GENERAL DISTRIBUTION

FEDERAL COURT OF AUSTRALIA

Seven Network Limited v News Limited [2007] FCA 1062

TRADE PRACTICES – retail pay television provider ('*Foxtel*') refuses to take premium sports channels from a channel supplier ('*C7*') incorporating Australian Football League ('*AFL*') content – a consortium, including Foxtel, enters into a '*Master Agreement*' providing for bids to be made for the AFL pay television rights and the National Rugby League ('*NRL*') pay television rights – consortium's bids succeed – C7, deprived of '*marquee*' sports content, goes out of business.

TRADE PRACTICES – whether Foxtel, by refusing to accept offers by C7 to supply sports channels took advantage of its substantial power in the retail pay television market, in contravention of s 46(1) of the *Trade Practices Act 1974* (Cth) ('*TP Act*') – whether Master Agreement contained a provision ('*Master Agreement Provision*') having the purpose, effect or likely effect of substantially lessening competition, in contravention of s 45(2)(a)(ii) of the *TP Act* – whether giving effect to the Master Agreement Provision contravened s 45(2)(b)(ii) of the *TP Act*.

TRADE PRACTICES - markets – SSNIP test – limits of expert evidence – relevance of perceptions of industry participants – whether applicants have made out the existence of the pleaded wholesale sports channel, AFL pay rights, NRL pay rights or retail pay television markets.

TRADE PRACTICES – whether Master Agreement Provision had the effect of substantially lessening competition in the retail pay television market – whether at the time the parties give effect to the Master Agreement Provision, it had or was likely to have the effect of substantially lessening competition in the retail pay television market – significance of the weakness of Foxtel's only potentially significant competitor in the retail pay television market.

TRADE PRACTICES – purpose – whether, if parties to the Master Agreement had the objective of '*killing' C7*, that was a purpose of substantially lessening competition – whether all parties responsible for including an impugned provision in the contract, arrangement or understanding must fear the purpose of substantially lessening competition – whether all parties responsible for including the Master Agreement Provision shared the proscribed purpose.

TRADE PRACTICES – purpose – whether the parties to the Master Agreement had the purpose of substantially lessening competition – whether conduct crossed the boundary between legitimate, albeit ruthless, competitive conduct and anti-competitive conduct proscribed by s 45(2) of the *TP Act.*

TRADE PRACTICES – taking advantage of substantial market power – whether Foxtel took advantage of its substantial market power in the retail pay television market by refusing to accept offers from C7 to supply sports channels and by refusing to negotiate with C7 pending the award of the AFL pay television rights and the NRL pay television rights – whether Foxtel '*overbid*' for the AFL pay television rights.

TRADE PRACTICES – whether denial of retail access to C7 via the Telstra Cable, pursuant to exclusivity provisions of a '*Broadband Cooperation Agreement*' between Foxtel and Telstra, substantially lessened competition in the retail pay television market.

TRADE PRACTICES – whether the provisions of a content sharing agreement between Foxtel and Optus (another retail pay television provider) had the effect or likely effect of substantially lessening competition in the retail pay television market.

TRADE PRACTICES – misleading or deceptive conduct – whether pleaded representations established by the evidence– representations with respect to a future matter – falsity – reliance.

EQUITY– confidentiality – whether information relating to C7's bid for the NRL pay television rights was confidential – whether publication destroys confidentiality.

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Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005 (Cth)
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Broadcasting Legislation Amendment Act (No 2) 2001 (Cth) Sch 1, cl 5
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Telecommunications Act 1997 (Cth) s 7
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Television Broadcasting Services (*Digital Conversion) Act 1998* (Cth)
Trade Practices Act 1974 (Cth) ss 4, 4D, 4E, 4F, 4G, 4L, 4M, 6, 45, 45D, 45DA, 46, 47, 50, 51A, 52, 76, 82, 87, 87A, 87B, 88, 151AK, 152AA, 152AB, 152AC, 152AL, 152AR, 152CM
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Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199
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Australian Competition and Consumer Commission v Boral Ltd (2000) 106 FCR 328
Australian Competition and Consumer Commission v CC (NSW) Pty Ltd (1999) 92 FCR 375
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Australian Competition and Consumer Commission v Visy Paper Pty Ltd (2000) 186 ALR 731
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Australian Gas Light Co v Australian Competition and Consumer Commission (2003) 137 FCR 317
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Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247
Bell Group Ltd v Westpac Banking Corporation (Supreme Court of Western Australia, Owen J)
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Bitannia Pty Ltd v Parkline Constructions Pty Ltd [2006] NSWCA 238
Boral Besser Masonry Ltd v Australian Competition and Consumer Commission (2003) 215 CLR 374
Brandi v Mingot (1976) 12 ALR 551
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Broome v Cassell & Co Ltd [1972] AC 1027
Browne v Dunn (1893) 6 R 67
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Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592
C7 Pty Ltd v Foxtel Management Pty Ltd [2001] FCA 1864
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HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640
Hughes v Western Australian Cricket Association (Inc) (1986) 19 FCR 10
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Jones v Dunkel (1959) 101 CLR 298
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SEVEN NETWORK LIMITED and ANOR v NEWS LIMITED and ORS
NSD 1223 of 2002

SACKVILLE J
27 JULY 2007
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1223 of 2002**

BETWEEN: **SEVEN NETWORK LIMITED**
First Applicant

C7 PTY LIMITED
Second Applicant

AND: **NEWS LIMITED**
First Respondent

SKY CABLE PTY LIMITED
Second Respondent

TELSTRA MEDIA PTY LIMITED
Third Respondent

FOXTEL MANAGEMENT PTY LIMITED
Fourth Respondent

TELSTRA CORPORATION LIMITED
Fifth Respondent

TELSTRA MULTIMEDIA PTY LIMITED
Sixth Respondent

PUBLISHING AND BROADCASTING LIMITED
Seventh Respondent

NINE NETWORK AUSTRALIA PTY LIMITED
Eighth Respondent

PREMIER MEDIA GROUP PTY LIMITED
Ninth Respondent

AUSTRALIAN RUGBY FOOTBALL LEAGUE LIMITED
Twelfth Respondent

NATIONAL RUGBY LEAGUE INVESTMENTS PTY LIMITED
Thirteenth Respondent

NATIONAL RUGBY LEAGUE LIMITED
Fourteenth Respondent

FOXTEL CABLE TELEVISION PTY LIMITED
Fifteenth Respondent

OPTUS VISION PTY LIMITED
Sixteenth Respondent

AUSTAR UNITED COMMUNICATIONS LIMITED
Seventeenth Respondent

AUSTAR ENTERTAINMENT PTY LIMITED
Eighteenth Respondent

IAN HUNTLY PHILIP
Nineteenth Respondent

NEWS PAY TV PTY LIMITED
Twentieth Respondent

PBL PAY TV PTY LIMITED
Twenty-First Respondent

SINGTEL OPTUS PTY LIMITED
Twenty-Second Respondent

OPTUS VISION PTY LTD
First Cross Claimant

SINGTEL OPTUS PTY LIMITED
Second Cross Claimant

SEVEN NETWORK LIMITED
First Cross Respondent

C7 PTY LIMITED
Second Cross Respondent

JUDGE: **SACKVILLE J**
DATE OF ORDER: **27 JULY 2007**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. Optus, on or before 24 August 2007, file and serve draft Short Minutes of Order disposing of the Cross-Claim.

2. The Respondents file and serve, on or before 24 August 2007, any evidence upon

which they rely in relation to costs.

3. The Respondents file and serve, on or before 24 August 2007, written submissions as to costs.

4. Seven file and serve, on or before 7 September 2007, any evidence in reply on the question of costs.

5. Seven file and serve, on or before 7 September 2007, written submissions on costs.

6. The written submissions on costs of each group of Respondents not exceed ten double-spaced pages in length.

7. Seven's written submissions on costs not exceed 15 double-spaced pages in length.

8. Seven file and serve, on or before 24 August 2007, written submissions as to whether any further findings should be made in relation to damages or other relief ('*further findings*') and, if so, what issues and evidence would need to be addressed.

9. The Respondents file and serve on or before 7 September 2007, written submissions as to whether any further findings should be made and, if so, what issues and evidence would need to be addressed.

10. Seven's submissions as to any further findings should not exceed 15 double-spaced pages in length.

11. The written submissions of each group of respondents as to any further findings should not exceed ten double-spaced pages in length.

12. The proceedings be adjourned until 17 September 2007 at 10.15 am.

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

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **NSD 1223 of 2002**

BETWEEN: **SEVEN NETWORK LIMITED**
First Applicant

C7 PTY LIMITED
Second Applicant

AND: **NEWS LIMITED**
First Respondent

SKY CABLE PTY LIMITED
Second Respondent

TELSTRA MEDIA PTY LIMITED
Third Respondent

FOXTEL MANAGEMENT PTY LIMITED
Fourth Respondent

TELSTRA CORPORATION LIMITED
Fifth Respondent

TELSTRA MULTIMEDIA PTY LIMITED
Sixth Respondent

PUBLISHING AND BROADCASTING LIMITED
Seventh Respondent

NINE NETWORK AUSTRALIA PTY LIMITED
Eighth Respondent

PREMIER MEDIA GROUP PTY LIMITED
Ninth Respondent

AUSTRALIAN RUGBY FOOTBALL LEAGUE LIMITED
Twelfth Respondent

NATIONAL RUGBY LEAGUE INVESTMENTS PTY LIMITED
Thirteenth Respondent

NATIONAL RUGBY LEAGUE LIMITED
Fourteenth Respondent

FOXTEL CABLE TELEVISION PTY LIMITED
Fifteenth Respondent

OPTUS VISION PTY LIMITED
Sixteenth Respondent

AUSTAR UNITED COMMUNICATIONS LIMITED
Seventeenth Respondent

AUSTAR ENTERTAINMENT PTY LIMITED
Eighteenth Respondent

IAN HUNTLY PHILIP
Nineteenth Respondent

NEWS PAY TV PTY LIMITED
Twentieth Respondent

PBL PAY TV PTY LIMITED
Twenty-First Respondent

SINGTEL OPTUS PTY LIMITED
Twenty-Second Respondent

OPTUS VISION PTY LTD
First Cross Claimant

SINGTEL OPTUS PTY LIMITED
Second Cross Claimant

SEVEN NETWORK LIMITED
First Cross Respondent

C7 PTY LIMITED
Second Cross Respondent

JUDGE:	**SACKVILLE J**
DATE:	**27 JULY 2007**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. MEGA-LITIGATION AND ITS DISCONTENTS

1.1 Introduction

1 This case is an example of what is best described as '*mega-litigation*'. By that expression, I mean civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form. An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community.

2 Mega-litigation, if it proceeds to finality, often generates very long judgments. Regrettably, this is a prime example. The judgment is divided into 21 substantive Chapters, of which the first two are introductory. Chapter 1 addresses features of the present case which exemplify the challenges posed to the courts and to the parties involved in mega-litigation. Chapter 2 provides an overview of the principal issues in the litigation and a summary of the outcome.

3 The object of this Chapter is not to offer comprehensive solutions to the challenges presented by mega-litigation, nor is it to put forward the management or conduct of the present case as a model to be followed in other cases. On the contrary, it is generally only when mega-litigation nears its conclusion that the mistakes and lost opportunities in the conduct of the proceedings become apparent. By then it is too late. Nonetheless, I think it important to record the dimensions of this case and to identify some of the challenges it and similar cases present for the judicial system. Mega-litigation is an increasing phenomenon and the courts, if not Parliaments, must devise ways to deal with it more effectively.

4 For the purposes of this Chapter, it is enough to observe that the heart of the dispute is the complaint by **Seven** (as I shall describe the applicants collectively or individually, unless it is necessary to distinguish between them) that in May 2002 it was forced to shut down the business of the second applicant, C7 Pty Ltd ('**C7**'), a producer and distributor of sports channels for Australian pay television platforms. Seven says that the closure of C7's business was forced on it because some of the Respondents, notably the News, PBL and Telstra parties and associated corporations, engaged in anti-competitive conduct during the period 1999 to 2001. (Chapter 3 identifies the various parties and explains the relationships

between them.)

5 There are many factual and legal issues in the proceedings and a number of secondary disputes involving the Optus and NRL parties. However, the principal questions revolve around allegations that certain of the Respondents made or gave effect to arrangements that substantially lessened competition in various markets, or misused their market power, in contravention of ss 45 and 46 of the *Trade Practices Act 1974* (Cth) ('*TP Act*'). (I refer collectively to the respondents to these proceedings, other than those against whom the proceedings were discontinued, as the '**Respondents**'.)

1.2 The Hearing

6 The hearing occupied 120 sitting days. In addition to Seven, six groups of Respondents were separately represented throughout the trial, although other parties were also represented at various times. Seven's legal team for the trial, apart from additional legal representatives engaged in ancillary proceedings determined by other Judges of the Court, comprised three senior counsel and six junior counsel (although only three or four counsel were usually in court at any given time). Counsel were, of course, assisted by a significant number of solicitors and support staff. The six groups of Respondents actively participating throughout the trial were represented by a total of seven senior counsel and nine junior counsel. While not all of these counsel were present on all hearing days, they, too, were assisted by their respective teams of solicitors and support staff.

7 The burden on the Court was not limited to the 120 hearing days. Before Seven commenced the current proceedings, it successfully applied for an order for preliminary discovery under *Federal Court Rules* ('*FCR*'), O 15A, against a number of the parties it ultimately joined as Respondents. The preliminary discovery proceedings involved, in all, at least seven hearing days and required four judgments, of which two were reserved: *C7 Pty Ltd v Foxtel Management Pty Ltd* [2001] FCA 1864 (Gyles J, 21 December 2001); *C7 Pty Ltd v Foxtel Management Pty Ltd* [2002] FCA 1189 (Gyles J, 25 September 2002). In addition, during the trial, other Judges of the Court resolved a number of separate privilege claims that I could not determine because the parties thought it would be inappropriate for me to see the allegedly privileged documents in advance of the claims being determined.

8 The length of a hearing is not the only indicator of the dimensions of litigation.

Indeed, other cases have taken considerably longer than 120 hearing days. For example, a Federal Court case decided in 1985, also involving allegations of anti-competitive conduct, occupied 173 days of evidence and 32 days of oral addresses: *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, at 7, per Franki J. Other, more recent, cases have consumed even more court time. Thus, the hearing in *Bell Group Ltd v Westpac Banking Corporation* (Supreme Court of Western Australia, Owen J), concluded on 22 September 2006 after 404 hearing days spread over 38 months. In *Australian Securities and Investments Commission v Rich* (Supreme Court of New South Wales, Austin J), the evidence concluded on 21 September 2006 after 220 hearing days, 16,226 pages of transcript and 67 published judgments. I refer later to *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1, in which the hearing in the Supreme Court of South Australia lasted no less than 471 days ([67]).

9 The hearing in the present case was considerably shorter than it might have been. The parties' estimates prior to the commencement of the trial varied, but in August 2004 Mr Hutley SC (who represented the News parties) suggested that the case was likely to take '*a good deal longer than six months*'. Similar estimates were made in February 2005. In fact, the trial took just over twelve months from beginning (12 September 2005) to end (5 October 2006), although that period included a break from mid-December 2005 until early February 2006, and an adjournment of some three months after the conclusion of evidence on 20 June 2006 to enable the parties to prepare their written submissions and closing oral arguments. The oral argument commenced on 18 September 2006 and concluded on 5 October 2006.

10 The length of the trial would have been substantially greater but for several factors that curtailed the scope of the evidence, limited the need for more extensive oral submissions and facilitated the handling of vast numbers of documents tendered by the parties. These factors included the following:

> Some parties elected not to call evidence from persons whose witness statements had been filed in the proceedings but not tendered in evidence. For example, the PBL parties called no lay witnesses, despite filing eight witness statements. Excluding statements from parties against whom the proceedings were discontinued, the parties filed 19 lay witness statements which they did not tender and which therefore do not form part of the evidence. Obviously, if all the statements of lay witnesses had been tendered and their makers cross-

examined, the trial would have been very much longer. As events transpired, the statements made by 33 lay witnesses were admitted into evidence. Of these witnesses, 28 were cross-examined, while the makers of the remaining five statements were not required for cross-examination.

I rejected two '*expert*' reports tendered on behalf of Seven, amounting in all to 529 pages: *Seven Network Ltd v News Ltd (No 14)* [2006] FCA 500 (rejecting the tender of a report by Mr Salter valuing Seven's lost opportunity to become an '*integrated media company'*); *Seven Network Ltd v News Ltd (No 15)* [2006] FCA 515 (rejecting the tender of a report by Mr Kinsella discussing '*subscription drivers*' for pay television). These rulings relieved the Respondents from the need to call the authors of reports, comprising some 111 pages, replying to Mr Salter and Mr Kinsella. In addition, the Respondents chose not to tender a further three expert reports that had been filed. Consequently their authors did not give evidence. By reason of these matters, a good deal of hearing time was saved.

Interlocutory disputes were kept within reasonable bounds for a case of this size and complexity, in part because mediation apparently assisted the parties to reach agreement on a discovery regime. This is not to deny that the litigation generated many contests on pleading, procedural and evidentiary issues. I delivered sixteen reserved judgments on such issues and made countless *ex tempore* rulings in the course of the trial. In addition, Graham J delivered seven reserved judgments on questions of privilege and related matters, while Tamberlin J and Rares J also gave judgments on privilege claims. Nonetheless, the extent of disputation on interlocutory matters during the trial was perhaps somewhat less than might have been expected in hard-fought, complex multi-party litigation. Discussion between the parties and the bench frequently resolved issues before they developed into contests requiring full argument and (potentially) the preparation of reserved judgments.

While there were a very large number of objections to the admissibility of portions of written statements and reports, the parties cooperated in identifying representative issues on which rulings were required. This reduced substantially the number of rulings that I had to make. The regime required the parties to agree on the application of particular rulings to material that had

not specifically been the subject of argument. For the most part, the regime worked very well, saving the Court and the parties a good deal of hearing time.

Cross-examination of lay and expert witnesses, although usually very thorough, did not involve significant duplication. The Respondents accepted and abided by my ruling that the main burden of cross-examining each of Seven's witnesses ordinarily would be carried by one of the Respondents and that counsel for any of the others could cross-examine only if there was an issue, peculiar to its case, requiring additional questions to be put to the witness. It cannot be said that these arrangements produced cross-examination that was always notable for its brevity. For example, Mr Kerry Stokes, the Executive Chairman of the first applicant, Seven Network Ltd ('**Seven Network**'), was cross-examined over thirteen hearing days. Even so, there was little duplication in the cross-examination of Mr Stokes or, for that matter, the cross-examination of the other witnesses called by Seven. (As there was only one group of applicants, no question arose of duplication in the cross-examination of the Respondents' witnesses.)

The hearing was conducted in an electronic courtroom. Virtually all documents produced on discovery or subpoena were scanned or transferred onto an electronic database. When counsel referred to a document in court, it would be identified by a distinctive '*Doc ID*' number and brought up on screens located in the courtroom. The screens could be viewed by me, the legal practitioners and (except in the case of confidential documents) by members of the public. (Even so, the cross-examiner almost always provided a '*bundle*' of hard copy documents to the witness in order to facilitate the cross-examination. The *'bundle'* for Mr Stokes, for example, comprised no fewer than 12 large folders.) All pleadings, statements, expert reports and submissions were also placed on the electronic database. In addition, skilled operators provided a '*real-time*' transcript that could also be viewed on computer screens. Much hearing time was saved by avoiding the need for counsel and the Court to locate and retrieve hard copy documents either to put to witnesses or to refer to in submissions. It would have been virtually impossible to conduct the trial without the use of modern technology.

As is the way with modern commercial litigation, the parties prepared extremely detailed opening and closing written submissions. Subject to what is said in section 1.3, these submissions greatly reduced the time that otherwise would have been required for oral argument. The opening statements occupied six hearing days, while the closing oral argument required 12 hearing days.

1.3 Extent of the Documentation

11 While written submissions have their advantages, they exact a heavy price. In this case, the volume of closing written submissions filed by the parties was truly astonishing. Seven produced 1,556 pages of written Closing Submissions in chief and 812 pages of Reply Submissions (not counting confidential portions of certain chapters and one electronic attachment containing spreadsheets which apparently runs for 8,900 or so pages). The Respondents managed to generate some 2,594 pages of written Closing Submissions between them. The parties' Closing Submissions were supplemented by yet further outlines, notes and summaries (some of which, to be fair, were required by me, as I shall explain later ([39]-[40]).

12 The written submissions are only a minor component of the '*paper*' burden in a case like this. A characteristic of mega-litigation is that the warring parties (and often third parties) devote massive resources to locating and producing vast quantities of documentation that might (or might not) be relevant to the issues in the case. The wider the issues raised by the pleadings, the greater the number of documents that must be located and produced on discovery or on subpoena.

13 The parties must devote equally massive resources to inspecting the documents that have been produced. They must also collate and analyse documents that are helpful (and, indeed, those that are unhelpful) to their respective contentions. In the electronic age, when deleted emails or other documents stored in digital form can generally be retrieved, albeit sometimes with great difficulty, the process of production and inspection of documents becomes an industry in itself.

14 Consider the statistics in the present case. Seven says that it produced 18,335 documents on discovery, either in electronic or hard copy form. These consist of 13,702

'*unattached'* documents and 4,633 '*document groups'*. (An '*unattached document*' is one that has been discovered as a single entry, such as a report or a letter with no enclosures. A '*document group*' consists of two or more documents which have been attached to each other, such as a letter with enclosures or a bundle of board papers behind a cover page.) The comparable figures for the Telstra parties are said to be 4,519 documents, of which 3,251 are unattached and 1,268 are document groups. The two Optus respondents provided 3,686 documents (3,002 unattached and 684 document groups). (I use the expression '**Optus**' to refer to either or both of Optus Vision Pty Ltd ('**Optus Vision**'), the sixteenth respondent, and SingTel Optus Pty Ltd ('**SingTel Optus**'), the twenty-second respondent.)

15 The outcome of the processes of discovery and production of documents was an electronic database containing 85,653 documents, comprising 589,392 pages. ('*Documents*' for this purpose refers to the total of '*unattached documents*' and of separate documents within '*document groups*'.) The parties' tender lists, excluding witness statements and expert reports, show that 12,849 documents, comprising 115,586 pages, were ultimately admitted into evidence. The list of exhibits would have been very much longer had I not rejected the tender of substantial categories of documents.

16 There is much more to consider beyond the documentary exhibits. The pleadings amount to 1,028 pages. The statements of lay witnesses that were admitted into evidence run to 1,613 pages. The expert reports in evidence total 2,041 pages of text, plus many hundred pages of appendices, calculations and the like. As I have noted, the parties' final written submissions comprise no fewer than 4,962 pages. The transcript of the trial is 9,530 pages in length.

1.4 Costs

17 It is perhaps not surprising that a case that generates this volume of material also generates very large costs. What is surprising is the sheer amount of money that has been devoted to a single case. The evidence does not quantify the costs incurred thus far by the parties to the proceedings. However, in his oral submissions, Mr Meagher SC (for the PBL parties) suggested that Seven has spent in the order of $100 million on this litigation up to date. This estimate accords more or less with my own. If the other parties together have incurred similar expense, which I think is likely, the litigation has cost the parties collectively a staggering sum, amounting to nearly $200 million. Part of this sum may be deductible for

income tax purposes by the parties incurring the expense. Thus, in effect, some of the legal costs will ultimately be borne by the general body of taxpayers.

18 When the case was opened, Mr Sheahan SC, on behalf of Seven, suggested that it would be claiming more than $1.1 billion in damages (including interest). By the time final submissions were made, Seven's damages claim, at best, had been reduced to an amount between $194.8 million and $212.3 million. This amount was to be '*grossed up'* by a factor of 1.429 to account for income tax. Pre-judgment interest was also to be added. But bearing in mind that Seven, if successful, must pay tax on any damages award (as the parties agree), the maximum amount at stake in this litigation is not likely to be very much more than the total legal costs incurred to date. It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake (measured in financial terms). In my view, the expenditure of $200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful but borders on the scandalous.

1.5 Challenges

19 Mega-litigation creates formidable challenges for any court required to manage the case and to decide it within a reasonable time frame. The presiding judge can make efforts – perhaps strenuous efforts – to confine the scope of the litigation and thereby limit its cost, both to the parties and to the community. For example, the parties can be encouraged or even directed to undertake mediation or other forms of dispute resolution with a view to resolving their differences or at least narrowing the areas of dispute. They can also be directed to take measures designed to identify and record matters not genuinely in dispute. But there is a limit to what the judge can do without compromising his or her role as an independent and impartial judicial officer.

20 In the present case, I repeatedly encouraged the parties to enter mediation, if not to settle the proceedings, then at least to narrow the issues. In fact the parties did undertake mediation on more than one occasion, but apparently with only limited (but by no means negligible) success. Later in the proceedings, I directed the parties to prepare an agreed chronology and encouraged them to agree on a template for written submissions. However, the responses illustrate that parties to mega-litigation are often able effectively to ignore (albeit politely) directions made by the court, if they consider that their forensic interests will be advanced by doing so.

21 Much of the cost of conducting mega-litigation is generated by the discovery process. The process can impose a crippling burden on the parties, requiring them to locate and produce thousands of documents created over many years. The court may attempt to limit this burden, for example by making orders restricting the scope of discovery to specified categories of documents. Sometimes it may be appropriate to direct that separate questions be determined in advance of other issues in the proceedings. Such an approach can reduce the discovery burden and, depending on the answers to the separate questions, relieve the parties from the need to adduce evidence and argument on all the issues raised by the pleadings.

22 The compilation and presentation of expert evidence also can generate very great expense. The present case generated a vast quantity of expert evidence on a variety of topics from a variety of witnesses. Despite the eminence of a number of the experts in their respective fields, a substantial proportion of the costs incurred by the parties in producing this material was wasted. Some reports were inadmissible; some were largely repetitive of other reports (particularly on the competition issues); at least one (that of Professor Williams) I did not find particularly helpful; some expressed opinions on the basis of elaborate factual assumptions that have not been borne out by the evidence; and some, given the conclusions I have reached, have turned out to be unnecessary (unless an appellate Court takes a different view of the outcome).

23 In an age where mega-litigation is characterised by heavy, often unthinking reliance on expert evidence, the court may deem it appropriate to limit the number of reports or to restrict the volume of expert evidence. Procedures such as pre-hearing conferences between experts and the giving of concurrent evidence by experts may reduce the areas of disagreement and limit the hearing time required for exploring the remaining differences between the experts. If the parties insist on tendering expert reports that fail to comply with the rules of evidence or are simply unhelpful, they may find that the tender is rejected.

24 Limits may also be imposed on the extent of permissible cross-examination of lay witnesses. As I have noted, I directed that there should be no duplication of cross-examination of Seven's witnesses by the various Respondents. Similarly, in order to avoid prolonged legal argument and interruptions to the flow of evidence, I ordinarily permitted only one of the separately represented Respondents to object to particular questions asked by

Seven's counsel in cross-examination. While (perhaps wrongly) I did not impose rigid time limits on cross-examination, I attempted to insist, to the maximum extent practicable, on adherence to the cross-examiner's estimate of the time required to complete the questioning of each witness.

25 The fundamental difficulty facing a court hearing mega-litigation, however, is that the parties may decide, for whatever reason, to engage in a full-blown forensic battle in which almost every barely arguable issue is examined in depth. In these circumstances, the best efforts of the court to limit the scope of the dispute may amount to very little. In the present case, for example, mediation, although apparently helpful in relation to discovery issues, did not allow the parties to resolve the major disputes. Similarly, I made a tentative suggestion, which Seven took up, that some of the experts might give concurrent evidence as a means of saving hearing time and encouraging a narrowing of the issues. However, the proposal was strenuously resisted by the Respondents and ultimately was not implemented. The parties' resolute determination to put their respective cases at great length is reflected in the volume of their written submissions. That determination has also been reflected in the unwillingness of some parties to make concessions unless a point is self-evidently hopeless or there is a perceived forensic advantage to making the concession.

26 A further problem in managing mega-litigation is that the presiding judge often has insufficient advance knowledge of the facts and issues in the case, to impose effective constraints on the parties, even if he or she diligently reads the available material. Knowledge that might have enabled the judge to limit the scope of the litigation often comes too late. For example, with the benefit of hindsight, it may have been better in this case for issues of liability to have been determined separately from and before any questions of damages and other relief. One reason for expressing this view is that, as events have turned out, Seven has been unsuccessful in the proceedings. Accordingly, if this conclusion is upheld on appeal, questions of relief simply will not arise.

27 In any event, separate trials on liability and relief at the very least would have deferred the need to obtain (extremely expensive) experts' reports, and would have provided the experts, when they did prepare reports, with a firmer factual foundation for their opinions and calculations. (I raised the question of separate trials at a directions hearing, but was told that it was an impossible idea in the circumstances of this case.) Similarly, substantial costs

may have been saved if the largely discrete disputes between Seven and the Optus parties and between Seven and the NRL parties had been heard separately. But I was not asked to take those steps.

28 No doubt courts must endeavour to control mega-litigation more efficiently. Despite my efforts, I cannot claim success in keeping the costs of this litigation commensurate with the value of the claims made by Seven. Ultimately, the only effective constraint may be for the parties and their legal advisers to recognise that large-scale litigation is generally a very blunt and disproportionately expensive means of resolving major commercial disputes. This may mean that the boards and shareholders of public companies embroiled in litigation of this kind need to take a more critical and sustained interest in the proceedings. Those who are most closely involved in the events which are the subject of the litigation may be the least equipped to make the decisions which determine the course of the litigation. If there is one lesson to emerge from this case, it is that even the largest and best-resourced corporations owe it to their shareholders, if not to the general public, to think very carefully before committing themselves irrevocably to mega-litigation.

1.6 Attempts to Refine the Issues

29 Just as the number of hearing days is not the only indicator of the dimensions of litigation, the length of written submissions may not be a true reflection of their worth. Very detailed submissions, despite their length, can of course be most helpful in clarifying the issues in dispute and in analysing the complex factual and legal questions requiring resolution. But this is not necessarily so.

30 The parties in the present case filed their written submissions (other than Seven's Reply Submissions) by 15 August 2006. They plainly reflect a great deal of painstaking work by many people and the material contained in them has proved to be indispensable in the preparation of this judgment. Even so, it quickly became apparent that, subject to limited exceptions, the parties had not structured their Closing Submissions by reference to an agreed list of topics that had been handed up in court towards the conclusion of the evidence. Seven's Closing Submissions include an Appendix which rather forlornly identifies chapters in which topics on the agreed list have been addressed or referred to in some way. But the submissions do not follow the agreed list of topics. The Closing Submissions of the News parties (all 1,006 pages of them) refer to topics on the agreed list, but also do not adopt the

structure suggested by the agreed list.

31 For these reasons, I wrote to the legal representatives of the parties on 22 August 2006 inviting them to advise me whether the agreed list of topics continued to serve any purpose. The letter also addressed the question of chronologies. It acknowledged that the parties, in response to a direction requiring them to prepare an agreed chronology, had produced two '*Proposed Non-Contentious Chronologies*' comprising 176 pages. The letter noted, however, that the preparation of this document had not deterred the parties from producing their own competing chronologies, comprising many hundreds of pages. More importantly, the relationship, if any, between the various chronologies had been left unclear. The letter inquired how I was to determine which of the many events and transactions referred to in the various chronologies were genuinely in dispute.

32 The written responses of the parties to my enquiries made it clear that, by and large, they had decided to ignore the '*agreed*' list of topics. They had taken this course notwithstanding my understanding, derived from discussions in court, that the list would provide a template for the written submissions and, in all probability, for the judgment. In consequence, it appeared to me that the agreed list of topics no longer served any useful purpose.

33 It became equally clear that the direction to the parties to prepare an agreed chronology had served little purpose. I was unable to determine which facts were in dispute, at least without working my way through many hundreds of pages of material, most of which was not cross-referenced to the competing chronologies. Nor could I ascertain readily which factual issues were thought by the parties to be critical to the resolution of the many claims made by Seven.

34 In a second letter to the parties, dated 29 August 2006, I expressed myself thus:

> *'Despite their elaborate detail, some of the submissions seem to me to pay insufficient attention to the need to assist the Court in its difficult task of ordering a vast mass of material, isolating the issues and resolving them. The responses to my letter suggest that this state of affairs has come about because the parties, generally speaking, have decided to follow their own paths rather than accommodate the approach suggested (and in certain respects directed) by the Court. That approach was designed to expose as clearly as possible the legal and factual issues in dispute and thus make the*

resolution of them more manageable.

As I have repeatedly warned, the task of writing a judgment in this matter may turn out to be unmanageable if the parties do not co-operate in the presentation of arguments and submissions, particularly in relation to disputed factual issues. One consequence of imposing an unrealistic burden on the Judge is that completion of the judgment will be delayed to a point which is unsatisfactory both for the Court and for the parties. Another is that the conduct of any appeal will be rendered even more complex, time consuming and logistically difficult than can be expected in a case of these dimensions.

Quite apart from their length, I must confess to being surprised about some aspects of the submissions. At the risk of stating the obvious, part of the art of advocacy is to make it easy for the decision-maker to understand what issues need to be resolved and to explain clearly, cogently and concisely how and why the crucial issues should be resolved in favour of a particular party. To leave the Judge, if not completely at large, then without a reliable working compass in a vast sea of factual material, is not a technique calculated to advance a party's case. This, I hasten to say, is not because any Judge would consciously penalise a party by reason of the bulk of its submissions or the manner in which its arguments are presented. It is because the cogency and persuasiveness of submissions depends on the ability of the Judge to follow them and to isolate the critical legal and factual issues upon which a case is likely to turn'.

35 In this letter, I foreshadowed, among other things, making a direction that each party provide a summary of its case which identified:

> *'clearly and precisely the propositions of law critical to the party's case and the critical findings of fact that the party wishes the Court to make. The summary should contain cross-references to the written submissions, identifying where the proposed findings of fact are recorded in those submissions'.*

36 On 1 September 2006, having read more of the Closing Submissions, I sent a further letter to the parties. This recorded my dissatisfaction with certain aspects of the Closing Submissions, although I acknowledged that, at that stage I had not had time to read all of them. I identified a particular problem with Seven's Closing Submissions, as follows:

> *'Apart from the matters I have already identified in the correspondence, I am afraid that I am having considerable difficulty in following the case (or, more accurately, the very many cases) that the applicants apparently wish to put. This difficulty arises notwithstanding indeed perhaps because of – the length of the written submissions (over 1,500 pages). The submissions appear to demonstrate a marked reluctance to refine the issues being presented to the*

> *Court for determination. They put forward what seems to me at the moment to be a bewildering range of alternatives and provide little guidance as to how the possible combinations and permutations should be addressed in a judgment. Indeed, the applicants seem to be reluctant to identify their primary contentions from an extraordinary number of alternative arguments'.*

37 I pointed out that Seven's Closing Submissions appeared to advance close to 100 alternative contentions in support of its claim to relief based on alleged contraventions of s 45(2) of the *TP Act*. (The s 45(2) claim is but one of many causes of action pleaded by Seven in these proceedings.) Furthermore, the Closing Submissions had failed to identify Seven's primary case under s 45(2):

> *'Are all claims put forward as having an equal claim on the attention of the Court? If not (as one would expect), what is the applicants' principal contention? ... How do the applicants suggest that I approach the plethora of alternatives, or am I to be left at large? Which causes of action can be ignored? Surely not all are seriously pressed'.*

38 The problems I encountered with some of the Closing Submissions prompted me to conduct what in effect was a pre-oral submissions directions hearing. At that hearing, on 4 September 2006, Mr Sheahan provided a draft '*Case Summary*' on behalf of Seven that addressed some of the concerns I had raised in the correspondence. The Respondents indicated that they, too, were willing to prepare Case Summaries to assist me to understand the issues in the proceeding. Not surprisingly, most of the parties suggested that the Case Summaries would need to be somewhat longer than the very short documents I had envisaged.

39 In due course, all the parties filed or handed up Case Summaries. Seven's Case Summary, comprising 54 pages, for the first time identifies its primary case under s 45(2) of the *TP Act* and attempts to explain the relationship between at least some of the many causes of action upon which it relies. The Case Summary concedes, again for the first time, that Seven does not intend to press certain arguments, usually because they add nothing of substance to Seven's primary submissions. The Case Summary also identifies certain arguments that need not be addressed, depending upon the conclusions I reach on other contentions advanced by Seven.

40 Seven's Case Summary by no means clarifies all of the questions left unanswered by its Closing Submissions. Indeed, as became clear in the closing oral submissions, Seven's

Case Summary still leaves intact a very large, if not bewildering, range of alternatives for me to address. Nevertheless, the Case Summary at least represents an advance on the amorphous Closing Submissions filed by Seven. Even so, it must be said that filing of the Case Summary did not deter Mr Sumption QC, in particular, introducing fresh arguments in the course of his final oral submissions. Indeed, Mr Sumption did not shrink from introducing new or reformulated arguments in his oral submissions in reply. Naturally, the introduction of fresh arguments at this stage prompted the Respondents to reply in their own oral submissions and to hand up yet further written submissions.

41 It is difficult to avoid the impression that the changes in Seven's position and its frequent claims that the Respondents had misunderstood its arguments were not entirely unrelated to the fact that Seven's most senior counsel was present for only about 30 of the 120 days of the trial. No matter how experienced and skilled counsel may be – and in this case the parties, including Seven, were represented by very experienced and very skilled counsel – continuity of presentation in a lengthy and complex case is hard to achieve without continuity of representation.

1.7 Chronologies

42 I have referred to the absence of a comprehensive agreed chronology. The difficulties created by the lack of such a document have been ameliorated to some extent by the individual chronologies. In particular, News has provided an extremely detailed chronology, albeit (as one would expect) an account that is, to a degree, selective and incomplete on some issues. Nonetheless, when read with Seven's chronologies and supplemented by other material, it has provided an extremely useful resource for the preparation of the chronologies incorporated into this judgment.

43 I do not wish to underestimate the difficulties facing the parties in managing and presenting a case such as this. Nor do I wish to discount the very considerable assistance I have received from all parties, including Seven. Nonetheless, it is appropriate to record that Seven's chronologies have been of less assistance than I might have expected. They are comparatively sketchy and do not incorporate, even by cross-referencing, much material that (as the written submissions make plain) is important to Seven's case.

44 In order to incorporate material of this kind into the factual account (Chapters 6 to

11), it has been necessary to scour Seven's written submissions to locate references to events, transactions and communications that Seven regards as important to its case. Since the material is not presented in chronological order, the task of compiling and presenting the facts has been rendered more difficult and time-consuming than it should have been.

45 News' chronology does not address the events leading to and consequential upon what have been described as the First and Second Variation Agreements, entered into between C7 and Optus in late 2001. This is because those events have given rise only to claims between Seven and Optus, and do not involve News. Neither Seven nor Optus has prepared a comprehensive chronology of the events relevant to these claims. Instead they have preferred to incorporate references to transactions, documents and conversations within the interstices of their extensive written submissions. I have therefore had to prepare my own chronology by identifying the apparently significant events (which sometimes turn out to be insignificant) from the submissions and placing them in some kind of order. The advantages to the parties, let alone to the Court, of imposing this additional burden are not apparent.

1.8 Preparing a Judgment

46 Writing a judgment in a case such as this is an extremely onerous task. In part, this is due to the sheer volume of material that must be read, absorbed and analysed. The onerous nature of the task increases in proportion to the complexity of the legal and factual issues requiring resolution. In my view, only those who have undertaken a task of this character and magnitude can appreciate how relentless and indeed stressful it can be.

47 The volume of material is, however, only part of the story. Even though the judge has heard the entirety of the evidence and had the benefit of written and oral submissions, it is only by working through the mass of material in painstaking detail that the full picture (or at least as full a picture as the judge can reasonably discern) emerges. Sometimes this requires the analysis of apparently discrete issues to be re-evaluated as additional material, perhaps referred to in another context, comes to light.

48 For these reasons, mega-litigation requires the judge to be given every assistance that modern information technology can provide. The writing of this judgment would not have been possible without the electronic databases prepared for the trial and the search functions they incorporate. I have found particularly useful the electronic versions of the parties'

written submissions which, at my request, incorporated hyperlinks to the main documents (pleadings, statements, exhibits and transcript) to which the submissions refer. Similarly, the electronic version of the transcript, with hyperlinks to documents recorded in the transcript by Doc ID number, has been an invaluable resource.

49 Even so, there have been many problems associated with the use of the databases that, with the benefit of hindsight, could have been avoided. An example is interruptions to access apparently created by the interface between the database established for the hearing and the Court's security system. Another is the inconsistencies in the formatting of material, including submissions, provided by the parties. It is not necessary to record all the problems here. The important point is that, in future, the setting up and co-ordination of electronic databases in mega-litigation must be carried out under the direct supervision of the Court, not the parties. Moreover, the process must be directed from the outset to meeting the judgment writing needs of the judge.

50 In saying this, I do not attribute any responsibility to the parties for the information technology problems I have encountered. I wish to make it clear that the legal representatives have unfailingly responded helpfully to my requests for information and for modifications to be made to the databases. The responsibility is that of the Court.

1.9 Scope of the Judgment

1.9.1 Unresolved Issues

51 One consequence of Seven's reluctance to narrow its case, or to limit the range of alternative claims, is that I have been faced with a large number of possible combinations and permutations, depending on the findings of fact and the conclusions of law I reach. There is nothing unusual about a case that presents multiple issues and in which the parties rely on alternative arguments. In such a case, in order to accommodate the possibility of an appeal, a trial judge will often consider it appropriate to make findings on issues that do not strictly arise in view of his or her decision. This approach may allow the appellate court, if it takes a different view on a question of law or on a particular finding of fact, to make orders finally resolving the proceedings without further fact finding. The inconvenience of remitting the matter to enable further findings of fact to be made is thereby avoided. In particular, where an applicant fails on liability it is often a sensible course for the trial judge to assess damages

or determine other questions of relief in the event that an appeal on the issue of liability is upheld.

52 An example of the approach I have described is *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731. In that case, I dismissed the claim by the Australian Competition and Consumer Commission ('**ACCC**') for pecuniary penalties, because I construed s 45(6) of the *TP Act* in a manner that removed the alleged conduct from the prohibition on exclusive dealing contained in s 45(2)(a)(i). Since I recognised that the matter was likely to go on appeal, I made the factual findings that would be required if a different construction of s 45(6) were to be adopted. In the event, both the Full Court and the High Court did take a different view of s 45(6). As I had made the necessary findings, there was no occasion to remit the proceedings (except to determine the appropriate penalties): *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2001) 112 FCR 37; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1. I attempted to take a similar approach in *Jango v Northern Territory* (2006) 152 FCR 150.

53 Subject to my observations at the conclusion of this Chapter, an appeal in the present case, given the damages claimed (and the costs of the proceedings), is inevitable. However, it is simply not possible to make findings on every factual issue that might require resolution if an appellate court takes a different view of the many questions of law or, indeed, of fact that are determined in this judgment. I have been able to identify and address certain issues upon which I consider that I should express a view, even though they do not arise on the findings I have made. But it is clearly not feasible to canvass all the questions that might arise in the event of a successful appeal.

54 The conclusion I have reached is that Seven has not succeeded in any of the many causes of action in which it has relied. I have not addressed in this judgment the question of any relief to which Seven might be entitled, should I be wrong in rejecting its case. My principal reason for not assessing damages, or dealing with any other claims for relief, is that I simply do not know on what provisional basis the question should be addressed. Judging from the way the case has been conducted thus far, Seven is likely to appeal on a very large number of grounds. The relief to which Seven will be entitled, should it succeed on appeal, will depend upon which grounds are upheld. To attempt to cover all possibilities would take

an utterly disproportionate amount of further time and effort.

55 I have explained on several occasions to the parties that in the event of a successful appeal they run the risk of the proceedings having to be remitted in order to enable further necessary findings of fact to be made or to deal with other unresolved issues. I gave these explanations in order to bring home to the parties the virtues of compromise in the litigation and to emphasise the fact that this round of litigation (even allowing for an appeal) may well not be the last. They have chosen to press ahead in full knowledge of the possible consequences, including the fact that I may not be available to hear any remitted proceedings.

56 Despite the warnings I have given to the parties, I propose to give them the opportunity to make brief submissions as to whether, in order to minimise the inconvenience that might otherwise flow from a successful appeal, I should assess damages on the basis of a particular hypothesis. As at present advised, I am not prepared to canvass all the alternatives advanced by Seven at the trial. However, if there is one particular hypothesis that can be identified on the basis of which findings by me in relation to relief are likely to prove helpful, I would consider preparing a supplementary judgment.

1.9.2 Length of the Judgment

57 A related problem is created by the enormous volume of material with which I have been presented. If I were to deal with every argument in detail, not only would the judgment be even longer than it is now, but it would involve completely unacceptable delays in finalising the judgment. Faced with a similar problem in *TPC v TNT Management,* Franki J observed (6 FCR, at 8) that it was necessary to deal with the evidence and submissions '*in a practical way*'. This meant, among other things, not referring to evidence if it was of minor significance and not recounting unimportant submissions.

