 2019, Exhibit A5 (RT-17), p. 13:** Mr Beattie said "*If I was chairman of the NRL, which I am, and I was involved in a matter like this [i.e. a serious criminal charge like that to which Mr de Belin is subject], which I wouldn't be, but if I was, I would stand down*". Again, there is nothing here which suggests Mr de Belin is guilty of anything.

(8) **26 February 2019, Exhibit A5 (RT-17), pp. 23-24:** Mr Beattie said that "*This [i.e. the issue of serious accusations against players] will not be swept under the carpet*". Again, there is nothing here to suggest that Mr de Belin is guilty of anything.

152. It is also noted, in further response to [22] and [23] of the AOS, that the applicant does not plead any case relating to the Conduct Representations after 27 February 2019 (a position that is reaffirmed in [25] of the AOS). As a consequence, to the extent that Mr de Belin seeks to rely on matters after that date to establish the Conduct Representations, this paragraph is irrelevant and should be disregarded. Even if the applicant was to seek to leave to amend the ASOC to include such allegations, the respondents do not accept that this paragraph accurately summarises the effect of statements made on 28 February 2019 (which the AOS does not particularise).

153. In summary, therefore, there is no basis whatsoever for the implied representations that Mr de Belin seeks to attribute to the respondents. His claim must therefore fail.

(3) The Suspension Representation: whether misleading or deceptive

154. Mr de Belin contends here that, in a two-week period between 28 February 2019 and 10 March 2019, the respondents stated that Mr de Belin had been suspended and/or stood down and/or banned and that this was misleading or deceptive because during that period he had not been.

155. This claim involves angels dancing on the head of a pin. As explained above, on 28 February 2019 the respondents resolved to adopt a no-fault stand down policy in respect of charges like those to which Mr de Belin is subject. They also resolved that this would be implemented via a change to the NRL rules to be formally adopted before the start of the NRL season on 14 March 2019. As at 28 February 2019, therefore, it was absolutely clear that Mr de Belin would not play in any matches in the new season. If any reference was made to him being stood down or banned during his period, therefore, that was not misleading. Looked at practically, rather than semantically, at this point the respondents had decided that Mr de Belin would not play any games in the new season, albeit that the rule technically giving effect to this was not adopted until 11 March 2019 (as made clear by the Kardos Scanlon letter referred to at [7] AOS,[125] and the submissions of Leading Counsel at the hearing before Rares J on 7 March 2019).

156. In any event, there are very few statements where it can sensibly be said that the respondents were saying that Mr de Belin <u>had been</u> stood down at this point. All of the other statements on which Mr de Belin relies were that he <u>would be</u> stood down from any games in the new season (which was incontrovertibly correct, even putting these linguistic distinctions to one side).

157. In relation to each of the statements relied upon in Schedule A:

    (1) **28 February 2019, Exhibit A5 (RT-8), p. 220:** Mr Greenberg said words to the effect that Mr De Belin would be the first player stood down under the new policy and stressed it was not a judgement on his guilt or innocence. Mr Greenberg said Mr de Belin would be stood down under the new policy and cannot play until the completion of that case. This was all correct. Mr de Belin would be the first player

[125] Which is addressed at [30] of the Defence.

stood down, as has proven to be the case. The submission in the first sentence of [7] of the AOS does not accurately characterize what was announced.

(2) **28 February 2019, Exhibit A5 (RT-15), pp. 273-275:** A senior reporter for NRL.com, Brad Walter, stated that Mr de Belin was "*banned from playing after the ARL Commission introduced a mandatory 'no fault stand down policy'…*". As noted above, it is correct that, at this point, the New Rule had not been formally put into effect. But it remained correct that, as at that point, Mr de Belin would not play any games in the new season because of the new policy adopted by the respondents. The article also reports Mr Beattie as giving an explanation about why the respondents changed their policy. However, none of that supports the alleged Suspension Representation.