58 In *Western Australia v Ward* (2000) 99 FCR 316, an appeal involving many complex questions, Beaumont and von Doussa JJ made these comments (at 337 [54]):

> *'At trial more than 9,000 pages of transcript were recorded, and the exhibits run into many thousands of pages. Written submissions on the appeal also run into thousands of pages. ... In complex appeals involving enormous quantities of material it is impracticable, in reasons for judgment, to explore at length every one of the complaints made by each appellant. We propose therefore to ... confine our reasons to the issues raised that are both*

significant and consequential'.

59 Beaumont and von Doussa JJ made their comments in an appellate judgment, not a judgment delivered after a trial. Nonetheless, their observations and those of Franki J in *TPC v TNT Management* are pertinent to the present case. In making findings of fact, I have endeavoured to take into account the material identified in the written and oral submissions that is relevant to the findings. Similarly, I have endeavoured to address the principal arguments advanced by the parties (bearing in mind that it is not practicable to resolve all the alternative contentions that do not arise on the conclusions I have reached). Nonetheless, it is neither possible nor desirable to canvass explicitly all the arguments referred to in the submissions or the entirety of the evidence that may have influenced my findings.

60 I am conscious that this is a very long judgment indeed. I have endeavoured to bear in mind the advice of Schiemann LJ in *Customs and Excise Commissioners v A* [2003] 2 All ER 736, at 754 [83], endorsed by the New South Wales Court of Appeal in *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184, at 228-229 [285]-[286]:

> *'judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that: (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal; (iii) citation of the judgment in future cases will lengthen the hearing of those future cases because time will be taken sorting out the precise status of the judicial observation in question; and (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice'.*

61 I have also endeavoured to heed the warning of the Court of Appeal (at [282]) that '*prolixity is an enemy of comprehensibility and, indeed, cogency*'. As was said by Gleeson CJ, McHugh and Gummow JJ in *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, at 464 [62]:

> *'A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure to mention such facts and arguments would be evidence that he or she had not*

properly considered the losing party's case'.

62 Despite my efforts, I readily accept that I cannot validly make Mozart's protest to the Emperor (as imagined by Peter Shaffer in '*Amadeus*'), in response to the Emperor's complaint that Mozart's new symphony contained too many notes:

> *'I don't understand. There are just as many notes, Majesty, as are required. Neither more nor less'.*

No doubt, if I devoted yet more time to the preparation of this judgment, the number of words (if not notes) might have been reduced sufficiently to escape legitimate criticism. I plead in mitigation that the concept of proportionality applies as much to the time required to write a judgment as it does to other aspects of litigation.

1.10 A Risk

63 There is a particular risk associated with mega-litigation that (happily for all concerned, but particularly for me) has not (yet) eventuated in these proceedings. The completion of the trial and the timely preparation of a judgment are contingent upon the trial judge surviving in reasonable health for the entirety of the proceedings.

64 If, as the trial judge, I had been unable to continue for any reason after the hearing had commenced, the parties would have faced the horrendous prospect of having to restart the trial afresh. It is true that in the event of the death or serious illness or injury of a trial judge (for example, in consequence of falling off a ladder), the parties may be able to agree that a new judge should deal with the case on the papers, perhaps supplemented by limited oral argument. But the feasibility of that solution may depend upon the point at which the trial has to be aborted. Moreover, it may not be easy to proceed on the papers when so much turns on the credit of key witnesses and when the documentary evidence is so vast. Furthermore, continuing in this manner presupposes a willingness by the parties to co-operate in the conduct of any re-trial.

65 I asked at a pre-trial directions hearing whether the parties in the present case had considered insuring against the risk of judicial death or infirmity. Perhaps out of a sense of delicacy, I received no clear answer and do not know whether the parties gave consideration to obtaining insurance. Indeed, I do not know whether insurance of this kind is available, at

least without the judge being required to submit to a medical examination, or, if it is, whether the cost of the insurance is prohibitive. Be that as it may, if the trial had been aborted for any reason the parties not only would have lost a substantial portion of the costs incurred by them, but would have experienced additional very long delays in finalising the litigation.

66 Sooner or later, if it has not happened already, mega-litigation will be disrupted by a judge falling ill or otherwise being unable to continue presiding over the proceedings. In the future, both the courts and the parties to mega-litigation may need to give careful consideration to this possibility. One solution to the problem, although it would come at a significant cost to the court, could be for a reserve judge to participate in the trial and to have the authority of the parties to prepare a judgment should the primary trial judge be unable to do so. This solution may not be very attractive, especially for the reserve judge, but it may be preferable to the alternative. Another possibility is for the trial to be conducted by a panel of two judges, with the opinion of the more senior prevailing in the event of disagreement. This would have the advantage of permitting a division of labour and an opportunity for discussion between peers on the complex issues thrown up by mega-litigation.

1.11 A Cautionary Tale

67 It is appropriate to conclude a Chapter on mega-litigation with a cautionary tale that the parties in the present case would do well to heed closely. So far as I am aware, the longest civil trial in recent Australian history took place in the Supreme Court of South Australia. The litigation involved a claim for damages against a number of defendants in respect of losses incurred by a company when acquiring shares in another company in the course of an attempted takeover in late 1987. The defendants were a firm of accountants who prepared a report relating to the value of the shares, and five directors of the plaintiff's company. As I have previously noted, the trial ran for 471 days, from 15 June 1994 to 29 September 1997. Remarkably enough, the trial judge, Mullighan J, delivered a judgment of nearly 500 printed pages within a mere four months of the conclusion of the hearing: *Duke Group Ltd (in liq) v Pilmer* (1998) 27 ACSR 1. His Honour awarded damages of some $93 million in favour of the plaintiff and made certain orders for contribution among the defendants.

68 That, however, in Churchill's phrase, was merely the end of the beginning. Appeals and cross-appeals were heard by the Full Court of the Supreme Court of South Australia over

15 days in November 1998. In a judgment of some 239 printed pages delivered on 20 May 1999, the Full Court allowed the appeals and cross-appeals in part and increased the award of damages by about $23 million: *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64. The Full Court delivered a second judgment on the question of contribution between the tortfeasors on 8 December 2000: *Duke Group Ltd (in liq) v Pilmer (No 2)* (2000) 78 SASR 216.

69 In the meantime, an application for special leave to appeal to the High Court, on certain issues only, was granted on 30 November 1999. The High Court heard the appeal on 7 April and 23 November 2000 and delivered judgment on 31 May 2001: *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165. The majority held that the damages awarded against the accountants should be substantially reduced. The matter was remitted to the Full Court of the Supreme Court of South Australia for an assessment of damages consistent with the reasons of the High Court.

70 After a hearing on 16 November 2001, the Full Court made orders in the proceedings on 20 December 2001: *Duke Group Ltd (in liq) v Pilmer (No 4)* [2001] SASC 451. The Full Court entered judgment against the accountants in a sum of approximately $31.7 million, inclusive of interest, and against other defendants in a sum of approximately $188 million. The Full Court dealt with the question of costs, but acknowledged that it was not in a position to resolve all issues in the absence of agreement between the parties.

71 Still this was not the end. On 15 October 2003, the Full Court heard an application to reopen the appeal on the question of the orders for contribution. On 18 November 2003, the Court granted the application, but ultimately dismissed the appeal from the trial Judge's orders on this question: *Duke Group Ltd (in liq) v Pilmer (No 5)* (2003) 87 SASR 325. On 27 May 2004 the Full Court delivered a further judgment explaining orders that it had made in the proceedings: *Duke Group Ltd (in liq) v Pilmer (No 6)* [2004] SASC 147.

72 On 19 November 2004, the High Court refused a further application for special leave to appeal in the proceedings. Ten and a half years had elapsed since the commencement of the trial and over 12 years since the commencement of the proceedings. Nearly seven years had passed since the trial judge had given judgment.

73 Even now, it is not too late for the parties to bring these protracted and excessively expensive proceedings to a conclusion by mutual agreement. In the light of my findings of fact and conclusions of law, the parties should be able to assess realistically their prospects on appeal. They should also take into account that the transactions which gave rise to this litigation are long past and have been overtaken, not only by later events, but a changed commercial environment in the industries in which they operate.

74 The alternative to a negotiated resolution may be a reprise of the *Duke* litigation.

2. OVERVIEW

2.1 Introduction

75 Seven commenced these proceedings on 19 November 2002. In the application and statement of claim filed on that date, Seven sought damages, declarations, injunctions and other relief against 19 respondents.

76 As is to be expected in such a complex case, the pleadings have been extensively amended. The final version of the pleadings comprises the Fifth Further Amended Application filed on 22 June 2006 ('**Application**') and the Fifth Further Amended Statement of Claim, also filed on 22 June 2006 ('**Statement of Claim**'). Despite the amendments to the pleadings, including the addition of three respondents and the removal of another two following settlement of the proceedings against them, the core of Seven's case has not fundamentally changed since the proceedings were instituted.

77 As I have noted in Chapter 1, the case revolves around the fate of C7, a wholly owned subsidiary of Seven Network. C7 commenced a business in mid-1998 as a producer and distributor of sporting channels to retail subscription (pay) television services. It is common ground that C7 ceased operations as a producer and distributor of sporting channels on 7 May 2002.

78 Before summarising the issues, I should record that a limited amount of the evidence in these proceedings was commercially sensitive and is protected from publication by confidentiality orders. In preparing this judgment, I have attempted to avoid explicit reference to any such evidence. So far as I am aware, no portion of the judgment need be regarded as confidential.

2.2 Seven's Principal Claims

2.2.1 Anti-Competitive Conduct Causing Harm to C7

79 Seven claims, among other things, that a number of the Respondents engaged in anti-competitive conduct that caused harm to C7 and ultimately brought about its demise. The parties principally responsible for this form of anti-competitive conduct are said to be:

the first respondent, News Ltd ('**News**'), a wholly owned subsidiary of The News Corporation Ltd ('**TNCL**');

the seventh respondent, Publishing and Broadcasting Ltd ('**PBL**');

the fifth respondent, Telstra Corporation Ltd ('**Telstra**', an expression that I also use to refer to any or all of the Telstra parties); and

certain corporations associated with TNCL, PBL or Telstra.

80 The associated corporations said to have engaged in the anti-competitive conduct include:

the second respondent, Sky Cable Pty Ltd ('**Sky Cable**'), which at the relevant times was ultimately owned in equal shares by TNCL and PBL;

the third respondent, Telstra Media Pty Ltd ('**Telstra Media**'), a wholly owned subsidiary of Telstra;

the sixth respondent, Telstra Multimedia Pty Ltd ('**Telstra Multimedia**'), also a wholly owned subsidiary of Telstra;

the eighth respondent, Nine Network Australia Pty Ltd ('**Nine**'), a wholly owned subsidiary of PBL; and

the ninth respondent, Premier Media Group Pty Ltd ('**Fox Sports**'), ultimately owned in equal shares by TNCL and PBL.

81 Sky Cable and Telstra Media operate in partnership a retail pay television service ('**Foxtel**') under the brand name '*Foxtel*'. Nine operates free-to-air television channels, while Fox Sports compiles and supplies sporting channels to pay television operators (including Foxtel). Until C7 ceased to operate its business, Fox Sports and C7 were competitors, although the parties disagree as to the market in which they competed.

82 Seven's causes of action against the News, PBL and Telstra respondents, insofar as they are based on anti-competitive conduct causing harm to C7, arise out of events, or series of events, occurring between mid-1999 and early 2001. According to Seven, there were three major instances of anti-competitive conduct which caused or contributed to the demise of C7.

83 **First**, during the period from mid-1999 until December 2000, when the Australian

Football League Ltd ('**AFL**') awarded the AFL pay television rights for 2002 to 2006 to News, Foxtel refused to negotiate with C7 for the carriage of its channels on the Foxtel platform. The refusal occurred (so Seven argues) even though the C7 channels contained attractive programming, including AFL matches (which were not otherwise available to Foxtel subscribers), and even though Telstra, effectively one of the '**Foxtel partners**', considered that C7's proposals, if accepted, would have been highly beneficial to Foxtel. Seven says that the conduct of Foxtel was designed to harm C7 and to favour the interests of Fox Sports, C7's competitor in the market for the supply of sports channels to retail pay television operators. Indeed, Seven says that News and PBL had the explicit purpose of '*killing C7*' and that Telstra, ultimately at least, acquiesced in that purpose.

84 **Secondly**, at a teleconference held on 13 December 2000, a '*consortium*', including representatives of News, Foxtel, PBL and Telstra, made an arrangement (referred to in the case as the '**Master Agreement**'). The Master Agreement was intended to facilitate Foxtel's acquisition of the AFL pay television rights for the 2002 to 2006 seasons. The Master Agreement provided for News to bid for and acquire the AFL broadcasting rights and then to sub-license the AFL pay television rights to Foxtel and the AFL free-to-air rights to Nine and Network Ten Pty Ltd ('**Ten**'), another free-to-air channel, on previously agreed terms. These terms required Foxtel to pay $30 million per annum, plus adjustments, for the AFL pay television rights, in circumstances where the Foxtel partners were aware that Foxtel was overpaying for the rights and that the acquisition would result in a loss to it over the five year term of the sub-licensing agreement. The Master Agreement also contemplated that Fox Sports would acquire the pay television rights to National Rugby League ('**NRL**') matches for the 2001 to 2006 seasons from the '**NRL Partnership**', which (as will appear from Chapter 3) makes all decisions relating to NRL broadcasting rights.

85 Pursuant to the Master Agreement, News and Fox Sports successfully bid for the AFL broadcasting rights and the NRL pay television rights, respectively, and subsequently entered into the various licensing and other transactions contemplated by the arrangement. Seven says that the objective and effect of the Master Agreement were to deprive C7 of the rights to the two '*marquee sports*' which were essential to C7's continued existence as a sports channel. That objective was achieved. In consequence, the two pay television platforms with which C7 had contracts (Optus and Austar) terminated or failed to renew their contracts once C7 had lost the AFL pay television rights. (I use the expression '**Austar**' to refer to either or

both of Austar United Communications Ltd ('**Austar United**'), the seventeenth respondent, and Austar Entertainment Pty Ltd ('**Austar Entertainment**'), the eighteenth respondent.) Bereft of both the AFL pay television rights and the NRL pay television rights, C7 could not continue as a viable sports channel. It was effectively doomed.

86 **Thirdly**, Seven says that during the period from August 1999 until August 2000, Foxtel and Telstra Multimedia repeatedly denied C7's request for access to Telstra Multimedia's hybrid fibre coaxial cable (the '**Telstra Cable**'). C7 made its requests pursuant to the access arbitration regime contained in Pt XIC of the *TP Act*. Foxtel and Telstra Multimedia declined the requests on the ground, among others, that Foxtel had a '*protected contractual right*' in relation to the Telstra Cable under the applicable contractual arrangements. The refusal of access prevented C7 from offering its channels directly to retail pay television subscribers and prejudiced Seven's chances of successfully bidding for the AFL broadcasting rights, including the pay television rights.

87 The claim based on denial of access to the Telstra Cable loomed larger in Seven's pleaded case and in opening than it did in the closing submissions. In the end, it played a relatively minor part in the proceedings.

2.2.2 Causes of Action Based on Anti-Competitive Conduct Causing Harm to C7

2.2.2.1 MASTER AGREEMENT: THE EFFECTS CASE

88 Seven says that the Master Agreement (the arrangement made at the teleconference of 13 December 2000) involved two elements. One required or contemplated that News would acquire the AFL broadcasting rights, while the other required or contemplated that Fox Sports would acquire the NRL pay television rights. The acquisition of each set of rights was to occur with the support of the other parties to the Master Agreement. In particular, Foxtel had agreed with News to take defined AFL pay television rights for $30 million per annum (plus adjustments), should News' bid for the AFL broadcasting rights succeed, while Nine and Ten had agreed to take the AFL free-to-air television rights for a combined fee of $46 million per annum (plus adjustments). Together these arrangements constituted what Seven describes as the '**Master Agreement Provision**'.

89 According to Seven, the effect and likely effect of the Master Agreement Provision

was that:

> News acquired the AFL pay television rights under an obligation to sub-license them to Foxtel;
>
> Fox Sports acquired the NRL pay television rights; and
>
> as a result, C7, deprived of essential '*marquee sports*' content, was forced to cease operating its business.

90 Consequently, so Seven contends, the effect or likely effect of the Master Agreement Provision was a substantial lessening of competition in each of four markets:

> the wholesale sports channel market (being a market for the wholesale acquisition and supply of channels containing sports programming for pay television platforms);
>
> the AFL pay rights market (being a market for the acquisition and supply of the rights to broadcast AFL matches on pay television);
>
> the NRL pay rights market (being a market for the acquisition and supply of the rights to broadcast NRL matches on pay television); and
>
> the retail pay television market (being a market for the supply of retail pay television services).

While Seven identifies and relies on all of these markets, its primary case relates to substantial lessening of competition in the wholesale sports channel market. Seven contends that the demise of C7 substantially lessened competition in that market, since C7 was the closest constraint on Fox Sports and there were substantial barriers to entry into the market.

91 The parties to the Master Agreement are said to be News, PBL, Telstra and Foxtel (that is, Sky Cable and Telstra Media, the partners in Foxtel) (the '**Consortium Respondents**'). Seven argues that the Consortium Respondents made a contract or arrangement containing a provision which '*would have or be likely to have the effect ... of substantially lessening competition*', and thus each of them contravened s 45(2)(a)(ii) of the *TP Act*.

92 According to Seven, the Consortium Respondents also gave effect to the Master

Agreement Provision by entering into the various agreements contemplated by the Master Agreement, including the '*Foxtel Put*' by which Foxtel agreed to take the AFL pay television rights from News at a fee of $30 million per annum. They each therefore gave effect to a provision of a contract or arrangement which had, or was likely to have, the effect of substantially lessening competition, and thereby contravened s 45(2)(b)(ii) of the *TP Act.*

2.2.2.2 MASTER AGREEMENT: THE PURPOSE CASE

93 Seven contends that the Consortium Respondents intended that Foxtel should acquire the AFL pay television rights for 2002 to 2006 and that C7 should be prevented from acquiring the NRL pay television rights for 2001 to 2006. The objective was to force C7 out of business and thereby prevent it from competing:

> against Fox Sports, as a buyer in the AFL pay rights and NRL pay rights markets;
>
> against Foxtel and Fox Sports, as suppliers in the wholesale sports channel market; and
>
> against Foxtel, as a provider of services in the retail pay television market.

94 Accordingly, the Consortium Respondents, or some of them, contravened s 45(2)(a)(ii) of the *TP Act* by making a contract or arrangement containing a provision that had the purpose of substantially lessening competition in each of the four markets identified by Seven. They also each contravened s 45(2)(b)(ii) of the *TP Act*, by giving effect to a provision that had the purpose of substantially lessening competition.

2.2.2.3 TAKING ADVANTAGE OF MARKET POWER

95 Seven says that during the period from November 1998 to December 2000, Foxtel had a substantial degree of power in the retail pay television market. It took advantage of that power by:

> refusing to accept offers made by C7 to supply its channels for broadcast on the Foxtel platform;
>
> agreeing to pay $30 million per annum (plus adjustments) for the AFL pay television rights for the 2002 to 2006 seasons, which was known to be more

than the rights were truly worth; and

stating to the AFL and the NRL Partnership that C7 would not be permitted to supply its channels to the Foxtel platform, even if C7 acquired the AFL pay television rights for 2002 and beyond.

96 Seven's case is that Foxtel took advantage of its market power for the purpose of preventing C7 from engaging in competitive conduct in several markets, including the retail pay television market and the wholesale sports channel market. Seven also contends that Foxtel took advantage of its substantial market power for the purpose of preventing or deterring Optus from engaging in competitive conduct in the retail pay television market. Accordingly, Foxtel took advantage of its market power for one of the purposes proscribed by s 46(1) of the *TP Act* and thus contravened that subsection.

2.2.2.4 DENIAL OF ACCESS TO THE TELSTRA CABLE

97 Seven argues that the conduct of Foxtel and Telstra Multimedia in denying C7 access to retail pay television customers via the Telstra Cable gave effect to a provision in an agreement between them, known as the Broadband Co-operation Agreement ('**BCA**'), which conferred exclusivity of access to the Telstra Cable on Foxtel. The provision had the effect or likely effect of substantially lessening competition in the retail pay television market, since giving effect to Foxtel's right of exclusive access deprived C7 of the opportunity to supply its channels directly to retail pay television subscribers. For this reason Foxtel and Telstra Media contravened s 45(2)(a)(ii) of the *TP Act.* The loss of the opportunity to enter the retail market adversely affected Seven's chances of acquiring the AFL pay television rights.

98 Although this claim was given some prominence during the hearing, Seven acknowledges in its Case Summary that the claim need only be addressed if all other claims against the Telstra parties fail.

2.2.2.5 RELIEF SOUGHT BY SEVEN

99 Seven seeks damages against the News, PBL and Telstra parties and Foxtel (Sky Cable and Telstra Media) by reason of the anti-competitive conduct directed at C7. Seven's primary claim is based on the value of C7's lost opportunity to produce and exploit pay television sports channels. Seven advances three '*mutually exclusive scenarios*' for assessing

damages, supported by elaborate expert evidence. Seven's claim for damages arising out of the contraventions already outlined relies on '*Scenario 1*'. Scenario 1 assumes that in the absence of the unlawful anti-competitive conduct (that is, in the '*counter-factual world*'), C7 would have retained the AFL pay television rights for the 2002 to 2006 seasons, but would not have acquired the NRL pay television rights for 2001 to 2007.

100 On this basis, Seven claims that the net present value ('**NPV**') of its lost opportunity as at February 2002, taking account of other relatively modest compensable losses (such as C7's close-down costs), is between $194.8 million and $212.3 million. These figures are, however, calculated on the assumption that C7 would have been able to acquire the AFL pay television rights for the 2002 to 2006 seasons for $22 million per annum (plus adjustments). If it be assumed that C7 would have had to pay $30 million per annum (plus adjustments) for the AFL pay television rights (the amount Foxtel in fact paid), the damages recoverable under Scenario 1, on Seven's calculations, are reduced to between $167.4 million and $182.5 million.

101 It is common ground that any damages award should be '*grossed up*' for the effect of income tax, by using a multiplier of 1.429. In addition, Seven seeks pre-judgment interest calculated from the valuation date.

102 Seven also seeks declaratory and injunctive relief against the News, PBL and Telstra parties, although Seven no longer presses some forms of relief claimed in the Application. The '*structural relief*' sought by Seven includes orders requiring News and PBL to divest themselves of their direct or indirect interests in Sky Cable and Foxtel. In final oral submissions, Mr Sheahan SC agreed on behalf of Seven that the sensible course was to defer the final resolution of Seven's claim to non-pecuniary relief until I make the necessary factual findings and reach conclusions as to the nature of the contravening conduct, if any.

2.2.3 Anti-Competitive Conduct: The Foxtel-Optus CSA

103 Seven also mounts a case based on anti-competitive conduct which is said to have taken place after the award of the AFL broadcasting rights and the NRL pay television rights in December 2000. This case rests primarily on the purpose and effect of the Foxtel-Optus Content Supply Agreement (**'Foxtel-Optus CSA**'), entered into on 5 March 2002 between the '**Foxtel Partnership**' (Sky Cable and Telstra Media in partnership), the sixteenth

respondent, Optus Vision, and other Optus entities.

104 The fourth respondent, Foxtel Management Pty Ltd ('**Foxtel Management**') was also a party to the Foxtel-Optus CSA. Foxtel Management is owned equally by Sky Cable and Telstra Media. It carries on the business of Foxtel as its agent. Optus Vision at all material times has been a retail pay television provider. Prior to the Foxtel-Optus CSA, Optus Vision was a competitor of Foxtel, although the parties disagree both as to the relevant market and the extent to which Optus Vision acted as a constraint on Foxtel in the market. Optus Vision forms part of the Optus Group, which provides a range of telecommunications services and thus at all material times has been a competitor of Telstra, at least in relation to certain services.

105 The Foxtel-Optus CSA provides that Optus Vision has the right to receive and broadcast all of Foxtel's channels and that Optus Vision must make all the channels it produces and most of its other content available to Foxtel for broadcast on the Foxtel Service. The Foxtel-Optus CSA also contains pricing arrangements which Seven says limit Optus Vision's ability to compete with Foxtel on the price charged to retail subscribers.

106 Seven's principal case is that the effect or likely effect of the relevant provisions of the Foxtel-Optus CSA was to substantially lessen competition in the retail pay television market, in contravention of s 45(2) of the *TP Act*. Seven recognises that before the Foxtel-Optus CSA was executed, Optus' pay television business was experiencing difficulties. It also acknowledges (although this was in dispute until the final submissions) that had the Foxtel-Optus CSA not been executed, Optus would have adopted a '*Manage for Cash*' strategy that involved it winding down its retail pay television business.

107 However, Seven says that, but for the Foxtel-Optus CSA, Optus would have continued as a pay television operator and would have sought actively to retain subscribers and to acquire attractive programming. Optus would therefore have continued to compete with Foxtel. According to Seven, the effect of the Foxtel-Optus CSA provisions was that Optus ceased to impose competitive constraints on Foxtel. In particular, there was little or no product differentiation between the two services and a significant reduction in the price competition that otherwise would have taken place.

108 Seven further says that the Foxtel-Optus CSA contains '*exclusionary provisions*' within the meaning of s 4D of the *TP Act*. This is because:

> prior to the execution of the Foxtel-Optus CSA, Foxtel and Optus were in competition with each other in relation to the acquisition of programs from suppliers;
>
> but for the Foxtel-Optus CSA, the competitive relationship would have been likely to remain; and
>
> a substantial purpose of the Foxtel-Optus CSA provisions was to limit the acquisition by Foxtel and Optus of programs from suppliers, including Hollywood studios.

Accordingly, the entry into the Foxtel-Optus CSA constituted a contravention of s 45(2)(a)(i) of the *TP Act* (which forbids the making of an agreement containing an '*exclusionary provision*').

109 Seven seeks damages for the loss of a valuable opportunity to enter into a three year agreement for the supply of the C7 channels to Optus on terms that had been discussed with Optus in September 2001. One possible issue to which this claim gives rise is how it can be reconciled with Seven's contention that C7 was doomed to extinction by the Master Agreement Provision.

2.3 Seven's Claims Arising out of the NRL Bidding Process

110 Seven relies on a number of causes of action, independently of its claims based on anti-competitive conduct, arising out of the process by which the NRL Partnership awarded the NRL pay television rights to Fox Sports in December 2000. The partners in the NRL Partnership are the twelfth respondent, the Australian Rugby Football League Ltd ('**ARL**') and the thirteenth respondent, National Rugby League Investments Pty Ltd ('**NRLI**'). NRLI is a subsidiary of News.

111 Seven's principal claim is that the nineteenth respondent, Mr Ian Huntly Philip ('**Mr Philip**'), disclosed confidential information relating to the terms of an offer for the NRL pay television rights which Seven made to the NRL Partnership on 5 December 2000. Mr Philip at the time, among other positions held by him, was Chief General Counsel of News, a

director of Sky Cable and a member of the NRL Partnership Executive Committee ('**NRL PEC**'). The NRL PEC made decisions on behalf of the NRL Partnership. Seven claims that Mr Philip disclosed the confidential information to Foxtel, News, PBL, Telstra and Fox Sports in circumstances which, as they were aware, breached confidentiality. Seven says that these parties misused the confidential information to Seven's disadvantage. According to Seven, the unauthorised use of the confidential information enabled Fox Sports to make a successful bid for the NRL pay television rights.

112 Seven also claims that the NRL Partnership and NRLI represented to Seven that C7's bid for the NRL pay television rights would be treated in a fair and impartial manner ('**the fair process representation**'). The representation is said to have been misleading and deceptive because there were no reasonable grounds for making it and in fact (so Seven says) the NRL Partnership ultimately accepted an inferior bid for the NRL pay television rights than that put forward by C7.

113 Seven seeks equitable compensation for the losses sustained by C7 by reason of Mr Philip's disclosure of confidential information. Alternatively, Seven seeks an account of the profits derived by News, PBL, Telstra and Fox Sports in consequence of their misuse of the confidential information. It also seeks damages for losses sustained by reason of the making of the fair process representation.

114 The claim for equitable compensation is based on '*Scenario 3*', which assumes that, but for the breach of confidence, C7 would have acquired the NRL pay television rights for 2001 to 2006, but would not have acquired the AFL pay television rights for 2002 or any later years. On this basis, Seven seeks equitable compensation for C7's loss of opportunity to exploit the rights (plus certain other losses such as the close-down costs), which is calculated to have a net present value of between $85.9 million and $104.5 million calculated as at February 2002. These amounts must be grossed up for tax and (according to Seven) also require the addition of pre-judgment interest calculated from the valuation date.

2.4 Optus-Specific Causes of Action

2.4.1 Seven's Claims against the Optus Respondents

115 Following C7's failure to obtain the AFL pay television rights beyond 2001, Optus

Vision became entitled to terminate the Channel Production and Supply Agreement of 30 June 1998 ('**C7-Optus CSA**'), pursuant to which C7 supplied sports channels to the Optus platform. Optus Vision and C7 were in dispute, however, as to the date on which the right to terminate could be exercised. As a result of negotiations, the parties entered into what was described as the '**First Variation Agreement'** in September 2001. The First Variation Agreement amended the C7-Optus CSA, *inter alia,* by inserting the so-called '**Exclusivity Clause**' (which became cl 8A of the C7-Optus CSA) and by clarifying the date on which Optus Vision could exercise its right of termination. The First Variation Agreement was for a term of three months, but the '**Second Variation Agreement**' formally executed on about 25 January 2002, effectively extended the arrangement until 28 February 2002. The Exclusivity Clause, which was drafted in broad terms, prevented Optus Vision negotiating or entering into agreements with channel suppliers other than C7 for the duration of the C7-Optus CSA (as amended by the Variation Agreements).

116 Seven claims that Optus Vision breached the Exclusivity Clause by negotiating with Foxtel for the Foxtel-Optus CSA, which was ultimately entered into on 5 March 2002. Seven also says that Optus Vision breached the Exclusivity Clause by negotiating with Foxtel and Fox Sports for the '**Foxtel-Optus Term Sheet**' of 20 February 2002**,** by which Fox Sports agreed to supply sports content to Optus Vision pending the finalisation of the Foxtel-Optus CSA. According to Seven, as a result of Optus Vision's breach, C7 lost the opportunity to enter into a valuable three year agreement to supply Optus Vision with general sports programming channels. Seven seeks damages for that lost opportunity.

117 In addition, Seven seeks damages against the twenty-second respondent, SingTel Optus, Optus Vision's holding company, on the ground that it:

> indemnified Seven against any breach by Optus Vision of the C7-Optus CSA; and
>
> induced Optus Vision to breach the Exclusivity Clause.

Seven's damages claim includes exemplary damages against SingTel Optus because it:

> *'engaged in conscious wrongdoing in contumelious disregard of the rights of [Seven]'.*

118 Seven also claims that Optus engaged in misleading and deceptive conduct in the

lead-up to the Second Variation Agreement. Optus is said to have misrepresented its intentions concerning compliance with the Exclusivity Clause. But for Optus' misleading and deceptive conduct, so Seven says, Seven would have insisted that Optus Vision enter into a three year agreement with C7.

119 Finally, Seven seeks damages against Optus Vision for repudiating the C7-Optus CSA. Optus Vision purported to exercise its contractual right of termination (available because Seven had lost the AFL pay television rights) but, according to Seven, Optus Vision was not entitled to do so because at the time it was in breach of the Exclusivity Clause.

120 Seven's damages claim against Optus is based on '*Scenario 2*'. This values C7's lost opportunity to produce sports channels on the assumption that C7 acquired neither the AFL pay television rights for 2002 to 2006 nor the NRL pay television rights for 2001 to 2006, yet succeeded in acquiring the AFL pay television rights in respect of 2007 and later years. Seven relies on the expert evidence of Professor McFadden who suggested that the NPV of C7's lost opportunity on Scenario 2 was between $26 million and $65 million.

2.4.2 Optus' Cross-Claim

121 By a Second Further Amended Cross-Claim filed on 9 February 2006 ('**Cross-Claim**') Optus alleges that it was induced to agree to the Exclusivity Clause by misleading representations on the part of Seven as to the date on which Optus Vision's right to terminate the C7-Optus CSA arose. Accordingly, Optus says, Seven is precluded from relying on the Exclusivity Clause.

122 Optus also advances a large number of other contentions that enable it (so it argues) to avoid liability under the Exclusivity Clause. These include claims that:

> the Exclusivity Clause was an unreasonable restraint of trade or contravened the *TP Act*; and
>
> Optus Vision only agreed to the Exclusivity Clause because Seven breached an obligation under the C7-Optus CSA to supply Optus with a copy of Seven's agreement with the AFL, which would have revealed the true date the right to terminate arose.

123 Optus seeks orders, among others, setting aside the Exclusivity Clause or declaring it to be unenforceable.

2.5 Settled Claims

124 Ten was originally named as the tenth respondent in the proceedings. Despite being sued by Seven, Ten joined forces with Seven in 2005 to bid for the AFL broadcasting rights for the 2007 to 2011 seasons. Seven and Ten were ultimately successful in acquiring those rights. On 6 February 2006, shortly after their success was announced, Seven discontinued the proceedings against Ten. It is one of the many somewhat bizarre features of this case that Seven apparently maintained its suit against Ten during the whole of the period of their joint bid for the AFL broadcasting rights.

125 The AFL was originally the eleventh respondent in the proceedings. However, by orders made on 5 December 2005, Seven discontinued the proceedings against the AFL. It is another strange feature of this case that Seven was suing the AFL at the same time as it was negotiating with the AFL to acquire the AFL broadcasting rights for the 2007 to 2011 seasons.

126 The consent orders reserved the question of costs and preserved the AFL's entitlement to make submissions in any claims for relief insofar as they affect it. In fact, the AFL filed brief written submissions opposing the grant of certain relief in the event that Seven pressed its claim for that relief.

2.6 Structure of the Judgment

127 In **Chapter 1** I have explained some of the problems and challenges posed by this particular example of mega-litigation. In this **Chapter 2**, I provide an overview of the claims made in the litigation and the conclusions I have reached on the principal issues.

128 **Chapter 3** identifies the parties to the proceedings and outlines the relationships between associated entities. Chapter 3 refers briefly to the principal transactions relating to the allocation of the AFL broadcasting rights and the NRL pay television rights (although most of these are referred to in more detail elsewhere in the judgment). In addition, Chapter 3 provides summary information concerning the officers who played (or are said to have

played) a significant part in the transactions which are central to Seven's case. It also provides some background on the AFL and NRL Competitions, each of which generates valuable broadcasting rights.

129 **Chapter 4** explains the regulatory framework governing television broadcasting in Australia, including the so-called anti-siphoning regime established by the *Broadcasting Services Act 1992* (Cth) ('*BS Act*') that has played such a large part in the case. The Chapter also provides some information on free-to-air and pay television in Australia.

130 **Chapter 5** explains the approach I have taken to assessing the evidence of witnesses whose credit has been impugned. I assess the credibility of the key witnesses who gave evidence in the proceedings. I also consider the significance of the fact that some potential witnesses have not been called to give evidence, notwithstanding that they can be regarded as being in the camp of one or other of the parties.

131 **Chapters 6 to 11** recount, at considerable length, the facts relevant to Seven's claims and to Optus' Cross-Claim. The account includes some important findings of fact on contested issues. I have rejected a simple chronological approach in favour of ordering the material by reference to topics. Each of the six Chapters deals with a particular aspect of the case. The account within each Chapter is more or less in chronological order, although events are grouped under sub-headings by subject matter.

132 This thematic approach has the advantage of recording events in a form that allows them most readily to be related to the various claims made by Seven. It has the disadvantage that the events cannot, in truth, be neatly compartmentalised according to subject matter. For example, certain discussions, such as those occurring at the teleconference of 13 December 2000, related to both the AFL broadcasting rights and the NRL pay television rights. Indeed, Seven's case depends, to some extent, on the existence of an arrangement among the Consortium Respondents relating to both sets of rights.

133 It is therefore important to appreciate that the thematic presentation of the facts is not intended to suggest that the various discussions and transactions were not inter-connected. Nor does it imply any pre-judgment of Seven's case, insofar as it depends on the relationship between events referred to in different Chapters. The facts recounted in one Chapter may be

directly relevant to a number of causes of action and may influence the interpretation of conversations or events recounted in another. The analysis of Seven's contentions in this judgment is intended to take into account the relevant events, regardless of where they are referred to in the judgment.

134 **Chapter 6** provides background information on pay television in Australia during the period 1993 to 1999, including the foundation agreements that provided the framework for many of the events central to this case.

135 **Chapter 7** addresses C7's efforts to license its sporting channels to Foxtel during 1999 and 2000 and the related dispute between the Foxtel partners, particularly News and Telstra (whose interests were held through Sky Cable and Telstra Media), concerning Foxtel's operations. The dispute primarily concerned the terms on which the Fox Sports channels were licensed to Foxtel and Telstra's efforts to reduce the price paid by Foxtel (in which it had an interest) to Fox Sports (in which it had no interest).

136 **Chapter 8** analyses the events leading to the award to News in December 2000 of the AFL broadcasting rights for 2002 to 2006 and the acquisition by Foxtel of the AFL pay television rights in respect of the same period.

137 **Chapter 9** deals with the events leading to the award to Fox Sports in December 2000 of the NRL pay television rights for 2001 to 2006.

138 **Chapter 10** recounts C7's attempts to gain access to the Telstra Cable pursuant to the regime in Pt XIC of the *TP Act*. These events relate to Seven's claim that the conduct of Foxtel and Telstra Multimedia contravened s 45(2) of the *TP Act* by giving effect to a term of the BCA that was likely to have the effect of substantially lessening competition.

139 **Chapter 11** covers the events post-dating the award of the AFL broadcasting rights, including those leading to the execution by Foxtel and Optus of the Foxtel-Optus CSA in March 2002, by which the parties agreed to share content to be broadcast on their respective pay television platforms. Chapter 11 also deals with events relevant to the claims between Seven and Optus.

140 The balance of the judgment contains my reasoning on Seven's contentions and in relation to Optus' Cross-Claim. The sequence of Chapters has been influenced to some extent by the structure of the parties' written submissions, although the parties themselves have not adopted a uniform approach. Where I have found it convenient to depart from the structure suggested by the written submissions, I have done so.

141 **Chapter 12** addresses the questions of market definition posed by Seven's submissions. I make findings in relation to the existence or otherwise of the four markets relied on by Seven – the AFL pay rights market; the NRL pay rights market; the wholesale sports channel market; and the retail pay television market.

142 **Chapter 13** deals with Seven's case under s 45(2)(a)(ii) and (b)(ii) of the *TP Act* against the Consortium Respondents, insofar as it is based on the effects or likely effects of the Master Agreement Provision. The Chapter also deals with certain other provisions which Seven claims had the effect or likely effect of substantially lessening competition in the four markets on which it relies. I consider whether, in the light of the findings as to markets made in Chapter 12 and the questions of construction that arise, any of the provisions identified by Seven had the effect or likely effect of substantially lessening competition in any of the pleaded markets.

143 **Chapter 14** considers Seven's alternative case that the Master Agreement Provision and the other provisions identified by Seven had the purpose of substantially lessening competition and that each of the Consortium Respondents therefore contravened s 45(2)(a)(ii) and (b)(ii) of the *TP Act*. Because of the construction I give to the legislation, it is necessary to determine whether **all** the parties responsible for including the provision in the contract, arrangement or understanding shared the proscribed purpose. As in Chapter 13, it is necessary, when making this judgment, to take into account the findings I make on questions of market definition.

144 **Chapter 15** makes findings as to whether News, Foxtel or PBL had the purpose Seven alleges against them, namely '*killing C7*'.

145 **Chapter 16** considers whether Seven has established that Foxtel took advantage of its power in the retail pay television market for a proscribed purpose, in contravention of s 46(1)

of the *TP Act.*

146 **Chapter 17** analyses whether Foxtel and Telstra Multimedia contravened s 45(2)(b)(ii) of the *TP Act* by refusing C7's requests for retail access to the Foxtel platform via the Telstra Cable.

147 **Chapter 18** considers whether provisions in the Foxtel-Optus CSA, by which Foxtel and Optus agreed to share content on their respective pay television platforms, had the purpose or effect of substantially lessening competition in the retail pay television market.

148 **Chapter 19** deals with four causes of action propounded by Seven, arising out of its failure to acquire the NRL pay television rights in December 2000.

149 **Chapter 20** addresses Seven's claims against Optus and Optus' Cross-Claim against Seven.

150 **Chapter 21** deals with Seven's causes of action based on the alleged contravention by Foxtel Cable Television Pty Ltd ('**Foxtel Cable**'), the fifteenth respondent, of the anti-siphoning regime created by the *BS Act*; alleged contraventions by News, PBL, Telstra, Nine and Fox Sports of s 45D of the *TP Act* arising out of the Master Agreement Provision; and alleged contraventions of s 45(2) of the *TP Act* flowing from the Optus-NRL Licence of 25 January 2001, pursuant to which Fox Sports, with Foxtel's consent, supplied the '*NRL on Optus*' channel to Optus during the 2001 NRL season.

2.7 Summary of Conclusions

2.7.1 General Observations

151 Before summarising the conclusions I have reached on Seven's case and Optus' Cross-Claim, it is appropriate to make some general observations. These comments are designed to assist in placing this very lengthy and complex case in context.

152 **First**, it was part of Seven's strategy for a long period of time to claim that a bid by Foxtel for the AFL pay television rights would constitute unlawful anti-competitive conduct. Moreover, Seven was seriously contemplating litigation against the Consortium Respondents (or some of them) in respect of the loss or possible loss of the AFL pay television rights well

before the AFL actually awarded the rights for 2002 to 2006 in December 2000. For example, on 22 November 1999 Mr Stokes conveyed to the AFL a threat that any bid by Foxtel for the AFL pay television rights would be a breach of the *TP Act*. In May 2000, Mr Stokes told Dr Switkowski that he was considering wide-ranging legal options to protect Seven's interests in the AFL pay television rights. Prior to the AFL's award of the broadcasting rights, Seven unsuccessfully sought the intervention of the ACCC in the bidding process. At Seven's annual general meeting on 18 November 2000, Mr Stokes warned of a damages claim against Foxtel if Seven lost the AFL pay television rights. Mr Stokes conceded in evidence that, by that time, he was giving serious consideration to suing the parties bidding for the AFL broadcasting rights.

153 If a party embarks on a strategy of the kind adopted by Seven in this case, yet continues to deal with those whom it accuses of anti-competitive conduct, its own conduct may well be influenced and its perceptions coloured by the very strategy it is following. The risk of that happening is increased if the strategy includes litigation, because there must be a strong temptation to act in a manner that is calculated to improve the chances of success in the forensic battle to come.

154 The impending litigation itself may shape the recollections of those who ultimately give evidence, particularly if the litigation is seen as critical to the fortunes of the prospective litigant. Of course, the reconstruction of events through a prism of self-interest is a common feature of litigation in which the facts are strongly disputed. But if a party implements a litigious strategy while the relevant events are still unfolding, the pressures to reconstruct or interpret events in a manner that reflects the party's objectives may be very intense.

155 In my view, Seven's case has been affected by these factors. As my findings indicate, certain of Seven's witnesses frequently reconstructed events in a manner that not merely reflected Seven's interests, but could not withstand critical examination. In particular, the accounts of those witnesses could not be reconciled, in important respects, with the contemporaneous documentation.

156 **Secondly**, the gist of Seven's complaint against the Consortium Respondents is that they engaged in anti-competitive conduct in relation to the acquisition of the AFL pay television rights and the NRL pay television rights. Seven also complains that Foxtel took

advantage of its market power to refuse C7's offer to supply channels for broadcast on the Foxtel platform. Seven relies on the provisions of the *TP Act* that aim to promote competition and, to that end, prohibit certain forms of anti-competitive conduct.

157 It is not essential that a party which invokes the *TP Act* to attack allegedly anti-competitive practices of its rivals should itself be a paragon of competitive virtue. Yet it is striking that Seven's strategy in 1999 and 2000 for obtaining the AFL broadcasting rights for 2002 to 2006 hinged on avoiding a competitive bidding process for the rights. Seven had certain advantages in the bidding process, including its status as the existing holder of the broadcasting rights, its role as a free-to-air television broadcaster and its entitlement to a last right of refusal in relation to the AFL free-to-air television rights for 2002 to 2006. Seven sought to exploit these advantages by insisting to the AFL that it would bid only for the AFL broadcasting rights as a whole and not separately for the pay and free-to-air television rights. Seven also used a variety of techniques, including seeking the intervention of the competition regulator, to discourage Foxtel from bidding (whether through News or otherwise) for the AFL pay television rights. Seven's intention was to position itself as the only potential buyer of the AFL broadcasting rights.

158 Mr Sumption, in his oral closing submissions on behalf of Seven, accepted that the logic of Seven's position in the case is that once News realised that Fox Sports (of which it was the part owner) had a real chance of acquiring the NRL pay television rights, News could not lawfully bid for the AFL pay television rights as a component of the AFL broadcasting rights. As I discuss in Chapter 13 ([2172], [2220]), Mr Sumption did not concede that, from a policy perspective, there was anything odd about this result. He pointed to steps that the AFL might have taken to generate competitive bids for its broadcasting rights. Even so, it seems curious that competition law should have the effect, in the particular circumstances of this case, of conferring upon one potential buyer the opportunity to acquire valuable rights without any opposition from an otherwise willing competitive bidder for the same rights. That was the very basis on which the ACCC declined to intervene in the competitive bidding process for the AFL broadcasting rights.

159 **Thirdly**, Seven has consistently maintained that securing the AFL pay television rights was essential to C7's commercial survival after 2001. Yet the evidence clearly establishes that Seven failed to make its best offer for the rights when they became available.

The reasons for Seven's quite remarkable failure are also explained in Chapter 13 ([2273]-[2276]). In essence, Seven was the author of its own misfortune.

160 I do not suggest that this finding is determinative of Seven's case on liability (although it may be significant on the question of damages, should that arise). But the finding demonstrates that Seven was far from a helpless victim in the face of the allegedly anti-competitive conduct of which it complains.

161 **Fourthly**, an important element in Seven's case is that the Consortium Respondents endorsed a bid for the AFL pay television rights by Foxtel, believing that the price offered was substantially more than the rights were worth and that the acquisition would prove to be loss-producing for Foxtel. It is yet another extraordinary feature of this case that Mr Stokes conceded in cross-examination that he regarded the price paid by the Foxtel Partnership for the AFL pay television rights as a '*good*' deal for a purchaser. As I explain in Chapters 8 and 15, this concession makes it very difficult for Seven to establish the factual foundation for its '*overbidding*' contention.

162 **Fifthly**, there is more than a hint of hypocrisy in certain of Seven's contentions. I particularly have in mind Seven's claim that Mr Philip divulged confidential information in relation to Seven's bid for the NRL pay television rights and that certain Respondents received the information knowing that it had been obtained in circumstances which breached confidentiality. I find in Chapter 19 that Seven '*leaked*' to the media details of its bid, thus destroying any confidentiality in the information. This finding makes it surprising, to say the least, that the claim was brought in the first place. Another example is Seven's complaint that C7 suffered losses by being denied retail access via the Telstra Cable when (as I find) it never had any serious intention that C7 should be a retailer of pay television services.

163 By pointing to these matters, I do not intend to imply that the behaviour of all the Respondents was exemplary. Mr Philip, for example, on his own account dishonestly attempted to mislead Telstra into contributing additional support to Fox Sports' bid for the NRL pay television rights. News also was content to withhold important information from Telstra, in effect its partner in Foxtel, and did so over a considerable period of time. But in the end it is Seven which must make out its pleaded case against the Respondents.

2.7.2 Specific Conclusions

164 As I have noted, Seven's primary case as to the substantial lessening of competition relates to the wholesale sports channel market. In **Chapter 12**, I find that Seven has failed to establish the existence of that market. I also find that Seven has not established the existence of either the AFL pay rights market or the NRL pay rights market on which it relies. However, I conclude that Seven has made out that there was, at the relevant times, a retail pay television market in the terms pleaded by it.

165 It follows from the findings made in Chapter 12, that Seven can only succeed in its anti-competitive effects case under s 45(2) of the *TP Act* if the provisions on which it relies had the effect or likely effect of substantially lessening competition in the retail pay television market. In **Chapter 13**, I find that the Master Agreement Provision and the other provisions relied on by Seven did not have the effect or likely effect at the relevant times of substantially lessening competition in that market. By December 2000 (when the Master Agreement was entered into) and January 2001 (when the parties gave effect to the Master Agreement Provision), Optus' pay television operations had been experiencing very substantial losses over a period of several years. The strong likelihood in December 2000 and January 2001 was that, if the Master Agreement had not been entered into or implemented, Optus would have negotiated a content sharing agreement with Foxtel along the lines of the Foxtel-Optus CSA (which was in fact executed on 5 March 2002). Thus, even in the absence of the Master Agreement Provision, Optus would not have been a significant constraint on Foxtel in the retail pay television market.

166 In **Chapter 14**, I conclude that Seven's case based on the anti-competitive purpose of the various provisions, including the Master Agreement Provision, cannot succeed. The reason is that even if each of the Consortium Respondents had the objective attributed to it by Seven – that of killing C7 – achieving that objective could not have substantially lessened competition in the retail pay television market. By reason of Optus' parlous state, any lessening of competition in that market would have occurred quite independently of the fate of C7.

167 Although strictly not necessary to do so, I consider in Chapter 14 further construction questions relating to s 45(2)(a)(ii) and (b)(ii) of the *TP Act*. I construe these provisions as requiring **all parties** responsible for the inclusion of the impugned provision in the contract,

arrangement or understanding to have the subjective purpose of substantially lessening competition, if a contravention of s 45(2) is to be established. I find that Telstra was responsible, together with the other Consortium Respondents, for including the Master Agreement Provision in the Master Agreement (that is, the provision requiring or contemplating that bids would be made for both the AFL and NRL pay television rights). But I also find that Telstra did not have the purpose proscribed by s 45(2), even if it is assumed that the other Consortium Respondents did have such a purpose. Thus Seven's purpose case under s 45(2) in relation to the Master Agreement Provision fails.

168 Seven's case in relation to the other provisions on which it relies (with one exception) similarly fails because Seven cannot show that all parties responsible for including the provision in the contract, arrangement or understanding shared the purpose proscribed by s 45(2) of the *TP Act*. The exception is the so-called News-Foxtel Licence, which is not affected by this particular analysis, although I reject Seven's claim based on the News-Foxtel Licence for other reasons.

169 In view of the conclusions reached in Chapter 14, it is not necessary, in order to deal with Seven's purpose case under s 45(2) of the *TP Act*, to make factual findings about the purpose of News, Foxtel and PBL. However, such findings may be important if my construction of s 45(2) is incorrect. Moreover, the purpose of News, Foxtel and PBL may be relevant to Seven's case that Foxtel took advantage of its market power for a proscribed purpose in contravention of s 46(1) of the *TP Act*. It also has some significance for the market definition issues. Accordingly, I deal with the factual issues relating to the purpose of News, Foxtel and PBL in **Chapter 15.**

170 I find in Chapter 15 that Seven has not established that any of News, PBL and Foxtel (Sky Cable and Telstra Media) had the objective of destroying C7 and thereby substantially lessening competition. Seven has not demonstrated that any of those parties crossed the boundary that distinguishes legitimate, albeit aggressive and even ruthless competitive conduct from anti-competitive behaviour of the kind proscribed by ss 45(2) and 46(1) of the *TP Act*.

171 In **Chapter 16**, I conclude that Foxtel did not take advantage of its power in the retail pay television market in any of the ways alleged by Seven. In particular, find that:

Seven has not made out its pleaded case in relation to Foxtel's refusal to accept '*offers*' by C7 to supply its channels;

Foxtel, by refusing to negotiate with C7 pending the award of the AFL broadcasting rights, did not take advantage of its market power; and

the statements made by Foxtel to the AFL and to the NRL Partnership were not materially facilitated by its power in the retail pay television market.

172 In **Chapter 17**, I reject Seven's case based on the conduct of Foxtel and Telstra Multimedia in denying C7 access to the Telstra Cable. I find that the requests made by C7 for retail access were intended to place pressure on Foxtel in relation to other issues. Seven never intended that C7 should take advantage of retail access via the Telstra Cable, should it ever have become available. I conclude that, although Foxtel and Telstra Multimedia gave effect to a provision in the BCA that conferred on Foxtel exclusive access to the Telstra Cable, that provision did not have the effect or likely effect of substantially lessening competition in the retail pay television market.

173 In **Chapter 18**, I find that the provisions of the Foxtel-Optus CSA (by which Foxtel and Optus agreed to share content) did not have the effect or likely effect of substantially lessening competition in the retail pay television market. I reach this conclusion because, in the absence of the Foxtel-Optus CSA, Optus would have adopted the '*Manage for Cash*' strategy which would have led to the closure of Optus' pay television operations within three to four years. In the meantime, in the so-called '*counter-factual world*', Optus would not have been a significant competitive constraint on Foxtel.

174 In **Chapter 19**, I conclude that Seven's cause of action founded on breach of confidentiality fails. I find that, although Mr Philip (contrary to his evidence) deliberately disclosed certain information relating to Seven's bid for the NRL pay television rights, the information lacked the quality of confidentiality because Seven had already publicly disclosed it. I also reject Seven's contentions on the other causes of action upon which it relies in relation to the award of the NRL pay television rights.

175 In **Chapter 20**, I reject Seven's claims that Optus engaged in misleading or deceptive conduct in contravention of s 52 of the *TP Act.* However, I find that Seven engaged in misleading or deceptive conduct in the lead-up to Optus executing the First and Second

Variation Agreements. I conclude that the appropriate relief to which Optus is entitled is an order pursuant to s 87(2)(ba) of the *TP Act* refusing to permit Seven to enforce the Exclusivity Clause inserted into the C7-Optus CSA by the First and Second Variation Agreements. In consequence, Seven's claim based on breach of contract fails. I conclude that Optus is not entitled to any further relief.

176 In **Chapter 21**, I conclude that Seven has not made out the various additional causes of action based on alleged contraventions of the anti-siphoning regime in the *BS Act*, s 45D of the *TP Act* and s 45(2) of the *TP Act*.

2.8 Proposed Orders

177 The result is that I propose in due course to make orders dismissing Seven's claims for relief. Optus will be directed to bring in Short Minutes of any order it says should be made on its Cross-Claim.

178 I intend to defer making final orders until the parties have the opportunity to make submissions on costs. Although I intend to dismiss Seven's Application, as indicated in Chapter 1, I nonetheless propose to give the parties an opportunity to make brief submissions on what issues relating to relief, if any, I should address before entering final orders. The only reason for contemplating this course as a possibility is to facilitate the appellate process. I emphasise that in giving the parties this opportunity I do not necessarily intend to accede to any request that they make, even assuming they are in agreement.

179 The orders I propose to make now are set out in **Chapter 22**.

3. THE PARTIES AND THE FOOTBALL COMPETITIONS

3.1 Applicants

3.1.1 Seven Network

180 The first applicant, Seven Network, was incorporated in New South Wales. It carries on business principally as a broadcaster operating a commercial free-to-air television network. It does so through five wholly owned subsidiaries, each of which holds a commercial broadcasting licence issued under the *Broadcasting Services Act 1992* (Cth) ('*BS Act*'). The free-to-air network known as the Seven Network ('**7 Network**') broadcasts in Sydney, Brisbane, Melbourne, Adelaide, Perth and regional Queensland.

181 7 Network is affiliated with Prime Television, a regional network. Prime Television has stations broadcasting in Canberra and regional New South Wales, Victoria and Western Australia. 7 Network is also affiliated with Southern Cross Broadcasting, which has stations in Adelaide and regional areas of New South Wales, Victoria, Queensland, Tasmania and the Northern Territory, as well as in Hobart and Darwin.

182 Until the end of the 2001 AFL season, Seven Network or its subsidiaries held the AFL broadcasting rights (both free-to-air and pay). The AFL granted the broadcasting rights for the 1993 to 1998 AFL seasons to Seven Network's subsidiaries by an agreement dated 8 November 1993 ('**AFL-Seven Original Licence**'). By the '**AFL-Seven Licence Extension**' dated 15 November 1996, the AFL extended the grant of the broadcasting rights until the end of the 2001 season.

183 AFL games were in fact broadcast on 7 Network's free-to-air service until the end of the 2001 season. From 1996 to 1998, some AFL games were broadcast on pay television through SportsVision channels (shown on the Optus pay television platform), while from 1999 to 2001 AFL games were broadcast on C7 (shown on the Optus and Austar pay television platforms).

184 Seven Network has never held the free-to-air or pay television rights for the NRL although, as I shall explain, NRL matches were incorporated into a C7 channel supplied to Optus Vision. As has already been noted, in late 2000 C7 bid unsuccessfully for the NRL

pay television rights for the 2001 to 2006 seasons.

3.1.2 C7 and the Content Supply Agreements

185 The second applicant, C7, originally named Fanessa Nominees Pty Ltd, was incorporated in Western Australia. It is a wholly owned subsidiary of Seven Network. In the second half of 1998, C7 (then called '*Seven Cable Television*') commenced operating what Seven has described in these proceedings as a '*wholesale channel supply business*' in Australia. The business involved the production and supply of sporting channels to the retail providers of pay television services. The C7 channels consisted primarily of sports programming and included exclusive live coverage of the AFL matches, to which C7 had acquired the exclusive pay television rights under a sub-licence from Seven Network.

186 By the C7-Optus CSA (that is, the Channel Production and Supply Agreement of 30 June 1998), Seven Network agreed to supply sports channels, including AFL matches, to Optus Vision on a non-exclusive basis. From August 1998, C7 commenced supplying television channels to the Optus platform. For the first six months or so, these channels were called '*Sports Australia*' and '*Sports Australia 2*'. The former was the primary, full-time channel, while the latter was an '*overflow channel*', broadcast mostly on weekends. From March until December 1999, the primary channel was known as '*C7 (Sport) AFL*'. Thereafter the primary channel was known as '*C7 Gold*' (January 2000 until October 2001) and as '*C7 Sport*' (November 2001 until March 2002, when the channel ceased to operate). The second channel was branded '*C7 Sport (NRL)*' from March until December 1999 and '*C7 Blue*' from January 2000 until 1 November 2001, when it ceased to operate.

187 By an arrangement made with News on 14 May 1998, Optus Vision acquired the non-exclusive NRL pay television rights for the 1998, 1999 and 2000 seasons. Optus incorporated its coverage of the NRL matches on C7's overflow channel, C7 Blue. C7 also used this channel to show live sports that could not be fitted into the schedule of its primary channel, C7 Gold.

188 On 5 March 1999, C7 and the eighteenth respondent, Austar Entertainment, entered into the Austar Channel Supply Agreement ('**C7-Austar CSA**'), under which C7 agreed to supply the Austar pay platform with a single full-time sports channel on a non-exclusive basis. The C7-Austar CSA was expressed to operate from 1 April 1999 to 28 February 2002

and provided for the sports channel to include live AFL matches. In fact, the C7 channel supplied to Austar contained the same programming as the primary C7 channel broadcast on Optus. For satellite and cable subscribers to Austar, the C7 channel was included in Austar's General Entertainment tier known as '*Austar Deluxe*'. This tier on Austar incorporated other sports and entertainment channels.

189 Although the C7-Austar CSA was expressed to expire on 28 February 2002, it was extended until 31 March 2002. By that time, C7 no longer had the AFL pay television rights. Accordingly, Austar Entertainment elected not to take the C7 channel after 31 March 2002.

190 In addition to the supply agreements with Optus and Austar, in April 1999 C7 entered into a supply agreement with Neighbourhood Cable, a regional pay television service provider in Victoria. That supply agreement continued in force until December 1999, when it was apparently terminated. A fresh agreement was entered into in March 2001 and continued until January 2002.

191 On 28 March 2002, Optus ceased broadcasting the C7 channel (Optus Vision and C7 having agreed to an extension of their arrangement for 28 days beyond 28 February 2002). On about 6 May 2002, C7 ceased supply the signal which would have enabled Optus to take the C7 channel. From this time, C7 did not have access to any retail pay television platforms and no longer generated any revenue. As has already been noted, C7 ceased operations on 7 May 2002.

3.1.3 Seven's Officers

192 The relevant officers of Seven during the material times included the following:

> **Mr Kerry Stokes** became a director of Seven Network in June 1995 and Executive Chairman in July 1999. From June 1995 until July 1999, Mr Stokes was Seven Network's Non-Executive Chairman and from August 1999 to October 2000 he was the Chief Executive Officer ('**CEO**'). Mr Stokes and his private companies have a substantial shareholding in Seven Network. Mr Stokes said in evidence that he controlled something over 40 per cent of the shareholding in Seven Network.
>
> **Mr Peter Gammell** was appointed an alternate director of Seven Network in

June 1995 and became a director in November 1997. Mr Gammell later became Chairman of i7 Ltd ('**i7**'), which conducted Seven Network's online consumer content business and was directly responsible for C7. Mr Gammell described himself as a nominee of Australian Capital Equity Pty Ltd ('**ACE**') on the Seven Network board. ACE was described by Mr Stokes as his '*private company*'.

Mr Julian Mounter was appointed a director of Seven Network on 10 September 1998. He took up his position as CEO and Managing Director on 1 January 1999. Mr Mounter's Executive Service Agreement provided that his term of appointment was three years from 1 January 1999. However, he left his position on 30 July 1999 because of what a press release issued by Seven Network described as '*irreconcilable differences ... over a restructuring of the company*'.

Mr Harold Anderson was Director of Sports and Olympics for Seven Network from March 1999 to May 2003. Mr Anderson reported directly to Seven Network's CEO. He was a member of Seven Network's Executive Management Committee which subsequently became known as the Strategy Group and, later, as the Broadcast Strategy Group.

Mr Steven Wise became Managing Director of Seven Resources, a division of Seven Network, in July 1999. In April 2000, he became CEO of i7 which, at that stage, was responsible for the operations of C7. In December 2001, Seven Network created a new division called New Media and Investments, which assumed responsibility for pay television strategy, including C7. Mr Wise became CEO of this division.

Mr Shane Wood was General Manager of Pay Television at Seven Network from July 1998 to July 1999. In July 1999 his title changed to Chief Operating Officer, but his responsibilities remained essentially the same until May 2002. Mr Wood's responsibilities included day-to-day management of C7's operations. Between July 1998 and August 2000, Mr Wood reported to Seven Network's CEO and thereafter he reported to Mr Wise as CEO of i7.

Ms Maureen Plavsic was an Executive Director of Seven Network from May 1997 to September 2003. She was the Chief Executive and Managing

Director, Broadcast Television, between November 2000 and April 2003. In that position, she had executive responsibility for all aspects of the Seven Network's free-to-air business. Before that appointment, Ms Plavsic had held the position of Director of Sales and Corporate Marketing between October 1999 and October 2000.

193 All but two of these persons gave evidence in the proceedings. Mr Mounter, whose association with Seven ended in 1999, did not give evidence. Ms Plavsic provided a witness statement, but the statement was not tendered by Seven.

3.2 Respondents

3.2.1 News Parties

3.2.1.1 NEWS (AND TNCL)

194 The first respondent, News, is a subsidiary of TNCL (The News Corporation Ltd) and was incorporated in South Australia. TNCL is a global media company, with newspaper, film studio, free-to-air and subscription television businesses in many countries. Its Australian media interests have included, at all relevant times, newspapers, subscription television and content production. Until recently, TNCL was listed in Australia, but it is now listed in the United States, although of course its shares are still traded on Australian stock exchanges.

195 Although News is a respondent to the proceedings, TNCL is not. Nonetheless, it is convenient to refer to TNCL's Australian interests. These interests, whether held directly or indirectly, included the following:

(i) a 100 per cent interest in the twentieth respondent, News Pay TV Pty Ltd ('**News Pay TV**');

(ii) until February 2005, a 50 per cent interest in the second respondent, Sky Cable;

(iii) a 25 per cent interest in the fourth respondent, Foxtel Management;

(iv) a 10 per cent interest in the fifteenth respondent, Foxtel Cable;

(v) until February 2005, a 25 per cent interest in the Foxtel Partnership, the partners in which are the second respondent, Sky Cable, and the third respondent, Telstra Media;

(vi) through the thirteenth respondent, NRLI, a 50 per cent interest in the NRL Partnership which is responsible for granting the NRL pay television rights; and

(vii) until January 2005, a 50 per cent interest in the ninth respondent, Fox Sports.

196 News, through its subsidiaries, owns and publishes over 100 metropolitan, regional and suburban newspapers throughout Australia. News has also acquired, from time to time, both free-to-air and pay television sports rights, which it sub-licenses to third parties. In particular, under an agreement known as the '*Australian Pay Television Rights – NRL to News*' of 14 May 1998 ('**NRL-News Pay Rights Agreement**'), News acquired from the NRL Partnership the exclusive NRL pay television rights for a three year period from 1 January 1998. News was permitted to sub-license the rights on a non-exclusive basis. Under the NRL-News Pay Rights Agreement, News was also granted the exclusive first right of negotiation and last right of refusal in respect of the broadcast rights (including free-to-air and pay television) to the NRL Competition, any Rugby League matches conducted under the auspices of the NRL Partnership and any representative matches conducted by the ARL. The first and last rights cover the period 1 January 1998 to 1 January 2023. News in fact sub-licensed the NRL pay television rights to Optus Vision and Foxtel, with each platform receiving the same games. News also sub-licensed the NRL pay television rights to Austar.

197 On 19 December 2000, News formally acquired the AFL pay television rights for 2002 to 2006 for a fee of $30 million per annum (plus CPI adjustments and GST). The agreement by which this came about has been referred to in these proceedings as the '**AFL-News Licence**'. On 19 December 2000, News also acquired the AFL free-to-air television rights for the same five year period, subject to Seven Network's rights under a so-called '**First and Last Deed**', between it and the AFL, executed on 3 September 1997. On 25 January 2001, News acquired the AFL free-to-air television rights after Seven Network chose not to exercise its last rights.

3.2.1.2 NEWS PAY TV

198 The twentieth respondent, News Pay TV, a company incorporated in New South Wales, is a wholly owned subsidiary of TNCL. Until February 2005, News Pay TV held a 50 per cent interest in Pay TV Management Pty Ltd ('**Pay TV Management**'), which in turn owned all the shares in Sky Cable. (The remaining 50 per cent interest in Pay TV Management was held by a wholly owned subsidiary of PBL.) Sky Cable owned 50 per cent of Foxtel Management so that, in effect, TNCL held a 25 per cent interest in Foxtel Management. Sky Cable also owned 20 per cent of the shares in Foxtel Cable, giving TNCL, in effect, a 10 per cent interest in Foxtel Cable.

3.2.1.3 NRLI

199 The thirteenth respondent, NRLI, is a wholly owned subsidiary of Super League Pty Ltd which, in turn, is a wholly owned subsidiary of News. NRLI is incorporated in New South Wales.

200 NRLI and the twelfth respondent, ARL, are partners in the NRL Partnership. The NRL Partnership owns the unified competition known as the '*National Rugby League Competition*' ('**NRL Competition**'). The NRL Competition commenced in 1998 as a result of an agreement between News and ARL to merge rival Rugby League competitions. One of the two rival competitions prior to that time was conducted by ARL and the other ('*Super League*') was controlled by News.

3.2.1.4 MR PHILIP

201 The nineteenth respondent, Mr Philip, was and (so I was informed at the close of the hearing) still is Chief General Counsel of News. Mr Philip is a respondent because Seven seeks relief against him by reason of his alleged breach of confidentiality in relation to Seven's bid in 2000 for the NRL pay television rights.

202 Mr Philip played a number of roles in the events leading to this litigation. He was a director of Sky Cable, Foxtel Cable, News Pay TV and Pay TV Management. In addition, he has been a director of Fox Sports since 1999 and of NRLI since its incorporation. At the relevant times, Mr Philip was a member of the NRL PEC as a representative of NRLI (which, as I have noted, is a subsidiary of News).

3.2.1.5 NEWS' OFFICERS

203 Apart from Mr Philip, the principal officers of the News parties who gave evidence, or who were referred to in evidence, are identified below. Like Mr Philip, some held positions in companies which were not controlled by News alone.

Mr KR (Rupert) Murdoch has been a director of News since 1987. At all material times, he was the Chairman and CEO of TNCL and was a resident of the United States.

Mr LK (Lachlan) Murdoch was a director and the Executive Chairman of News from 1995 until (apparently) mid-2005. Mr Murdoch was also a director of Foxtel Management and Foxtel Cable (from 1995 until December 2004), Sky Cable (from 1999 until (presumably) 2005), News Pay TV (from November 1998 until (presumably) 2005) and Pay TV Management. Mr Murdoch occupied the position of CEO of News until October 2000, when he seems to have left Australia for New York. However, he continued as Executive Chairman of News for approximately another five years. Mr Lachlan Murdoch was living in Australia at the time the hearing took place.

Mr Peter Macourt became a director of News in 1994. From 1994 to September 1998, he was News' Chief Financial Officer; thereafter, until 3 July 2001, he was the Deputy Chief Executive; and from the latter date he became News' Chief Operating Officer. Mr Macourt has also been a director of Sky Cable and Foxtel Cable since 1995; of Foxtel Management and Pay TV Management since 1998; and of Fox Sports since June 1999. Mr Macourt was a director of NRLI from 25 February 1998 to 26 May 2000 and a member of the NRL PEC in the period leading up to the award of the NRL pay television rights to Fox Sports in late 2000.

Mr John Hartigan was the CEO of News from October 2000 and a director from 17 November 2000. Prior to his appointment as CEO, Mr Hartigan was the Editorial Director of News.

Mr Ian Frykberg was employed by News between December 1996 and June 1998 as Executive Director of Sport '*on a contract basis*'. After that time, he continued to act as a consultant for News on different terms and conditions

and also acted as a consultant to Foxtel Management. Mr Frykberg was a director of National Rugby League Ltd ('**NRL Ltd**'), the fourteenth respondent, between March 1998 and January 2000 and a director of Fox Sports between September 1998 and February 2000. Mr Frykberg was the acting CEO of Fox Sports from September 1999 to December 1999, following the termination of the employment of the previous CEO, Mr Dodds.

Mr Thomas Mockridge was a director of News from 6 February 1996 until 29 October 2002. He was a director of Foxtel Management and Foxtel Cable from 1995 until 31 March 2000 and the CEO of Foxtel Management from January 1997 until about February 2000. Prior to his appointment as CEO of Foxtel Management, Mr Mockridge had been employed by News in various roles. He negotiated with Telstra in 1994 on behalf of News in relation to the Foxtel pay television business.

204 Mr Rupert Murdoch, Mr Lachlan Murdoch and Mr Hartigan did not give evidence in the proceedings. Messrs Philip, Macourt, Frykberg and Mockridge gave evidence and were cross-examined.

3.2.2 Telstra Parties

3.2.2.1 TELSTRA

205 The fifth respondent, Telstra, is incorporated in the Australian Capital Territory. It is a very large, publicly listed Australian telecommunications and information services company. Until 1997, the Commonwealth of Australia was the sole shareholder in Telstra. At all relevant times since that date, the Commonwealth has been Telstra's majority shareholder. (After the hearing in this case concluded, the Commonwealth sold part of its majority stake in Telstra.)

206 Telstra has been involved in pay television since 1994. In November 1994, Telstra and the News Group entered into a Heads of Agreement to establish a joint venture under the name of '*Foxtel*'. The joint venture was to deliver pay television services in Australia using Telstra's hybrid fibre coaxial cable (that is, the Telstra Cable). Telstra's interests in pay television have been held through two wholly owned subsidiaries: the third respondent, Telstra Media, and the sixth respondent, Telstra Multimedia.

3.2.2.2 TELSTRA MEDIA

207 The third respondent, Telstra Media was incorporated in New South Wales and, as I have noted, is a wholly owned subsidiary of Telstra. Telstra Media is one of the two partners in the Foxtel Partnership. It holds a 50 per cent interest in Foxtel, while Sky Cable holds the other 50 per cent interest. Telstra Media and Sky Cable also each hold 50 per cent of the shares in Foxtel Management. I shall refer briefly to the relevant terms of the arrangements governing the Foxtel Partnership when dealing with the position of the Foxtel parties.

3.2.2.3 TELSTRA MULTIMEDIA

208 The sixth respondent, Telstra Multimedia, was incorporated in New South Wales. It owns the Telstra Cable, which is one of the two main hybrid fibre coaxial cable networks in Australia, the other being owned by Optus Vision.

209 The roll-out of the Telstra Cable commenced in 1994. From 1995, the Telstra Cable was configured so that it had the capacity to carry 64 analogue pay television channels. Since March 2004, the Telstra Cable has also carried pay television services in digital format and it presently has the capacity to carry up to 560 digital channels. From 1994 until the hearing, Telstra had invested over $3.7 billion in the construction and operation of the Telstra Cable, which services areas of Sydney, Melbourne, Brisbane, the Gold Coast, Adelaide and Perth. By mid-2001, the Telstra Cable passed about 2.5 million homes, a figure that had largely remained unchanged since late 1997. This figure represented about one third of Australian households. From October 1995 until early December 2002, Foxtel was the only pay television service carried on the Telstra Cable.

210 From December 2002, Telstra, through Telstra Pay TV Pty Ltd, has also provided pay television services to subscribers by means of the Telstra Cable. The pay television service, which is normally '*bundled*' with telephony services, provides the same channels or suites of channels offered by Foxtel.

3.2.2.4 TELSTRA'S OFFICERS

211 The principal officers of Telstra who gave evidence, or who were referred to in evidence, are identified below.

Dr Zygmunt Switkowski was first employed by Telstra in 1997 as Group Managing Director, Business and International, a position he held until February 1999. On 1 March 1999, Dr Switkowski was appointed CEO and Managing Director of Telstra and continued to hold those positions until 1 July 2005. While CEO of Telstra, he was a Telstra-nominated director of Foxtel Management and Foxtel Cable, initially between 1 March and 23 March 1999 and then from 31 July 2001 until 1 July 2005. Prior to his employment with Telstra, Dr Switkowski was CEO of the entity then called Optus Communications Pty Ltd and was Chairman of Optus Vision from 1996 to 1997.

Mr Bruce Akhurst first joined Telstra in December 1996 as General Counsel. In 1999 he was appointed Group Managing Director, Legal and Regulatory and in December 2002 he assumed the role of Group Managing Director, Telstra Wholesale, Telstra Broadband and Media and Group General Counsel. Before joining Telstra, Mr Akhurst was a partner in the law firm of Mallesons Stephen Jaques, specialising in competition law. Mr Akhurst became a Telstra-appointed director of both Foxtel Management and Foxtel Cable on 29 March 2000. He became Chairman of the Board of Foxtel Management on 30 March 2005.

Mr Robert Mansfield was a director of Telstra between 12 November 1999 and 14 April 2004. For some time during this period, not precisely identified in the evidence, Mr Mansfield was Chairman of the board of Telstra.

Mr Gerald Moriarty was a director of both Telstra Media and Telstra Multimedia between 22 June 1995 and 15 December 2000. Together with Mr Akhurst, Mr Moriarty had executive responsibility for the dispute with Seven relating to C7's access to the Telstra Cable. Mr Moriarty was a director of Foxtel Management and Foxtel Cable from 27 June 1995 to 31 July 2001.

Mr Gerald Sutton joined Telstra in December 1999, and worked in the Convergent Business Division before taking up the position of Managing Director of Telstra Media in March 2001. Mr Sutton was a Telstra-nominated alternate director of both Foxtel Management and Foxtel Cable from 21 August 2001 until his appointment as a director on 30 March 2005.

Notwithstanding his title of Managing Director, the company's filings suggest that Mr Sutton did not become a director of Telstra Media and Telstra Multimedia until 4 April 2003.

Mr Greg Willis was a director of Telstra Media from 10 April 2000 to 4 April 2003. He was a director of Telstra Multimedia from 2 June 2000 to 4 April 2003. Mr Willis was also a Telstra-nominated director of Foxtel Management and Foxtel Cable from 11 April 2000 to 31 July 2001. During 2000, Mr Willis was effectively the Chief Operating Officer preparing Telstra for the Olympic Games. It appears that he reported to Mr Pretty, the Group Managing Director of '*Convergent Business*', a unit responsible for internet and media-based businesses. However, at this time, Mr Willis was also responsible for the day-to-day management of Telstra's relationship with Foxtel and, in this respect, reported to Mr Akhurst.

Mr Sam Chisholm was a director of Telstra from 17 November 2000 until 28 October 2004. Mr Chisholm was appointed a director of Foxtel Management on 31 July 2001 and soon after became Chairman of the Foxtel Management board. He was also a director of Foxtel Cable from 23 May 1995 to 16 January 1998 and was reappointed from 31 July 2001. He remained a director of Foxtel Management and Foxtel Cable at least until April 2005.

Mr Paul Rizzo was appointed as a Telstra nominee on the boards of Foxtel Management and Foxtel Cable in March 1999 and retained these positions until 31 July 2001. Mr Rizzo was Chairman of the board of Foxtel Management between 19 March 1999 and 21 August 2001. At the time of this appointment he was Chief Financial Officer of Telstra, a position he held until January 2001.

Ms Danita Lowes was in charge of the Telstra Media Division from early 1998 until February 2000. During the same period she was a Telstra-nominated director of Foxtel Management. During her employment with Telstra, she sent a number of lively emails, some of which were extremely critical of Telstra's partners in the Foxtel Partnership, especially News. After leaving Telstra, Ms Lowes was employed by an entity associated with Seven Network and acted as a consultant to Seven Network. The precise dates of her

engagement with Seven Network were not established by the evidence, but she certainly was working on its behalf by June 2001.

Mr Brenton Willis was a Project Manager, Pay Television, with Telstra's Media Division, reporting to the relevant Group Managing Director. Dr Switkowski described him as a Telstra executive with active involvement in relation to the Foxtel business. Mr Boyd's statement said that Mr Brenton Willis was a financial analyst and I think that this is an accurate description of his role.

212 Of the Telstra officers referred to above, only Dr Switkowski and Messrs Akhurst and Sutton gave evidence.

3.2.3 PBL Parties

3.2.3.1 PBL

213 The seventh respondent, PBL was incorporated in Western Australia. It owns, operates and manages a range of media, gaming, entertainment and e-commerce businesses and investments. PBL also publishes many of Australia's best-selling magazines.

214 PBL's interests, held through various subsidiaries and other entities, include the following:

(i) a 25 per cent share in the Foxtel Partnership (through Sky Cable);

(ii) 100 per cent of the issued shares in the eighth respondent; and

(iii) a 50 per cent interest in Fox Sports.

215 PBL acquired its interest in Fox Sports through the twenty-first respondent, PBL Pay TV Pty Ltd ('**PBL Pay TV**'), in November 1999. At that time, PBL Pay TV exercised an option to acquire a 50 per cent interest in Fox Sports. The option had been granted by the Fox Sports Option Deed, dated 3 December 1998, between TNCL and PBL. At the time the deed was executed, News held all the shares in Fox Sports.

3.2.3.2 NINE

216 The eighth respondent, Nine, is a wholly owned subsidiary of PBL. Nine carries on business principally as a national broadcaster operating a commercial free-to-air television network known as the '**Nine Network**'. The Nine Network broadcasts predominantly in capital cities. Wholly owned subsidiaries of Nine hold commercial broadcasting licences and operate free-to-air commercial television stations in Sydney, Melbourne, Brisbane and Darwin. Nine has affiliates which broadcast in Perth (controlled by Sunraysia Television), Adelaide (controlled by Southern Cross Broadcasting), Canberra and regional areas of Australia. Nine has in place supply arrangements for the broadcast of its programs on affiliated stations.

217 On the commencement of the NRL Competition in 1998, Nine acquired the exclusive NRL free-to-air television rights until the end of the 2007 season. In January 2001, Nine acquired from News the AFL free-to-air television rights for the 2002 to 2006 seasons. Ten also acquired free-to-air television rights from News for AFL matches for this period.

3.2.3.3 PBL PAY TV

218 The twenty-first respondent, PBL Pay TV, was incorporated in Victoria and is also a wholly owned subsidiary of PBL. PBL Pay TV is the vehicle through which PBL holds its 50 per cent interest in Fox Sports and (more indirectly) its 50 per cent interest in Sky Cable. It is through Sky Cable that PBL holds its interest in Foxtel, which it acquired in December 1998.

219 PBL Pay TV and News Pay TV are partners in the Pay TV Partnership, which was constituted when PBL exercised its option to acquire an interest in Foxtel. PBL Pay TV and News Pay TV each owns 50 per cent of the shares in Pay TV Management, which is the agent of the Pay TV Partnership. Until February 2005, Pay TV Management owned all the shares in Sky Cable. Since that date, Pay TV Management has owned about 29.4 per cent of the shares in Fox Sports, which in turn owns all the shares in Sky Cable.

3.2.3.4 PBL'S OFFICERS

Mr James Packer became a director of PBL in April 1992 and remained in that position at all material times. On a date not identified in the evidence, he

became Executive Chairman of PBL and occupied that position at least during the period 1998 until December 2000. Mr Packer was a director of Foxtel Cable and Foxtel Management between 3 December 1998 and 30 March 2005. He was a director of Pay TV Management and Sky Cable at all material times from December 1998.

Mr Nicholas Falloon was a director of PBL from 1990 until 27 March 2001 and its CEO from May 1998 until his departure from the company in March 2001. He was PBL's nominated director of SportsVision from August 1995 until its liquidation in June 1998 and a director of Optus Vision between August 1995 and January 1997. From 1992 to 1998, Mr Falloon was a director of Nine. Between December 1998 and March 2001, Mr Falloon held directorships in a number of other companies including Sky Cable, Foxtel Cable, Foxtel Management and Fox Sports (from October 1999). At some time after his departure from PBL, Mr Falloon became Executive Chairman of Ten. At the material times, Mr Falloon, assisted by Mr James McLachlan, was primarily responsible for monitoring and developing PBL's interests in Foxtel and Fox Sports.

Mr Geoffrey Kleemann was Chief Financial Officer of PBL at all material times after October 1998. Mr Kleemann was not a director of PBL, but was a director of Nine (from October 1998) and of Fox Sports (from October 1999).

Mr James McLachlan was a director of Sky Cable, PBL Pay TV, Pay TV Management and Nine between late 1998 and November 2004. He was also a director of Fox Sports between October 1999 and November 2004. According to PBL's Closing Submissions, Mr McLachlan was CEO of PBL's investment arm, although there does not appear to be evidence directly to that effect.

Mr David Leckie was a director of PBL from August 1990 until 8 January 2002. He was also a director of Nine between June 1994 and January 2002 and participated in the negotiations leading to News' bid for the AFL broadcasting rights in 2000. In keeping with the revolving door phenomenon which appears to be a characteristic of the Australian television industry, Mr Leckie became the Managing Director of Seven Network after leaving PBL.

220 PBL filed witness statements by Messrs Falloon and Kleemann and six others not

mentioned above. However, none of the statements was tendered and PBL called no lay witnesses.

3.2.4 Sky Cable

221 The second respondent, Sky Cable, was incorporated in New South Wales and was originally a wholly owned subsidiary of TNCL. However, in October 1998 the seventh respondent, PBL, exercised an option granted to it by TNCL in June 1997 to acquire a 50 per cent interest in Sky Cable.

222 As a result of these arrangements, Pay TV Management, in which News Pay TV and PBL Pay TV each had a 50 per cent share, owned all the shares in Sky Cable. In this way, Sky Cable was ultimately owned equally by TNCL and PBL. Since January 2005, however, Fox Sports has owned all the shares in Sky Cable.

223 Sky Cable and Telstra Media are partners in the Foxtel Partnership, which conducts the Foxtel pay television business. It follows that, as I have noted, TNCL and PBL each ultimately has a 25 per cent interest in the Foxtel Partnership.

3.2.5 Foxtel Parties

3.2.5.1 FOXTEL PARTNERSHIP

224 The Foxtel Partnership is not a separate legal entity and is not a party to the proceedings. Each of the Foxtel partners, namely Sky Cable and Telstra Media, is, however, joined as a respondent, as is the fourth respondent, Foxtel Management.

225 The relationship between the Foxtel partners is governed by a number of agreements. One is the Foxtel Television Partnership Agreement, made on 14 April 1997 and amended on 3 December 1998 ('**Foxtel Partnership Agreement**'), between Sky Cable, Telstra Media and Foxtel Management. The Foxtel Partnership Agreement provides that Foxtel Management is to be the exclusive agent to manage the business of the Foxtel Partnership. The amendments to the Foxtel Partnership Agreement made in December 1998 were introduced in consequence of PBL becoming a shareholder of Sky Cable.

226 The Foxtel Partnership conducts the business of supplying pay television services by

cable and satellite under the brand name '*Foxtel*'. The Foxtel business had its genesis in the Umbrella Agreement of 9 March 1995 (amended and restated on 14 April 1997) between TNCL and Telstra ('**Umbrella Agreement**'). The Foxtel pay television platform commenced operations in October 1995, in the form of a twenty channel cable pay television service, using the Telstra Cable to deliver the service. Since March 1999, the Foxtel Partnership has also delivered a digital service by satellite. It originally acquired transponder capacity on the Optus B3 satellite, but in late 2003 switched to the Optus C1 satellite.

227 In March 2004, the Foxtel Partnership commenced supplying a digital pay television service on the Telstra Cable and an enhanced digital service by satellite. Foxtel's analogue service is currently being phased out.

228 The Foxtel Partnership, like other pay television platforms, acquires channels from channel suppliers such as Fox Sports and ESPN, but has also produced its own channels. Following the Foxtel Partnership's acquisition of the AFL pay television rights from News in 2001, it compiled the '*Fox Footy Channel*'. This channel, which commenced in early 2002, showed AFL content exclusively, even in the off-season. In February 2002, the Foxtel Partnership appointed Optus Vision as a non-exclusive selling agent for its *Fox Footy Channel* and in March 2002, the Foxtel Partnership sub-licensed the *Fox Footy Channel* to Austar. However, the *Fox Footy Channel* apparently ceased operations after the 2006 AFL season, by which time Seven had acquired the AFL broadcasting rights for the 2007 to 2011 seasons.

3.2.5.2 FOXTEL MANAGEMENT

229 Foxtel Management, carries on the business of the Foxtel Partnership as its exclusive agent, pursuant to cl 9.1 of the Foxtel Partnership Agreement and also under a Management Agreement of 14 April 1997 ('**Management Agreement**'). Sky Cable and Telstra Media each has a 50 per cent shareholding in Foxtel Management.

230 Under the Foxtel Partnership Agreement, as amended, the board of Foxtel Management comprises eight voting directors, four of whom are appointed by Telstra Media and four by Sky Cable (cl 11.1). Of Sky Cable's nominees, two must be appointed as representatives of News and two as representatives of PBL. The ninth director is the CEO, but he or she is not entitled to vote. Decisions made by the board must be by majority vote

and require the support of at least one director appointed by each of Telstra Media, News and PBL. It follows that, in practice, the board cannot make an affirmative decision without the support of each of Telstra Media, News and PBL; in other words, each has a right of veto. This fact has considerable significance for the present case.

231 Under the Foxtel Partnership Agreement, at least as it has worked in practice, Telstra Media appoints the Chairman of the board of Foxtel Management; News appoints the CEO after consultation with Telstra Media; and PBL appoints the Chief Financial Officer (cl 11.4).

232 The Foxtel Partnership Agreement provides that a '*Business Plan*' may not be amended without the approval of Sky Cable and Telstra Media (cl 10.1). It also provides that a number of matters require the unanimous consent of the members of the Foxtel Partnership for the time being. These matters include entering into any contractual obligation or commitment under which the business conducted by the Foxtel Partnership will incur a liability exceeding $2.5 million, other than as provided in the Business Plan (cl 10.2(i)).

233 The Foxtel Partnership Agreement originally provided that the directors, in exercising or performing their powers or duties as directors, could act solely in the interests of the party appointing them (cl 11.3(a)). This provision was, however, deleted by cl 4 of the '**BSD Side Agreement**' dated 25 July 1997, between Telstra, Telstra Multimedia, TNCL and Foxtel Management. Subject to limited exceptions, the BSD Side Agreement obliges each party to require its representatives on the board to act in the best interests of Foxtel Management. By virtue of other agreements, the details of which are presently irrelevant, this requirement became binding on PBL as well as the other parties.

3.2.5.3 FOXTEL CABLE

234 The fifteenth respondent, Foxtel Cable, is incorporated in New South Wales. It holds subscription television broadcasting licences under the *BS Act.* Foxtel Cable is the entity that supplies the Foxtel Partnership's packages of pay television channels to residential and commercial subscribers and owns the supply business. It does so pursuant to the Foxtel Partnership Agreement.

235 Sky Cable and Telstra Media are the two shareholders in Foxtel Cable. Sky Cable owns 20 per cent of the shares and Telstra Media 80 per cent.

236 By the Management Agreement, Foxtel Cable delegated authority to the Foxtel Partnership to manage Foxtel Cable's business. The Foxtel partners, in turn, delegated authority under the Foxtel Partnership Agreement to Foxtel Management.

3.2.5.4 OWNERSHIP TABLE

237 The following table shows the ownership structure of the Foxtel entities prior to February 2005.

TABLE 3.1: Ownership of Foxtel Prior to February 2005

[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

238 Certain changes to the ownership structure of the Foxtel Partnership and Fox Sports occurred in about February 2005. For completeness, these are recorded in Table 3.3, reproduced in section 3.2.6.2

239 The parties used the expression '*Foxtel*' to refer, variously, to the Foxtel Partnership, the Foxtel partners, the Foxtel pay television platform (sometimes called the '*Foxtel Service*') and Foxtel Management. For the most part, this usage causes no particular difficulty, since the context makes the sense clear. I have frequently followed the same practice, but in some parts of the judgment I have found it convenient to distinguish between the different concepts denoted by the expression.