(3) **28 February 2019, Exhibit A6 (RT-16), pp. 7-8:** Mr Greenberg stated that "*I can advise today that a charge against Jack de Belin is in the serious indictable offence category and he'll be stood down under the new no fault policy*". Again, this was correct; Mr de Belin would be stood down under the new policy, as has proven to be the case.

(4) **28 February 2019, Exhibit A6 (RT-18), p. 34:** This is a report that appears to be from the Associated Press. It is therefore not something attributable to the respondents.

(5) **28 February 2019, Exhibit A5 (RT-8), pp. 231-232:** A report from NRL.com stated that Mr de Belin had proclaimed his innocence in the wake of the NRL banning him from playing. Again, as explained above by this time it was clear that Mr de Belin would not play in the new season, and so this statement was practically correct. The article also contains a report of a statement from Mr Greenberg that Mr de Belin would be stood down under the no fault policy. Again, this was correct.

(6) **1 March 2019: Exhibit A5 (RT-8), p. 234:** Mr Beattie stated that Mr de Belin would be stood down under the new policy. Again, this was entirely correct.

(7) **1 March 2019, Exhibit A5 (RT-8), p. 235:** A report from NRL.com stated that Mr de Belin had become the first player stood down under the new policy. Again, as explained above, this was substantially correct.

(8) **6 March 2019, Exhibit A5 (RT-8), p. 280:** A report by NRL.com Chief Reporter, Michael Chammas, stated that Mr de Belin had been given some time away to deal with the impact of the NRL standing him down. Again, as explained above, this was substantially correct.

(9) **6 March 2019, Exhibit A5 (RT-15), p. 282:** In an interview on the ABC's 7.30 program, Mr Beattie stated that three players had already been stood down under the new policy. It is correct that the New Rule was not formally adopted until 11 March 2019, so that this statement was technically incorrect (as Mr Greenberg candidly accepted). But, for the reasons given in paragraph 155 above this statement remained substantially correct. The allegation at [24] AOS is therefore rejected.

158. Even if Mr de Belin could establish that the limited statements where a statement was made to the fact that Mr de Belin had been stood down (as opposed to would be stood down) were misleading during this period, he would then have to show some loss arising from these statements. As explained above, he has advanced no evidence of loss in relation to any of the statements made by the respondents. *A fortiori*, therefore, he has not established loss in relation to this sub-set of those statements. For instance, even if it were to be found that the statement made by Mr Beattie referred to in paragraph 157(9) above, contravened s. 18 ACL, it is difficult if not impossible to see any causally related damage to Mr de Belin which flowed from that representation given the fact that Mr de Belin was actually stood down five days later. Not one piece of evidence has been led to suggest any loss in that five day period.

I. ALLEGED UNCONSCIONABILITY

159. Mr de Belin contends that the NRL's conduct in relation to him has been unconscionable within the meaning of s. 21 ACL (as informed by the factors s. 22 ACL). This is something of an omnibus claim, by which Mr de Belin relies on all of his other causes of action, together with certain additional discrete matters.[126]

[126] See [31]-[42] AOS.

(1) Threshold issues

160. Like Mr de Belin's claim under s. 18 ACL, his claim under s. 21 suffers from certain threshold flaws.

161. First, s. 21 only applies where a person is acting in connection with the supply or acquisition of goods or services to or from a person. It thus applies to "*contracts for services*" but not "*contracts of service*": see the definition of "services in s. 2 ACL.

162. In the present case, Mr de Belin is under a contract of service with his Club. He is in an employment relationship with that Club and contends that the NRL has behaved unconscionably in relation to that employment relationship. Similarly, it was held in *Adamson* (in the context of a claim under s. 45 of the Trade Practices Act) that a change to the governing rules of rugby league was not a change that related to the supply of services (in the relevant sense) because players were subject to contracts of service: *Adamson at* 332-337 per Wilcox J.

163. As a consequence, s. 21 has no application.[127]

164. Secondly, Mr de Belin has again, as with his claim under s. 18 ACL, not led any evidence as to what his loss is said to be as a result of this unconscionable conduct.