3.2.5.5 FOXTEL'S OFFICERS

Mr Thomas Mockridge's position as CEO of Foxtel Management from January 1997 until February 2000 has been noted ([203]).

Mr James Blomfield was employed by News between 1995 and 18 December 2001. He became the CEO of Foxtel Management after Mr Mockridge's resignation and remained in that role until 18 December 2001. Mr Blomfield was a director of Foxtel Management and Foxtel Cable from 31 March 2000 until 20 December 2001.

Mr Kimberley Williams succeeded Mr Blomfield as CEO of Foxtel Management in December 2001. From that date, Mr Williams was a director of both Foxtel Management and Foxtel Cable.

Mr Peter Campbell commenced employment at Foxtel Management in September 1999, as Manager of External Channel Relations. He continued in this role until June 2004, when he became General Manager of External Channel Relations and the Executive in Charge of the AFL. Prior to his appointment at Foxtel Management, Mr Campbell had been employed by a subsidiary of Seven Network. In his capacity as General Manager of External Channel Relations, Mr Campbell was responsible, among other things, for negotiating the supply of content for the Foxtel platform and for ensuring contractual compliance by Foxtel in relation to the AFL broadcasting rights.

Mr Angus Boyd was employed by Foxtel Management in December 1998 as a Strategic Planning Analyst. In September 2002, he became Senior Analyst, Strategic Planning and Special Projects. Mr Boyd prepared financial models in connection with the Foxtel Partnership's participation in the bidding for the AFL pay television rights in 2000.

240 The voting directors of Foxtel Management during the period 1998 to December 2001 were the following:

News appointees: Mr Lachlan Murdoch; Mr Macourt (from 16 January 1998); Mr Cowley (until 3 December 1998); Mr Philip (16 January 1998 to 25 January 1999, alternate director from 16 January 1998);

PBL appointees: Mr James Packer; Mr Falloon (3 December 1998 until 27 March 2001); and Mr Yates (from 23 April 2001);

Telstra appointees: Mr Blount (until 1 March 1999); Dr Switkowski (1 March 1999 until 23 March 1999 and from 31 July 2001); Mr Akhurst (from 29 March 2000); Mr Moriarty (until 31 July 2001); Ms Lowes (3 December 1998 until 11 February 2001); Mr Rizzo (from 23 March 1999 until 31 July 2001); Mr Greg Willis (from 1 April 2000 until 31 July 2001); and Mr Chisholm (from 31 July 2001).

241 As has been noted, Mr Mockridge gave evidence. Messrs Williams, Campbell and Boyd also gave evidence. Mr Blomfield, however, did not.

3.2.6 Fox Sports

3.2.6.1 OWNERSHIP OF FOX SPORTS

242 The ninth respondent changed its name from Sports Investments Australia Pty Ltd to Premier Media Group Pty Ltd in November 2003, but all parties in these proceedings have referred to it as '**Fox Sports**'. The shares in Fox Sports are held, through subsidiaries, by TNCL and PBL equally. The subsidiaries are, respectively, News and PBL Pay TV.

243 News first acquired an interest in what became Fox Sports in 1995, when it obtained a 25 per cent interest. In 1997, it increased its interest to 50 per cent and on 12 June 1998 it acquired the remaining 50 per cent share. At that point, Fox Sports was known as Liberty Sports Australia Pty Ltd, but it changed its name to Sports Investments Australia Pty Ltd on 21 August 1998. The most recent name change occurred, as noted above, in November 2003.

244 PBL acquired its 50 per cent interest in Fox Sports in November 1999, through PBL Pay TV. PBL exercised an option that had been granted to it on 3 December 1998, by the '**Fox Sports Option Deed**' between TNCL and PBL. At the time the option was granted, TNCL held all the shares in Fox Sports.

245 Since 1998, Fox Sports has compiled channels consisting primarily, but not exclusively, of sports programming. Its channels have included '*Fox Sports 1*', '*Fox Sports 2*', '*NRL on Optus*', '*Fuel*' (action sports and '*extreme lifestyle activities*') and the '*How to Channel*' (home renovations and lifestyle issues). At various points between 1998 and 2002, Fox Sports supplied sports channels to the major retail pay television platforms: Foxtel, Optus and Austar.

246 From 13 May 1998 to 20 February 2002, the Fox Sports channels were supplied to Foxtel on an interim month-to-month basis by way of a '*pass-through*' sub-licence from Austar. It is common ground that one reason for Foxtel's refusal to take C7 on its pay television platform between 1999 and 2001 was News' and PBL's desire (not shared by Telstra) to finalise a long-term supply arrangement between Fox Sports and Foxtel. The finalisation of such an arrangement was frustrated (so far as News and PBL were concerned) by Telstra's unwillingness to confirm arrangements it thought were too generous to Fox Sports and, consequently, were detrimental to Foxtel. In the event, Fox Sports and Foxtel

entered an agreement on 20 February 2002 for the supply of Fox Sports to Foxtel **(**'**Fox Sports-Foxtel Supply Agreement**'**)**. The Agreement was for an indefinite term and allowed Foxtel to license the Fox Sports channels to Optus. By that time, of course, Fox Sports had acquired the NRL pay television rights.

247 On 3 September 1998, Fox Sports and Austar United, the seventeenth respondent, entered into the Austar Channel Supply Agreement ('**Fox Sports-Austar CSA**'). Under the Fox Sports-Austar CSA, Fox Sports agreed to supply Austar with channels until 30 June 2006. The Fox Sports-Austar CSA replaced an earlier agreement dated 13 May 1998.

248 In 2001, Fox Sports produced the '*NRL on Optus*' channel which it supplied to Optus. On 20 February 2002, Foxtel sub-licensed two Fox Sports channels to Optus on condition that they were rebranded '*Optus Sports 1*' and '*Optus Sports 2*'. This sub-licence was an interim arrangement pending the coming into force of the Foxtel-Optus CSA (that is, the Foxtel-Optus Content Supply Agreement of 5 March 2002). The Foxtel-Optus CSA in fact came into operation in November 2002, once the conditions precedent were satisfied, and the interim Fox Sports licence was terminated with effect from 30 November 2002.

3.2.6.2 OWNERSHIP TABLES

249 The ownership structure of Fox Sports after PBL exercised its option in 1999 is shown in Table 3.2.

TABLE 3.2: Ownership of Fox Sports Prior to February 2005

[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

250 The changes effected in about February 2005 are recorded in Table 3.3.

TABLE 3.3: Ownership of Foxtel and Fox Sports after February 2005

[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

3.2.6.3 FOX SPORTS' OFFICERS

251 Reference has been made to the position of Messrs Philip, Macourt, Frykberg, Kleemann and Falloon in relation to Fox Sports. In addition, the following officers of Fox

Sports gave evidence:

> **Mr David Malone** became CEO of Fox Sports on 25 January 2000 and held that position at the time he gave evidence. Prior to joining Fox Sports, he was CEO of Multichannel Network Pty Ltd ('**MCN**'), the organisation through which pay television sells advertising. Among other responsibilities Mr Malone headed Fox Sports' '*Acquisition Team*' which formulated tactics for the acquisition of the NRL pay television rights in 2000.
>
> **Mr Jon Marquard** commenced employment at Fox Sports in 1998 as Corporate Counsel, having at one time practised as a solicitor. In February 1999, Mr Marquard held the position of Director of Business and Corporate Affairs, and in January 2003 he became Fox Sports' Chief Operating Officer. Mr Marquard reported to Mr Malone (following the latter's appointment) and was a member of the Acquisition Team in 2000. Mr Marquard attended Fox Sports board meetings from 1999 and prepared the minutes.
>
> **Mr Adam Oakes** became Director of Marketing at Fox Sports in April 2000 and in March 2003 he became Director of Marketing, Commercial and On-Air Promotions.

3.2.7 ARL and NRL Parties

3.2.7.1 NRL PARTNERSHIP

252 The twelfth respondent, ARL, was incorporated in New South Wales in 1986. It is a partner in the NRL Partnership with NRLI (which is, as has been seen, a subsidiary of News). The NRL Partnership owns the unified NRL Competition which resulted from the merger of the pre-existing ARL and Super League competitions. The NRL Partnership disposes of the television broadcast rights and other rights relating to the NRL Competition.

253 The NRL Partnership is governed by the '*Partnership Agreement - NRL Partnership*' ('**NRL Partnership Agreement**'), which was entered into on 14 May 1998, in consequence of the settlement of the Super League dispute. The terms of the NRL Partnership Agreement are referred to in Chapter 19 ([3071]-[3072]).

254 At the relevant times, the NRL Partnership was managed by the NRL PEC. NRLI

was entitled to nominate three of the six members of the NRL PEC, while ARL was entitled to nominate the remaining three. The three NRLI nominees in late 2000 were Mr Philip, Mr Peter Macourt and Mr Stephen Loosley. The three ARL representatives were Mr Colin Love (the Chairman of ARL), Mr Nicholas Politis and Mr John McDonald. As I have noted, Mr Philip and Mr Macourt gave evidence in the proceedings; the other four members of the NRL PEC did not.

255 Under the terms of the '**Merger Agreement**', which resolved the Super League dispute, the NRL PEC awarded News the NRL pay television rights for a three year period from 1 January 1998. In December 2000, the NRL PEC awarded the NRL pay television rights to Fox Sports for the 2001 to 2006 seasons.

3.2.7.2 NRL LTD

256 The fourteenth respondent, NRL Ltd, was formed in 1998 as a not-for-profit company limited by guarantee, for the purpose of organising and conducting the unified NRL Competition. The NRL Competition, although owned by the NRL Partnership, is operated and managed by NRL Ltd pursuant to the '**NRL Services Agreement**' of 14 May 1998. NRLI and ARL each appoint an equal number of directors of NRL Ltd.

257 The clubs participating in the NRL Competition contract directly with NRL Ltd, not the NRL Partnership. Each club receives a grant from NRL Ltd in consideration for its participation in the competition, but the clubs are not members or shareholders of NRL Ltd. The clubs cannot direct NRL Ltd or the NRL Partnership.

258 The board of directors of NRL Ltd deals primarily with matters related to the conduct of the NRL Competition, as distinct from major revenue matters such as the disposition of the NRL pay television rights. NRL Ltd has a CEO and numerous staff. At the relevant times, the CEO of NRL Ltd was Mr David Moffett and Mr David Gallop was the Director of Legal and Business Affairs. Neither gave evidence in the proceedings.

3.2.7.3 NRL CORPORATE STRUCTURE TABLE

259 Table 3.4 sets out the corporate structure for the NRL Partnership and NRL Ltd. The statement that the NRL PEC is the '*effective decision making organ*' should be understood as

a reference to major revenue matters.

TABLE 3.4: NRL Corporate Structure

[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

3.2.8 Optus Parties

3.2.8.1 OPTUS VISION

260 The sixteenth respondent, Optus Vision, was incorporated in the Australian Capital Territory in 1995. In effect, it was intended to be an incorporated joint venture between SingTel Optus, then known as Optus Communications Pty Ltd; a United States corporation (Continental Cablevision Inc); Pay TV Holdings Pty Ltd; and Tallglen Pty Ltd ('**Tallglen**'), a subsidiary of Seven Network. SingTel Optus originally held 46.5 per cent of the shares in Optus Vision, but it acquired the remaining shares in Optus Vision in 1997.

261 At all material times the Optus Group, of which Optus Vision forms part, has provided a broad range of communications services. These include mobile services, local and international telephony, business network services, internet and satellite services, and pay television.

262 Optus Vision has provided pay television services since September 1995. For this purpose it has used the hybrid fibre coaxial cable network ('**Optus Cable**') owned by a related company. The Optus Cable services parts of Sydney, Melbourne and Brisbane, but is unavailable to multi-dwelling units. By mid-2001, the Optus Cable passed and was capable of servicing about 1.4 million homes, representing about 20 per cent of Australian households at the time.

263 The Optus Cable is used not only to provide pay television services, but telephone and internet services. From 1998, Optus Vision '*packaged*' pay television with local telephony

services and in 1999 it extended the concept of '*bundling*' to include internet services. In 2000, Optus Vision marketed a product called '*Optus Choices*' which enabled customers to bundle pay television, local and long-distance telephony and internet services.

264 As at January 2002, although Optus had an interest in the Optus B3 Satellite, it supplied pay television services by satellite only to a small number of customers. The satellite was, however, used both by Foxtel and Austar to deliver their pay television services.

265 Both Telstra and Optus continue to add to the reach of their respective cable networks. There is considerable overlap, in the sense that many households can be serviced by both networks. The Telstra network is approximately 70 per cent '*overbuilt*' by the Optus Cable, while the Optus network is about 80 per cent overbuilt by the Telstra Cable. (The different figures are explained by the greater reach of the Telstra Cable.)

266 During its life, Optus Vision has acquired pay television channels from channel suppliers and has also produced its own channels. As has been noted, on 30 June 1998, Optus Vision, Seven Network and C7 entered into the C7-Optus CSA, under which C7 agreed to provide sports programming to the Optus platform on a non-exclusive basis, including coverage of AFL matches, until 31 December 2008. Optus Vision independently acquired non-exclusive NRL pay television rights for the 1998 to 2000 seasons. It appears that these rights were granted to Optus Vision by News as part of the settlement bringing about the merger of the ARL and Super League competitions.

267 The C7-Optus CSA provided for C7 to receive a minimum subscriber guarantee ('**MSG**') of approximately $30 million per annum, plus CPI adjustments. As I have noted, Optus Vision had a right to terminate the C7-Optus CSA if C7 did not have or lost the AFL pay television rights. Each of these provisions has played an important part in this case.

3.2.8.2 SINGTEL OPTUS

268 The twenty-second respondent, SingTel Optus, was formerly known as Cable & Wireless Optus Ltd and Optus Communications Pty Ltd. SingTel Optus commenced business in about 1992 as a provider of telephony services, initially using the Telstra Cable but later using its own network.

269 SingTel Optus is and has been at all material times the holding company of Optus Vision. In that capacity it guaranteed by deed poll ('**CWO Deed Poll**') the performance of Optus Vision's obligations under the C7-Optus CSA. The parent company of SingTel Optus is now Singapore Telecommunications Ltd ('**SingTel**'), a Singapore corporation. SingTel acquired all shares in SingTel Optus in August 2001. At that time, the acquisition was SingTel's largest single offshore investment.

270 SingTel Optus' pay television business has been managed as part of its Consumer and Multimedia Division ('**CMM**'). The business is conducted through Optus Vision.

3.2.8.3 OPTUS' OFFICERS

271 The relevant officeholders of SingTel, SingTel Optus and Optus Vision, include the following:

> **Mr Hsien Yang Lee** was the President and CEO of SingTel from May 1995 and a director of SingTel Optus from 31 August 2001 (apparently with a break from 29 October 2001 to 18 March 2002). Mr Lee was directly involved in SingTel's acquisition of SingTel Optus (previously Cable & Wireless Optus Ltd). He chaired the weekly SingTel Management Committee meeting.
>
> **Mr Christopher Anderson** was the CEO of SingTel Optus from August 1997 to August 2004 and a director of SingTel Optus and Optus Vision throughout virtually all of that period. Mr Anderson was a member of the Executive and Management Committees of SingTel after SingTel's acquisition of SingTel Optus in 2001. Prior to joining SingTel Optus, Mr Anderson was Group Chief Executive of Television New Zealand.
>
> **Mr Michael Ebeid** joined the Optus Group in 1995. In 1999, he joined CMM and in April 2000 he became involved in the pay television activities of CMM. At the time Mr Ebeid gave his evidence, he held the position of Director, Commercial Operations, of CMM.
>
> **Mr Paul Fletcher** was the Director of Corporate and Regulatory Affairs at SingTel Optus from December 2001. He commenced his employment with Optus Vision on 23 March 2000 and became a director on 5 June 2002. In his capacity as Director of Corporate and Regulatory Affairs, Mr Fletcher was

responsible, *inter alia*, for Optus' internal legal functions, regulatory issues and the '*commercial interconnect relationship*' with Telstra.

Mr Chris Keely was the General Manager of Business Affairs, Commercial Operations, CMM, from July 1998, having joined Optus in 1996. Mr Keely's responsibilities included providing advice to the senior management on all issues relating to Optus' pay television operations.

All five of these office holders gave evidence in the proceedings and were cross-examined.

3.3 Interlocking Directorships and Key Relationships

272 Seven prepared a chart which reflects the common directorships for any part or all of the period since 1 June 1998 to 1 April 2002. Table 3.5 reproduces that chart, which is an accurate, although not entirely comprehensive summary.

TABLE 3.5: Directors Common to Respondents and Associated Entities
[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

273 Seven points out that there are a number of key relationships that need to be taken into account in assessing the relevant events. These include the following:

> Since 1998, TNCL has indirectly held a 50 per cent interest in NRL Ltd and in the NRL Partnership. Until 2002, NRL matches were the only winter '*marquee*' sporting events shown on Fox Sports' channels.
>
> Since 1998, TNCL and PBL have each indirectly held a 50 per cent interest in Fox Sports.
>
> Telstra has always indirectly held a 50 per cent interest in the Foxtel Partnership. Since late 1998, TNCL and PBL, through Sky Cable, have each held a 25 per cent interest in the Foxtel Partnership.
>
> Under the terms of the Foxtel Partnership Agreement, no affirmative decision can be made by the board of Foxtel Management (which manages the business of the Foxtel Partnership) without the support of each of Telstra Media, News and PBL.

3.4 Inactive Parties: Austar

274 Austar has not played an active part in the proceedings and was excused from attendance. It adopted that stance on the not unreasonable ground that no relief is sought against either Austar United or Austar Entertainment.

275 Austar commenced its retail pay television service in August 1995, via satellite. The Austar pay television service has been provided to regional areas of New South Wales, Victoria, Queensland and South Australia, as well as to Tasmania and most of the Northern Territory. Parts of Darwin are serviced by Austar's own cable network. By the end of June 2001, some 2.1 million householders in these areas could access Austar's service. As the result of Austar's migration from the Optus B3 Satellite to the Optus C1 Satellite, this had increased to about 2.3 million homes by the end of 2003.

276 Austar has not competed directly with either Foxtel or Optus for retail subscribers, since Austar services different geographic areas than those serviced by Foxtel and Optus.

The one exception is on the Gold Coast, where Austar competes with the Foxtel Service. In conformity with its agreements with channel suppliers, including Foxtel, Austar does not offer its channels in the major Australian metropolitan areas (other than the Gold Coast).

277 As already noted, on 5 March 1999, C7 and Austar entered into the C7-Austar CSA which continued in force until 31 March 2002. By the Fox Sports-Austar CSA, made on 3 September 1998, Fox Sports granted Austar the rights to distribute the *Fox Sports 1* and *Fox Sports 2* channels in certain territories until 30 June 2006. On the same date, Fox Sports granted Austar the non-exclusive rights to telecast NRL matches for the 1998 to 2000 seasons in the same territories.

278 In 2002 Austar introduced bundling of mobile telephony and internet services (under the names '*Austarmobile*' and '*Austarnet*' respectively) with its pay television product. In September 2003, Telstra Pay TV obtained approval from the ACCC to bundle Austar's pay television service with Telstra's telecommunications services in areas serviced by Austar.

3.5 Former Parties

3.5.1 Ten

279 Ten was a respondent in these proceedings, but ceased to be a party following the settlement with Seven to which I have previously referred.

280 Ten operates the free-to-air television network known as '**Ten Network**' in Sydney, Melbourne, Brisbane, Adelaide and Perth. Ten makes programming available to affiliate stations which broadcast in Canberra, Hobart, regional Queensland, regional New South Wales, regional Tasmania and regional and remote Victoria.

281 As the result of an agreement with Nine and others, Ten acquired AFL free-to-air television rights from News for the 2002 to 2006 years. Seven and Ten joined forces in 2005 to bid for the AFL broadcasting rights for the 2007 to 2011 years. They were ultimately successful in acquiring the rights, through the exercise of Seven's last right of refusal. Shortly after their success was announced, minutes of order resolving the dispute between Seven and Ten were handed up in court.

3.5.2 AFL

282 The AFL was also originally a respondent in these proceedings, but Seven discontinued proceedings against the AFL. The AFL is a company limited by guarantee. Its members consist of life members and appointees of each club competing in the Australian Rules Football Competition conducted by the AFL. Since 1996, the AFL Competition has involved sixteen teams in five states competing over 22 weekly rounds, followed by the finals series. The season proper commences in March and concludes with the Grand Final in Melbourne at the end of September.

283 At the relevant times, **Mr Wayne Jackson** was the CEO and a director of the AFL. **Mr Ron Evans** was the Chairman and a director of the AFL, while **Mr Graeme Samuel** was a director and a Commissioner of the AFL. Mr Samuel resigned his position with the AFL shortly before he was appointed in 2003 to the position of Chairman of the ACCC. Of course, Mr Samuel was not Chairman of the ACCC at the times it was concerned with the various events recounted in this judgment.

3.6 Football Competitions

3.6.1 AFL Competition

284 The Victorian Football League ('*VFL*') began an Australian Rules football competition in 1897. The participating clubs were all Victorian. This pattern continued for 85 years, until 1982, when the South Melbourne Football Club relocated to Sydney and became known as the '*Sydney Swans*'. In 1987, one team from Perth (the '*West Coast Eagles*') and one team from Brisbane (then known as the '*Brisbane Bears*') joined the VFL.

285 In 1990, the name of the competition was changed to the AFL Premiership Competition. During the 1990s, three further teams joined the AFL: one from Adelaide in 1991 ('*Adelaide Crows*'); a second from Perth in 1995 ('*Fremantle Dockers*'); and a second team from Adelaide in 1997 ('*Port Adelaide*'). Following the 1996 season, one of the VFL's foundation clubs, the '*Fitzroy Lions*', merged with the Brisbane Bears and the merged entity became known as the '*Brisbane Lions*'. In recent years, therefore, the AFL Competition has comprised 16 teams: nine from Melbourne; one from Geelong; one from Sydney; one from Brisbane; two from Adelaide; and two from Perth.

286 The AFL Competition season ordinarily starts in March and finishes on the last Saturday in September, when the Grand Final is played at the Melbourne Cricket Ground. During the regular season, there are 22 rounds, with eight matches played every round. Accordingly, the 16 clubs play a total of 176 matches prior to the finals. The matches are primarily played on Friday nights, Saturday afternoons and nights and Sundays afternoons. At the end of the regular season, the top eight teams participate in a final series comprising nine games played over four weeks, including the Grand Final.

287 Prior to the regular AFL Competition, a pre-season competition is conducted. This has taken different forms at different times, including round-robin and knock-out competitions. The rules in the pre-season competition games are slightly different from the rules applied in the regular competition.

288 State of Origin matches contested by State representative teams were staged by the AFL (and previously the VFL) between 1977 and 1999, but not since. (Presumably it is for this reason that State of Origin matches have been removed from the anti-siphoning list, which gives free-to-air television operators certain rights in respect of popular sporting events.) Since 1984, the AFL and the Gaelic Athletic Association of Ireland have organised from time to time an International Rules Football Series (a hybrid version of Australian and Gaelic Football) between Australian and Irish representative teams. This has not always been an annual event, but International Rules games were held each year between 1998 and 2005.

289 The most significant source of revenue for the AFL has come from the sale of the AFL broadcasting rights. It is an agreed fact that the rights account for approximately 45 per cent of the AFL's revenue. Other sources of revenue for the AFL include gate receipts from the pre-season competition and finals series.

3.6.2 Rugby League Competitions

290 The history of Rugby League in Australia was explained by the Full Court in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 ('*Super League Case*'), at 425 ff. The case arose out of attempts by News to establish Super League as a rival competition to that conducted under the auspices of ARL.

291 Rugby League in Australia grew out of moves in England in the 1890s to allow rugby

players to receive payments. This led to what is now known as Rugby League emerging as a code, separate from Rugby Union, with its own rules.

292 The first premiership Rugby League competition in Australia began in 1908 under the auspices of the New South Wales Rugby Football League ('*NSWRL*'). The competition comprised nine teams, eight from Sydney and one from Newcastle. A separate competition began in Queensland in 1909.

293 Over time, some teams left and others joined the NSWRL. The first televised game took place in 1961 and the NSWRL secured its first sponsorship in 1962. By 1982, there were twelve teams in the competition, all from Sydney. Between 1982 and 1988, one team left the competition and five teams joined. All five were based outside Sydney and three were from outside New South Wales.

294 ARL was incorporated in 1986 as a company limited by guarantee. Thereafter the NSWRL conducted the competition on behalf of ARL. ARL controlled national initiatives and international contests.

295 In 1995, the number of ARL teams increased from fifteen to twenty, with the addition of four interstate teams and one from New Zealand.

296 In 1995, News set in place measures designed to start its own Rugby League competition. Following News' success in the *Super League Case*, the Super League competition got under way in 1997. The competition comprised ten teams, eight of which were formerly ARL teams. The ARL competition continued with twelve teams.

297 In 1998, ARL and News agreed to merge their competitions. NRL Ltd was formed in March 1998 to organise and conduct the unified NRL Competition on a national basis with fewer clubs than the aggregate of the pre-existing competitions. The structure of the competition and the role of the various entities has already been explained.

298 In 1998, the NRL Competition involved twenty teams. As the result of mergers and the exclusion of South Sydney, the number of teams was reduced to fourteen in 2000 (South Sydney challenged its exclusion under ss 45(2) and 4D of the *TP Act*, but ultimately failed:

News Ltd v South Sydney District Rugby League Football Club Ltd (2003) 215 CLR 563). However, South Sydney was reinstated in 2002. Since the reinstatement, fifteen clubs have competed in the NRL Competition which, from 2003, has been known as the '*Telstra NRL Premiership*'. Of the fifteen participating clubs, nine are from Sydney and one is based in each of Canberra, Melbourne, Newcastle, Brisbane, North Queensland and New Zealand.

299 Since 1998, the NRL Competition season has commenced in March each year and has concluded with the playing of the Grand Final in late September or early October. The number of rounds each season has varied from 24 to 26. As the NRL Competition involves fifteen participating clubs, there have been seven matches each round, with one team receiving a bye. Special arrangements are made during the rounds scheduled around the State of Origin fixture between representatives of New South Wales and Queensland. The eight top teams compete in the finals series, which comprises nine matches culminating in the Grand Final.

300 In addition to the NRL Competition and State of Origin matches, other Rugby League games are played under the auspices of the NRL Ltd. These include a New South Wales City versus New South Wales Country fixture and Rugby League Internationals involving the Australian representative team.

4. FRAMEWORK FOR TELEVISION BROADCASTING IN AUSTRALIA

4.1 Introduction

301 In this Chapter I deal with the principal features of the regulation of television broadcasting, both free-to-air and pay, that bear on the issues in the present case. The regulation of the television industry goes far beyond the matters to which I refer and, at the time of the hearing, was in a state of flux. I have confined the account to regimes that were in force at the relevant times and that were referred to, otherwise than in passing, in evidence or submissions.

302 In addition, I provide a brief, in no way complete, overview of free-to-air broadcasting in Australia, the form of which has been shaped by the regulatory regime. I also provide certain information on pay television broadcasting in Australia. However, other aspects of the history and structure of pay television in Australia are dealt with elsewhere in the judgment.

4.2 Licensing Regime under the *Broadcasting Services Act*

4.2.1 Broadcasting Licences

303 The *Broadcasting Services Act 1992* (Cth) ('*BS Act*') has governed, at all material times, the provision of broadcasting services in Australia. In particular, the *BS Act* sets up a licensing regime for broadcasting services, regulates the content of such services and imposes restrictions on the ownership and control of broadcasting service providers. Section 6 of the *BS Act* defines '*broadcasting service*', subject to certain exceptions, to include:

> *'a service that delivers television programs ... to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means ...'*

304 Prior to the amendment of the *BS Act* by the *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005* (Cth) ('*ACMA Act*'), the Australian Broadcasting Authority ('**ABA**') was responsible *inter alia*, for allocating licences under the statutory regime and for administering the licensing scheme. The *ACMA Act* transferred the functions of the ABA to the Australian Communications and Media Authority. However, since the ABA was the regulator at the times material to this litigation, I shall refer

to its role under the *BS Act*, prior to the amendments made by the *ACMA Act*.

305 In performing its functions under the *BS Act*, the ABA is to promote the objects of the Act, including '*the economic and efficient use of the radiofrequency spectrum*' (s 23). Its functions include planning the availability segments of the '*broadcasting services bands*' (s 158(b)). This expression is defined by s 6 to mean that part of the radiofrequency spectrum that has been designated under s 31 of the *Radiocommunications Act 1992* (Cth) as being primarily for broadcasting purposes and that has been referred by the Minister to the ABA for planning.

306 Where the Minister has referred a part of the radiofrequency spectrum to the ABA for planning, it must prepare '*a frequency allotment plan*' (s 25(1)). The plan determines the number of channels that are to be available in particular areas of Australia for the purpose of providing broadcasting services using that part of the radiofrequency spectrum. The ABA is also to prepare '*licence area plans*' (s 26(1)). These plans determine the number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia through the use of the broadcasting services bands. The licence area plans must be consistent with the relevant frequency allotment plan.

307 In order to provide a free-to-air or subscription (pay) television service, a person must have the appropriate licence issued under the *BS Act*. Penalties are imposed for contraventions (Pt 10, Div 1) and action may be taken by the ABA to stop any unauthorised service (Pt 10, Div 2).

308 A commercial free-to-air television operator must hold an individual '*commercial television broadcasting licence*' (ss 6, 12(1), 131). The expression '*commercial broadcasting services*' is defined (s 14) to mean broadcasting services:

> *'(a) that provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and*
>
> *(b) that provide programs that:*
>
> > *(i) are able to be received by commonly available equipment; and*
> >
> > *(ii) are made available free to the general public; and*

(c) that are usually funded by advertising revenue; and

(d) that are operated for profit ... ; and

(e) that comply with any [relevant] determinations ...'

309 The appropriate licence for subscription television broadcasters is an individual '*subscription television broadcasting licence*' (ss 6, 12(1), 96, 132), or a class licence for '*subscription television narrowcasting services*' (ss 12(2), 117(c)). Section 16 defines '*subscription broadcasting services*' to mean broadcasting services that:

'(a) provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and

(b) are made available to the general public but only on payment of subscription fees (whether periodical or otherwise); and

(c) comply with any [relevant] determinations ...'

310 Section 17 defines '*subscription narrowcasting services*' to mean subscription broadcasting services that are directed to special interest groups, or that provide programs of limited appeal or limited duration: see *SportsVision Australia Pty Ltd v Tallglen Pty Ltd* (1998) 145 FLR 308, at 341-343, where Bryson J of the Supreme Court of New South Wales held that the *sports AFL* subscription channel, then carried on a tier by Optus, was a '*subscription narrowcasting service*' because it broadcast content of limited appeal.

311 All licences granted under the *BS Act* are subject to the standard conditions specified in Sch 2, Pts 1 and 2. The standard conditions relate to such matters as political broadcasts and the proper keeping of records. Commercial television broadcasting licensees are subject to the conditions imposed by Sch 2, Pt 3 (s 42(1)). Subscription television broadcasting licensees are subject to the conditions in Sch 2, Pt 6 (s 99(1)), while subscription television narrowcasting licensees are subject to the conditions specified in Sch 2, Pt 7 (s 118(3)). The conditions applicable to a subscription television broadcasting licence and a subscription narrowcasting licence include a requirement that '*subscription fees will continue to be the predominant source of revenue for the service*' (Sch 2, Pt 6, cl 10(2)(b); Pt 7, cl 11(2)).

4.2.2 Commercial Television Broadcasting Licences

312 Before allocating certain licences, including a new commercial television broadcasting licence, the ABA must designate a licence area for the licence: s 29(1). At the relevant times, there were in fact 27 licence areas for television in Australia.

313 Prior to 25 June 1998, the ABA was prohibited from allocating more than three television licences for the same area. From that date until 31 December 2006, the ABA has been prohibited from allocating any commercial television broadcasting licences, except in an area where fewer than two such licences have been allocated: ss 28, 28A. In consequence of these arrangements, each of the six largest capital cities in Australia has three commercial television services, as do several regional areas in the eastern states. Hobart and some regional areas have two commercial services. There are four '*solus*' regional markets, each of which has only one commercial service. At the time of the hearing, there were 53 commercial television broadcasting licences on issue.

314 The holder of a commercial television broadcasting licence is not permitted to hold or be in a position to exercise control of another commercial television broadcasting licence in the same licence area: s 53(2). A licensee is also prohibited, subject to certain exceptions, from providing commercial television broadcasting services under the licence outside the relevant licence area: Sch 2, Pt 3, cl 7(2A). The holder of a commercial television broadcasting licence cannot hold or be in a position to control commercial television broadcasting licences such that its combined licence area population exceeds 75 per cent of the Australian population: s 53(1).

4.2.3 Subscription Television Licences

315 Australia was among the last of the economically advanced countries to authorise subscription television services. Sections 93 and 96 of the *BS Act*, inserted by the *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992* (Cth), provided for the allocation of subscription television broadcasting licences (s 93 was subsequently repealed).

316 The ABA must allocate one licence per service: s 96(2). Before allocating a subscription television broadcasting licence, the ABA must request the ACCC to provide a

report: s 97(1). The report must advise whether the allocation of the licence would constitute a contravention of s 50 of the *TP Act* if the allocation of the licence were the acquisition of an asset by a corporation: s 97(2). The term '*service*' is not defined by the *BS Act*. However, there are dicta suggesting that the expression '*one licence per service*', which is used in s 96(2), suggests that each service is provided by a particular channel: *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1996) 136 ALR 319, at 322, per *curiam*.

4.3 Anti-Siphoning and Anti-Hoarding

4.3.1 Anti-Siphoning Regime

317 Much in the case is said to turn on the so-called '*anti-siphoning regime*' created by the *BS Act*. The regime is central to the competing arguments relating to the identification of relevant markets. An understanding of the regime is also necessary to follow the nature and form of the transactions that have given rise to this litigation.

318 The background to the anti-siphoning regime was explained by the Full Federal Court in *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd* (1997) 73 FCR 429, at 430-431, as follows:

> *'When parliament decided to make provision, in the Broadcasting Services Act 1992 (Cth), for subscription television, one of the issues it needed to confront was what to do about major events; events, particularly sporting events, that the Australian public had long been accustomed to having available on free-to-air television. If nothing was done, and market forces were allowed to prevail, there was a chance that a subscription service would acquire the exclusive right to televise such an event, and thereby deny everyone but its subscribers the opportunity to view it on television. Parliament thought this possibility unacceptable. Accordingly, it included in the Act some provisions that are generally called "the anti-siphoning provisions". These provisions do not force the free-to-air transmission of a declared event. Provisions having that effect would have cut across the underlying philosophy of the Act, namely, that it is generally for the national broadcasters (the Australian Broadcasting Corporation and Special Broadcasting Service) and commercial television broadcasting licensees to determine what programs to televise on the services provided by them. The anti-siphoning provisions operate indirectly. They encourage the free-to-air transmission of declared events by removing any incentive for a subscription service to "lock away" the exclusive rights. If it does so, it loses its own right to televise the event'.*

The expression '*anti-siphoning*' appears to reflect the intention of the regime that important sporting events should not be '*siphoned*' to pay television.

319 As the Full Court pointed out in *Foxtel Cable v Nine Network* 73 FCR, at 431, the anti-siphoning provisions consist of two elements. First, s 115(1) empowers the Minister, by notice published in the *Gazette,* to specify an event or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public. The Minister has power to amend a notice, for example by specifying an additional event to be included in the list: s 115(1A). An event specified in a notice is taken to be removed 168 hours after the end of the event unless a declaration to the contrary is made in the meantime: s 115(1B). A notice is a disallowable instrument for the purposes of s 46A of the *Acts Interpretation Act 1901* (Cth): s 115(3)

320 The second element of the scheme is a standard condition imposed on subscription television licensees (but not subscription narrowcasting licensees) under Pt 6 of Sch 2 to the *BS Act.* The condition is as follows (cl 10(1)(e)):

> *'the licensee will not acquire the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under subsection 115(1) unless:*
>
> *(i) a national broadcaster has the right to televise the event on any of its broadcasting services; or*
>
> *(ii) the television broadcasting services of commercial television broadcasting licensees ... who have the right to televise the event cover a total of more than 50% of the Australian population'.*

For the purposes of cl 10(1)(e)(ii), if a program supplier for a commercial television broadcasting licence has a right to televise an event, the licensee is taken also to have the right: cl 10(1B). Contravention of a condition of a subscription television broadcasting licence constitutes an offence: s 139(2).

321 The parties agree that the expression '*right to televise ... an event*' means that a free-to-air operator must have the right to televise the event as it happens or as soon thereafter as is technically feasible. It follows that a right in a pay television provider to broadcast the highlights of an event, or to broadcast the event several days after it takes place, does not involve a breach of cl 10(1)(e) set out above. The parties' agreement on this issue reflects the

holding of the Full Court in *Foxtel Cable v Nine Network* 73 FCR, at 435. The Court explained the basis for the holding in the following passage (at 435):

> *'It must be remembered that the anti-siphoning provisions are concerned with events of a national nature, events that the Minister has adjudged likely to attract widespread public interest. They will not necessarily be sporting events; the provisions could be used to cover an historical event like a special commemoration or visit. But all the events listed in the notice of 6 July 1994 were sporting events and this may be the future pattern. Either way, events are selected because the Minister is of the opinion that many people will wish to feel part of them, by seeing them as they occur, not by later seeing a television record of them. In the present context, we do not think it can be said that a national broadcaster or television broadcasting licensee has the "right to televise the event" unless that broadcaster or licensee can televise it as it happens, or as soon thereafter as is technically feasible'.*

322 As this passage implies, the Minister gazetted the first anti-siphoning list on 6 July 1994, to prepare for the introduction of pay television in Australia. The original list was expressed to continue for a period of ten years, until the end of 2005 (subject to amendment from time to time). A new list has been put in place for the period 1 January 2006 to 31 December 2010. Thus far, only sporting events have been placed on the anti-siphoning list.

323 An event can be removed from the anti-siphoning list in any one of three ways. First, as noted above, an event is automatically removed from the list seven days after it concludes, unless the Minister makes a declaration otherwise.

324 Secondly, by virtue of amendments to the *BS Act* which took effect on 20 July 2001, an event was automatically delisted six weeks before its scheduled commencement, unless the Minister published a declaration that the event continues to be specified in the notice: s 115(1AA), inserted by the *Broadcasting Legislation Amendment Act (No 2) 2001* (Cth), Sch 1, cl 5. The period of six weeks was changed to 12 weeks as from 1 April 2005: *Broadcasting Services Amendment (Anti-Siphoning) Act 2005* (Cth), Sch 1, cl 1. The Minister may publish a declaration under s 115(1AA) only if satisfied that at least one free-to-air broadcaster has not had a reasonable opportunity to acquire the right to televise the event concerned: s 115(1AB). It follows (as the parties agree) that a sporting event will now be automatically delisted 12 weeks before its scheduled commencement if the free-to-air broadcasters have had a reasonable opportunity to acquire the rights to televise the event, but have elected not to do so.

325 Thirdly, the Minister has a general power to remove an event from the list, although the amending notice is a disallowable instrument: s 115(2), (3). Accordingly, anyone may apply to the Minister to remove a particular sporting event or events from the anti-siphoning list. In practice, it appears that the Minister has not been prepared to remove an event unless satisfied that the free-to-air broadcasters have had a reasonable opportunity to televise the event.

326 At all material times, each match in the AFL Competition (including finals) and each match in the NRL Competition (including finals) was on the anti-siphoning list. Annexure A to this judgment sets out the events specified on the anti-siphoning list during the period November 1998 to December 2010. Annexure A omits events that have been removed from the list from time to time.

4.3.2 Anti-Hoarding Regime

327 The anti-siphoning regime does not require a commercial broadcaster or a national broadcaster to televise an event to which it has free-to-air rights, even if the event is on the anti-siphoning list. Following concern about the failure of the Nine Network to show the first session of the Ashes cricket series in England in 1997, Parliament introduced the anti-hoarding regime which:

> *'obliges a commercial television broadcasting licensee which has acquired the right to televise live a designated event or series of events, but does not intend to exercise the right, either in whole or in part, to offer the ABC and the SBS the right to televise live at nominal charge, that part of the event which it does not intend to televise live. In similar vein, if the ABC or SBS have acquired rights to an event and do not intend to use them, they must offer their unused live rights to each other. In recognition of the fact that it is common practice in the commercial broadcasting industry for rights to sporting events to be acquired by companies other than the licensee, the anti-hoarding rules also apply to persons who supply programs to commercial television broadcasting licensees'.*

D Butler and S Rodrick, *Australian Media Law* (2nd ed, Lawbook Co., 2003), at [12.550]. It is a condition of each commercial television broadcaster's licence that it not contravene the anti-hoarding rule: *BS Act*, Sch 2, Pt 3, cl 7(1)(ha). Since the introduction of the anti-hoarding provisions in 1998, only two events have been designated by the Minister on the anti-hoarding list. The events were the soccer World Cups of 2002 and 2006.

4.4 Program Standards, Codes of Practice and Regulation of Advertising

4.4.1 Free-To-Air Television

328 Section 122 of the *BS Act* requires the ABA to determine program standards relating to content and delivery for commercial television broadcasting licensees. The section concerns only standards for children's programs and for the Australian content of programs. A licensee must comply with any applicable program standard as a condition of its licence (*BS Act*, Sch 2, Pt 3, cl 7(1)(b)).

329 The ABA has determined a number of standards. The standards require, among other things, that licensees:

> broadcast at least 390 hours of children's programs per annum;
>
> ensure that the overall annual minimum level of Australian programming between 6 am and midnight is at least 55 per cent;
>
> broadcast a minimum volume of first-release Australian drama programs (including children's drama); and
>
> ensure that at least 80 per cent of total advertising time between 6 am and midnight is taken up by Australian-produced advertisements.

330 Section 123 of the *BS Act* states that it is Parliament's intention that industry groups representing, among others, commercial broadcasting licensees and subscription broadcasting licensees must develop codes of practice applicable to their broadcasting operations. Codes of practice are developed in conjunction with the ABA and are registered with the ABA if they conform to certain criteria (ss 123(1), (4), 124). If the ABA considers that a registered code of practice does not provide '*appropriate community safeguards*' in relation to certain matters, it must determine its own standard (s 125).

331 The relevant industry group for free-to-air broadcasters is Free TV Australia (formerly known as the Federation of Australian Commercial Television Stations ('*FACTS*')) and, later, as Commercial Television Australia ('*CTVA*'). The relevant code of practice developed by Free TV Australia and registered with the ABA is the *Commercial Television Industry Code of Practice July 2004* ('*Free TV Australia Code*').

332 The conditions of commercial broadcasting licences impose other restrictions on the content of broadcasts. For example, licensees must not broadcast a program that has been refused classification or has been classified '*X*' by the Classification Board of the Office of Film and Literature Classification (*BS Act*, Sch 2, Pt 3, cl 7(1)(g)).

333 The Free TV Australia Code imposes limits on the volume of free-to-air advertising by the licensee. For example, on any one day a licensee may schedule an average of no more than 13 minutes per hour of '*non-program matter*' between 6 pm and midnight, and an average of no more than 15 minutes per hour at other times. ('*Non-program matter*' includes most paid advertising and certain program promotions.) A channel may schedule up to 15 minutes of non-program matter in any hour between 6 pm and midnight, with different hourly limits applying at other times. The parties agree that these restrictions equate to a daily average of 348 minutes of non-program material; a weekly average of 2,436 minutes; and a monthly average of about 10,556 minutes.

4.4.2 Pay Television

334 The relevant industry group for pay television providers is the Australian Subscription Television and Radio Association ('*ASTRA*'). ASTRA has developed two codes of practice which are registered with the ABA: the *Subscription Broadcast Television Code* ('*ASTRA Broadcasting Code*'); and the *Subscription Narrowcasting Television Code* ('*ASTRA Narrowcasting Code*').

335 The *ASTRA Broadcasting Code* applies to subscription broadcasting services within the meaning of the *BS Act*, while the *ASTRA Narrowcasting Code* applies to open and subscription narrowcasting services as defined in the *BS Act*. Licensees who provide both broadcasting and narrowcasting programming are subject to both ASTRA Codes.

336 Subscription television broadcasting licensees are subject to conditions that restrict content. For example, like a free-to-air broadcaster, a subscription television broadcasting licensee must not broadcast a program that has been refused classification or has been classified '*X*' by the Classification Board (*BS Act*, Sch 2, Pt 6, cl 10(1)(f)) and there are extremely stringent restrictions on the broadcast of '*R*' classified programs (cl 10(1)(g)). There are, however, no regulatory restrictions on the ability of a pay television licensee, which operates a subscription television narrowcasting service under a class licence, to

broadcast '*R*' classified programs. The *ASTRA Narrowcasting Code* requires that access to '*R*' classified programs be restricted by disabling devices.

337 Advertisements and sponsorship announcements were not permitted on pay television services until 1 July 1997. Broadcasting of advertisements and sponsorship announcements has been permitted since that date, subject to a subscription television licence condition that subscription fees remain the predominant source of revenue for the service (cl 10(2)(b)). Subscription television licensees are not otherwise subject to regulations restricting the volume of advertising.

4.5 Telecommunications Access Regime

338 Part XIC of the *TP Act*, which was introduced in 1997, is headed '*Telecommunications Access Regime*'. The statutory regime is relevant to Seven's case that Foxtel and Telstra Multimedia gave effect to a provision in the BCA, which conferred upon Foxtel exclusive rights of access to the Telstra Cable. Seven says that by this conduct, Foxtel and Telstra Multimedia contravened s 45(2)(b)(ii) of the *TP Act.*

339 It is convenient to consider the material provisions of Pt XIC here. The account of the key provisions in this section is based in part on that of Beaumont J in *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 464, at 468-469 [5]-[7].

340 Section 152AA of the *TP Act* provides a '*simplified outline*' of Pt XIC, as follows:

> '• *The [ACCC] may declare carriage services and related services to be* ***declared services.***
>
> • *Carriers and carriage service providers who provide declared services are required to comply with* ***standard access obligations*** *in relation to those services.*
>
> • *The* ***standard access obligations*** *facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services.*
>
> • *The terms and conditions on which carriers and carriage service providers are required to comply with the* ***standard access obligations*** *are subject to agreement.*
>
> ...

- *If agreement cannot be reached … the terms and conditions are to be determined by the [ACCC] acting as an arbitrator.*

  …

- *The [ACCC] may conduct an arbitration of a dispute about access to declared services. The [ACCC's] determination on the arbitration must not be inconsistent with the standard access obligations …*

  …

- *A carrier, carriage service provider or related body must not prevent or hinder the fulfilment of a standard access obligation'.*

A '*carriage service*' means a service for carrying communications by means of guided and/or unguided electromagnetic energy: *TP Act,* s 152AC; *Telecommunications Act 1997* (Cth), s 7.

341 Section 152AB of the *TP Act* sets out the objects of Pt XIC. The first object is (s 152AB(1)):

> *'to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services'.*

Section 152AB(2) specifies a number of matters to which regard must be had in determining whether something promotes the long-term interests of end-users.

342 The power to declare a service is conferred by s 152AL(3) of the *TP Act.* Before exercising the power, the ACCC must hold a public inquiry and prepare a written report. The declaration can only be made if the ACCC is satisfied that it will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

343 The '*standard access obligations*' are set out in s 152AR of the *TP Act.* An access provider (that is, a carriage service provider supplying declared services) must, if requested by a service provider (including a pay television broadcaster):

> *'supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services'* (s 152AR(3)(a)).

This obligation is qualified by s 152AR(4), as follows:

> *'Paragraph (3)(a) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects:*
>
> *(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the request was made;*
>
> *(b) preventing the access provider from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made;*
>
> *(c) preventing a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person's actual requirements;*
>
> *(d)* ***depriving any person of a protected contractual right****'*. (Emphasis added.)

344 Section 152AR(12) defines '*protected contractual right*' to mean:

> *'a right under a contract that was in force at the beginning of 13 September 1996'.*

4.6 Brief Overview of Free-to-Air Broadcasting

4.6.1 Networks

345 Since 1995, three free-to-air commercial television networks (the 7, Nine and Ten Networks) have serviced each of the major metropolitan areas. In addition, these areas are serviced by the two public national broadcasters, namely the Australian Broadcasting Corporation ('**ABC**') and the Special Broadcasting Service ('**SBS**') (together the '**National Broadcasters**').

346 The three commercial networks broadcast predominantly in the major capital cities. Other commercial broadcasters, mainly affiliated regional broadcasters, service regional areas and the smaller capital cities. (I refer to the three commercial networks and their regional affiliates as the '**Commercial Broadcasters**'.) Specifically (as previously noted):

> Seven owns stations that broadcast in Sydney, Melbourne, Brisbane, Adelaide,

Perth and regional Queensland;

Nine owns stations that broadcast in Sydney, Melbourne, Brisbane and Darwin, while affiliates cover Perth, Adelaide, Canberra and regional areas of Australia; and

Ten provides coverage in Sydney, Melbourne, Brisbane, Perth and Adelaide.

4.6.2 Technologies

347 In theory, all technologies can be used to provide free-to-air television services. In Australia, however, the free-to-air broadcasters have provided channels via terrestrial broadcasts. These transmissions have been in analogue format: that is, the transmission uses an analogue modulation technique. Each analogue free-to-air service provides a single channel for viewers that can transmit one continuous stream of programming and some limited data embedded in the main carrier signal, such as teletext.

348 Digital transmission of television broadcasts enables multiple programs to be transmitted simultaneously, using the same amount of radiofrequency spectrum as is used for analogue television. This form of transmission is known as '*multi-channelling*'. The Commercial Broadcasters have not been permitted to transmit programs via multi-channelling, subject to a minor exception where a licensee is broadcasting live sports coverage of a sporting event which is delayed for reasons outside the licensee's control and, in consequence, the sporting event broadcast overlaps with a regularly scheduled news program. The National Broadcasters are permitted to transmit certain programs via multi-channelling, if the programs are not provided as part of a subscription service.

349 The regulatory scheme governing the introduction of digital free-to-air television was set up by the *Television Broadcasting Services* (*Digital Conversion) Act 1998* (Cth), which inserted Sch 4, headed '*Digital television broadcasting*', into the *BS Act*. The scheme requires a commercial television broadcasting licensee to comply with the Commercial Television Conversion Scheme ('*CTC Scheme*') as a condition of its licence. The CTC Scheme, which was formulated by the ABA, specifies arrangements for the progressive conversion of commercial free-to-air television transmissions from analogue mode to digital mode. The ABA has also formulated a counterpart digital conversion scheme for the National Broadcasters.

350 Under the CTC Scheme, the ABA has prepared '*digital channel plans*' which allot additional channels to free-to-air broadcasters. This enables the broadcasters to transmit programs in Standard Definition Television ('*SDTV*') and High Definition Television ('*HDTV*') digital mode, as well as in analogue mode, during a 'simulcast period'. SDTV is the base format for digital television broadcasting and provides a wider picture and larger viewing area, in addition to CD-quality sound. HDTV is a high quality form of digital television broadcasting, providing cinema quality pictures and sound.

351 The simulcast period is to run for at least eight years from 1 January 2001. During the simulcast period, a licensee must achieve certain HDTV digital transmission quotas. At the end of the simulcast period, analogue transmissions are to cease. Schedule 4 to the *BS Act* provides, however, for a review of the arrangements for the simulcast period to be conducted by 1 January 2006. It appears that no such review had been conducted by the stipulated date.

352 Digital free-to-air television was introduced in Sydney, Melbourne, Brisbane, Perth and Adelaide in 2001 and extended thereafter to regional areas. In compliance with their obligations, each of the Commercial Broadcasters and the National Broadcasters has delivered both SDTV and HDTV digital signals, at the same time as transmitting in analogue format.

353 Although commercial broadcasting licensees are not permitted to '*multi-channel*' during a simulcast period, they are permitted to provide digital enhancements to their primary simulcast program, provided the enhancements are directly linked to, and contemporaneous with, that program. Digital enhancements enable a viewer to watch one or more streams of content simultaneously. For example, a viewer may be able to watch a cricket match and simultaneously display program enhancements, such as player statistics or highlights using '*picture-in-picture*' display technology. Digital enhancements may take the form of text, data, speech, music, sounds or visual images, or any combination of these.

4.6.3 Ratings

354 The Commercial Broadcasters, in the period from 1995 to 2001, attracted the bulk of free-to-air television viewers. Table 4.1 records the television ratings for the Commercial Broadcasters and the National Broadcasters during that period, based on ratings in the five major metropolitan markets from 6 pm until midnight.

TABLE 4.1: Free-to-Air Ratings: 1995−2001

	Commercial share (%)				Non-commercial share (%)		
	Seven	**Nine**	**Ten**	**Total**	**ABC**	**SBS**	**Total**
1995	29.8	32.4	21.1	**83.3**	13.9	2.9	**16.8**
1996	30.4	31.9	20.7	**83.0**	14.2	2.8	**17.0**
1997	29.5	32.6	20.7	**82.8**	14.3	2.8	**17.1**
1998	29.1	32.6	20.8	**82.5**	14.4	3.1	**17.5**
1999	29.4	32.8	19.5	**81.7**	14.7	3.7	**18.4**
2000[1]	32.2 (29.3)	31.0 (32.9)	18.5 (19.3)	**81.7 (81.5)**	14.8 (15.5)	3.4 (3.5)	**18.2 (19.0)**
2001	29.4	30.6	21.3	**81.3**	14.0	4.6	**18.6**
10-year average 1992-2001	29.5	32.1	20.9	**82.5**	14.4	3.2	**17.5**

Note: 1. Figures in brackets exclude the Olympics (weeks 38 to 41).

4.7 Pay Television in Australia

355 I have referred in Chapter 3 to the principal pay television operators providing services to retail subscribers during the relevant periods, namely Foxtel, Optus and Austar. I point out there that Austar did not compete directly with Foxtel or Optus, as it serviced different geographic areas (except on the Gold Coast).

4.7.1 Subscribers

356 Table 4.2 sets out the aggregate number of pay television subscribers, according to platform, during the period from December 1995 to June 2004.

TABLE 4.2: Subscribers to Pay Television: 1995−2004

	Foxtel		Optus	Austar	Australis/East Coast
	Analogue	**Digital**			
Dec 1995	8,006		4,782		62,000
Jun 1996	79,912		46,115		
Dec 1996	136,746		157,961	103,410	110,000
Jun 1997	205,276		178,810		
Dec 1997	279,643		167,741	196,205	102,000
Jun 1998	324,539		176,980	210,881	
Dec 1998	417,360		194,777	272,262	
Jun 1999	496,599		208,525	313,577	
Jan 2000	580,673		207,784	363,061	
Jun 2000	635,490		210,481	387,483	
Dec 2000	697,760		216,515	399,328	
Jun 2001	738,224		245,673	404,856	
Dec 2001	769,380		264,837	402,998	
Jun 2002	792,290		266,269	379,939	
Dec 2002	801,232		240,139	365,991	
Jun 2003	827,903		219,432	365,680	
Dec 2003	852,887		208,473	378,900	
Jun 2004	665,357	229,937	195,149	406,523	

Notes: 1. Austar went into liquidation in May 1998.

2. The figures for Foxtel, for the period December 2002 to June 2004,

include subscribers to Foxtel through Telstra Pay TV.

3. Both Foxtel and Austar launched their full digital services in March 2004.

4.7.2 Basic and Tiers

357 Reference was frequently made in evidence and submissions to pay television subscribers being on '*basic*' or on a '*tier*'. These terms were not defined in the Agreed Assumptions. However, the evidence indicates that '*basic*' refers to the basic package which all subscribers to a particular platform must take. The content of the basic package may vary considerably between platforms and over time.

358 A '*tier*' comprises a channel or a package of channels that subscribers to a platform can take in addition to the basic package. Where the tier comprises a single channel, it is often described as an '*a la carte*' offering or a '*stand alone*' channel. Ordinarily, a subscriber pays an additional monthly fee for the tier. Typically, content offered on a tier appeals to a particular segment of subscribers who are willing to pay extra for access to that material.

359 By way of illustration, the Foxtel basic cable package in December 2000 incorporated 29 channels, including *Fox Sports 1* and *Fox Sports 2*, *Fox 8*, *Sky Racing*, *Lifestyle*, *CNN* and *Sky News*. The cost of the basic package was $37.95 per subscriber per month ('**pspm**'). A subscriber wishing to take movie channels on a tier or tiers paid an additional $10.00 or $20.00 pspm depending on the selection. Various add-on channels were available a la carte at an additional cost, ranging from $6.95 pspm to $14.95 pspm (for '*Adults Only*').

360 The arrangement between the pay television platform and the channel supplier whose products are on a tier can differ, depending on the content and its value as a subscription driver. The distributor may pay a licence fee for the channel on a tier by reference to the number of subscribers to the basic package, even though the subscribers to the tier will always be fewer than the subscribers to the basic package. This is usually known as payment '*as if on basic*'. An alternative is for the licensing arrangement to be based on the number of subscribers to the tier. The simplest example, although there are various forms, is a licence fee calculated as an amount per subscriber (to the tier) per month.

4.7.3 Bundling

361 A phenomenon that has played some part in these proceedings is known as '*bundling*'. This occurs where a provider of pay television (not necessarily the compiler of channels) offers a package which combines pay television services with other products, such as telephony services.

362 Bundling appears to have commenced in Australia in 1996, when Optus provided free installation for pay television subscribers (worth $29.95 at the time) if they acquired local telephony from an Optus affiliate. In 1998, Optus packaged its pay television services with local telephony services. In 1999, Optus extended its bundling to Optus Internet and in 2000 to long-distance telephony services. In 2000, Optus reported that new pay television subscribers taking more than one bundled product had increased to 65 per cent. By the end of June 2000, more than 95 per cent of new Optus pay television subscribers were also taking local telephony services.

363 In July 2002, Telstra notified the ACCC that it proposed to offer the Foxtel Service bundled with telecommunications services. The ACCC approved this offering in November 2002. Prior to this, Telstra had been unable to offer a bundled product as News was not prepared to agree to Telstra reselling the Foxtel Service for this purpose. By May 2003, Telstra had signed up 100,000 customers to its so-called '*Rewards*' package, although not all customers taking the package would necessarily have been subscribers to Foxtel.

364 In 2002, Austar introduced bundling of mobile telephony and internet services with its pay television service. In September 2003, Telstra Pay TV obtained approval from the ACCC to bundle Austar's pay television service with Telstra's telecommunications services in areas that Austar then supplied (rural and regional Australia, Hobart and Darwin).

4.7.4 A Matter of Terminology

365 In the pay television industry, an exclusive entitlement to show a sporting event live may be very important. Within the industry, the expression '*exclusively live*' connotes an entitlement in the holder of the rights to be the only broadcaster permitted to show the particular event live. However, other broadcasters may be entitled to broadcast the event on a delayed basis. The expression '*live and exclusive*' connotes an entitlement to show the event

not only live, but to the exclusion of any other broadcaster, even on a delayed basis.

5. CREDIBILITY OF LAY WITNESSES

366 In this Chapter, I:

make general observations about the role of the Court in assessing the credibility of witnesses whose evidence is challenged in cross-examination;

record my views as to the credibility and reliability of the principal lay witnesses called by Seven and the Respondents (bearing in mind that PBL called no lay witnesses);

address the significance of parties failing to call witnesses who can be regarded as within their respective camps in the light of the so-called rule in *Jones v Dunkel* (1959) 101 CLR 298; and

consider what evidentiary consequences flow from News' document deletion policies.

5.1 General Observations

367 The credit of a number of witnesses in the present case was challenged, sometimes vigorously, in cross-examination. Mr Hutley SC, for example, repeatedly accused Mr Stokes and Mr Gammell of deliberately telling untruths in the course of their evidence. Mr Philip admitted in his written statements that he lied to Mr Akhurst in December 2000 as part of an attempt to persuade Telstra to support a revised bid by Fox Sports for the NRL pay television rights. Mr Philip's admission that he had lied in his dealings with Telstra did not render him immune from accusations by Mr Sumption QC that he was not telling the truth in the witness box about his dealings with Telstra or his motives for certain conduct. Seven also submits that Mr Akhurst's evidence, in certain respects, was '*so lacking in credibility that it should be rejected*' and that he was '*generally evasive*' in the witness box.

368 Quite apart from challenges to credit, the parties disputed the reliability of at least some evidence given by most of their opponents' lay witnesses. For example, in his closing oral submissions, Mr Sumption seemed to abandon a rather half-hearted attempt in Seven's written submissions to challenge Dr Switkowski's credit in relation to certain aspects of his evidence. Instead, Mr Sumption submitted that Dr Switkowski had simply forgotten a great deal of material that he had known in 2000. In particular, Mr Sumption invited me to reject

on that ground Dr Switkowski's evidence that, even if News' purpose in acquiring the AFL broadcasting rights included bringing about C7's demise, he did not appreciate that fact at the time he gave Telstra's support to News' bid.

369 In Australia, appellate courts recognise that there are '*natural limitations*' that affect the scope of an appeal on findings of fact in cases where the appellate court is confined to the record of the proceedings at first instance: *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23], per Gleeson CJ, Gummow and Kirby JJ; *CSR Ltd v Della Maddalena* (2006) 224 ALR 1 at 7 [17], per Kirby J (with whom Gleeson CJ agreed). These limitations:

> *'include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole*'. (Citations omitted.)

Fox v Percy 214 CLR at 126 [23].

370 An appellate Court affords respect to what are said to be the:

> *'advantages of trial judges, ... especially where their decisions might be affected by their impression about the credibility of witnesses'.*

Fox v Percy 214 CLR, at 127 [26], per Gleeson CJ, Gummow and Kirby JJ. Nonetheless appellate courts have expressed caution about paying excessive deference to findings on credit based on an assessment of the demeanour or appearance of a witness. The '*subtle influence of demeanour*' seems now to be given less weight by appellate courts than was once the case: *CSR v Della Maddalena* 224 ALR, at 9 [23], per Kirby J (with whom Gleeson CJ agreed).

371 The High Court has recently cited with approval the observation of Atkin LJ that:

> *'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour'.*

Société d'Avances Commerciales v Merchants' Marine Insurance Co (The "Palitana")

(1924) 20 Lloyd's Rep 140, at 152, cited in *Fox v Percy* 214 CLR, at 129 [30], per Gleeson CJ, Gummow and Kirby JJ. Moreover, the High Court has pointed out that judges have:

> *'become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges,* ***both at trial*** *and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical*'. (Emphasis added.)

Fox v Percy 214 CLR, at 129 [31], per Gleeson CJ, Gummow and Kirby JJ. See also *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, at 32 [67], per *curiam*.

372 A recent paper by the Chief Judge at Common Law of the Supreme Court of New South Wales has canvassed some of the literature casting doubt on the assumption that careful observation of a witness giving evidence will reveal whether he or she is lying: P McLellan, 'Who Is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80 ALJ 655. In particular, there is a danger that a confident presentation by a witness may wrongly be taken as a guarantee of reliability and a hesitant presentation may wrongly be taken as proof that the witnesses is not telling the truth. Chief Judge McLellan also refers (at 664) to the psychological literature emphasising the fallibility of memory, especially its susceptibility to suggestion. He quotes (at 665) the helpful insight embodied in the *Guidelines Relating to Recovered Memories* (2000) of the Australian Psychological Society:

> *'Memory is a constructive and reconstructive process. What is remembered about an event is shaped by how that event was experienced, by conditions prevailing during attempts to remember, and by events occurring between the experience and the attempt at remembering. Memories can be altered, deleted and created by events that occur during and after the time of encoding, during the period of storage, and during any attempts at retrieval'.*

These observations tend to accord with the experience of trial judges and are reinforced by my assessment of much of the evidence in this case.

373 The present judgment follows a trial at which a great deal of evidence was given by many witnesses. It is not an appellate judgment. Nonetheless, the observations in *Fox v*

Percy are pertinent to the fact-finding process a trial judge is required to undertake. It is not inconsistent with those observations to observe that the importance of '*demeanour*' as an indicator of the reliability of a witness may vary according to the circumstances. It may be quite inappropriate, to take an example not relevant to this case, to regard an indigenous person's apparent unwillingness to make eye contact and hesitancy in answering questions as demonstrating untruthfulness. But if a confident and articulate witness becomes hesitant and defensive when confronted with documentary evidence apparently at odds with his or her own account of events, the witness' hesitancy might well suggest a lack of candour: see McLellan, at 662.

374 In this case, most of the lay witnesses gave evidence about events occurring some years before they signed their witness statements and an even longer period before they gave oral evidence in the proceedings. The crucial events occurred, for the most part, in 1999 and 2000. Accordingly, witnesses giving oral evidence in 2005 and 2006 were being asked to recall meetings, conversations and transactions that had taken place between five and seven years earlier. Similarly, when witnesses were asked about their motivation for particular actions, or their intentions at certain times, they were being asked to cast their mind back perhaps six or seven years, to the time when they took the actions or formed their intentions. It is expecting a great deal of any witness to remember clearly what was said at a meeting or what he or she was thinking at a given time from a distance of half a decade or more. It is even more difficult when the recollection necessarily involves reconstruction in the context of litigation. As Mr Sumption observed in his final oral submissions, it is difficult even for the most honest witness to recall when he or she first learned of something or what his or her opinion was at a particular time without the recollection being shaped by subsequent events or the heat of battle. Mr Sumption might have added that it is particularly difficult when the litigation is the outcome of a strategy formed well before the proceedings commenced.

375 As I have noted, an enormous volume of documentation (including electronically stored material) contemporaneous with the relevant events was produced or identified by the parties on discovery and in response to notices to produce (although, for reasons that I shall explain, the News parties produced relatively little). Much of this material comprises internal emails. These communications tend to be more revealing than more formal correspondence between parties, which is often expressed more circumspectly. (Of course, the experience in this case and others like it may curtail the frank exchange of views by email within large

organisations or, alternatively, may encourage the early culling of electronic records, a practice enthusiastically implemented by News.)

376 Not all the material produced by the parties, or by non-parties in response to subpoenas, was tendered in the proceedings. Nonetheless, as I have explained in Chapter 1, there was a very large volume of documentation in evidence. In consequence, contemporaneous records often shed light on many of the disputed factual issues. Of course, contemporaneous records are not invariably reliable and a judgment may have to be made about their accuracy. But if there is no reason to doubt them, the records may be very helpful in determining where the probabilities lie. The minutes of a meeting or an email summarising a recent conversation, particularly where the documents are prepared by someone with no obvious axe to grind, often will provide the '*ounce of intrinsic merit or demerit*' that is worth pounds of fallible evidence derived from memories prone to distortion and reconstruction.

377 Mr Stokes and, to a lesser extent, Mr Gammell, for example, not infrequently gave evidence about the content of meetings or discussion that was at odds with contemporaneous records such as minutes or emails sent shortly after the discussion. In these circumstances, the records have assisted me to conclude that their accounts, insofar as they conflict with the contemporaneous records, are more likely to be the product of a coloured reconstruction of events than an accurate reflection of what actually occurred. Similarly, where a witness' account drawn from memory is difficult to reconcile with (in the language used in *Fox v Percy*) the '*objectively established facts*', I tend to regard the account with some scepticism.

378 This is not to say that I have been relieved from the need to assess the credibility of key witnesses, at least in relation to certain aspects of their evidence. Sometimes there are conflicts between their accounts of events that must be resolved. Sometimes I have been required to determine whether a witness' account of his intentions or motivation is likely to be correct (none of the lay witnesses was female). Sometimes I have been required to determine what would have happened in a '*counter-factual world*', an assessment that may depend, in part, upon what the witnesses concerned say they would have done in a hypothetical set of circumstances.

379 In assessing both credit and reliability it is necessary to remember the kind of men

who gave lay evidence. Virtually all were executives of large media companies or companies with large media interests. Some were very senior executives: Mr Stokes (Seven); Mr Macourt (News); Dr Switkowski (Telstra); and Mr Anderson and Mr Lee (Optus). Others were less senior, but usually held very responsible positions. As might be expected, the witnesses were, generally speaking, both intelligent and knowledgeable about their respective industries or fields of work. All were involved in what they saw as intense competition with rivals, albeit in the context of heavily regulated industries in which allegiances can shift from time to time. It is fair to say that none of the witnesses had any obvious difficulty in expressing himself or (except in certain instances of illness or understandable weariness) in following the questions put to him, although not all were equally articulate.

380 The witnesses had undertaken varying degrees of preparation for giving their evidence and had different perceptions of the litigation and their role in it. Some, plainly enough, felt aggrieved that they had been embroiled in the litigation. For example, in a moment of frustration, when his veracity was under challenge, Mr Mockridge said that he regarded the case as '*bizarre*' and the fact that he was in the witness box as also '*bizarre*'. Mr Philip, not surprisingly in view of his admissions, manifested clear signs of discomfort at various points in his cross-examination.

381 Mr Stokes was clearly one of the driving forces behind the proceedings instituted by Seven. Perhaps surprisingly, he was prepared to undergo what he must have known would be a long and searching cross-examination in which his credibility would come under sustained attack. While Mr Stokes may not have foreseen quite how long and searching the cross-examination would be, he appeared on the surface, with a few exceptions, to be relatively unruffled by the experience.

382 In my opinion, Mr Stokes' generally calm demeanour in the witness box illustrates the caution that is necessary before relying on a witness' appearance or behaviour as a clear indication of the reliability or otherwise of his or her evidence. As Seven points out and I accept, Mr Stokes was subject to a vigorous, sometimes aggressive cross-examination conducted in the full glare of publicity (although I do not regard the cross-examination as having exceeded the bounds of propriety). During his 14 days of cross-examination, Mr Stokes remained unfailingly calm and polite even in the face of repeated claims that his evidence was fabricated. For the most part, Mr Stokes' answers were laconic.

383 Mr Stokes showed considerable self-control and great determination throughout his period in the witness box. These characteristics were particularly striking, since Mr Stokes is clearly accustomed to being in control of his business environment. Occasionally this became apparent as when, in response to a question, he commented somewhat sharply that he was '*not used to being instructed by one of our managers in what to do*'.

384 The question, however, is what inferences, if any, should be drawn from Mr Stokes' controlled demeanour. Seven submits that on the basis of his demeanour that I should infer that Mr Stokes is a man of '*sincere and strongly held convictions*' and that his evidence was given '*honestly and with care*'. There is little doubt that Mr Stokes is a man of sincere and strongly held convictions, although I would have reached this conclusion independently of his demeanour when giving evidence. Mr Stokes' demeanour demonstrated clearly enough that he was well able to suppress outward manifestations of the emotions that must have been stirred by the nature of the cross-examination and by his inability to control the course of the proceedings. However, I do not think that Mr Stokes' generally calm and controlled demeanour in the witness box, of itself, provides a great deal of assistance in assessing Mr Stokes' reliability on contested issues. This, however, is not to suggest that Mr Stokes' demeanour when responding to particular questions was not of assistance in making findings on factual questions. There were clearly occasions, despite his self-control, when he exhibited signs of discomfort when giving evidence that appeared to be implausible.

5.2 Seven's Witnesses

5.2.1 Mr Stokes

385 It is one thing for Mr Stokes to have been prepared to pursue this litigation notwithstanding the enormous outlay of costs incurred by Seven (in which he has a substantial interest). It is quite another for him to have been willing to give evidence.

386 In retrospect, it may have been possible for Seven to conduct this litigation without Mr Stokes going into the witness box. In his final oral submissions, Mr Sumption was at pains to contend that issues of credit, so far as Seven's witnesses are concerned, go primarily to causation and damages, rather than liability. No doubt this submission recognises the difficulties in the path of accepting some of the evidence given by Seven's witnesses. But it also reflects the fact that Seven perhaps might have run its case without Mr Stokes subjecting

himself to cross-examination. In the absence of Mr Stokes, Seven might have been foreclosed from persisting with its more extravagant claims for relief, but for the most part these have been effectively abandoned in any event.

387 Mr Stokes' willingness to give evidence is somewhat perplexing. Not only must he have known that he would face a gruelling cross-examination, but it must have been apparent to him well before he stepped into the witness box, that his account of events was likely to prove vulnerable at many points. As became clear in the course of cross-examination, his evidence was repeatedly at odds with the contents of the contemporaneous documentation. Time after time, Mr Stokes asserted that important discussions had taken place at board meetings or elsewhere, when the relevant minutes or other contemporaneous records contained no reference to them. He also maintained that he had been unaware of matters that, according to the records, had been discussed in his presence. This judgment is replete with examples.

388 Mr Stokes is plainly a highly intelligent, shrewd and determined person. These attributes, and others, have undoubtedly contributed to his very considerable business success. It would be surprising if a person of Mr Stokes' intelligence and shrewdness did not appreciate the difficulties in the path of accepting much of his evidence, insofar as it was a matter of dispute. It would be particularly surprising, given that Seven had access to and availed itself of legal advice at every stage of the litigation (and indeed on many occasions beforehand). This is not a dispute (or series of disputes) in which expense has been spared. Mr Stokes' legal advisers would have had every opportunity to draw his attention, in an appropriate way, to the apparent disparities between his version of events and the contemporaneous documentation.

389 In assessing Mr Stokes' evidence I have taken into account a number of factors in his favour. They include the following:

> Mr Stokes was willing to give evidence in the face of the matters to which I have referred and to confront what was bound to be (and was) a searching cross-examination;
>
> no witness could be expected to recall accurately all relevant events that occurred six or seven years before the trial;

some of the attacks on Mr Stokes ultimately went nowhere (such as the suggestion that certain documents were deliberately backdated);

Mr Stokes clearly regards himself as a strategist and innovative thinker, whose role, even as CEO of Seven, was not to descend to the detail even of apparently important transactions;

Mr Stokes' strengths (and interests) do not lie in the meticulous completion or scrutiny of paperwork (a trait that tends to be much more highly prized by lawyers than by business people); and

Mr Stokes was required to endure a very long and challenging cross-examination and, perfectly understandably, was affected by weariness from time to time.

390 I should also record that there were occasions on which Mr Stokes made concessions in a reasonably straightforward manner. An example of what I regard as an important concession was his agreement that the successful offer Foxtel made for the AFL pay television rights (through the Foxtel Put) was '*a good price*' (for Foxtel).

391 Even taking these matters into account, however, there were simply too many occasions on which Mr Stokes' evidence was implausible for me to regard him as a reliable witness on disputed issues. Sometimes it is extremely difficult or impossible to reconcile his version of events with the contemporaneous records, the reliability of which there is no good reason to doubt. Sometimes Mr Stokes' evidence flies in the face of incontrovertible facts. Sometimes, he changed his evidence when confronted with material that made it virtually impossible to maintain the position he had previously adopted. Sometimes Mr Stokes' evidence conflicted with that of other witnesses (including, on occasions, witnesses called by Seven) whose accounts are, in my view, reliable.

392 So far as contemporaneous records are concerned, there may be, as Mr Sumption submits, a difference between an apparently reliable record that **omits** reference to a discussion or event that a witness says took place, and a similar record that **includes** reference to a discussion or event that the witness denies occurred. However, Seven adduced no evidence to counter the inference that the minutes of board and committee meetings within Seven were intended to be reasonably reliable records of the meetings prepared by competent

people. In any event, it is often difficult to think of a plausible reason why the contemporaneous records would have omitted reference to a particular discussion or event that Mr Stokes said took place, if indeed it did. Further, Mr Stokes on a number of occasions denied knowledge of important information, such as the state of C7's negotiations with Austar, that the contemporaneous documentation overwhelmingly suggests was drawn to his attention.

393 A trial judge in civil proceedings should exercise caution before pronouncing that a witness has given deliberately false evidence. Often it is necessary only to determine whether the witness' evidence, insofar as it is relevant to the issues, should be accepted in whole, in part or not at all. It may not matter very much, for the purposes of deciding the litigation, whether a witness found to be unreliable has told deliberate untruths or has given unsatisfactory evidence for other reasons.

394 However, in this case a sustained and vigorous attack was mounted against Mr Stokes' credit, including his honesty as a witness. I think it appropriate to observe that, although some of the particular attacks on Mr Stokes' credit lacked cogency, there were occasions on which, in my opinion, he gave evidence that he knew was not true. One example was a particularly unconvincing denial that he did not share the objective of others within Seven of '*ramping*' the price that News (through Fox Sports) would ultimately have to pay for the NRL pay television rights by outbidding Seven. Mr Stokes participated in a conference at which the objective was discussed and, on his own admission, said nothing to dissociate himself from the views expressed there. Mr Gammell gave evidence that everyone at the meeting agreed with the ramping objective. Internal Seven documentation makes it clear that ramping was, at the very least, a critical (if not the only) objective underlying the bidding by Seven for the NRL pay television rights. Mr Stokes' evidence on this issue was not only implausible but, I must conclude, deliberately false.

395 Similarly, I must conclude that Mr Stokes' professed ignorance about the state of negotiations between Seven and Austar could not have been a mere failure of memory. This evidence went to the damages sought by Seven and Mr Stokes understood its importance. Mr Stokes repeatedly denied that matters came to his attention over a substantial period of time, notwithstanding much documentary evidence to the contrary. The inaccuracy of Mr Stokes' evidence on this point, in my view, was not the product of inadvertence.

396 Having said that, it is also appropriate to record my view that the unreliability of Mr Stokes' evidence was, in part, a product of his reconstruction of events through the prism of self-interest, layered with more than a little wishful thinking. Mr Stokes' evidence demonstrates that he was extremely resolute and persistent in pursuit of his and Seven's business objectives, sometimes to the point of obstinacy. His relentless attempts to enlist the ACCC as an ally in Seven's battles with its opponents are examples of both persistence and, to a marked degree, apparent over-optimism.

397 Mr Stokes demonstrated a tendency both in his actions and evidence to see the commercial world, particularly the propriety of his competitors' conduct, in rather black and white terms. (This trait has not proved an insuperable obstacle to Seven itself switching allegiances, as shown by its alliance with Ten in bidding for the AFL broadcasting rights in 2005.) A rather Manichaean view of the commercial world may or may not explain Mr Stokes' propensity to engage in litigation (a propensity of which the Respondents sought to make much, although it hardly seems to be unique in the television industry). But it may help to explain how he could believe that particular discussions or events occurred, or that certain beliefs were expressed or opinions held, when the objective evidence strongly suggests otherwise. A firm grasp of the facts, in the lawyer's sense, is evidently not a prerequisite to business success.

398 In summary, I cannot accept Mr Stokes as a reliable witness on matters that are in dispute, especially where there is contemporaneous documentation or cogent oral evidence that conflicts with his account.

5.2.2 Mr Gammell

399 Mr Gammell is an accountant by training. He came to Australia in 1981 and worked for a company controlled by Mr Stokes. Mr Gammell returned to Scotland in 1984, but after five years came back to Australia to take up a position as General Manager of ACE, Mr Stokes' private company. Later Mr Gammell assumed the title of Group Managing Director of ACE and has continued in that position ever since.

400 Mr Gammell became an alternate to Mr Stokes as a director of Seven Network in 1995 and a non-executive director in 1998. There has clearly been a very close working relationship over the years between Mr Stokes and Mr Gammell. This relationship continued

throughout the period relevant to this case, except for three months from early July 1998, when Mr Gammell was overseas.

401 Like Mr Stokes, Mr Gammell generally appeared unruffled in the witness box, notwithstanding that his credibility was repeatedly challenged. He, too, displayed considerable self-control during his evidence.

402 Mr Gammell made a number of concessions readily enough. For example, Mr Gammell acknowledged that he had told Ms Lowes of Telstra that Seven's attempts to secure retail access for C7 via the Telstra Cable was a pressure tactic to get C7 onto the Foxtel platform, although he gave contradictory evidence as to whether he had admitted to Ms Lowes that C7 was not in truth looking for retail access via the Telstra Cable. He agreed that his conversation with Mr Falloon on 4 November 1999, in which Mr Falloon said '*hell will freeze over*' before C7 got onto Foxtel, had taken place in the context of a discussion about C7's application for a right of access to the Telstra Cable, rather than in relation to C7's attempts to gain wholesale access to the Foxtel Service. Mr Gammell also accepted that he had framed a particular bid for the NRL pay television rights with the express purpose of creating division within the NRL PEC and that Seven's bid for the NRL pay television rights was designed in part to '*ramp*' the price that News or Fox Sports would have to pay for the rights.

403 Despite these concessions, I formed the view that Mr Gammell's evidence was sometimes unreliable. Difficulties with his account became apparent when he claimed that over a period of four months from November 1998 he did nothing to follow up the state of negotiations for the supply of C7 to Austar and Foxtel. I have taken into account that Mr Gammell was out of Australia on several occasions between November 1998 and March 1999 and that there were other matters to occupy his time. Even so, I find his evidence that he did nothing to ascertain the position in relation to Austar and Foxtel implausible. Among other things, Mr Gammell met with Mr Mounter at least twice during this period (once in London). Mr Gammell had every opportunity to make inquiries on issues in which he evidently had a close interest.

404 Similarly, I found implausible Mr Gammell's evidence that he had remonstrated with Mr Mounter before the board meetings of 26 March 1999 and 28 May 1999, about the latter's

approach to the negotiations with Austar and Foxtel. Mr Gammell agreed that he did not raise the issue at either board meeting. His apparent reticence is very hard to accept, given that he regarded Mr Mounter's conduct as threatening the very viability of C7 and that, by the time of the second board meeting, Mr Gammell thought that Mr Mounter's continued tenure as CEO was untenable.

405 My reservations about the reliability of Mr Gammell's evidence are reinforced by his claim that he had understood a reference in Mr Mounter's CEO's report of 16 June 1999 to '*$4-$5 a sub*' as meaning that Mr Mounter was negotiating with Foxtel to pay C7 a fee of $4.00 to $5.00 pspm on basic or as if on basic. Mr Gammell had earlier conceded that he knew that Mr Mounter was '*sticking to his guns*' – that is, negotiating with Foxtel for the supply of C7 on a tier, not on basic. My reservations are compounded by the fact that the documentation relating to Mr Mounter's departure from Seven in July 1999 makes no reference to his stance on the negotiations for the sale of C7 to Austar and Foxtel. Mr Gammell's explanation for yet another apparently significant omission I found to be unconvincing.

406 Other aspects of Mr Gammell's evidence were equally unsatisfactory. For example, he claimed to have instructed Mr Wise in July 2000 to correct a draft budget to remove a revenue figure based on $2.00 pspm for C7 on a tier on Foxtel. Yet no correction was ever made to replace that figure with the figure that Mr Gammell said he regarded as appropriate, namely $4.00 to $5.00 pspm on basic (which would have increased revenue by perhaps $30 million per annum). Mr Gammell had a motive for dissociating himself from the negotiations with Foxtel for the placement of C7 on a tier, namely to bolster Seven's damages claim. In my opinion, that motive coloured his evidence.

407 My overall impression is that Mr Gammell's evidence is something of a mixture of frankness and unreliability. I think that parts of his account have been strongly influenced, unconsciously or otherwise, by his perception of the case Seven seeks to advance. It is therefore necessary to approach his evidence on contested issues with caution, especially where it is unsupported by or inconsistent with contemporaneous documentation or other reliable evidence.

5.2.3 Mr Wise

408 A good deal of Mr Wise's evidence was given in a straightforward manner. Early in his evidence, in particular, Mr Wise presented as a careful and generally quite precise witness. While his memory of some events was imperfect, the gaps in his recollection during that portion of his evidence were no more than might be expected of a witness asked to remember conversations or dealings that took place years earlier.

409 As Mr Wise's cross-examination continued, however, his evidence became less convincing in a number of respects. For example, after being pressed for some time, Mr Wise conceded that letters he sent to the AFL on 20 and 22 November 2000 had been carefully crafted following discussions with Mr Stokes and Mr Gammell, in terms that were misleading. He then disputed the proposition that the AFL had in fact been misled, giving reasons that I found difficult to understand and, in any event, unpersuasive.

410 Shortly after this evidence, Mr Wise gave an equally unpersuasive explanation as to what he had meant by suggesting that Mr Stokes tell the AFL that Seven had received no credit for having '*suffocated*' soccer by not showing it on free-to-air television. Mr Wise's explanation of what he intended to convey in his '*dummy bid*' email of 24 November 2000 to Mr Gammell was also somewhat confused and, at least insofar as Mr Wise denied any knowledge that Seven intended to '*ramp*' News in relation to the NRL rights, was not at all persuasive.

411 There were other occasions on which Mr Wise was reluctant to admit the obvious or on which his evidence was simply self-contradictory. An example of the former was his reluctance to acknowledge that he appreciated that Seven's public campaign against SingTel would be likely to damage SingTel's reputation. An example of the latter was Mr Wise's apparently unequivocal evidence that, at the end of 2000, his understanding was that negotiations between Seven and Foxtel for the carriage of C7 had ceased with Seven's offer of 17 November 1999. Mr Wise later claimed that he had performed certain calculations in December 2000 by reference to negotiations for the carriage of C7 on Foxtel. Those negotiations had taken place in November 2000 between Mr Stokes and Mr Blomfield. His attempt to reconcile the two pieces of evidence did not succeed. In addition, Mr Wise, like Mr Stokes, was forced from time to time to disavow the accuracy of contemporaneous records in order to support his version of what had taken place.

412 In my view, some of Mr Wise's evidence was coloured by his perception of where Seven's interests lay in the proceedings. I have therefore found it necessary to approach carefully Mr Wise's evidence on certain contested issues. Care is especially warranted when Mr Wise's evidence is difficult to reconcile with contemporaneous documentation and lacks internal consistency.

5.3 News' Witnesses

5.3.1 Mr Macourt

413 Seven's criticism of Mr Macourt's credibility are relatively mild, certainly when compared with its attack on the veracity of Mr Philip. Seven's Closing Submissions argue that I should '*treat Mr Macourt's evidence with reserve in some respects*'. The particular criticisms made by Seven are that he had a tendency to engage in advocacy and that some of the explanations he gave for particular conduct did not withstand scrutiny. For example, Seven says that Mr Macourt's evidence as to his reasons for refusing to allow the C7 channels to be taken by Foxtel fell away in cross-examination.

414 Mr Macourt's credit is important, since he was a decision-maker on behalf of News and played a significant role in Foxtel's affairs. Mr Philip reported to him. As Mr Sumption acknowledged in his oral closing submissions, in order for Seven to make out its case that News and Foxtel's objective was to destroy C7, it is necessary to reject Mr Macourt's evidence to the contrary.

415 For the most part, Mr Macourt answered questions in a straightforward manner. He quite often gave his evidence in an emphatic and convincing fashion, particularly when disagreeing with propositions put to him by Mr Sumption. I think it is significant that Mr Macourt gave what seemed to me frank answers to questions that were clearly intended to elicit material unfavourable to the Respondents' interests. For example, he readily accepted that between 1998 and 2002 he would have preferred C7 to go out of business. He agreed that in 1998 he had every intention of preventing C7 being taken by Foxtel (although he did not accept the motives suggested to him by Mr Sumption).

416 Mr Macourt also candidly admitted to some matters that do not necessarily do him credit. He said, for example, that he would not have informed Telstra in December 2000 that

C7's offer for the NRL pay television rights was likely to '*disappear*', even though that was his view at the time. Similarly, Mr Macourt acknowledged that he would not necessarily have contradicted Mr Philip in a face to face meeting with Telstra, even if Mr Philip was putting propositions that Mr Macourt did not consider to be correct. Mr Macourt also acknowledged that he had authorised supply arrangements involving Fox Sports without informing Telstra in advance, because he did not want Telstra to prevent the arrangements being implemented. (News subsequently expressed its regret for the lack of consultation, but attributed it to:

> *'[a] context where Telstra was taking a completely unrealistic and uncooperative approach to the supply of programming by Fox Sports'*.)

417 Despite the apparent frankness of many of his responses, I formed the impression that from time to time in his evidence Mr Macourt acted as something of an advocate for News' interests. Mr Macourt certainly had a very good grasp of the legal issues in the case and was astute to discern the direction his cross-examination was taking. Perhaps for this reason there were a few occasions when I thought that he was rather too quick to claim that he had no recollection of particular events. In making that observation, I take into account that Mr Macourt's recall of events that occurred years before was plainly not as precise as, for example, that of Mr Mockridge.

418 There were also occasions when Mr Macourt was forced to acknowledge that he had overstated the position in his written statements. It is fair to say that some of the reasons Mr Macourt gave in his written statements for refusing to allow Foxtel to take C7 he found difficult to sustain in the witness box. In my view, however, his evidence that he was unwilling to allow Foxtel to take the C7 channels until the dispute with Telstra concerning the pricing of Fox Sports had been resolved, withstood cross-examination.

419 My overall general impression is that Mr Macourt's evidence was given truthfully and with reasonable care, even though he saw himself as an advocate for News. Nonetheless, there are some aspects of his evidence that warrant close scrutiny in the light of the contemporaneous documentation and the objective circumstances. For example, I think that Mr Macourt adverted to the possible impact on C7 of Foxtel's acquisition of the AFL pay television rights to a greater extent than he was prepared to concede. But I accept the broad thrust of his evidence as to his state of mind and the matters he took into account in his

decision-making.

5.3.2 Mr Philip

420 Mr Philip was appointed Chief General Counsel of News in 1997 and held that position at the time he gave evidence. He had previously been a partner in a large law firm, then known as Allen Allen and Hemsley, specialising in commercial and corporate work. Mr Philip's clients included News and Foxtel. He said that he did not conduct litigation while at the firm, but had been '*[p]eripherally involved in litigation*' from time to time. In the course of his work, Mr Philip acquired familiarity with the competition provisions of the *TP Act.*

421 Mr Philip maintained his practising certificate while at News. At the material times, Mr Philip also occupied the positions that have been identified in Chapter 3 ([202]). He played an important part in the events that gave rise to this case.