(2) The alleged unconscionability

165. Even if Mr de Belin can overcome the threshold problems noted above, Mr de Belin's unconscionability claim is based on his other causes of action succeeding, together with certain discrete additional matters.[128] If follows that whether his claim of unconscionability succeeds depends on which other aspects of the claim are made out.

166. In any event, even assuming every aspect is made out, there is nothing approaching unconscionability here. What is required is the need for conduct to expose some "*special situation of disadvantage*" or some "*unconscientious advantage*" being taken which deprives a person of the ability to make some "*worthwhile judgment*": see the summary in *Robinson* at [87]-[96]. It involves a higher moral standard than unfairness or

127 See *Stewart's Guide to Employment Law* (6th ed., 2018), para. 6.15.
128 ASOC, para. 25.

unjustness: *Parker Trading as on Grid off Grid Solar v Switchee Pty Ltd Trading as Australian Solar Quotes* [2018] FCA 479 at [77] per Gleeson J.

167. In the present case, the NRL has simply amended its rules in a manner that – subject to the argument about restraint of trade – it is accepted that the NRL has power to do. This accorded with the contract which Mr de Belin had agreed, following the provision to him of appropriate advice. It is true that the new policy differed from the policy that it had previously adopted [129] but there is nothing in that which makes the change unconscionable.

168. In response to the allegations made in the AOS:

(1) As explained above, the respondents did not make the representations alleged in [32.1], [32.2] and [41(c)] of the AOS. Even if such representations were made, there is no basis whatsoever to assert that they were "*arrogant [and] knowingly inaccurate*" as alleged at [32.2]. This is an allegation of deliberate falsity and is not pleaded nor particularised.

(2) There was nothing unfair or unreasonable in preventing Mr de Belin from pursuing his trade, to the extent that he has been so prevented, as alleged in [32.3.1] of the AOS, for the reasons set out above.

(3) The respondents have not prevented the performance by Mr de Belin or his Club of their respective obligations under the Playing Contract, whether indefinitely or at all, as alleged in [32.3.2] of the AOS. The Playing Contract is subject to the NRL Rules, as explained above.

(4) As to [32.3.3] and [33] of the AOS, it is true that the New Rule differed from the previous policy and thus the way in which these matters had previously been treated. That is why it was "new". But there is no basis for any suggestion that the respondents were somehow prevented from changing the NRL Rules. For example, there is (rightly) no allegation that any estoppel is in play. Plainly, the respondents were always entitled to amend the NRL Rules, provided that is not an unlawful restraint of trade.

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[129] As noted by Mr de Belin in various sub-paragraphs of ASOC, para. 25.

(5) As explained above, there was adequate consultation with the RLPA, contrary to what is said by [32.3.4]. Mr de Belin has led no evidence to suggest any failure in consultation.

(6) As to [32.3.5], [33] and [41(d)] of the AOS, it is correct that Mr de Belin cannot appeal against his standing down. The stand down is triggered by his serious criminal charge, and he accepts that he has been so charged. There is nothing that Mr de Belin can say to change this, and it is noted that he does not put forward any grounds as to why he should not be stood down on the terms of the New Rule adopted.

(7) The respondents reject the allegation (made at [33] of the AOS) that Mr de Belin's interests have been disregarded. The respondents gave anxious consideration to those interests – together with the interests of all other stakeholders in the game of rugby league in Australia – before making their decision.[130]