422 Mr Philip gave the impression of a man who quite willingly subordinated his sense of ethics and propriety to a single-minded determination to advance the commercial interests of his employer. Mr Philip admitted to dishonestly attempting to persuade Telstra to contribute an extra $13 to $14 million to Fox Sports' bid for the NRL pay television rights. Mr Philip also admitted that he had destroyed the fax by which he made his request to Telstra and that he had asked the recipients to do likewise because he feared that Seven might use the document to sue him for breach of confidentiality in relation to C7's bid for the NRL pay television rights. The fax only came to light because at least one recipient did not comply with the request.

423 Mr Philip was not the architect of News' policy of deleting the central record of emails after three days, but he was an enthusiastic proponent of deleting all emails from his own computer after 14 days. He acknowledged in evidence that one reason he had adopted this practice was to avoid the possibility that:

> *'somebody might read your e-mails and draw adverse conclusions about you or News ... from them'.*

He took pains to recommend that Mr Macourt produce a detailed electronic record of a meeting between Mr Macourt and Mr Gammell on 4 December 2000 and to assist in compiling the record, yet made sure that Mr Macourt's original handwritten notes were

destroyed. I did not find convincing Mr Philip's attempts to explain why he had taken that course.

424 When confronted in cross-examination with his own admissions as to his dishonest conduct (which Mr Philip had disclosed in a statement filed in the course of the trial), Mr Philip's responses conveyed the impression that up to that point he had not fully grasped the magnitude of what he had done. Be that as it may, the evidence shows that at the time Mr Philip went into the witness box, News had taken no action either to terminate his employment or to discipline him. A possible, although unlikely, explanation for this lack of action is that News had not had sufficient time to act on Mr Philip's admitted dishonesty. If it remains the case that News has taken no disciplinary action against Mr Philip, it would reflect very seriously indeed on News' standards of commercial morality.

425 In any event, for a solicitor still holding a practising certificate to engage in deliberately dishonest conduct calls out for further inquiry by the authority responsible for professional discipline. I propose to request the Registrar of the Court to forward a copy of this judgment to the Law Society of New South Wales for its consideration and, if necessary, referral to the appropriate bodies.

426 As I observe in Chapter 19, Mr Philip's admissions of dishonesty do not necessarily mean that his evidence was untruthful in all or, indeed, in any respects. However, there are some parts of his evidence that I do not accept. For example, as I explain in Chapter 19 ([2984]ff), I reject Mr Philip's evidence that he did not deliberately disclose information to Mr Akhurst of Telstra concerning C7's bid for the NRL pay television rights. His evidence on that issue was confused, implausible and singularly unsatisfactory.

427 I found other parts of Mr Philip's evidence difficult to accept. For example, he denied contemplating that C7 had a real chance of acquiring the NRL pay television rights because he intended to urge the NRL PEC to accept the Fox Sports offer regardless of the merits of C7's offer and he expected the other members of the NRL PEC to follow suit. Yet on 13 December 2000, during a period of frenetic action in relation to the AFL and NRL pay television rights, Mr Philip found time to create a draft call option to be exercised by Foxtel Management against C7 if the latter secured the NRL pay television rights. Mr Philip professed not to remember why he created the document at such a late stage, a disclaimer that

did not ring true, particularly as he told the teleconference of 13 December 2000 that there was a serious risk that C7 might acquire the NRL pay television rights. The document created by Mr Philip does not necessarily mean that his evidence about his voting intentions was untrue. But I do not think he was being frank with the Court in professing not to remember why he had created it.

428 Mr Philip was willing to go to considerable lengths to present a picture that bore little relationship to reality. As Seven submits, his efforts to maintain the fiction that there was no consortium bidding for the AFL pay television rights reflected the extremely wishful thinking of a lawyer seeking to present an artificial (and false) picture of the facts, rather than the true position. Mr Philip also seemed to me to downplay the extent to which he was involved in commercial decision-making by News or by the entities of which he was a director.

429 In assessing Mr Philip's evidence, it is appropriate to take into account that, apart from hard copy documents retained in his own files or copies of electronic or paper communications retained by others, he deleted the records of his emails. He did so, in part, because he appreciated that communications of this kind might be useful in litigation. Seven has been denied the opportunity to cross-examine Mr Philip by reference to the deleted material.

430 For these reasons, I do not regard Mr Philip as a reliable witness. His evidence therefore needs to be scrutinised carefully, including his claims as to his thought processes in relation to particular decisions, negotiations or communications.

431 This caution does not lead me to conclude that I should reject all of Mr Philip's evidence. Sometimes it is supported by the contemporaneous documentation or by other witnesses whose evidence I consider to be reliable. For example, I think it likely that Mr Philip deferred to Mr Macourt in the manner he described. I also think it likely that Mr Philip was told and accepted that News' position, for sound commercial reasons, was that C7 should not be taken on Foxtel until the long-term contractual arrangements between Fox Sports and Foxtel had been secured. Similarly, I think it likely that Mr Philip believed that a decision by Foxtel not to take C7 pending the award of the AFL pay television rights would enhance Foxtel's chances of successfully bidding for the rights.

5.4 Foxtel's Witnesses

5.4.1 Mr Mockridge

432 Mr Mockridge presented as an astute, precise witness. Unlike some witnesses, Mr Mockridge had taken considerable trouble to re-familiarise himself with the contemporary documentation bearing on his evidence. He thus seemed to be well-prepared for his time in the witness box.

433 Seven accepts that Mr Mockridge's '*evidence as to factual matters is generally reliable*', but submits his evidence should nonetheless be treated with some reserve. Seven argues that Mr Mockridge had a tendency to exaggerate or frame his evidence in a way that assisted News.

434 Mr Mockridge was not a reticent witness. He did not hesitate to request clarification of the cross-examiner's questions, nor to correct what he regarded as erroneous assumptions underlying questions. An example is the following exchange:

> *'Your judgment was that if Telstra was given Foxtel management's evaluation of the financial implications of carrying C7, it would no longer accept [as] the excuse for not carrying C7 that the Fox Sports deal remained outstanding? --- To answer that question in the negative, I'll have to accept your statement that it was an excuse, and it wasn't an excuse. But the essence of the question is no'.*

435 I formed the impression that Mr Mockridge was very alert to the competition issues in the case, notwithstanding his protest at one point that he was '*at a loss to understand what the critical issues are in this case*' and that he could not '*make head nor tail of it*'. I also gained the impression, as Seven suggests, that he saw himself as something as an advocate for Foxtel in these proceedings. This stance was consistent with his frank acknowledgement that he had seen his role as CEO of Foxtel as in part that of an advocate, for example to allay the ACCC's concerns about merger proposals.

436 For these reasons, Mr Mockridge's evidence sometimes had a marked advocate's flourish, as illustrated by the following exchange:

> *'And you understood during the period you were CEO that the risk of an intervention by the ACCC was reduced if it were accepted that free-to-air television and pay TV were in the same market; isn't that right? --- I think if –*

> *I would state it more strongly.* ***If the reality of pay TV and free TV being in the same market is accepted****, there is no grounds for the ACCC intervention.*
>
> *...*
>
> *And you understood it to be very much in Foxtel's interest to have either this court or the ACCC adopt the position from which Foxtel was an advocate? --- I understood it [to be] in Foxtel's interest* ***for the reality of the marketplace to be accepted*** *by the regulator, yes'.* (Emphasis added.)

Similarly, when asked why the small number of subscribers who could choose between Foxtel on satellite and Optus on cable might select the former (notwithstanding that its charges were higher), Mr Mockridge said the reason was '*unambiguously the quality of the Foxtel service*'. At another point he underplayed the conflict in the Telstra-News relationship in the first half of 1999. He acknowledged that there had been '*differences of view*' but insisted, not very persuasively, that '*broadly this was a successful relationship*'.

437 It is necessary to bear these matters in mind when assessing Mr Mockridge's evidence. Nonetheless, I consider him to be generally a reliable witness, whose account of events was mostly consistent with the contemporaneous documentation and who showed a good recall of significant events. Generally speaking, he was prepared to make concessions where appropriate. There were several occasions when I found Mr Mockridge's version of events to be not entirely convincing, but overall I thought that his evidence was given truthfully and with some care.

5.5 Telstra's Witnesses

5.5.1 Dr Switkowski

438 Seven's position in relation to Dr Switkowski's evidence is somewhat curious. Mr Sheahan certainly challenged Dr Switkowski's credibility in cross-examination. Specifically, as Mr Sheahan explained in dealing with objections to certain questions, he sought to contradict Dr Switkowski's denial that he (Dr Switkowski) had known in 2000 that the purpose of News and PBL was to '*kill C7*'. Mr Sheahan also sought to contradict Dr Switkowski's evidence that he was not conscious that the transactions to which he committed Telstra on 13 December 2000 would have the effect of destroying C7 as a viable business.

439 To that end, Mr Sheahan suggested to Dr Switkowski in cross-examination that Telstra had a powerful motive to forego any scruples about the fate of C7 when it came to securing the cooperation of the other Foxtel partners in expanding the scope of Foxtel's business. Dr Switkowski agreed that he supported the idea of an expansion of Foxtel's activities in certain respects. The thrust of the questioning was that such an expansion, which required the support of both News and PBL, would '*unlock*' value in Foxtel, to the advantage of Telstra as a 50 per cent partner in the business. The assumption underlying the questioning appeared to be that Dr Switkowski was prepared to sacrifice Foxtel's immediate commercial interests (by paying too much for the AFL pay television rights), in order to gain rewards from a more valuable Foxtel business further down the track. In addition, Mr Sheahan asked a number of questions that went only to Dr Switkowski's credit, although the answers did not cause me to doubt the reliability of Dr Switkowski's evidence.

440 In addition to these matters, Mr Sheahan put directly to Dr Switkowski that he had formed the view in about September 1999 that the goal of News and PBL, in refusing to allow C7 access to the Foxtel platform, was '*to run C7 out of business*'. Dr Switkowski denied that he had formed such a view. Mr Sheahan also questioned Dr Switkowski about a conversation he had with Mr Stokes at a dinner meeting which took place on 31 May 2000. Dr Switkowski accepted that Mr Stokes may have said (as he claimed) that both Seven and C7 would be brought down if they lost the AFL pay television rights. However, Dr Switkowski said in evidence that he interpreted Mr Stokes as dramatising the importance of Seven acquiring the AFL broadcasting rights and as warning Telstra off Seven's '*territory*'.

441 Despite the challenges to Dr Switkowski's credit in cross-examination, Seven's written submissions, as I have noted, make only limited criticisms of his evidence. Indeed, the submissions concede that Dr Switkowski's denials that he had been told by his executives that News and PBL wished to kill C7 '*probably have the ring of truth*'.

442 The only criticisms of Dr Switkowski's evidence ultimately made in Seven's submissions in chief seem to be the following:

> it is unlikely that Dr Switkowski would not have turned his mind to the consequences for C7 of the AFL and NRL proposals and thus his evidence to the contrary should not be believed;

> Dr Switkowski's expressed belief that resort to litigation was an ordinary incident of the business strategy of all major media proprietors in Australia, especially Mr Stokes, is difficult to reconcile with his willingness, while at Optus and Telstra, to do business with Mr Stokes and Seven; and
>
> it is a '*point of concern*' that certain passages in the witness statements of Dr Switkowski and Mr Akhurst are identical.

In addition, in its written Reply Submissions, Seven invites me to prefer Mr Stokes' account of his conversation with Dr Switkowski on 31 May 2000, insofar as reference was made in that conversation to a loss of the AFL broadcasting rights being likely to bring C7 down.

443 As I have noted, Mr Sumption confirmed in his closing oral submissions that Seven makes no challenge to Dr Switkowski's credit and that it does not suggest that he was deliberately untruthful in his evidence. Instead, Mr Sumption submitted that Dr Switkowski '*had forgotten a great deal of the material that he once knew in 2000*'. According to Mr Sumption, Dr Switkowski had come into the transaction involving the AFL broadcasting and NRL pay television rights at a late stage ('*from a great height*') and it would therefore not be surprising if he had forgotten his state of mind at the time. The evidence, so he argued, is enough to justify finding that Dr Switkowski:

> *'was well aware that the likely consequence of the acquisition of AFL rights was the demise of C7, or at any rate its demise as an entity which could seriously challenge the competitive position of Fox Sports, and I ask you to find that was a matter from which he must have inferred that bringing about that result was part of the purpose of News'.*

A finding to this effect would require me to reject Dr Switkowski's explicit evidence to the contrary.

444 Clearly enough, Dr Switkowski's recollection of the events about which he gave evidence was far from perfect. He readily accepted in cross-examination that he did not remember certain matters about which he was asked. It is also true, as Dr Switkowski himself pointed out, that he was primarily concerned about strategic issues arising in his management of an extremely large telecommunications company worth, in 2000, some $70-$80 billion. Questions concerning Telstra's role in pay television, for the most part, were not at the forefront of his mind, despite his membership of the pay television sub-committee of

the board. Nonetheless, in my view, Dr Switkowski generally demonstrated a surprisingly good recall of the events in which he was involved and of the issues requiring decisions to be made at the time. On more than one occasion, his recollection, unaided by reference to documents, turned out to be supported by the contemporaneous materials.

445 It is also significant that Dr Switkowski's attention was drawn to the AFL broadcasting rights well before the critical teleconference of 13 December 2000. For example, earlier in 2000, Dr Switkowski attended meetings and made decisions about '*Project Chess*', a plan that contemplated that Telstra itself would bid for and acquire the AFL broadcasting rights for 2002 to 2006. Dr Switkowski met with Mr Stokes on 31 May 2000 and had been briefed in preparation for that meeting. In late October and early November 2000, he had discussions with Mr Chisholm and others about Foxtel's possible acquisition of the AFL pay television rights. He was well aware of the strategic issues arising from the relationship between Telstra and the other Foxtel partners.

446 Once Seven accepts that Dr Switkowski's credit is not in issue, I have little hesitation in accepting his evidence that he was not aware that the likely consequence of the acquisition of the AFL broadcasting rights by News and the sub-licensing of the AFL pay television rights to Foxtel would be the demise of C7 or its demise as an entity capable of seriously challenging Fox Sports. Given Dr Switkowski's good recall of other matters and the significance of the transaction to which he was committing Telstra (even though it was relatively modest by Telstra's standards), I do not accept Seven's submission that in the witness box he simply forgot his state of mind at the time.

447 For completeness, I should add that I accept that Dr Switkowski held the views he expressed in his evidence about Mr Stokes' litigious propensities, notwithstanding his willingness to do business with Mr Stokes or Seven on a number of occasions. I see no inconsistency between Dr Switkowski's evidence and his actions, given the need for Telstra and Optus (on the one hand) and Seven (on the other) to cooperate on certain matters, such as advertising.

448 The fact that several passages in the statements of Dr Switkowski and Mr Akhurst are identical possibly may reflect on Telstra's legal advisers, but I do not think that, of itself, it affects the reliability of the evidence in those statements. Finally, the relatively minor

differences in the recollection of Dr Switkowski and Mr Stokes as to the content of their discussions on 31 May 2000 are no more than might be expected from participants to a conversation that took place many years earlier.

5.5.2 Mr Akhurst

449 Mr Akhurst, before taking up a position as General Counsel at Telstra, was a partner in a large law firm, Mallesons Stephen Jaques, specialising in competition law and general commercial matters. His involvement in the issues concerning Telstra and Foxtel became greater from about July or August 1999, although the process was gradual.

450 Mr Akhurst did not seem to have examined the extensive contemporary documentation in depth before giving his evidence. Leaving aside matters in which his involvement was peripheral, this meant that his recollection of some events and communications was vague and, in certain respects, inaccurate. As I have already remarked, this of itself is no more than is to be expected when a witness is asked about matters occurring at least five years earlier, particularly when, in this case, Mr Akhurst had no particular reason to pay close attention to some of the documents to which he was taken in cross-examination.

451 Nonetheless, I formed the view that there were occasions when Mr Akhurst was inclined to take refuge in being unable to remember matters that he preferred not to address directly. For example, Mr Akhurst said that he could not recall that, after receiving a June 2000 memorandum from Telstra's Legal & Regulatory Department, he appreciated that Seven's public position was that C7's business would be in jeopardy if it did not secure the AFL pay television rights. I think Mr Akhurst must have appreciated at the time that this was Seven's position and that the probability is that he realised that in the witness box.

452 Another example is Mr Akhurst's inability to recall being told by Mr Fogarty (on 31 October 2000) that Foxtel had indicated that acquiring the AFL pay television rights '*will negate C7*'. Even when shown the email, he maintained that he may have skimmed over it and thus could not remember it. I think it is likely that Mr Akhurst appreciated at about this time that if Seven failed to acquire the AFL pay television rights, the consequences for C7 might be very serious. By this time, Mr Akhurst appreciated (as he accepted in evidence) that if Seven lost the AFL pay television rights Optus and Austar would be entitled to terminate

their content supply agreements with C7.

453 Because of my concerns about aspects of Mr Akhurst's testimony, I have scrutinised carefully his evidence on the central issues, especially his reasons for Telstra giving support to the bids by News and Fox Sports for the AFL broadcasting and NRL pay television rights. Nonetheless, I think that the substance of his evidence on these issues should be accepted. I reach this conclusion in part because Mr Akhurst's account was consistent with contemporaneous documentation. For example, Mr Akhurst's evidence that he was influenced by Mr Chisholm's view that Foxtel should acquire the AFL pay television rights from the AFL, is supported by contemporaneous documentation showing that Mr Chisholm indeed expressed that view. An email of 20 November 2000 from Mr Akhurst to Dr Switkowski supports Mr Akhurst's evidence that he did not think that Telstra's support for Foxtel acquiring the AFL pay television rights involved anti-competitive conduct. Mr Akhurst was told by Mr Philip in written communications that there was a sound commercial justification for each of the bids to be made by News (supported by Foxtel) and by Fox Sports. I have also taken into account that Mr Akhurst's evidence was consistent with that of Dr Switkowski, whose evidence I accept as reliable.

454 Mr Akhurst was cross-examined on his explanation for deciding to lend Telstra's in-principle support to the Foxtel Put (at a fee of $17.5 million per annum) at Foxtel's board meeting of 9 November 2000. The cross-examination demonstrated that Mr Akhurst might well have made further inquiries to verify what he had been told about the merits of the proposal and to probe further Mr Fogarty's assessment of the possible consequences of concentrating the AFL and NRL sports rights in the hands of News and Fox Sports. I also think it probable that Mr Akhurst, although he was reluctant to acknowledge it, appreciated that there was a real risk that if C7 lost the AFL pay television rights it might not be able to survive as a supplier of sports channels.

455 I do not think, however, that the cross-examination established that Mr Akhurst formed the view that the objective of News, PBL or Telstra in seeking the AFL pay television rights was to kill C7 or otherwise severely harm it as a supplier of sports channels. Appreciating that there was a risk that the loss of the AFL pay television rights might threaten C7's survival is very different from understanding that this was a substantial objective sought by News or PBL in bidding for the AFL pay television rights. The risk was an incident, as

Mr Akhurst saw matters, of the ordinary processes of competition for the AFL pay television rights.

456 Much less do I think that the cross-examination established that Mr Akhurst thought that Telstra should support any such objective. Mr Akhurst considered that there were valid commercial reasons for Telstra to agree to the Foxtel Put and for Foxtel to acquire the AFL pay television rights. In particular, he considered that the rights would drive Foxtel's subscriber growth and benefit the business generally. In reaching this conclusion, I have not overlooked that Mr Willis had expressed the view in early November 2000 that C7 stood between a sports monopoly and some competition. Mr Akhurst said, and I accept, that he was sceptical of the proposition that Fox Sports would be able to extract monopoly profits.

457 Nor did the cross-examination establish that Mr Akhurst's state of mind in relation to these matters changed materially between 9 November 2000 and 13 December 2000, when the teleconference took place. The course of events at the teleconference and Dr Switkowski's evidence support Mr Akhurst's denial that he allied himself with any objective of News, PBL or Foxtel to kill C7.

5.6 Optus' Witnesses

5.6.1 Mr Lee

458 Mr Lee was challenged in cross-examination about his evidence as to what Optus would have done had the Foxtel-Optus CSA not been approved by the ACCC. That challenge to his credit failed, as Seven recognises. Seven makes no submission that Mr Lee should not be regarded as a witness of truth, although it contends that his reconstruction of the '*counter-factual*' (what Optus would have done had the Foxtel-Optus CSA not been executed) should not be accepted.

459 In my view, Mr Lee was an impressive witness. I agree with Optus' submission that his responses were not only articulate, but well-informed and careful. He demonstrated a good recall of the events in which he was involved and his evidence was consistent with the relevant contemporaneous documentation. I regard his evidence as reliable.

5.6.2 Mr Anderson

460 Mr Chris Anderson was the CEO of SingTel Optus between August 1997 and August 2004. He was also a director of SingTel Optus and of Optus Vision for most of that period. Following the acquisition of SingTel Optus by SingTel in 2001, Mr Anderson became a member of the Executive and Management Committees of that company. In June 2004, Mr Anderson became a non-executive director of PBL and some of its affiliated companies. Thus, at the time he gave evidence, he was an officer of one of the respondents, but not of SingTel Optus or its associated companies.

461 Mr Anderson was a somewhat unusual witness. He presented as a competent executive who had been instrumental in turning around the fortunes of Optus during his tenure. He seemed, however, very concerned to persuade Mr Karkar, the cross-examiner, that he (Mr Anderson) was providing a truthful and, so far as he could recall, a complete account of events. Perhaps for this reason, he tended to be somewhat voluble in his responses. His answers were also peppered with comments that in some circumstances might be taken as indicative of a less than candid witness. For example, he frequently prefaced answers with '*I am not trying to be unhelpful*' or '*frankly*'.

462 Mr Anderson gave evidence over three days, but only for less than an hour on the third day. On the first two days he was clearly handicapped by a cold or influenza, a handicap which may have affected his concentration at some points. On the third morning, when he was cross-examined about whether SingTel Optus' CMM would have been closed down if the CSA with Foxtel had not been entered into on 5 March 2002, he seemed to be less affected by illness. Be that as it may, he was particularly firm and clear in rejecting repeated suggestions that, in that hypothetical situation, SingTel Optus would have elected to keep CMM going notwithstanding the losses it had incurred.

463 Mr Anderson, unlike some other witnesses, had clearly not made a detailed study of contemporaneous documentation in preparation for giving evidence. On the whole, however, while there were some gaps in his memory, his recollection of the course of events was reasonably sound.

464 In general, despite the odd features of his evidence, I consider Mr Anderson to be a reliable witness. I think that there were occasions on which he protested a little too much and

became somewhat defensive. He was also concerned to work out where the cross-examiner was heading. But I reject the attacks on his credit. It seems to me that his evidence on the principal issues was largely unshaken in cross-examination.

5.7 Rule in *Jones v Dunkel*

465 Both Seven and the Respondents rely on the so-called rule in *Jones v Dunkel* to support their respective cases. There was no dispute as to the principles to apply, although there were strong disagreements as to the significance of the principles in the circumstances of this case.

466 In *Jones v Dunkel,* Menzies J said (101 CLR, at 312) that a direction should have been given to the jury in a civil trial that made three things clear:

> *'(i) that the absence of the defendant ... as a witness cannot be used to make up any deficiency of evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference'.*

467 Windeyer J observed (at 321, citing *Wigmore on Evidence* (3rd ed, Little Brown & Co, 1940) vol 2, at 162), that it was '*plain commonsense*' that:

> *'The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which made some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted'.*

468 Windeyer J also said (at 320-321) that, unless a party's failure to give evidence be explained, '*it may lead rationally to an inference that his evidence would not help his case*'. This proposition extends to a potential witness in the party's camp. A potential witness is normally regarded as within the camp of a particular party if it would be natural for that party

to call the witness, or if the party could reasonably be expected to call the witness: *RPS v The Queen* (2000) 199 CLR 620, at 632 [26], per Gaudron ACJ, Gummow, Kirby and Hayne JJ; *O'Donnell v Reichard* [1975] VR 916, at 929, per Newton and Norris JJ.

469 The rule in *Jones v Dunkel* only applies where a party is required to explain or contradict something: *Schellenberg v Tunnel Holdings Pty Ltd* (1999) 200 CLR 121, at 142-143 [51], per Gleeson CJ and McHugh J, approving J D Heydon, *Cross on Evidence* (6th Aust ed, Butterworths, 2000), at [1215]. The particular passage in *Cross on Evidence* approved by Gleeson CJ and McHugh J continues as follows:

> *'What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts "requiring an answer"'.* (Footnotes omitted.)

470 The unexplained failure by a party to call witnesses **may**, not must, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted that party's case: *Cross on Evidence* (7th Aust ed, LexisNexis Butterworths, 2004), at [1215] (e), citing *Jones v Dunkel* 101 CLR, at 308, per Kitto J; at 312, per Menzies J; at 320-321, per Windeyer J. Moreover, although the trier of fact may draw that inference, it is not appropriate to infer that the absent witness' evidence would have exposed facts unfavourable to the case of the party failing to call the witness: *Brandi v Mingot* (1976) 12 ALR 551, at 559, per Gibbs ACJ, Stephen, Mason and Aickin JJ.

471 The joint judgment of the High Court in *Brandi v Mingot* approved the analysis in *O'Donnell v Reichard*, a decision of the Full Court of the Supreme Court of Victoria. In the latter case, Newton and Norris JJ said ([1975] VR, at 929) that where a *Jones v Dunkel* inference is available, it may be taken into account against the party in question for two purposes, namely:

> *'(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and*
>
> *(b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken'.*

472 It follows from these principles that the rule in *Jones v Dunkel* cannot be employed to fill in gaps in the evidence or to convert conjecture and suspicion into inference: *Cross on Evidence* (7th Aust ed), at [1215] n 244; *West v Government Insurance Office* (1981) 148 CLR 62, at 69, per Stephen, Mason, Aickin and Wilson JJ. Moreover, if a party chooses without explanation not to give evidence, the rule in *Jones v Dunkel* does not require the court to refrain from drawing any inferences in that party's favour. As Hill J said in *Flack v Chairperson, National Crime Authority* (1997) 80 FCR 137, at 149:

> *'It may well be the case that where two inferences are equally open one favourable and one unfavourable, and the evidence of the witness might confirm one inference, that the failure of that witness to give evidence would lead to the conclusion that the other inference should be drawn. That may follow from the proposition that it can be assumed that the evidence of the witness who fails to give evidence would not support the witness' case. But except in a case where the inferences are equally open, each case will involve the Court weighing up all the relevant evidence to determine whether an inference should be drawn. Put another way, I do not think that* Jones v Dunkel *will ever lead to the conclusion that where there are competing inferences one inference will, in all cases, of necessity have to be accepted by the Court where the inference to be drawn does not depend upon evidence which the non-participating witness might give, or even where it might, if other evidence justifies the drawing of the inference'.*

473 The rule in *Jones v Dunkel* does not require a party to give merely cumulative evidence. *Cross on Evidence* (7th Aust ed), at [1215], n 251, gives the example of a meeting attended by five people. No *Jones v Dunkel* inference will ordinarily arise in relation to evidence concerning the meeting if some of the participants are called. Similarly, if the senior officers responsible for making a decision give evidence of the decision and their reasons for making it, the rule in *Jones v Dunkel* does not apply merely because more junior officers have not been called, even if they contributed to the decision-making process: *Apand Pty Ltd v The Kettle Chip Company Pty Ltd* (1994) 52 FCR 474, at 490, per *curiam.*

474 Seven devotes a chapter in its Closing Submissions to the rule in *Jones v Dunkel.* In that chapter, Seven submits that inferences adverse to one or more Respondents can be drawn from the failure to call no less than 25 potential witnesses. The potential witnesses identified by Seven include very senior executives, such as Mr Lachlan Murdoch, the CEO of News at relevant times; Mr Blomfield, the CEO of Foxtel Management until December 2001; Mr James Packer, Chairman of PBL; and Mr Mansfield, the Chairman of Telstra. The list also includes less senior personnel, or those who were more peripheral to the relevant events.

Potential witnesses within these categories include Mr Greg Willis, a director of Telstra Media and Foxtel Management; Mr Brenton Willis, a Project Manager with Telstra Media; Mr Dalgliesh, Director, Marketing of Optus' CMM division; and various officers of NRL Ltd and ARL. Had all the potential witnesses identified by Seven been called, the case would have run for at least another 30 or so hearing days.

475 I am not entirely sure of the purpose of Seven's submissions on this topic. Seven appears to submit that, as a general proposition, inferences adverse to the various Respondents should be drawn from the failure to call witnesses within their respective camps. For example, Seven says that:

> *'the Court should draw inferences from the fact that [News] failed to call Mr [Lachlan] Murdoch, who was ... a key decision-maker in the events at the heart of the proceeding. The attempts made by Mr Macourt, and to a lesser extent Mr Philip, to distance Mr Murdoch from these events should not be accepted'.*

Seven points out that Mr Murdoch was engaged in certain negotiations and attended certain significant meetings. The submissions do not, however, at least at this point, identify the factual questions in respect of which inferences adverse to News should be drawn by reason of its failure to call Mr Murdoch.

476 Similarly, Seven submits that Mr James Packer was '*actively involved in all relevant facets of the case pleaded by [Seven]*'. Seven points out, for example, that Mr Packer participated in the teleconference of 13 December 2000 and held a meeting with Mr Lachlan Murdoch, Mr Chisholm of Telstra and Mr Chris Anderson of Optus and which opened the way to the Foxtel-Optus CSA. Seven invites me to find that Mr Packer was as involved as Mr Murdoch in the relevant events. However, its submissions do not explain precisely which inferences adverse to PBL should be drawn from Mr Packer's unexplained absence from the witness box.

477 If the point of these submissions is simply to establish that Mr Murdoch and Mr Packer should be regarded as within News' and PBL's camps respectively, for the purposes of the rule in *Jones v Dunkel,* I have no difficulty with that proposition. It seems to me clear that each should be so regarded. The critical question is then whether News' failure to call Mr Murdoch, or PBL's failure to call Mr Packer, justifies drawing an inference against those

parties and in favour of Seven on particular factual issues. As the authorities show, whether such inferences should be drawn will depend on the nature of the factual issues raised by the pleadings, the totality of the evidence relating to those issues and the extent to which the evidence of Mr Murdoch or Mr Packer might reasonably be thought to elucidate the matters in dispute. The significance of the unexplained absence of any potential witness from the witness box cannot be determined in the abstract.

478 This is not to deny that it may be necessary, when considering the inferences that should be drawn in relation to specific factual questions, to take into account that one or other of the Respondents has not called a potential witness from their camp who could have been expected to explain or contradict something. An example is Mr Stokes' account of a meeting with Mr James Packer, said to have taken place on the weekend of 9 and 10 December 2000. Clearly, Mr Packer could have been expected to give evidence contradicting Mr Stokes' account if that account was inaccurate. Mr Packer did not do so.

479 A second example is Foxtel's failure to call Mr Blomfield to give evidence about his conversations with Mr Fogarty of Telstra in late October or early November 2000 in which he said words to the effect that the acquisition of the AFL pay television rights was '*about killing C7*'. Contrary to News' submissions, I find that Mr Blomfield was in News' camp at the time the hearing took place notwithstanding the circumstances in which his employment was terminated. Clearly he could have given evidence explaining his comments. Mr Blomfield's unexplained absence from the witness box is therefore a factor (but only one factor) to be taken into account in determining the significance of his comments.

480 Contrary, however, to the tenor of some of Seven's submissions, the unexplained failure to call Mr Packer or Mr Blomfield does not require me to accept the evidence of Mr Stokes or to infer from Mr Blomfield's comments that Foxtel (or some of the Foxtel partners) had the objective of killing C7. These factual issues must be determined in the light of the totality of the evidence. In the result, I do not accept the substance of Mr Stokes' account of his conversation with Mr Packer, despite PBL's failure to call Mr Packer. Similarly, although I give some weight to Mr Blomfield's comments, I do not regard them as decisive or compelling on the question of whether I should infer that Foxtel had the purpose of killing C7 that Seven attributes to it.

481 It must also be borne in mind that although Mr Murdoch and Mr Packer (and other potential witnesses identified by Seven) may have participated in significant conversations, this does not mean that there is any real dispute as to what occurred. For example, Ms Lowes of Telstra prepared a detailed file note of a conversation between Mr Murdoch and Mr Blount (CEO of Telstra) on 17 December 1998, the accuracy of which there is no reason to doubt. Similarly, there is no real dispute as to the substance of what was said at the teleconference of 13 December 2000, at which the Master Agreement was made. In any event, four witnesses who had attended the teleconference gave evidence: Mr Macourt, Mr Philip, Dr Switkowski and Mr Akhurst. In these circumstances, there is no room for the application of *Jones v Dunkel* in relation to the contents of the discussion.

5.8 Document Deletion Policies

482 News has a policy with respect to the deletion of electronic communications. According to Mr Philip, email traffic within News is stored on the local computer and '*synchronised*' to a central disk storage. Between 1998 and 2002, the practice was to delete the material stored centrally after a period of three days, by overwriting the back-up disks.

483 The effect of this policy is to delete any record of email traffic, both incoming and outgoing, after three days, except to the extent that the creator or recipient of an email chooses to retain it. The individual may retain a copy of the email, either by retaining it on his or her hard drive, or by printing out the email and storing it in a paper file. It appears that News discovered fewer than 50 emails in electronic form, although doubtless more would have been discovered as part of paper files.

484 Mr Philip claimed that he printed out important emails and retained them in his files. However, his practice was to delete emails permanently from the hard drive of his computer after about two weeks. His explanation for this practice was that he thought it '*sensible to be precise about what you retain and don't retain*'. Mr Philip agreed with the cross-examiner's proposition that one reason for him adopting this practice was:

> *'so that people will in future know as little as possible from documentary records about what you, Mr Philip, have been doing'.*

485 Mr Philip's actions show that he was perfectly prepared to destroy documents he considered to be detrimental to his interests or to those of News. In these circumstances, I

think the appropriate course is to take an approach analogous to the rule in *Jones v Dunkel*. That is, if the evidence as a whole is consistent with a particular inference relating to Mr Philip's conduct or intentions, that inference may be easier to draw by reason of the absence of contemporaneous internal News documentation that might have shed light on the true position.

486 There is no direct evidence that other officers of News were prepared to destroy documents in the same way as Mr Philip. However, the paucity of News' discovery of emails suggests that internal emails damaging to News' interests would not come to light unless someone chose to retain a hard copy. An approach analogous to the rule in *Jones v Dunkel* might therefore be appropriate if the evidence on a particular point is unclear and it is likely that internal News emails would shed light on the true position.

487 There is no evidence as to PBL's policy relating to the retention or deletion of electronic communications. (PBL called no lay witnesses.) However, it appears that PBL and Nine discovered between them only 30 emails for the period 1998 to 2001. Of course, this surprisingly low number might have been the consequence of practices quite different from those adopted by News. There is certainly no evidence of the deliberate destruction of unhelpful documents.

488 News' document deletion practice raises real issues for the conduct of litigation of this kind. Although there has been no suggestion that News' general policy is unlawful, Seven has been deprived, to some extent, of the opportunity to cross-examine News' officers by reference to contemporaneous emails. I was not told how many emails were discovered in paper form or were preserved by recipients outside News, so the precise extent of any disadvantage is hard to assess. Even so, care must be taken to ensure that cynical business practices are not rewarded by forensic advantages.

489 Having said that, I think the impact of News' document deletion policy on the conduct of this case was not as serious as it might have been. Both Mr Macourt and Mr Philip had roles outside News. Neither Foxtel Management nor Sky Cable appears to have implemented a policy similar to News. In any event, the documentary evidence includes many contemporaneous communications by Mr Macourt and Mr Philip, including internal Foxtel communications or communications between the Foxtel partners. Discussions in

which Mr Macourt or Mr Philip (or both) participated were often recorded by others, such as Ms Lowes of Telstra. The same is true of meetings attended by Mr Lachlan Murdoch.

490 In the end, each disputed factual issue must be resolved by reference to the evidence as a whole. This includes News' document deletion policy, but the policy is only one factor to take into account in evaluating the totality of the evidence.

6. BACKGROUND TO PAY TELEVISION IN AUSTRALIA: 1993–1999

491 In this Chapter, in order to provide background to the critical factual and legal issues in these proceedings, I outline some of the major events and transactions relating to pay television in Australia that occurred between 1993 to 1999. The outline is substantially in chronological order, but is not intended to cover all relevant events and transactions during this period. More details are provided, particularly in relation to developments towards the end of the period, elsewhere in the judgment.

6.1 1993

492 In September 1993, Australis Media Ltd ('**Australis**') was listed on the Australian Stock Exchange. In April 1995, it became the first broadcaster to commence providing retail pay television services, using the name '*Galaxy*'. Optus Vision commenced supplying pay television services by cable in September 1995, while the Foxtel cable service commenced in October 1995.

493 In November 1993, the AFL granted companies related to Seven Network the exclusive free-to-air and pay television rights for the 1993 to 1998 AFL seasons ('**AFL-Seven Original Licence**'). Although pay television was not scheduled to commence until 1995, the AFL agreed to permit live, unrestricted pay television coverage of six Saturday night games per season in each of the 1995 to 1998 seasons and at least twelve Sunday matches played in Melbourne in each season.

6.2 1994

6.2.1 Origins of Austar

494 In 1994, on a date not precisely established in the evidence, Austar, then known as '*CEtelevision*' was established.

6.2.2 Origins of Fox Sports

495 In September 1994, a subsidiary of Australis entered into a joint venture with Liberty Sports Australia Pty Ltd ('**Liberty Sports**'), a subsidiary of an American corporation. The purpose of the joint venture was to establish a sports channel to be known as '*Premier Sports*' (which became '*Fox Sports*' in early 1996). Premier Sports commenced broadcasting in

January 1995, and was operated by Premier Sports Australia Pty Ltd ('**Premier Sports Australia**') on behalf of the joint venture.

496 Australis commenced broadcasting pay television services, including Premier Sports, via satellite and Multipoint Distribution Service ('**MDS**') in April 1995. At this time neither News nor PBL had yet acquired any interest in the Fox Sports business.

6.2.3 Origins of the Foxtel Partnership

497 In November 1994, News and Telstra entered into Heads of Agreement to establish a joint venture, to be known as Foxtel, in which each would have a 50 per cent share. The interest of News was held through Sky Cable. Foxtel was to deliver pay television services on the Telstra Cable from October 1995. This arrangement was formalised in March 1995 ([226]).

6.2.4 Origins of Optus Vision

498 In December 1994, Continental Cablevision, SingTel Optus (then known as Optus Communications Pty Ltd) and PBL entered into '*Main Heads of Agreement*' ('**Optus Vision Heads of Agreement**') governing the terms on which the parties would participate in the Optus Vision joint venture, depending upon whether Seven Network agreed to participate. The parties agreed to the terms on which Seven would be invited to participate in the joint venture. At this time Seven held the AFL broadcasting rights.

6.3 1995

6.3.1 Alliance: TNCL and Telstra

499 On 9 March 1995, TNCL and Telstra entered into the so-called '*Umbrella Agreement*' which set out the terms of an '*Alliance*' between them for the purpose of establishing a number of businesses in the broadband video home entertainment sector. The Alliance was defined as the overall relationship between TNCL and its subsidiaries (such as News), on the one hand, and Telstra and its subsidiaries on the other. The Umbrella Agreement, which established the basis for the Foxtel Partnership, was amended and restated on 14 April 1997. It is more fully described below ([523]ff).

500 By the end of June 1995, Foxtel Cable had been formed and Telstra had apparently

transferred certain pay television broadcasting licences to it. Telstra Media (wholly owned by Telstra) and Sky Cable (then wholly owned by News) together had commenced carrying on the business of the Foxtel Partnership.

6.3.2 Australis and the Foxtel Partnership

501 On 9 March 1995, Telstra, News and the Foxtel Partnership entered into Heads of Agreement with Australis (which then used the brand name '*Galaxy*'), known as the '**TNC Heads of Agreement**'. Eight Galaxy channels were to be made available to Foxtel over a 25 year period, with Foxtel to make payments on a per subscriber basis, subject to an MSG (minimum subscriber guarantee). The Galaxy package included Premier Sports (later known as Fox Sports). Telstra and News each took a significant equity stake in Australis. In April 1995, the Trade Practices Commission (the predecessor to the ACCC) announced that it would not take any action in relation to the TNC Heads of Agreement. By April 1995, the Galaxy package included Premier Sports, Showtime/Encore, TV1, Arena, Max, Discovery, Red and CNBC Asia.

502 In March 1995, the Premier Sports channel was licensed to Australis and Australis granted a sub-licence to Foxtel.

6.3.3 Seven and Optus Vision

503 In late 1994 and early 1995, representatives of each of Optus Vision and Foxtel made presentations to the board of Seven Network with a view to Seven investing in their ventures.

504 Interests associated with Mr Stokes commenced acquiring a shareholding in Seven Network in about April 1995. At that time, News and Telstra each held interests in Seven Network (approximately 15 per cent and 10 per cent, respectively). Mr Stokes became a director and Non-Executive Chairman of Seven Network in June 1995. Mr Stokes' view at the time was that Seven should not have licensed the AFL pay television rights exclusively for the benefit of Optus Vision, but should have made the rights available to all pay television platforms. Nonetheless the arrangements proceeded.

505 On 28 April 1995, Seven announced that it had accepted an offer to join Optus Vision as an equity partner and program supplier. Under the agreement, Seven was to acquire a two

per cent equity in Optus Vision and an option to increase that stake to 15 per cent before July 1997. Pay TV Holdings acquired a five per cent equity with an option to increase its share to 20 per cent. Seven was also to acquire a 30 per cent interest in Optus' sports channels and an eight per cent interest in Optus' movie channels. As previously noted ([260]), Optus Vision was duly incorporated, in effect as an incorporated joint venture. Seven held its interest through Tallglen, a subsidiary. The agreement announced in April 1995 was implemented by the '*Optus Vision Joint Venture: Optus Vision Shareholders Agreement*' executed on 19 May 1995 ('**Optus Vision Shareholders Agreement**').

506 Optus Vision commenced operating its pay television service in September 1995 via the Optus Cable and progressively added channels to its service from time to time. The service was provided through Optus Vision Media Pty Ltd ('**Optus Vision Media**'), under licence from Optus Vision.

6.3.3.1 SPORTSVISION

507 The shareholders of Optus Vision established SportsVision Australia Pty Ltd ('**SportsVision**') as a vehicle for the production and distribution of sports programs. The main shareholders in SportsVision were Tallglen (30 per cent), ESPN (25 per cent), PBL (20 per cent) and Optus Vision (25 per cent). Each shareholder was to contribute sports rights to the SportsVision venture, for sub-licensing to Optus Vision. Seven was to contribute AFL broadcasting rights; PBL (through Nine) was to contribute ARL broadcasting rights; and ESPN was to contribute international sports rights.

6.3.3.2 TALLGLEN AGREEMENT

508 On 19 May 1995, Tallglen entered into a Sports Programming Licence Agreement ('**Tallglen Agreement**') with SportsVision. The key terms of the Tallglen Agreement are outlined in the judgment of Bryson J of the Supreme Court of New South Wales in *SportsVision Australia Pty Ltd v Tallglen Ltd* (1998) 44 NSWLR 103, at 106-109, and only a brief reference to them is needed here. Tallglen granted to SportsVision the right to broadcast a number of sporting events, including AFL matches. SportsVision was granted live and exclusive rights to broadcast throughout Australia six Saturday night AFL games and twelve Sunday afternoon AFL games per season. SportsVision also received rights in relation to certain other AFL matches to be broadcast in Sydney and Brisbane and the replay

rights to all AFL matches. SportsVision in turn granted Optus Vision certain pay television rights, including AFL matches, pursuant to '*Sports Programming Affiliation Agreements*' entered into in April and May 1995.

6.3.4 Seven Extends the AFL Broadcasting Rights

509 In May 1995, Seven was informed that News and Nine had expressed interest in acquiring the AFL broadcasting rights. In response to that concern, Seven put funding proposals to Optus Vision and negotiated with the AFL for an extension of Seven's licence from the AFL (which was due to expire in 1998). The negotiations continued in May and early June 1995, during which time the AFL received offers for the AFL broadcasting rights from other parties, including Nine.

510 On 1 June 1995, Seven Network made an offer to the AFL for the broadcasting rights (both free-to-air and pay) for the 1999, 2000 and 2001 seasons. An amended offer was made on 7 June 1995. The amended offer, subject to some revision, was accepted by the AFL. The agreement involved the following payments or contra (in the form of on-air support):

	Free-to-air Television Rights (Seven)	Pay Television Rights (OptusVision)	Airtime Support (Seven)	Total
	$m	$m	$m	$m
1999	23.0	11.0	3.5	37.5
2000	21.5	12.0	4.0	37.5
2001	20.0	13.0	4.5	37.5
TOTAL	4.5	36.0	12.0	112.5

511 The agreement required the AFL to allocate 36 games per season '*to pay television live – all Australia*'. This agreement ultimately resulted in the execution of the AFL-Seven Licence Extension on 15 November 1996. The details of the AFL Licence Extension and the consolidated licence agreement between the AFL and Seven are dealt with later ([826]ff).

6.3.5 SportsVision Distributes Programs

512 On 14 July 1995, SportsVision, Optus Vision, ESPN, Pay TV Holdings (a subsidiary of Nine) and Tallglen executed the Programming Distribution Joint Venture Agreement

('**PDJV Agreement**'). The PDJV Agreement was intended to establish SportsVision as the vehicle for a joint venture for the purpose of distributing sports programs which the parties would make available to SportsVision. The programs were to include AFL matches, ARL matches and international sports. Under the PDJV Agreement, Seven licensed SportsVision to broadcast AFL matches and Nine licensed SportsVision to broadcast ARL matches.

513 From 1995 to 1998, SportsVision produced and supplied to Optus Vision two pay television channels called '*Sports Australia 1*' and '*Sports Australia 2*'. SportsVision also supplied the *ESPN* channel to Optus Vision for broadcasting to subscribers. From 1996 to 1998, SportsVision compiled AFL matches into a pay television channel called '*Sports AFL*' which was broadcast on Optus. Sports AFL was a dedicated cable subscription channel which transmitted only AFL programs.

6.3.6 Austar Commences

514 By August 1995, Austar had commenced broadcasting its retail pay television service via satellite. The Austar pay television service became available in many regional areas in Australia (other than Western Australia). The migration of Austar's satellite signal to a new satellite (the C1 satellite) in June 2003 increased its satellite coverage area and allowed a further 200,000 homes to access the signal.

6.3.7 The Foxtel Partnership Agreements

515 By the end of August 1995, agreement had been reached on the terms of the agreements governing the Foxtel Partnership, although the agreements were not executed until 14 April 1997. The agreements ultimately entered into on the latter date were as follows:

> The **Foxtel Partnership Agreement**, between Sky Cable, Telstra Media and Foxtel Management, which provided that News and Telstra would carry on business in partnership for the provision of pay television services. As I have already noted, the Foxtel Partnership Agreement provided for Foxtel Management to manage the business of the Foxtel Partnership as its exclusive agent.
>
> The **Foxtel Television Partnership Agreement** between Sky Cable, Telstra

Media and Foxtel Cable, whereby the Foxtel Partnership, through Foxtel Management, was to establish and manage Foxtel Cable's business. Foxtel Cable was to supply the pay television services to subscribers and pass on the revenue received from them to the Foxtel Partnership.

The **Management Agreement** between Sky Cable, Telstra Media, Foxtel Cable and Foxtel Management, pursuant to which Foxtel Cable appointed the Foxtel Partnership to manage the business of providing subscription television services and the Foxtel Partnership appointed Foxtel Management as its agent to manage Foxtel Cable's business.

The **BCA**, the parties to which were Telstra Multimedia and Foxtel Management on behalf of the Foxtel Partnership. The BCA set out the terms on which broadband facilities were to be provided to the Foxtel Partnership. As I have noted ([97]), the BCA granted the Foxtel Partnership the exclusive right to provide pay television services via the Telstra Cable. The BCA also set out revenue sharing arrangements between Telstra and the Foxtel Partnership. By an '**Implementation Deed**' dated 21 November 2002, the Foxtel Partnership's exclusive right to use the Telstra Cable was removed.

516 In October 1995, the Foxtel Partnership commenced supplying a 20 channel pay television service by way of cable. Foxtel progressively added channels to this service from time to time.

6.3.8 Australis Has Liquidity Problems

517 By the second half of 1995, Australis was experiencing severe liquidity problems. In October 1995, it announced an agreement with TNCL and Telstra, subject to ACCC approval, to merge Foxtel's cable and Australis' satellite and microwave operations. Optus Vision lodged submissions with the ACCC urging it not to approve the proposed merger. In February 1996, the ACCC refused approval.

6.3.9 News Joins Fox Sports

518 On 30 October 1995, TNCL entered a joint venture with Liberty Media Corporation, the parent corporation of Liberty Sports, and other parties. TNCL's interest in the joint venture was 50 per cent. The joint venture acquired all the shares in Premier Sports

Australia, the operator of Premier Sports, and all the shares in Liberty Sports, the joint venturer with Australis' subsidiary in the business. The effect of these arrangements was that TNCL acquired a 25 per cent interest in the joint venture conducting the Premier Sports business. TNCL agreed to license the '*Fox Sports*' trademark to the joint venture and the Premier Sports channel was subsequently re-branded '*Fox Sports*'.

6.4 1996

6.4.1 PBL and Australis

519 In April 1996, as a result of a plan for recapitalisation of the company, PBL gained a 9.5 per cent economic interest in Australis and rights of refusal over the disposal of certain programming assets held by Australis.

6.4.2 Seven versus PBL

520 In September 1996, Tallglen and Seven Network instituted proceedings in the Supreme Court of New South Wales alleging that the terms of an agreement, whereby PBL became entitled to acquire shares in Optus Vision, breached the Optus Vision Shareholders Agreement. Because of the allegations made in the proceedings and the relief sought by Tallglen and Seven Network, Optus Vision effectively became paralysed.

521 The proceedings were ultimately settled on terms recorded in a '*Deed of Settlement and Release*' dated 28 March 1997, to which Seven Network, PBL and Optus Communications (among others) were parties. Under the Deed, Seven Network, Nine and Continental Cablevision agreed to transfer their respective shareholdings (whether held directly or through subsidiaries) in Optus Vision to Optus Communications. The parties did not, however, agree to dispose of their interests in SportsVision.

6.5 1997

6.5.1 Seven and Nine Leave Optus Vision

522 In about March 1997, Seven, Nine and Continental Cablevision agreed to transfer their shareholdings in Optus Vision to Optus Communications.

6.5.2 Umbrella Agreement

523 On 14 April 1997, Telstra and News (through TNCL) entered into a number of agreements which continue to govern their involvement in pay television. The first was the Umbrella Agreement, entered into initially on 9 March 1995, but amended and restated on 14 April 1997. The Umbrella Agreement recited that Telstra and News desired to participate in business opportunities presented by the convergence of technologies and that they had agreed to establish an '*Alliance*' (in essence the Foxtel Partnership). The Umbrella Agreement was intended to set out the terms of the Alliance (cl 2.1). Except as otherwise provided, the parties agreed that they would have equality of interest in all businesses established within the scope of the Alliance (cl 2.4). The Alliance embraced all businesses within the broadband video home entertainment sector relating to '*Services*', including pay television (cll 3.1, 3.2).

524 Clause 7 is of particular relevance to the dispute which arose between Telstra and News concerning the terms on which Fox Sports would provide its channels to the Foxtel Partnership. It provided as follows:

> *'7.1 Where News, its Related Bodies Corporate or its Affiliates hold exclusive rights in Australia to Exhibit Video Programs (including, but not limited to sports events and other major events) News must:*
>
> *(a) procure that it and any Related Body Corporate; and*
>
> *(b) use all reasonable endeavours to procure that its Affiliates,*
>
> *offer to or procure for the Alliance exclusive long term rights to Exhibit such programs in Australia.*
>
> *7.2 Where News, its Related Bodies Corporate or its Affiliates hold non-exclusive rights in Australia to Exhibit Video Programs (including, but not limited to sports events and other major events) News must:*
>
> *(a) procure that it and any Related Body Corporate; and*
>
> *(b) use all reasonable endeavours to procure that its Affiliates,*
>
> *offer to or procure for the Alliance rights to Exhibit such programs in Australia.*
>
> *7.3 An offer of program rights under clause 7.1 or 7.2 must be made at a price and on other terms no less favourable to the Alliance than the price and terms available from other relevant sources for comparable*

program rights, or if not available then on reasonable commercial terms'.

525 A second agreement executed on that day was the '**Program Rights Agreement**', between News, Foxtel Management and two other parties. Clause 2 of the Program Rights Agreement mirrored the language of cl 7 of the Umbrella Agreement, but imposed the obligations on News for the benefit of Foxtel Management.

526 In addition, on 14 April 1997, Telstra and News and associated parties executed the Foxtel Partnership and Management Agreements and the BCA ([515]).

6.5.3 SportsVision versus Seven

527 In late 1996, a dispute arose between Tallglen and SportsVision as to the extent to which Tallglen had to supply live and exclusive coverage of AFL matches to SportsVision and the scope of Tallglen's obligation to nominate those matches in advance. Relations deteriorated further during the 1997 AFL season. In early June 1997, Seven proposed to nominate SportsVision's AFL matches on a week to week basis. SportsVision rejected this proposal. Seven also refused to give SportsVision an undertaking that Seven's licensees would not broadcast matches that Seven had nominated as live and exclusive matches pursuant to the Tallglen Agreement.

528 On 13 June 1997, SportsVision commenced proceedings against Seven in the Supreme Court of New South Wales for allegedly breaching the Tallglen Agreement in relation to the transmission of AFL matches and the nomination of matches by Seven. The proceedings were ultimately resolved in favour of SportsVision on 22 May 1998. Bryson J made declarations to the effect that Tallglen would breach the Tallglen Agreement if Seven broadcast on free-to-air television any AFL match that had been nominated as a SportsVision live match and that Tallglen was obliged to nominate SportsVision exclusive matches on certain nominated days: *SportsVision v Tallglen*, 44 NSWLR 103, at 120. Although SportsVision succeeded in the proceedings, by the date Bryson J gave judgment the company was doomed, since (as Mr Stokes agreed in his evidence) Seven and others had decided to withdraw their investments.

6.5.4 Telstra, News and PBL Agree

529 From May 1997, Australis suspended all marketing of its pay television service and announced that it expected flat or declining subscriber numbers thereafter.

530 In June 1997, following its departure from Optus Vision, PBL entered into a series of agreements with News (or TNCL) and Telstra. Under those agreements:

> PBL assigned certain of its interests in Australis to News;
>
> News and Telstra acquired US$30 million of bonds from PBL;
>
> PBL agreed that its rights in certain programming assets of Australis would, at the request of News and Telstra, be exercised so as not to prevent a merger of the Foxtel Partnership and Australis;
>
> PBL acquired an option to equalise its pay television interests with News either in Foxtel or the merged Australis/Foxtel entity; and
>
> the Pay TV Partnership between PBL and News was also granted an option to acquire an interest in Fox Sports, conditional on PBL exercising its option to acquire an interest in Foxtel.

6.5.5 The ACCC Intervenes

531 On 30 June 1997, the ACCC issued a '*Deeming Statement*' declaring certain services to be '*eligible services necessary for the supply of broadcasting services*'. The effect of the Deeming Statement, if valid, would have been to create access rights to the Telstra Cable in third parties pursuant to Pt XIC of the *TP Act*. The 1997 Deeming Statement was ultimately held to be invalid for reasons that are not presently material: *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 517, reversing in part *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* (2000) 173 ALR 362, at 399 [141]-[142], per Wilcox J. The Deeming Statement and Seven's attempts to obtain retail access via the Telstra Cable are dealt with further in Chapter 10.

532 In July 1997, Australis and the Foxtel Partnership agreed to merge. The merger attracted the opposition of the ACCC and the agreement was ultimately terminated in November 1997.

6.5.6 AFL First and Last Deed

533 On 21 August 1997, PBL submitted to the AFL an offer for the first and last rights in relation to the AFL broadcasting rights from 2002. The proposed fee for the first and last rights was $25 million on the signing of a First and Last Deed. PBL's proposal included put options in favour of the AFL in respect of both free-to-air and pay television rights. PBL's offer was not accepted.

534 On 24 July 1997, Mr Stokes for Seven and Mr Lachlan Murdoch for News agreed to the '*Docklands Stadium Consortium Proposal*'. News was prepared to participate in the consortium on specified terms, including Seven agreeing that all:

> *'pay television rights to AFL matches, including any first or last right of negotiation, made available by the [Docklands Stadium Consortium] Bid must be given to News'.*

Mr Stokes understood at the time that News was interested in the pay television rights for Foxtel.

535 On 3 September 1997, the AFL and companies related to Seven Network entered into the '*First and Last Deed'*, by which the AFL granted Seven a first and last right of refusal over certain free-to-air television rights for the period 2002 to 2011. The details of the First and Last Deed are dealt with later ([833]ff).

6.5.7 News Acquires Half of Fox Sports

536 On 26 September 1997, a News subsidiary acquired from the joint venture established with Liberty Sports in October 1995 all the shares in Premier Sports Australia and Liberty Sports. At this point, News (through Liberty Sports) and Australis each held a 50 per cent interest in the Fox Sports business.

6.5.8 The Content Agreements

537 On 30 September 1997, Mr Rupert Murdoch for TNCL and Mr Dick Brown for Cable & Wireless Optus signed a short form agreement whereby the parties committed to '*co-operat[ing] in restructuring the pay television industry in Australia*'. The proposal envisaged the creation of a single content company to be formed before the end of November 1997 '*through a merger between Foxtel and Australis*'. The content company was to provide

programming to all other Australian distributors.

538 On 29 October 1997, TNCL and Optus Communications entered into a long form agreement similar in effect to the short form agreement signed in September. The recitals to the agreement recorded the following:

> *'A. Each of News and Optus acknowledge that the pay television industry in Australia at present is not viable because the subscriber uptake of pay television services is too low and the cost of acquisition of the programming comprised in those services is too high.*
>
> *B. Accordingly, Optus and News have been discussing ways in which the programming comprised in the pay television services supplied in Australia can be made more attractive to potential subscribers so as to increase penetration, lower the rates of churn and achieve sustainable long term competition.*
>
> *C. As a result of those discussions Optus and News agree that the way in which programming can be made more attractive is for all core programming to be available for inclusion in all pay television services in Australia.*
>
> *D. Optus and News acknowledge that a number of program supply agreements presently in place confer on one or other pay television service exclusive rights and that it will be necessary to achieve the objective referred to in paragraph C to obtain the agreement of those program suppliers to vary those programming arrangements to provide for non-exclusive supply and accordingly a lower per subscriber price of supply*'.

The agreement was conditional upon the termination, on or before 24 November 1997, of the '*Acquisition Agreement*' by which Foxtel was supplied to Australis. That condition precedent was never met.

539 On 20 February 1998, TNCL and Optus Communications entered into a second agreement based on the parties' belief (as set out in the recitals) that '*the Australian pay television industry is ... unsustainable and all retail pay television suppliers have incurred substantial losses*'. The agreement was conditional on Telstra's consent. According to Mr Macourt's evidence, the creation of C7 led Optus to disengage from discussions concerning implementation of the content agreements.

6.6 1998

6.6.1 Foxtel and Austar Agree

540 On 2 May 1998, the Foxtel Partnership (through Foxtel Management) and Austar entered into a detailed term sheet ('**Foxtel-Austar Term Sheet**'). It recited that Australis was in financial difficulty and that both Austar and the Foxtel Partnership required access, among other things, to '*Sports Programming*' including the Fox Sports channels, to ensure the continuity and viability of their business. The term sheet set out the terms on which Austar and the Foxtel Partnership would sub-license Sports Programming to each other if their agreements with Australis were terminated. The Foxtel Partnership agreed to sub-license Sports Programming to Austar in '*AUSTAR Areas*' while Austar agreed to sub-license Sports Programming to the Foxtel Partnership in the '*Non-AUSTAR Areas*'.

6.6.2 Australis Collapses

541 On 5 May 1998, Australis was placed in receivership. On 18 May 1998, it was made the subject of a winding up order. Shortly thereafter, Fox Sports terminated its supply agreement with Australis because of Australis' failure to pay licence fees when due. Australis ceased supplying the channels to Foxtel. On 29 June 1998, SportsVision's shareholders applied to wind up the company by reason of its inability to raise sufficient equity to meet funding requirements.

6.6.2.1 NEWS ACQUIRES ALL OF FOX SPORTS

542 News then exercised its pre-emptive right to acquire Australis' share in the Fox Sports joint venture. This was implemented by an agreement dated 12 June 1998 between (among others) Australis (in liquidation), Liberty Sports and Premier Sports Australia. Liberty Sports purchased the interest of Australis in the '*Fox Sports Assets*'. In consequence News acquired 100 per cent ownership of the Fox Sports business through Liberty Sports. In August 1998, Liberty Sports changed its name to Sports Investments Australia Pty Ltd. Later still, in November 2003, Sports Investments Australia Pty Ltd changed its name to Premier Media Group Pty Ltd. This is the ninth respondent, Fox Sports.

6.6.2.2 PREMIUM MOVIE PARTNERSHIP AND FOXTEL

543 In May 1998, the Premium Movie Partnership, which had supplied the *Showtime* and

Encore movie channels to Australis, advised Foxtel that it had terminated its agreement with Australis. That agreement had enabled Australis to supply the *Showtime* and *Encore* channels to Foxtel, as part of the eight Galaxy channels made available under the TNC Heads of Agreement entered into in March 1995. An agreement between Foxtel and the Premium Movie Partnership for direct supply of the *Showtime* and *Encore* movie channels to Foxtel then became effective.

6.6.3 Fox Sports-Austar Interim Licence

544 On 13 May 1998, Austar and Fox Sports entered into an interim arrangement whereby Fox Sports supplied the *Fox Sports 1* and *Fox Sports 2* channels (other than NRL content) on a non-exclusive basis directly to Austar ('**Fox Sports-Austar Interim Licence**'). Austar was to pay US$5.25 pspm for each residential subscriber, subject to an MSG of US$787,500. Austar was not permitted to sub-license to Optus Vision. The Fox Sports-Austar Interim Licence covered the regions that had been franchised by Australis.

545 On the same day, Austar and Fox Sports entered into a similar agreement in relation to the regions which had not been the subject of franchising by Australis. Austar was permitted to sub-license the channels (excluding NRL), but not to Optus Vision. The agreements were terminable upon two months notice. As will be seen, a long-term arrangement was entered into on 3 September 1998 ([568]).

6.6.4 Austar Sub-Licenses Fox Sports to Foxtel

546 Austar immediately sub-licensed *Fox Sports 1* and *Fox Sports 2* to the Foxtel Partnership on an exclusive basis in '*Non Austar Areas*' and on a non-exclusive basis in '*Austar Areas*'. The sub-licence was terminable at any time by Foxtel and was terminable by Austar if Foxtel acquired certain sports rights from another person.

547 From 13 May 1998 until 20 February 2002, the Fox Sports channels were supplied to Foxtel by way of a sub-licence from Austar. Foxtel paid Austar US$5.25 pspm with an MSG of US$787,500 per month. The pspm fee was of course the same as that payable by Austar to Fox Sports. It is of some importance to this case that the licence fee was constant and contained no provision for adjustments for inflation. Mr Macourt's evidence, which I accept, was that the absence of any price adjustment created concerns for Fox Sports as inflation

began to take effect.

6.6.5 Merger Agreement

548 On 14 May 1998, the Merger Agreement resolving the Super League dispute was executed. The Merger Agreement annexed further agreements ('**NRL Agreements**') by which News acquired the NRL pay television rights for the years 1998 to 2001 and sub-licensed them on a non-exclusive basis to Optus Vision. The NRL Partnership also granted News the first right of negotiation and last right of refusal over the NRL free-to-air and pay television rights and internet rights for the 25 year period between 1998 and 2023. Details of the Merger Agreement and related agreements are given in Chapter 9 ([1160]ff).

6.6.6 AFL Website

549 By a '*Joint Venture Agreement*' executed in about June 1998, Seven and News agreed to form an unincorporated joint venture for the purpose of designing, building and operating the official AFL internet site. Seven and News jointly held the rights to operate the site for a three year period, with an option to renew for a further four year term.

6.6.7 C7-Optus CSA

550 On 30 June 1998, Optus Vision, Seven Network and C7 entered into the C7-Optus CSA, under which Seven agreed to provide non-exclusive sports programming to Optus Vision, should Optus Vision lose its sports programming content (then being supplied by SportsVision). In fact, SportsVision ceased to provide sports programming to Optus on about 31 August 1998. The term of the C7-Optus CSA was until 31 December 2008. Details of the C7-Optus CSA are given later ([1505]).

6.6.8 C7 Commences Service

551 On 2 July 1998, Seven gave notice to SportsVision terminating the Tallglen Agreement.

552 In about August 1998, C7 (then called Seven Cable Television) commenced providing sports programming to Optus on an interim basis. C7 commenced a full service to Optus on about 1 November 1998. The designation of C7's channels has previously been explained ([186]).

6.6.9 PBL Exercises Its Option over the Foxtel Partnership

553 On 29 October 1998, PBL exercised its option to acquire 50 per cent of TNCL's interest in Sky Cable. This had the effect that PBL and News each had a 25 per cent interest in the Foxtel Partnership, effective from 3 December 1998. The acquisition price which was to be paid by PBL on completion, was $158.127 million (equal to the invested cost of the other partners). Following completion, Telstra had the right to put part of its stake in the Foxtel Partnership to PBL and News, such that Telstra, News and PBL would each have a one third share. Telstra, however, chose not to exercise that right.

554 Immediately following PBL's announcement that it had exercised its option, representatives of Seven met with the ACCC to express concern about PBL's newly acquired interest in the Foxtel Partnership. In the course of that meeting, as recorded in the note of an ACCC officer:

> *'[Seven] reiterated its long-held view that there is one market for antitrust purposes in which Pay TV operators compete with free-to-air operators for television viewers'.*

A similar view was expressed in a letter sent subsequently by Seven's solicitor to the ACCC.

555 As recorded in a '*Deed of Accession*' dated 3 December 1998 between PBL, Telstra and TNCL, upon completion of PBL's exercise of its option, the Pay TV Partnership was formed between News Pay TV and PBL Pay TV. The Pay TV Partnership acquired all the shares in Sky Cable, which was described in the Deed of Accession as a partner in each of the Foxtel Partnership and the Foxtel Television Partnership. Under the '*Terms of Accession*' set out in the Deed, '*non compete*' obligations were imposed on PBL, TNCL and Telstra until 2008. These obligations, which mirrored those in the Umbrella Agreement, prohibited a party (subject to certain exceptions) from supplying programs to a television via an STU (set top unit), otherwise than as a participant in the Foxtel Partnership.

6.6.10 PBL's Option over Fox Sports

556 Under the arrangements entered into between PBL, News and Telstra in June 1997, the Pay TV Partnership had been granted an option to acquire an interest in the Fox Sports business, conditional upon PBL exercising its option to acquire an interest in the Foxtel Partnership. On 3 December 1998, coinciding with the completion of PBL's acquisition of

its interest in the Foxtel Partnership, TNCL and PBL entered into the Fox Sports Option Deed. This provided that TNCL was to grant PBL an option to acquire 50 per cent of all interests of TNCL and its affiliates in the Fox Sports entities (being Premier Sports Australia and Sports Investments Australia Pty Ltd, later Premier Media Group Pty Ltd (that is, Fox Sports)). The arrangements of December 1998 included a '**Program Rights Deed**' under which PBL undertook to give the Foxtel Partnership the exclusive first right to refuse and the exclusive last right to match any proposed grant of licences of programming to third parties (cl 2).

6.7 1999

6.7.1 C7-Austar CSA

557 On 5 March 1999, C7 and Austar entered into the C7-Austar CSA, under which C7 agreed to supply a full-time non-exclusive sports channel to Austar during the period from 1 April 1999 to 28 February 2002 ([1505]).

6.7.2 ACCC Declaration

558 On 3 June 1999, the ACCC issued a draft decision to declare analogue carriage services for pay television supplied over cable. On 1 September 1999, the ACCC made a declaration pursuant to s 152AL(3) of the *TP Act* that:

> *'the Analogue Subscription Television Broadcast Carriage Service ... is a "declared service", for the purposes of Part XIC of the [TP Act]'.*

559 The effect of the declaration, if valid, was to subject analogue subscription television broadcast services to the competition regime set out in Pt XIC of the *TP Act*: *Foxtel Management v ACCC* 173 ALR, at 367 [3], per Wilcox J. The declaration, which came into force on 8 September 1999, was held to be valid by the Federal Court on 8 May 2000 (see *Foxtel Management v ACCC* 173 ALR, at 418 [219], per Wilcox J), a decision affirmed on 18 August 2000 by the Full Court: *Telstra v Seven Cable Television* 102 FCR, at 553 [141]-[142], per *curiam*. These matters are referred to again in Chapter 10.

6.7.3 PBL Exercises Its Fox Sports Option

560 In September 1999, PBL, through its subsidiary PBL Pay TV, exercised its option under the Fox Sports Option Deed for a purchase price of $58.6 million, effective on 3

December 1999. (A further $10.5 million was paid in June 2000.) From this time, TNCL and PBL, through their respective subsidiaries, had a 50 per cent interest in Fox Sports.

6.7.4 Pay Television Providers

561 In 1999, TARBS World Television Australia Pty Ltd ('**TARBS**') began operating a multicultural pay television platform. TARBS provided programming via satellite and achieved Australia-wide coverage.

562 In 1999, the retail pay television service providers were Foxtel, Optus, Austar and TARBS. In addition, a service known as Neighbourhood Cable operated a cable network in three towns in regional Victoria. By 1999, as I have explained in Chapter 4, Optus was packaging its pay television service with local telephony services in a '*bundled*' offer, which had been expanded to include internet services.

7. FOXTEL, C7 AND THE DISPUTE BETWEEN NEWS AND TELSTRA

7.1 Introduction

563 In this Chapter, I deal with two related matters. The first concerns the dealings between Foxtel and C7 leading to the decision of the Foxtel Management board not to take C7 until it was known to whom the AFL would award the AFL broadcasting rights for 2002 to 2006. The second is the dispute between News and Telstra as two of the partners (through Sky Cable and Telstra Media) in the Foxtel Partnership. Not all the dealings between Foxtel and C7 were affected by the partnership dispute and the dispute between News and Telstra was by no means confined to the conduct of negotiations between Foxtel and C7. On the contrary, the dispute between News and Telstra centred on the proposals for the long-term supply of Fox Sports to Foxtel. However, the question of whether Foxtel would take C7 and, if so, on what terms was closely related, at least from Telstra's perspective, to the principal bone of contention between the parties. It is for this reason that it is convenient to consider both matters together.

564 The Chapter recounts the course of the News-Telstra disputes until early January 2001, immediately after the AFL and the NRL Partnership had awarded their respective pay television rights. The dealings between the Foxtel partners, leading to resolution of the disputes and the execution of the Foxtel-Optus CSA on 5 March 2002 are addressed in Chapter 11.

7.2 Fox Sports Licenses Austar

565 One element in the dispute between News and Telstra arose out of arrangements entered into between Fox Sports and Austar. After Fox Sports and Austar had entered into the Fox Sports-Austar Interim Licence of 13 May 1998 ([544]), they negotiated for more permanent arrangements. In a letter of 6 July 1998, Austar's CEO (Mr Fries) asserted to Mr Macourt that, although Austar was very interested in continuing carriage of Fox Sports, it could not:

> *'continue to dedicate nearly 25% of our gross revenue (approximately $10/sub/month) to Fox Sports in its current form'.*

Mr Fries also said that:

> *'[w]ith the Optus/7 Sports deal we have been presented with an attractive alternative for sports programming and intend to explore this alternative'.*

566 In a letter sent on the same day, Mr Mann of Austar requested Mr Philip that Austar be permitted to package NRL programming with any other sports programming, including *'any sports channel created by any rationalisation of sports programming in Australia*'. Mr Philip replied on 24 July 1999, that this proposal was unacceptable because:

> *'News has legitimate concerns to prevent the quality perception of the NRL coverage suffering by association with the branding and programming practices of various sports channels'.*

Austar attempted to persuade News to change its mind, but Mr Philip remained firmly opposed to the proposal.

567 In the meantime, on 8 July 1998, Mr Macourt sent a fax to Mr Fries outlining alternative proposals for Austar to take both Fox Sports channels for a five year term. One proposal involved flat fee pricing, while the other provided for a fee on a pspm basis. The latter proposal contemplated a base price of US$5.25 pspm (inflation adjusted), with volume discounts reducing the fee to US$3.00 pspm for more than 350,000 subscribers in the first year. NRL was included from 2001, but the NRL pay television rights were to attract a fee of $130,000 per season week for 1999 and 2000. On 30 July 1998, Mr Macourt made a revised offer, reducing certain of the proposed fees.

568 After further negotiations, the Fox Sports-Austar CSA was executed on 3 September 1998. Fox Sports granted Austar the right to retail distribution of the Fox Sports channels (including, from 1 January 2001, the NRL) in specified territories. The licence was to expire on 30 June 2006, but Austar could terminate the agreement if, during the NRL seasons for 2001 to 2006, Fox Sports did not have the NRL pay television rights. Austar was not permitted to sub-license except to Austar entities.

569 The Fox Sports-Austar CSA made provision for a '*Base Price*' of US$4.75 pspm and a '*Band A Price*' of US$3.25 pspm. The Base Price was payable for the first 250,000 subscribers and the Band A Price for subscribers in excess of 250,000. The price was payable '*as if on basic*': that is, by reference to all subscribers and not merely to the subscribers to the tier on which Fox Sports was placed. The Fox Sports-Austar Interim

Licence was terminated, except to the extent necessary to enable Austar to perform its obligations to Foxtel. The result was that Foxtel continued to receive Fox Sports programming through Austar, with payments remitted to Fox Sports.

570 On 3 September 1998, News also sub-licensed the NRL pay television rights to Fox Sports for the territories in which Austar provided services. Fox Sports granted Austar the non-exclusive rights to telecast NRL matches in the territories covered by the Fox Sports-Austar CSA for the period 13 March 1998 to 31 October 2000. The sub-licence provided that the feed of NRL matches would be compiled on *Fox Sports 2* and that Austar could exercise its right by taking a feed of the coverage on that channel. However, Fox Sports retained a right of approval '*over any alternative channel into which the coverage of [NRL] Matches may be compiled if it is not Fox Sports Two*'.

571 The arrangements between Fox Sports and Austar were concluded without Telstra's knowledge or consent. Mr Macourt acknowledged in evidence that Telstra had not been told because he thought Telstra might try to stop the deal. Mr Philip and Mr Macourt explained the position to Mr Rupert Murdoch in a briefing note of 21 October 1998:

> *'Whilst Telstra has not been informed of the non-exclusive deal struck with Austar at US$4.75 for satellite and US$5.25 for cable, it was imperative to Fox Sports and FOXTEL that Austar keep taking Fox Sports as its principle [sic] sports service rather than moving to the Optus Vision Channel Seven sports service which it was threatening to do. Even Telstra acknowledges that keeping Austar as a customer is crucial to both FOXTEL and Fox Sports. News is of the view that it was free to do the deal with Austar but had no confidence that Telstra would have permitted FOXTEL to conclude a deal with Austar in time on the back of exclusive supply from Fox Sports to FOXTEL (it was our expectation that Telstra would have happily used Austar's threats to go to Optus Vision and Channel Seven to put pressure on Fox Sports to reduce the price of Fox Sports to both FOXTEL and Austar)'.*

(This briefing note is an example of an internal communication discovered by News, notwithstanding its document deletion policy discussed in Chapter 5.)

7.3 Seven's Projections: May 1998

572 As I have noted, by May 1998 Seven was developing plans for its own pay television sports channel to replace SportsVision, which was at that time headed for winding up. These included a series of business plans prepared by Mr Hyde under the supervision of Mr

Bateman and Mr Gammell. Mr Stokes also had some involvement in the process.

573 A business plan, apparently prepared on about 31 May 1998, projected a subscriber base of 1.06 million in 1999 for a Seven pay television sports channel. Total costs for the channel, including the cost of pay television rights and production, were estimated at $24.6 million for that year. A later business plan, apparently prepared on about 5 June 1998, made more modest predictions as to the number of subscribers. However, total costs were estimated at $40 million for the first full year, comprising $24.6 million in rights fees and $15.4 million in '*additional production costs*'. The model contemplated, among other things, that the sports channel would be placed on a tier on Foxtel.

7.4 News' Dilemma

574 A memorandum from Mr Mockridge to Mr Lachlan Murdoch of 2 June 1998 recorded that Optus had told:

> *'News that if they receive a non-exclusive back-up deal for Fox Sports they will blow up SportsVision, leaving Fox Sports as the premier sports provider in Australia'.*

In the memorandum, Mr Mockridge said that the attraction to News of Optus' proposal was that:

> *'it potentially delivers Fox Sports the dominate [sic] sports distribution position in Australian pay television'.*

575 Nonetheless, Mr Mockridge was opposed to the proposal from Foxtel's point of view because (among other things):

> *'*
> - *for Fox Sports to be non-exclusive across both FOXTEL and Optus Vision massively dilutes our branding message because in the market place FOXTEL and Fox Sports are synonymous ... ;*
>
> ...
>
> - *to permit Optus access to Fox Sports without there being any reciprocal programming supply of AFL from Optus significantly enhances Optus' position versus FOXTEL ...'*

In his evidence, Mr Mockridge agreed that he was identifying a dilemma for News: should it promote the interests of Fox Sports (in which it had a 50 per cent share) or those of the Foxtel

Partnership (in which it had a 25 per cent share)?

7.5 Proposed Supply of Fox Sports to Optus

576 On 9 June 1998, Mr Philip forwarded to Mr Macourt a proposal for the non-exclusive supply of the Fox Sports channels to Optus. The price proposed was US$5.25 pspm, calculated on the basis of the total number of subscribers to Optus and to its sub-licensees' packages, with provision for annual increments. Optus was to be responsible for obtaining and paying for NRL pay television rights. The proposal contained a provision preventing Optus from transmitting sports programming not provided by Fox Sports, except with the latter's consent. Mr Philip, who was responsible for inserting the provision, explained in evidence that its purpose was '*to obtain exclusivity of supply of sports programming in favour of Fox Sports*'. He agreed that its purpose and effect was to prevent Optus from transmitting sports programming provided by Seven '*and anyone else who came along*'.

577 On 15 and 16 June 1998, Mr Spain (from Optus' solicitors) and Mr Philip exchanged faxes. It appears that Optus had set a deadline of 15 June 1998 by which to reach an agreement, but Mr Philip persisted with proposed draft terms '*in case discussions recommenced*'. In the event, further discussions did take place between News and Optus.

578 On 19 June 1998, Mr Philip sent Optus a revised term sheet. Clause 11(b) of the revised term sheet required Optus, if it acquired AFL programming, to procure non-exclusive AFL pay television rights for Fox Sports on the same terms as applied to Optus (without any MSGs and at a maximum price of $3.00 pspm).

579 On 26 June 1998, Telstra's solicitors wrote to News and Foxtel Management expressing the view that News was not free to hold discussions with Optus unless and until the exclusive first right of refusal provisions of the Umbrella Agreement (cl 7) had been complied with. The point was reiterated in strong terms in a letter of 1 July 1998, which asserted that any discussions that had taken place between News and Optus in relation to the acquisition of programming by Optus had breached News' contractual obligations to Telstra and Foxtel and its fiduciary obligations to Telstra. In the meantime, on 30 June 1998, Seven and Optus entered into the C7-Optus CSA.

580 Mr Philip responded to the letters on 2 July 1998. He denied the assertions made by

Telstra, on the basis that News had procured an offer of the supply of exclusive rights from Fox Sports to Foxtel which the latter had not thus far accepted. He stated that if Foxtel did not accept the offer, there was nothing to prevent Fox Sports offering the channels on a non-exclusive basis to Optus.

581 News' understanding of the reasons why Fox Sports ultimately failed to reach agreement with Optus was recorded in a later briefing note (21 October 1998) to Mr Rupert Murdoch on the state of News' relationship with Telstra. The document recorded that '*[a]t partnership level there is a level of mistrust*'. Telstra had been happy to accept the substantial benefits of the rationalisation of pay television (including agreements with Optus and PBL), but had made no contribution to the process. The note referred to the negotiations with Optus as follows:

> *'At the time of formulating the offers we were aware that Sports Vision [sic] was in financial trouble with insolvency likely. Discussions were held with Optus – at all times subject to Telstra approval – concerning the supply of unbranded sports product. Telstra sought to prevent such discussion through delay and subsequent legal threats (letters from Mallesons on June 26 and July 1). This was successful in that Optus has signed a sports deal with Seven, an arrangement that will inevitably lead to higher sports rights fees'.*

In an associated memorandum, Mr Philip said this:

> *'Direct result of Mallesons letter to Optus Vision [of 2 July 1998] was to drive Optus Vision to Channel Seven, so as to increase competition between FOXTEL and Optus Vision, and increase the cost of sport programming'.*

582 Mr Macourt said in evidence that these memoranda referred to increased competition for subscribers involving general entertainment channels and movies, with sports being only one piece of the picture. The reference to an increase in the cost of sports programming related to possible increases in the cost of sports rights, arising from competition between C7 and Fox Sports.

7.6 The Supply of Fox Sports to Foxtel: Early Negotiations

583 As has been noted ([544]), on 13 May 1998, the Foxtel Partnership received a sub-licence of the Fox Sports channels from Austar on an interim basis. On 4 June 1998, Mr Philip of News, '*in anticipation of News obtaining control of Fox Sports in the near future*', sent to Mr Mockridge of Foxtel Management two alternative proposals for the long-term

supply of the Fox Sports channels to Foxtel. (News in fact exercised its right to acquire Australis' share in Fox Sports on 12 June 1998.)

584 The first proposal was for the grant of exclusive rights (subject to certain exceptions including supply to Austar areas), with a right to sub-license. The suggested price was US$6.25 pspm, with an annual increase of five per cent from 1998 to 2000 and six per cent from 2000 onwards, subject to specified MSGs. In addition, Foxtel was to make an initial payment of $8 million, to be set off against subscriber fees for the last two months of the term. The second proposal was for non-exclusive rights at US$5.25 pspm, with an initial payment of US$4 million, reduced MSGs and a volume discount for 500,000 subscribers or more. In each case, the proposed term was six years, expiring on 30 June 2004.

585 Each of the two proposals contained a clause, equivalent to that included in Fox Sport's proposal to Optus, which would have prevented Foxtel transmitting any sports programming not provided by Fox Sports unless the latter agreed. There were exceptions for *ESPN* (on a tier) and for AFL programming (provided that Foxtel licensed Fox Sports to supply the programming to Foxtel.) As Mr Macourt confirmed, the intent, so far as AFL programming was concerned, was to allow Foxtel to take a feed of AFL matches via Fox Sports, but to prevent it from taking a different channel containing AFL programming, such as C7. He acknowledged that, having regard to the exceptions in the offer, the only party caught by the provision at the time would have been Seven. Mr Macourt also said that he expected the clauses to be negotiated out.

586 On 5 June 1998, Ms Lowes reported to Mr Blount that she had discussed with Mr Macourt the fact that Fox Sports was requesting Foxtel to pay higher fees for sports than under current arrangements. She had told Mr Macourt that the request was unacceptable to Telstra as it could not be argued that higher prices were in Foxtel's interests.

587 On 12 June 1998, Mr Freudenstein, on behalf of Foxtel Management, sent Ms Lowes and Ms Dodd of Telstra a fax, of which a copy was sent to Mr Philip and Mr Macourt. The fax attached a marked up copy of the arrangement for the exclusive supply of Fox Sports to Foxtel that had been proposed by Mr Philip. In substance, Foxtel was '*prepared to do a deal on broadly the same economic terms as the existing Australis Fox Sports deal*'. Thus it was prepared to pay a base subscriber fee of US$5.25 pspm and adjusted MSGs.

588 On 16 June 1998, Mr Philip forwarded to Mr Freudenstein and Ms Dodd a document specifying a set of issues that had arisen in relation to the Fox Sports-Foxtel proposal. He suggested a meeting, which apparently took place on 18 June 1998. A summary of the meeting prepared by Mr Philip recorded that Telstra had argued that a fee of US$6.25 pspm, or even of US$5.25 pspm, was too high and that, in any event, the fee should be set in Australian dollars. Telstra also objected to other features of the proposal, including the '*$8 million bond*' and the percentage increases in the licence fees over time.

589 On 19 June 1998, Mr Philip sent to Mr Mockridge and Mr Freudenstein of Foxtel Management redrafted exclusive and non-exclusive terms sheets '*indicative of counter offers from you that Fox Sports is likely to find acceptable*'. The non-exclusive term sheet contemplated that Foxtel would be permitted to carry other sports channels (including but not limited to AFL programming), provided that they were carried on a tier above that carrying the Fox Sports channels. Mr Macourt agreed in evidence that the general object of this clause was to prevent other sports suppliers from competing with Fox Sports. He also said that it was part of an attempt to make Fox Sports the '*gate-keeper of sports programming for Foxtel*'. Mr Macourt further agreed that, in view of the exceptions for *ESPN* and *Sky Racing*, the only channel that he anticipated would be affected was C7.

590 Ms Lowes of Telstra put her views to Mr Macourt in a fax of 22 June 1998. She said that she was at a loss to understand the commercial justification for the then current proposal which was '*more expensive and on worse terms than Australis' original deal with Fox Sports*'. Ms Lowes asserted that the terms were neither reasonable nor commercial. She recognised, however, the desirability of Foxtel securing long-term sports programming and suggested as a basis for discussion certain '*price parameters*'. Her suggestion was a base price of US$5.25 pspm, subject to volume discounts above 500,000 subscribers. She rejected the proposal that Foxtel should pay an $8 million bond.

591 On 28 June 1998, Mr Mockridge sent a memorandum to Ms Lowes attaching financial models relating to the proposal for the long-term supply of Fox Sports to Foxtel. The proposal at this stage contemplated a price of US$5.25 pspm for the Fox Sports channels until October 1998, increasing five per cent annually until 2000 and thereafter by six per cent per annum. Foxtel would receive a reduced price of US$4.00 pspm above a specified subscriber level and there would be no MSG.

592 On 1 July 1998, Mr Mockridge sent a term sheet prepared by Mr Freudenstein to Mr Macourt and Ms Lowes which was said to reflect earlier discussions. In his covering note, Mr Mockridge expressed the view that:

> *'the proposal of a starting price [is] consistent with the old Australis deal but by including volume discounts if we reach subscribers in excess of 90% of our business plan projection for FOXTEL/Austar combined is no worse (and possibly better) for FOXTEL than the old Australis deal. It is therefore consistent with my initial view that a deal around the old Australis position was "fair" to both shareholders given the significant benefits to both shareholders delivered via the termination of the TNC Heads'.*

593 In the meantime, Telstra's solicitors wrote their letters of 26 June and 1 July 1998 complaining of the negotiations concerning the supply of Fox Sports to Optus ([579]).

7.7 News' Financial Models: Mid-1998

594 In May and June 1998, Mr Macourt of News asked for a series of financial models to be prepared in order to assess the financial impact of the Fox Sports channels being supplied to Optus and Austar. One such model, prepared by Mr Parker in about late May 1998, showed that carriage of Fox Sports on all three pay platforms over a 10 year period, on the basis of the assumptions recorded in the model, produced a net present value ('**NPV**') of $1.038 billion. Carriage on both Foxtel (but no satellite coverage) and on Austar produced an NPV of $88.9 million, while carriage on the Foxtel platform alone (no satellite coverage) produced an NPV of -$171.2 million. Mr Macourt accepted in his evidence that the models suggested to him at the time that there was a very considerable financial difference between the situation where the Fox Sports channels were carried on Foxtel alone and where they were carried on Foxtel, Optus and Austar.

595 Other modelling performed by Mr Parker at Mr Macourt's request at about this time was prepared on alternative assumptions as to the inflation rate applied to rights expenses and outside production costs depending on the '*competitive environment*'. The inflation rate was assumed to be five per cent when there was no '*alternative sports programmer*' and eight per cent when there was such a programmer. (The rate of general inflation was assumed to be 3.5 per cent.) According to Fox Sports 2000 Budget Operating Plan, rights fees and delivery represented 66 per cent of total expenses, while production costs amounted to 24 per cent of total expenses.

596 On about 17 June 1998, a further 10 year model was prepared within News under Mr Parker's supervision in order to take account of amendments provided by Mr Macourt and Mr Lachlan Murdoch during a business plan meeting. The model preserved the distinction between rights inflation of eight per cent for exclusive supply of Fox Sports to Foxtel and Austar only (that is, where there was an alternative sports programmer) and rights inflation of five per cent for non-exclusive supply to all three platforms (that is, where there was no alternative sports programmer). The assumptions recorded in the model indicate that News was contemplating that AFL might be shown on a tier. The model estimated that exclusive supply produced an NPV of -$23.4 million, compared with an NPV of $100.9 million for non-exclusive supply. The major reasons for the different outcomes were, as Mr Macourt explained, extra revenue from Optus subscribers and reduced rights fees payable on the non-exclusive model.

597 Mr Macourt agreed in evidence that the reason for differentiating between the situation where there was and was not competition in the sports channel business was that if Fox Sports was the only sports channel supplier, '*it would be able to drive a harder bargain with sports bodies who sell rights*'. Mr Macourt also agreed that it was important to News, Fox Sports and Foxtel to hold down the cost of sports rights and that the most likely source of competition to Fox Sports '*in the sports channel business*', following the demise or likely demise of SportsVision, was C7.