(8) In respect of [6], [35] and [41(c)] of the AOS and paragraph 25(k) of the ASOC, there is no evidence to support the various allegations as to what took place at the meeting between Mr de Belin and Mr Greenberg on 27 February 2019. Mr de Belin has led no evidence as to what is meant to have happened at the meeting. Mr de Belin was present in Court for the majority of the hearing but chose not to give evidence. Mr Gillis, his manager, was present at the meeting[131] and although he gave evidence, he did not give any evidence at all about what happened at the meeting. Again, the inference must be that the evidence of Mr de Belin or Mr Gillis on such a topic would not have assisted thee applicant's case. Thus, the only evidence of the meeting is that given by Mr Greenberg.[132] That evidence should be accepted, especially in the light of the fact that it is not contradicted by Mr de Belin or Mr Gillis. Mr Greenberg's evidence does not reveal that anything untoward happened or that he acted in any way unconscionably. Further, even if the Court assumed that what was said about this meeting in the ASOC is correct, it cannot sensibly lead to the conclusion that Mr de Belin was taken advantage of when he did not agree to anything as a result of the meeting. That is, if it were to be found

130 Greenberg, para. 113(o).
131 T-310.31-T-310.34 (Greenberg).
132 T-239.40-T-242.30, T-310.31-T-310.34 (Greenberg).

that Mr Greenberg tried to convince Mr de Belin to step down of his own accord, that could never make out a claim of unconscionability when Mr de Belin apparently rejected that suggestion.

(9) Mr de Belin alleges that the New Rule is discriminatory (at [35] of the AOS). This is not explained or particularised. It appears to be a complaint that in the past the respondents had a different policy (see [36] of the AOS). Mr de Belin also relies on the NRL Rules (pre amendment) as an "industry code" that he contends should govern his treatment (see [37] of the AOS). Plainly, however, it must be open to the respondents to change their policy where the need arises. A change in policy will mean players are treated differently from how they were treated before the change. But this is not discrimination. Were it otherwise, the NRL Rules would be ossified forever, contrary to the express references to their potential amendment in all of the contractual documents.

(10) Mr de Belin contends that the respondents should have entered into an individual negotiation with him (at [35], [38] and [41(a)] of the AOS). This is difficult to understand. The respondents did hold a meeting with Mr de Belin on 27 February 2019, but Mr de Belin says the mere holding of that meeting was an unconscionable act. Moreover, it is quite clear from the present proceedings (which were issued before the New Rule was formally adopted) that Mr de Belin does not accept that he should be stood down, whether for the period required by the New Rule or at all. It is therefore not clear what Mr de Belin says these negotiations should have been about. Any such individual negotiation also would have been futile as the New Rule is intended to apply to all players equally, not just Mr de Belin.

(11) Mr de Belin complains of the supposedly "*retrospective*" nature of the New Rule (at [38] and [41(d)] of the AOS). This is addressed above.

(12) Mr de Belin says that it was the objective intention of the parties when the Playing Contract was entered into, and when he applied to be registered, that he would not be stood down from playing unless the NRL were satisfied of his misconduct and he received procedural fairness (at [38] of the AOS). This is tantamount to saying that the NRL was prohibited from amending the NRL Rules to provide for any form of stand down that did not already exist in the Rules. That is obviously

inconsistent with what all the contractual documents say. Indeed, Mr de Belin expressly accepts that he has contractually agreed to abide by the NRL Rules as amended from time to time (see [39] of the AOS).

(13) It is also said that Mr de Belin's right to procedural fairness has been "*unilaterally removed*" (at [39] of the AOS). The premise upon which this submission is based is a false one. It is impossible to "*remove*" something which did not exist. The New Rule makes it plain that there is no provision for review or appeal which are applicable in respect of its application and for good reason, as explained above.

(14) Mr de Belin also contends that the New Rule is contrary to the terms and intent of the CBA (at [41(e)] of the AOS). This is, again, incorrect. The CBA expressly contemplates that changes can be made to the NRL Rules and, as explained above, consultation with the RLPA took place.

169. In those circumstances, the allegations of unconscionability and lack of good faith made by Mr de Belin should be rejected.

170. The applicant's claims should be dismissed with costs.

ALAN SULLIVAN QC

Level 29, Chifley Tower

Tel: 9231 2936

OLIVER JONES

Eleven Wentworth Chambers

Tel: 8228 2020

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