7.8 C7's First Proposal to Foxtel: 7 June 1998

598 Seven first put a proposal to provide a sports channel to Foxtel at a meeting which took place on about 7 June 1998 at the Quay Apartments in Sydney. The participants were Messrs Macourt, Mockridge, Stokes and Gammell. Seven presented a draft term sheet at the meeting, which included the following features:

> the channel was to be branded '*Seven's Super Sport*';
>
> Seven was to have total control over the content of the sports channel;
>
> Seven warranted that the channel would be on air for 24 hours a day, 52 weeks a year, but gave no warranties as to specific sports content;
>
> Foxtel was to provide Seven with a general Australian entertainment channel for carriage on its service '*at some time in the future*';

the term was to be 10 years, with Seven to have an option to extend for a further term of 10 years; and

the licence fee was to be $10.00 pspm, subject to an MSG of 80 per cent of 300,000 subscribers in any year, with the cost per subscriber to reduce as the subscriber base increased.

599 Mr Macourt's evidence was that the price asked by Seven was '*far too expensive*' and '*clearly unacceptable*'. He said that he was also concerned that the offer had no guarantee of quality, although he acknowledged that the sports channel had not yet commenced broadcasting and it was open to Foxtel to negotiate guarantees as to quality. Mr Macourt further said that he did not wish Foxtel to take a '*rival branded sports service*' until the relationship between Fox Sports and Foxtel was resolved:

> *'I had this concern principally because I perceived that Telstra might seek to utilise an agreement with another sports channel as a basis for excluding Fox Sports or renegotiating the price at which FOXTEL took Fox Sports to a level which would seriously undermine Fox Sports' capacity to supply quality sports programming to FOXTEL. I considered either result as inimical to the interests both of Fox Sports and FOXTEL'.*

Mr Macourt accepted that one reason he rejected Seven's proposal was that as a matter of principle he was not willing to let Foxtel carry a channel of a company that he regarded as a competitive threat. However, he maintained that if the channel had been cheap enough he would have accepted it on Foxtel.

600 Mr Mockridge was more emphatic in his evidence. He said that he regarded Seven's proposed price as '*excessive and not ... a genuine commercial offer*'. Indeed, in his cross-examination Mr Mockridge asserted that the term sheet was '*so crazy and lacked such detail*' that it conveyed that Seven was not prepared to deal. Mr Mockridge said that because he did not regard the proposition as serious, he did not carry the negotiations further. This was despite holding the view (as he acknowledged) that it was desirable, in principle, for Foxtel to carry AFL content. Mr Gammell confirmed Mr Mockridge's evidence to the extent that he recalled Mr Mockridge making it clear at the meeting of 7 June 1998 that the proposed price for C7 was unacceptable.

601 Mr Gammell's evidence was that he regarded Seven's offer as reasonable. However, he formed that view largely because he believed that Foxtel was paying Fox Sports in the

range of $12.00 pspm. Although Mr Gammell ultimately learned the true position (that is, that Foxtel was paying US$5.25 pspm), he apparently continued to believe that Foxtel paid $12.00 pspm, at least until April 1999.

602 At the time C7 made its proposal to Foxtel, Seven had not secured any supply agreement with Optus and C7 had not commenced business. As already noted, the C7-Optus CSA was entered into on 30 June 1998.

7.9 C7's Business Plans: July–August 1998

603 Mr Gammell was overseas from 1 July 1998 for three months. During this period, Mr Wood took charge of C7, initially under direction of Mr Bateman. At the Seven Network board meeting of 31 July 1998, Mr Wood presented a preliminary business plan. The plan assumed that C7's channels would be supplied to Foxtel and Austar, as well as to Optus, and that it would be supplied on a tier at $4.00 pspm (inflation adjusted). The business plan estimated costs in the first year at $30.97 million, increasing to $55.71 million in 2008/2009. This reduction in estimated costs for the first year (from $40 million in earlier plans) reflected Mr Gammell's view in consultation with Mr Bateman that costs should be reduced.

604 The board approved the business plan in principle. However, Mr Wood was requested to prepare a revised business plan and a budget '*which included a profit*'. Mr Stokes accepted in evidence that the move from a cost base of $40 million to $31 million in the first year meant that the channel would have a '*different character*'.

605 Mr Wood presented a revised budget for C7 at the Seven Network board meeting of 28 August 1998. This showed **EBIT** (earnings before interest and tax) of $2.2 million on net revenue of $30.5 million and costs of $30.5 million, allowing $2.2 million for '*FTA rights recovery*'. The projection assumed modest revenue in the first year from Foxtel, on the basis that C7 would be on a tier at $4.00 pspm.

7.10 The Issues Crystallise between News and Telstra

7.10.1 News Tries to Persuade Telstra

606 In a letter of 23 July 1998, Mr Macourt, on the instructions of Mr Lachlan Murdoch, asked Mr Moriarty of Telstra to consider financial models for various rights acquisitions from

Fox Sports. Mr Macourt described the three models as follows:

> *'Model 1* *represents the exclusive offer to Foxtel provided to you in June.*
>
> *Model 2* *represents the non-exclusive offer provided on the same date. This model assumes licensing to Austar but not Optus.*
>
> *Model 3* *represents the non-exclusive offer to Foxtel with Foxtel sub-licensing to both Optus and Austar'.*

607 Mr Macourt observed in his letter that, on the basis of then current events, Model 3 appeared to be an unlikely outcome. He concluded as follows:

> *'I regard the recent events with Optus and Seven Sports as a significant opportunity for both Fox Sports and Foxtel. As you are aware News Limited has been very aggressive in obtaining rights for Foxtel including Rugby League, Rugby Union Super 12 and more recently international cricket and Premier League Soccer. I believe there will be the opportunity for Foxtel to dominate sports broadcasting over the next several years. However, this will require News to continue to aggressively pursue sports rights. We are prepared to do this and take further losses over the next several years, not shown in the model provided, if we can secure a sensible financial arrangement with Foxtel'.*

608 Mr Macourt's letter was followed, on 27 July 1998, by a letter from Mr Lachlan Murdoch to Mr Blount. Mr Murdoch said it was worth noting that:

> *'(a) the exclusive offer was priced higher than the non-exclusive offer because, under it, Fox Sports' profitability would depend entirely on FOXTEL's efforts to sublicence the programming;*
>
> *(b) the non-exclusive offer represented a considerable discount on the former Australis arrangements, with deeper volume discounts and price increases limited to CPI increases;*
>
> *(c) the cost of sports programming is increasing substantially ... the suppliers of sports programming treat television as their primary revenue source, and seek top dollar for all subscription driving sports programming;*
>
> *(d) the offers were both priced significantly below Seven's A$10.00 per subscriber proposal to FOXTEL – although there are serious questions about what Seven actually had to offer;*
>
> *(e) News and Fox Sports have put an enormous effort into having the best sports programming available for FOXTEL ...'*

Mr Murdoch continued as follows:

> *'I also hoped that the non-exclusive offer would facilitate Fox Sports' ability to pull Optus away from Seven, and in so doing, break Optus' exclusivity in AFL programming.*
>
> *I want Fox Sports to continue to build its business as a premium sports distributor. This involves buying rights which involve a significant financial commitment for Fox Sports. There are obvious benefits for FOXTEL in knowing that Fox Sports can develop its business in this way.*
>
> *The opportunity to build Fox Sports' base of premium programming and to obtain access to AFL programming will be lost if Fox Sports cannot conclude a reasonable arrangement with FOXTEL in the near future. This will hurt both FOXTEL and Fox Sports'.*

609 As Seven points out, the references to '*pull[ing] Optus away from Seven*' and '*break[ing] Optus' exclusivity in AFL programming*' appear to relate to cl 11 of the term sheet provided by Mr Philip to Optus on 19 June 1998. This provision would have required Optus, if it acquired AFL pay television rights, to procure non-exclusive pay distribution rights to AFL programming for Fox Sports on the same terms as applied to Optus itself. According to Seven, News' plan was:

> *'to sell Fox Sports to Optus, prevent Optus from taking C7, and procure Optus to supply AFL programming to Fox Sports, thus establishing Fox Sports as the dominant supplier of sports programming in Australia'.*

7.10.2 Telstra Responds

610 Ms Lowes replied on 28 July 1998 to Mr Macourt's letter on Telstra's behalf. In her response Ms Lowes said that:

> *'[a]s you know, we are still awaiting an offer from FOXTEL on terms which comply with the Umbrella Agreement'.*

611 This provoked a sharp response from Mr Lachlan Murdoch to Mr Blount, in which Mr Murdoch accused Ms Lowes of unnecessary rudeness. He characterised the use of the phrase '*as you know*' by Ms Lowes as '*not only fallacious but ... also malicious*'. Mr Murdoch could see no point to a meeting when '*our people ... go out of their way to insult one another*'.

7.10.3 Further Meetings: August-September 1998

612 Despite Mr Murdoch's sharpness, Telstra suggested a meeting with News to address the issues between them. That meeting was held on 28 August 1998. Telstra executives prepared a briefing note for Mr Blount (then CEO of Telstra) which summarised the respective views of the parties from Telstra's perspective:

> *'As far as we can tell, News appears to have a very different view of the history of Foxtel and the roles each party has played. News seems to believe that Telstra has gotten exactly what it wanted from Foxtel -- telephony defence and that they have been unable to get what they want -- a dominant position in programming supply and PayTV with returns to match. Apparently, they are very angry about the failure of SuperLeague. They believe that they lost a lot of money, all in the interests of Foxtel.*
>
> *News also seems to believe that they have done all of the hard work to make Foxtel a success and that Telstra has been slow, difficult to deal with, overly dependent on lawyers and ungrateful for their contribution. Except for the Australis winding up litigation, they believe that we have not taken the actions we should have to support Foxtel.*
>
> *The Telstra view differs greatly. Telstra, at best, has ambiguous views of the success of PayTV. It is tired of being "nickel and dimed" about payments into Foxtel/News and can point to numerous instances where it has not been consulted by News on key issues. (For example, News put an offer for FoxSports [sic] to Optus in breach of its legal obligations to Telstra and without our knowledge. We found out from Optus directly.) Telstra is also of the view that News does not act like a partner -- deals are always crafted to be in their best interests, they are sometimes abusive in their dealings with Telstra and will never give a point in Telstra's interests unless they can see a quid pro quo'.*

The note commented on sports programming as follows:

> *'FoxSports [sic] is one of the significant costs to Foxtel as well as an important driver of subscriptions. We need closure here. ...* ***In addition, all parties seem to believe that AFL rights for PayTV will be sold in the next few months. Obviously, we would like these rights to be secured for Foxtel****'.* (Emphasis added.)

613 A separate Telstra briefing note identified a number of key issues to be discussed at the meeting. They included:

> PBL's option to acquire an interest in the Foxtel Partnership;
>
> the strengthening of the Foxtel-Austar relationship;

the possibility of satellite transmission by Foxtel;

the desirability of Telstra '*bundling*' Foxtel with its telephony products; and

the acquisition of the AFL rights.

614 A further meeting took place between News and Telstra representatives, including Mr Lachlan Murdoch and Mr Blount, on 9 September 1998. A Telstra paper identified two related issues concerning Fox Sports that had emerged from the meeting, namely '*equity*' and the programming agreement with Foxtel. On the question of equity:

> '• *Telstra wants to ensure "appropriate" costs for sports programming. One way is to have all parties "equalised" in both FOXTEL and Fox Sports*
>
> • *Telstra is willing to match its interests in Fox Sports with those of PBL'.*

On the question of programming supply, the paper suggested an exclusive supply agreement between Fox Sports and Foxtel at US$2.73 pspm for an eight year term, with the parties agreeing '*to cooperate to acquire additional special rights (e.g. AFL) with acquisitions via special purpose [joint ventures]*'.

615 The Telstra paper identified the following key issues:

> '• *Seven has the AFL rights until 2001 and has indicated that it intends to retain them*
>
> • *Seven has told Telstra that it is willing to work with Fox Sports*
>
> • *Telstra would prefer to avoid a bidding war on AFL'.*

The potential solution was seen as the following:

> '• *Bring Seven into Fox Sports or create a new entity for sports programming*
>
> • *Potential equity*

30%	***30%***	***20%***	***20%***
News	***PBL***	***Seven***	***Telstra***

> • *Agree to work collaboratively to promote sports programming in*

conjunction with FOXTEL

- *key existing rights given to new entity at cost*
- *new rights to be purchased by entity*
- *first and last rights if purchased as part of FTA (subject to existing agreements between the parties)*
- *parties agree not to hoard rights'.*

616 Mr Murdoch sent Mr Blount a note the after the meeting of 9 September 1998, referring to a number of Telstra's expressed concerns. One such fear was that PBL and News might '*gang up*' on Telstra. Another of Telstra's fears noted by Mr Murdoch was that:

> *'value may flow out of the partnership through programming costs, in particular, through Fox Sports. You noted your desire to have certainty, transparency and fairness regarding sports programming costs. I was, and remain, surprised by Telstra's proposed pricing for the service. As I said yesterday, in my view Telstra's proposal simply does not reflect the commercial or competitive environment for sports rights. Once the opportunity to take Fox Sports non-exclusive a couple of months ago was lost, reducing the price for the service is uneconomic'.*

617 During September 1998, discussions continued between News and Telstra in relation to the pricing of Fox Sports to Foxtel. At a meeting between Mr Macourt and Ms Lowes on 16 September 1998, Ms Lowes put the proposition that a '*fair price*' for a sports service, excluding certain premium events such as the Olympics, was US$2.73 pspm. This prompted a letter from Mr Macourt on 17 September 1998 expressing his '*deep concern and disappointment about the conduct of our partnership relationship*'. Mr Macourt considered that Telstra's approach reflected '*deeply on the ability and integrity of News*' and that the negotiations would have to wait until the return of Mr Blount and Mr Lachlan Murdoch from overseas.

618 On 23 September 1998, a meeting took place between Mr Philip, Mr Frykberg, Ms Lowes and Ms Dodd to discuss the Fox Sports issue. On 30 September 1998, Ms Lowes sent a fax to Mr Philip describing the meeting as '*constructive*'. As had been foreshadowed at that meeting, she provided News with a list of '*Special Programming*' events that Telstra considered to be '*unique in nature ... and likely to be expensive*'. According to Ms Lowes, Telstra believed that any deal between Fox Sports and Foxtel should not include these events.

It would be better if they were purchased separately through special purpose joint ventures. The events nominated by Telstra included the AFL, the Rugby World Cup, the Olympics, the Soccer World Cup, the Cricket World Cup and the Ashes cricket series.

7.11 Telstra's Responses to the Fox Sports-Austar Licence and Further Negotiations with News: October-November 1998

619 It appears that Telstra finally became aware that Fox Sports had finalised a deal with Austar (the Fox Sports-Austar CSA) at a luncheon that took place between Telstra and Austar representatives on 13 October 1998. Ms Lowes reported that News had '"*done the dirty" to us on Fox Sports*'. She thought that the price charged to Austar was around US$5.00 pspm, but considered the agreement a clear breach of News' obligations to Foxtel. Ms Lowes identified three options for Telstra:

> *'1. Use the breach as grounds to terminate the partnership. Assuming it gets to this, News has 120 days to remedy. If they do not, we can buy them out at cost.*
>
> *2. Try to negotiate a deal with Seven for [Fox] Sports and use that as a chip to force them down.*
>
> *3. Get Rupert [Murdoch] or someone to get them to start acting like partners. (Remember they still owe us an offer on Super League.)'*

620 Ms Lowes sent Mr Blount a briefing note on 20 October 1998, in preparation for a scheduled meeting with Mr Rupert Murdoch in New York on 27 October 1998. The note recounted conflicts between News and Telstra and complained that the Austar deal had caused Foxtel '*real commercial harm*'. Oddly enough, Ms Lowes considered that the harm resulted from the fact that the price charged to Austar (which she still thought to be around US$5.00 pspm) was **too high**. She thought that this was an '*overvalue*' imposed on Austar by '*some collateral pressure*'. She again wanted News:

> *'to start behaving like partners ... If they cannot, or will not, I personally believe that we should seek to get rid of them'.*

621 Ms Lowes informed Mr Blount that Telstra had '*retained expert consultants*' and on their advice had developed the view that the Fox Sports programming was worth US$2.73 pspm. Ms Lowes suggested that Telstra's options included applying pressure on News through other parties including PBL:

> *'[PBL has] a good knowledge of the sports programming business (although their FTA interests will take precedence). On balance, we think they will be prepared to assist FOXTEL on price despite their future option to have synthetic equity in FoxSports [sic], as we know they have doubts about being with News through a synthetic interest with no control'.*

622 Mr Macourt and Mr Philip prepared a briefing note on 21 October 1998 for Mr Murdoch in advance of the scheduled meeting. It canvassed the possibility that Telstra and News should go their separate ways. The letter included commentary on the Fox Sports-Austar deal concluded on 3 September 1998:

> *'Whilst Telstra has not been informed of the non-exclusive deal struck with Austar at US$4.75 for satellite and US$5.25 for cable, it was imperative to Fox Sports and FOXTEL that Austar keep taking Fox Sports as its principle [sic] sports service rather than moving to the Optus Vision Channel Seven sports service which it was threatening to do. Even Telstra acknowledges that keeping Austar as a customer is crucial to both FOXTEL and Fox Sports. News is of the view that it was free to do the deal with Austar but had no confidence that Telstra would have permitted FOXTEL to conclude a deal with Austar in time on the back of exclusive supply from Fox Sports to FOXTEL (it was our expectation that Telstra would have happily used Austar's threats to go to Optus Vision and Channel Seven to put pressure on Fox Sports to reduce the price of Fox Sports to both FOXTEL and Austar)'.*

623 It is not clear whether the meeting scheduled for 27 October 1998 took place. In any event, another meeting was scheduled for 2 November 1998 between Mr Blount and Mr Lachlan Murdoch to discuss the Fox Sports issues. The briefing note for Mr Blount recommended that Telstra move no further than US$3.70 pspm as an average price (that is, for the long-term supply of Fox Sports to Foxtel). This was said to be what Optus paid for Seven Sports and was described as '*very generous*'. The note pointed out that Telstra had sought programming exclusivity for Foxtel because (among other reasons):

> *'strategically we would prefer FOXTEL to be the programming landlord to other pay TV operators'.*

News' view was recorded in the note as follows:

> *'News sought to do a deal with Optus non-exclusively; then did a deal with Austar, undermining FOXTEL's exclusivity. Clear goal to be the industry programming landlord for sports'.*

624 On 5 November 1998, following the meeting between Mr Blount and Mr Murdoch,

Mr Mockridge wrote to Mr Blount offering his (Mr Mockridge's) perspective on the dispute between News and Telstra. Mr Mockridge recorded that at about the time Fox Sports had terminated its arrangement with Australis, he had supported a deal for Fox Sports on broadly the same economic terms as Fox Sports previously had in place with Australis. He noted that Ms Lowes had the opportunity at that time to reserve Telstra's position in relation to this deal but she had chosen not to do so. Mr Mockridge thought that in these circumstances it was fair that any new deal be structured around the old Australis arrangements. However, Mr Mockridge noted that he had also told News that its initial attempts to raise the price of Fox Sports were unreasonable.

625 A further meeting between Mr Blount and Mr Lachlan Murdoch took place over dinner on 17 November 1998. It appears that at that meeting or earlier, Mr Murdoch provided Mr Blount with material that disclosed the price paid by Austar to Fox Sports. Ms Lowes thought that the revelation had occurred by accident. In any event, it propelled Ms Lowes to new heights of indignation. In an email to Mr Blount of 20 November 1998 she said:

> *'As you will read below, the deal with Austar has an average price to them of US$3.70. (This is, somewhat coincidentally, the amount you told Lachlan we would accept as a ceiling.) The deal they are offering Foxtel has an average price of approximately US$5.30!!! And Foxtel has more subscribers than Austar!!!*
>
> *Personally, I find this to be the most concrete demonstration to date that News does not view itself as a partner of Telstra.*
>
> *Do they view us as fools, suckers, idiots or all of the above??! We have been trying to negotiate this thing with them since May. We have acted in good faith at every opportunity and, I am pleased to say, have been proved correct in every position we have taken.*
>
> *What can they say? They have walked out of meeting [sic], done deals behind our back, failed to pay us money they owe us on FoxSports [sic], failed to tell us about key initiates that impact us (eg., their new broadcasting business), etc.*
>
> *Where will it end?'*

A summary attached to the email recorded the following information provided by Mr Murdoch to Mr Blount at the dinner:

> *'If FOXTEL got Austar's deal, its average price would be around US$3.70.*

We do not understand how News could leave FOXTEL paying the highest prices in the industry while subsidising others. This is a major partnership issue with grave implications. They must give FOXTEL a deal or bear the consequences'.

626 On 1 December 1998, Mr Blount sent a firm letter to Mr Lachlan Murdoch (although perhaps not in language as passionate as Ms Lowes might have wished), as follows:

'For Telstra, the terms of supply of Fox Sports, and the way in which News deals with Telstra in relation to Fox Sports, raise important matters which go to the heart of the alliance between our companies.

...

News' approach to negotiating with Telstra and its dealings with Austar, in particular, represents conduct that appears inconsistent with the fundamental principles which govern the relationship between our companies, particularly those relating to programming and good faith.

In these circumstances, I seek a full explanation for News' conduct in relation to the Fox Sports issue and, in particular, its dealings with Austar'.

7.12 Seven's Second Proposal to Foxtel: 5 November 1998

7.12.1 The Proposal

627 On 5 November 1998, shortly after PBL acquired its 25 per cent interest in Foxtel, Mr Bateman sent a letter to Mr Mockridge, with a copy to Mr Stokes and Mr Moriarty. The letter referred to earlier discussions between Mr Mockridge and Mr Gammell regarding the supply of '*Seven's Sports Pay Service*' to Foxtel and noted that all figures discussed had been quoted in Australian dollars. The letter also noted that Seven's Sports Pay Service had started on 1 September 1998 and was predominantly based around Australian domestic sport. Mr Bateman expressed the belief that the Seven Service '*would complement your current sports channels*'. He proposed that:

'Foxtel acquire the Seven Sports Pay Service and place it in the basic service. This would create a level playing field for your subscribers, Seven and Foxsport [sic] and would not distort the competitive environment.

As to price, I believe that Seven should receive the same fees and conditions as those we understand are applying to Foxsport. However, in consideration of the current penetration by Foxtel, we would consider negotiating an appropriate discount'.

628 Mr Stokes accepted in his evidence that the proposal was '*conceived and drafted on or about 4 November 1998*' and that there had not been any lengthy consideration given within Seven to whether the proposal was reasonable. Mr Stokes also accepted that, although the letter referred to the '*same fees and conditions as those we understand are applying to [Fox Sports]*', Seven had no clear idea what those fees and conditions were. Further, the letter, which appears to have been drafted with the assistance of Seven's solicitors, did not include any term sheet.

7.12.2 ACCC Becomes Involved

629 On 6 November 1998, Seven's solicitors forwarded a copy of Mr Bateman's letter of the previous day to the Australian Government Solicitor ('**AGS**'), which acted for the ACCC. The solicitors' letter noted that Seven had no objection to the ACCC writing to Foxtel and to News concerning Seven's proposal.

630 With surprising alacrity, the AGS forwarded to Seven's solicitors on the same day a draft letter to Foxtel for their urgent comment. Later that day, the ACCC sent the letter to Foxtel Management's Director of Legal and Business Affairs. The only substantial difference between the final version and the earlier draft sent to Seven's solicitors was the addition of a concluding paragraph.

631 The AGS's letter to Foxtel noted that the ACCC was making enquiries in relation to the competition implications of the '*equalisation*' of the interests of News and PBL in the Foxtel Partnership. The letter stated that the ACCC had been informed that Seven had:

> *'offered Seven's pay TV sports programming to Foxtel on favourable terms and that Foxtel has declined the offer. It has been suggested to the [ACCC] that Foxtel has declined the offer because Foxtel proposes or expects to obtain the rights to sport comprised in Seven's programming, particularly rights to the AFL, direct from the sporting organisations concerned or indirectly through one of its associated companies (such as News ... or Fox Sports) with a view to using the pay TV rights for inclusion in the Fox Sports channels and the free to air rights being used for Network Nine programming. I would be grateful if you would let me know whether Foxtel has declined Seven's offer of pay TV sports programming and, if so, Foxtel's reasons for declining the offer. Further, would you please comment on the suggestions referred to above which have been put to the [ACCC] as to Foxtel's strategy.*
>
> *The [ACCC] understands that the above mentioned "equalisation" arrangements are to be put in place in the near future, and, accordingly I*

would be grateful for your urgent response to this letter'.

In his evidence, Mr Stokes was unable to identify which was the offer '*on favourable terms*' declined by Foxtel, although he maintained that both the offer of June 1998 and the letter of 5 November 1998 had been on favourable terms.

632 Mr Mockridge's evidence was that he had been surprised to receive the letter from the ACCC, since Foxtel had not yet responded to Seven's proposal set out in its letter of 5 November 1998. He said that his opinion at the time was that Seven's letter had been:

> *'a stunt and that Seven was more interested in pursuing a regulatory or legal strategy than a genuine commercial one'.*

I accept that that was Mr Mockridge's view at the time.

633 Foxtel replied to the ACCC's letter on 10 November 1998. The reply expressed concern that Foxtel should have received a general letter from Seven offering to consider the supply of a sports channel to Foxtel and then, on the very next day, a letter from the ACCC alleging that Seven's offer had already been declined. Foxtel's letter went on to say that previous discussions with Seven had been terminated more than four months previously, having:

> *'involved an offer by Seven for the supply of a bundle of channels, including a sports channel, which were not even in existence at the time of those discussions'.*

Foxtel then sought to correct '*two particular misapprehensions*' set out in the ACCC's letter:

> *'FOXTEL has not received an offer from Seven of pay TV sports programming on favourable terms. Also, whilst FOXTEL would like to acquire rights to AFL programming if they become available, we have no present expectation of being able to do so'.*

634 On the same day, 10 November 1998, Seven's solicitors provided the ACCC with final drafts of affidavits by Ms Plavsic and Mr Bateman. Presumably, these draft affidavits were intended to support Seven's contention that the ACCC should intervene to prevent PBL from acquiring a stake in the Foxtel Partnership.

7.12.3 Foxtel Responds to Seven's Offer

635 Mr Mockridge responded to Mr Bateman's letter of 5 November 1998 on 23 November 1998. Mr Mockridge suggested that the best way to progress the matter was for Seven to provide a detailed analysis of Seven's Sports Pay Service schedule and for a meeting then to take place at which Seven could describe the programming line-up in more detail. The letter continued:

> *'I should caution that ... FOXTEL's disposition is not to add additional channels at this time given the amount of new programming that has entered the market in the last three years and instead [sic] our desire to enhance our existing line-up. In particular, I would be especially hesitant to add anything to basic and I would also be reluctant to consider a service which is branded the same as one of our free-to-air competitors (be that Seven, Nine or Ten)'.*

Seven apparently did not provide the briefing on the proposed schedule that Mr Mockridge had requested in this letter.

636 Mr Mockridge's report to Foxtel Management's board meeting of 1 December 1998 noted that Foxtel had received approaches from ESPN and Seven for carriage of their respective sports services. Mr Mockridge reported as follows:

> *'ESPN accepts that it is unreasonable to gain entry to FOXTEL basic, but they have sought placement on Entertainment Plus at $2 pspm. Seven has sought placement on basic for its prospective sports channel at "some discount" to FOX Sports. Unfortunately, Seven's proposal arrived one day before FOXTEL received a letter from the ACCC asking why we had rejected a Seven offer, indicating to us there was possible cooperation between Seven and the ACCC. I have indicated to ESPN that I do not see an early opportunity to carry its service, and to Seven that further details are required to enable proper consideration of their proposal, but that carriage on basic is an unrealistic expectation'.*

7.12.4 ACCC Takes No Action

637 On 3 December 1998, the ACCC wrote to Seven's solicitors stating that it had decided not to take any action under the *TP Act* against the acquisition by PBL of a 25 per cent interest in the Foxtel Partnership. The ACCC stated that it had reached the view, after obtaining legal advice, that:

> *'insignificant evidence of anti-competitive effects or purposes arising from the alliance in Foxtel of the interests of [News, Telstra and PBL], was available to support court proceedings'.*

The ACCC simultaneously issued a media release confirming its decision. On the same day, News and PBL entered into the Fox Sports Option Deed, by which News granted PBL an option to acquire 50 per cent of News' interest in Fox Sports.

7.13 Supply of C7 to Austar

638 The supply of C7 to Austar indirectly bore upon the dispute between Telstra and News. Telstra repeatedly invoked the terms of the agreement reached between C7 and Austar to justify its opposition to the terms sought by News for a long-term deal for the supply of Fox Sports to Foxtel. It is therefore convenient to deal here with the negotiations for the supply of C7 to Austar.

7.13.1 Negotiations between Optus and Austar

639 The C7-Optus CSA permitted Optus Vision to sub-license Seven's sports channel to Austar. Negotiations commenced in July 1998. In a letter of 7 July 1998, Optus proposed a licence fee of $6.00 pspm for the first 200,000 subscribers, with reductions as the number of subscribers increased. The channel to be provided was not to include NRL coverage.

640 Austar responded on 27 July 1998, pointing out that C7 could not meet Austar's total sports requirements because it needed *ESPN* for its '*international requirements*' and '*NRL rights represent[ed] an additional cost as well*'. Austar proposed a fee for basic carriage of $4.50 pspm for the first 200,000 subscribers, decreasing thereafter to $3.00 pspm for subscribers over 300,000. Austar proposed carriage on a tier at $5.00 per unit.

641 After further deliberations, including a meeting with Mr Stokes, Mr Mann of Austar wrote to Mr Weston of Optus on 25 August 1998. The letter stated that Mr Mann and Mr Fries had met recently with Mr Stokes and were '*suitably impressed*' with his vision for pay television. Austar's decision as to sports channels was being made difficult by '*financial and channel capacity limitations which effectively make us choose between C7 Sports/ESPN and FOX Sports*'. The letter indicated Austar's preference for taking C7 on a tier.

642 Mr Mann's letter identified two major obstacles to Austar granting C7 basic carriage. The first was NRL:

> *'Over the course of the last few weeks, we have repeatedly attempted to procure NRL rights for inclusion into C7 Sports to no avail.* ***Simply put, with 2/3 of our customer base and market potential north of Wagga Wagga, our inability to deliver this important sporting code is an unacceptable risk****.*
>
> *Furthermore, Fox Sports knows this and is demanding our deal be concluded before 1 September or we risk missing the finals, which in our view would kill our business. What can SEVEN do to ensure that we get NRL rights, if anything?'* (Emphasis added.)

The second issue was price. Austar offered C7 a price of $3.00 pspm for the first 200,000 subscribers, reducing thereafter to $2.00 pspm for subscribers over 300,000. (Ultimately Austar took both C7 and Fox Sports, the latter on basic, the former on a tier.)

643 At a meeting between Seven and Optus representatives on 24 September 1998, Mr Lattin of Optus confirmed that negotiations with Austar had broken down and that Seven should approach Austar independently in order to negotiate carriage of C7.

7.13.2 Negotiations between Seven and Austar

644 On 2 October 1998, Mr Stokes and Mr Bateman of Seven met with Mr Mann and Mr Fries of Austar. In a subsequent memorandum, Mr Bateman confirmed that further negotiations had occurred and that, as discussed with Mr Stokes, Seven's objective was to get C7 on basic at a price range from $4.50 to $6.50 pspm, although Austar favoured placing the service on a tier. In his evidence, Mr Stokes had no recollection of the conversation, but he agreed that he would have been content for C7 to be on a tier with Austar at $6.50 pspm. I find that he also would have been content with $4.50 pspm on basic.

645 Mr Bateman and Mr Wood met with Mr Mounter on 28 October 1998 (Mr Mounter having come to Sydney in anticipation of taking up his appointment as CEO of Seven in January 1999). Mr Mounter supported their objectives, but thought that the risk of being on a tier was reduced with a small basic service. On the same day, Mr Stokes lunched with Austar executives. Mr Stokes said that he could not recall the discussions, but it is very likely that he negotiated with the Austar representatives for the supply of C7. At this time, Mr Gammell was also aware of the state of negotiations with Austar.

646 On 12 November 1998, Mr Mann sent a fax to Mr Bateman asserting that because Austar had distributed Fox Sports on basic for over three years and for other reasons '*for*

AUSTAR to even consider basic carriage C7's pricing would have to be very low'. Mr Bateman subsequently reported to Mr Stokes that Austar's position was that C7 was not directly comparable with Fox Sports and that any reasonable comparison required C7 and *ESPN* in effect to be bundled.

647 Mr Bateman and Mr Wood met with Mr Mann on 24 November 1998. The discussion at that meeting centred on whether C7 would be sold on a stand alone basis (the sole product on a tier) or as a component of a tier that included *ESPN* and entertainment channels. Either Mr Bateman or Mr Wood suggested at this meeting that C7 was worth about $4.00 pspm on a tier.

648 On 26 November 1998, Mr Mann proposed a three year arrangement whereby Seven would be paid $1.75 pspm if C7 was included in a five channel entertainment tier, or $3.50 pspm if C7 was on a stand alone tier. The evidence is inconclusive as to whether Seven made a counter offer at the time. However, in about November 1998 Mr Wood prepared a five year business plan which assumed that C7 would be provided on a tier at $2.50 pspm (inflation adjusted), with an initial penetration rate of 33 per cent increasing to 50 per cent in the second year. (The business plan also assumed that C7 would be supplied to Foxtel on a tier at $4.00 pspm, with an initial penetration rate of 16 per cent, increasing to 20 per cent in the second year.)

649 By letter dated 16 December 1998, Austar offered to take C7 for five years on a non-exclusive basis. The fee was to be $2.00 per general entertainment tier subscriber and $3.50 per stand alone subscriber (or 50 per cent of revenue, whichever was greater). The stand alone offer related to particular licences held by Austar, predominantly in Tasmania. The offer related to a single C7 channel, as Austar already took NRL matches and therefore had no interest in C7's overflow channel.

650 Mr Wood assumed day to day control of the finalisation of the C7-Austar arrangement in early February 1999. Further negotiations took place in February 1999. One issue was the length of the proposed arrangement. Austar suggested a four year term, but Seven's solicitors replied that:

> *'Seven does not agree to a 4 year term. If Seven does not have the AFL rights after 2001 it probably will not continue to produce the Seven Service'.*

7.13.3 C7-Austar CSA: March 1999

651 Heads of Agreement were ultimately executed by C7 and Austar on about 5 March 1999 (the C7-Austar CSA). C7 licensed its channel (which had been renamed '*C7 Sport*') to Austar on a non-exclusive basis for a three year term, commencing on 1 April 1999 and expiring on 28 February 2002. The C7 channel was to include minimum AFL content in terms that mirrored the C7-Optus CSA. The fees remained unchanged from the term sheet of 16 December 1998. C7 was to be carried on the general entertainment tier with at least four high quality channels, including *ESPN*.

652 The price was to be $2.00 pspm for subscribers to the tier. The price for MDS subscribers was $3.50 pspm, reflecting the fact that C7 was supplied to those subscribers on a stand alone tier. (In fact from May 1999 to February 2002 C7 was available to satellite and cable subscribers as part of the Austar Deluxe package (a tier subscription), which included *Fox 8*, *ESPN*, *Hallmark*, *UKTV* and *FX*, all general entertainment channels.)

653 Mr Wood gave evidence that he negotiated on behalf of Seven the best terms that he thought could be obtained from Austar. I accept that evidence. Mr Stokes acknowledged that he had been kept apprised of the precise status of the negotiations between C7 and Austar until he went overseas in mid-December 1998. Mr Gammell claimed that he knew nothing of the negotiations between 23 November 1998 and 5 March 1999. I do not accept that evidence, which flies in the face of the objective circumstances and, for that matter, Mr Wood's evidence. Mr Stokes and Mr Gammell were kept up to date with the negotiations with Austar in a timely fashion and were aware of the terms being proposed.

7.14 Negotiations between News and Telstra

7.14.1 Mr Blount and Mr Murdoch Meet Again

654 A News document prepared on 11 December 1998, probably by Mr Philip and apparently copied to Mr Lachlan Murdoch, justified a proposal that had previously been put to Mr Blount. The proposal was for Foxtel to pay a fee of US$5.25 pspm (inflation adjusted), reduced to US$4.00 pspm for more than 600,000 subscribers. The memorandum complained that News had obtained inadequate returns from Fox Sports and that Telstra was asking News '*to subsidise the Foxtel programming*'. The memorandum also addressed the Austar issue:

'• Exclusivity is available other than in Austar territories consistent with existing programming arrangements between Foxtel and Austar.

- *Australia wide exclusivity was available at US$6.25 but the offer was not taken up.*

- *It was strategically imperative for Foxtel and Fox Sports to get Austar obliged to carry Fox Sports, rather than Optus C7, as its primary sports service – we were not even close to a deal with Foxtel when Austar was threatening to commit to Optus C7.*

If Austar had committed to Optus C7:

- *Optus C7 services would become associated with key Foxtel channels.*

- *Foxtel channel branding on Austar would deliver benefits to Optus C7.*

- *Austar would become less attractive as an acquisition for Foxtel and Austar's territory would become harder to recapture for Foxtel.*

- *Fox Sports would not be in a position to provide a viable service if Austar subscriber revenue was not available to Fox Sports'.*

655 A further meeting took place on 17 December 1998 between Mr Blount and Mr Murdoch, with Ms Lowes and Mr Macourt participating. Mr Lowes prepared a file note of the meeting, the accuracy of which there is no reason to doubt. The note included the following:

'Frank [Blount] said that he would like to raise the same point he made on the phone to Lachlan [Murdoch] – This is no longer just about the merits of US$5.25; it is now about the deal they did with Austar. Frank asked how Telstra could accept US$5.25 when Austar pricing was US$3.70.

Lachlan then said that News had to [do] the deal with Austar at that price because Austar was negotiating with Seven and that they risked losing them to C7. He said that they are good negotiators and they got that price. Frank then asked why we had to find out about such a deal via indirect methods and why we never heard about it from News. Lachlan responded by saying that "Well we were at a total impasse with Telstra on FoxSports [sic] and we needed to complete the deal." He went on to explain they needed the higher price from Foxtel to make a reasonable return and provide quality programming to Foxtel.

Frank asked why Telstra should be "subsidising" Austar. Lachlan explained that it was essential for FoxSports to have both Austar and Foxtel to make a return and provide quality programming. He said that Foxtel benefited from this.

> *I asked why Foxtel, with more subscribers than Austar, should be penalised for having News in the partnership – after all Foxtel should be able to leverage a deal between C7 and FoxSports. Peter [Macourt] replied that Foxtel would be hurt by not having FoxSports as it could not compete against Optus. Frank asked if Foxtel could do a deal with Seven. I said that Ian Philip had told me that "there was no way in hell News would agree to that." [Note: He also said that they would veto it at the Foxtel Board.] Peter Macourt muttered that a deal between Foxtel and Seven was not a possibility and that PBL would not agree to it either'.*

656 In his evidence, Mr Macourt accepted that his own position at the time was that News would not agree to the carriage of C7 on Foxtel until a long-term supply agreement was in place. Mr Macourt also accepted that, although he could not rule out the possibility that Telstra might agree to a long-term deal between Fox Sports and Foxtel, he had said in apparently unequivocal terms at the meeting that there was no possibility of a deal between Foxtel and Seven. However, he also said in evidence that he understood that Telstra's major concern was to achieve a lower price for the supply of Fox Sports than to ensure that Foxtel took C7.

7.14.2 Each Side States Its Position

657 On 22 December 1998, Ms Lowes sent Mr Philip a '*without prejudice*' draft term sheet proposing that Foxtel pay US$5.00 pspm (inflation adjusted) for Fox Sports, with volume discounts as the number of subscribers increased. In response, Mr Philip proposed a meeting in the New Year.

658 On 8 January 1999, Mr Akhurst sent a letter to Mr Philip drafted by Telstra's lawyers. The letter asserted that the long-term deal between Fox Sports and Austar was done '*behind Telstra's back*'. It also rejected News' contention that the Austar deal was permissible because Fox Sports, prior to reaching agreement with Austar, had made a '*Complying Offer*' to the Foxtel Partnership as required by the Umbrella Agreement. Telstra maintained that the letter of 4 June 1998 from News to Foxtel, containing alternative proposals, did not amount to a Complying Offer. Thus News was in breach of the Umbrella Agreement.

659 On 11 January 1999, Telstra's then chairman (Mr Hoare) and CEO (Mr Blount) met with Messrs Rupert and Lachlan Murdoch. No detailed record of that meeting was in evidence, but in the course of the meeting the Murdochs proposed that the interests of Telstra,

PBL and News in the Foxtel Partnership should be equalised at one third each.

660 The dispute with News was considered by a sub-committee of the Telstra board on 21 January 1999. An information paper prepared for that meeting, presumably with the involvement of Ms Lowes (who attended the meeting), included the following passages:

> *'At a meeting in December with Lachlan Murdoch, News admitted they had concluded a deal with Austar at this price, and defended it as necessary to win Austar's business over C7 (the competing sports channel produced by Seven). In a subsequent conversation with Danita Lowes, Peter Macourt echoed this view, saying that Fox Sports could not afford to – and would not – give FOXTEL an equivalent deal. He had no explanation as to why Telstra had not been told of the Austar deal, other than that we would have objected to it if we had known.*
>
> *...*
>
> *In various discussions and correspondence, News has argued that the prices put forward by Telstra are commercially unrealistic. They say the cost of sports programming is rising, that sports is a key subscription driver (despite the anti-siphoning rules), and that the price they seek is essential to enable Fox Sports to compete with C7 in acquiring a stronger programming lineup. ... Neither PBL nor News will accept FOXTEL using C7 programming. Accordingly, they argue that FOXTEL cannot, in effect, expect the benefit of pricing that might be determined in a competitive market.*
>
> *...*
>
> *News has indicated they would block FOXTEL dealing with C7, thereby denying FOXTEL the benefit of a competitive negotiation and a market price. Meantime, they are extracting and seeking permanently to extract the highest sports prices in the industry from FOXTEL, knowing that Telstra is funding 50% of this, and News only 25%'.*

661 An exchange of letters then took place between Mr Hoare and Mr Blount and the Murdochs. The former wrote on 26 January 1999, rejecting any consideration of the equalisation proposal until '*the existing fundamental partnership issues are resolved'*. They complained that Foxtel was bearing higher programming costs than either Optus or Austar. The Murdochs replied on 5 February 1999. They asserted that Fox Sports was a significantly better service than C7 and pointed out that the licence to Austar was non-exclusive and subject to certain restrictions. The two were therefore not comparable. Their letter continued:

> *'More importantly, the use of the price paid by Austar as a benchmark misconceives the role of Fox Sports and the reasons for licensing its*

programming to Austar.

The primary purpose of Fox Sports is to provide sports programming to FOXTEL. The price payable by FOXTEL should be calculated by reference to the cost of providing the relevant programming plus a reasonable rate of return on the capital invested in Fox Sports.

High-quality sports programming is essential to the success of FOXTEL. It is also very expensive to acquire and to produce. If the costs of doing so were borne by FOXTEL alone, they would be prohibitive. By licensing Fox Sports programming to Austar in the areas in which Austar operates, Fox Sports is able to reduce the costs of sports programming to FOXTEL. The terms Fox Sports agreed with Austar were the best terms it could reach in a context where Austar was threatening to acquire its sports programming from Seven. If that happened, sports programming to FOXTEL would be prohibitively expensive. Moreover, there would be a number of strategic disadvantages of Austar acquiring its programming from Seven, particularly in an anti-syphoning [sic] environment.

...

[Telstra] maintains that if Fox Sports had paid a "reasonable" price for its programming, the cost to FOXTEL would be US$2.73 per subscriber. We all know this is nonsense.

The approach taken by Telstra is misconceived. It demonstrates a lack of understanding of what is necessary to create a high quality sports channel. It overlooks the fact that the costs of Fox Sports programming was largely determined at a time when News clearly did ***not*** *have control of Fox Sports.*

...

We regret that Telstra was not consulted at the time Fox Sports did a deal with Austar. We agree that in the normal course of events it would have been appropriate for that to happen. However, the agreement was reached in a context where Telstra was taking a completely unrealistic and uncooperative approach to the supply of sports programming by Fox Sports'. (Emphasis added, except for '**not**'.)

7.15 Dr Switkowski Changes the Tone

662 On 1 March 1999, Dr Switkowski succeeded Mr Blount as CEO of Telstra. Dr Switkowski had had no involvement in pay television since his departure from Optus in June 1997. Two matters came to his attention relating to pay television shortly after he took office:

'One was the absolute level of FoxSports [sic] pricing to Foxtel, which we in Telstra believed was too high, and secondly the conduct of News with respect

to the Austar contract which we judged to be incompatible with the normal behaviours of a partner and that the pricings were inconsistent with the then pricing to Foxtel'.

663 It fell to Dr Switkowski to answer the letter sent by the Murdochs on 5 February 1999. He did so in a letter of 10 March 1999, which rejected the equalisation proposal. Dr Switkowski suggested that the way forward was for the management teams to negotiate as to the terms for the supply of Fox Sports to Foxtel.

664 Dr Switkowski's response was conciliatory in tone. This reflected his reluctance to pursue litigation except as a last resort. He gave three reasons for adopting this view:

> the '*dollar magnitude*' of the issue (which he estimated at $5 million per annum for Telstra) '*relative to the hurt*' did not warrant litigation;
>
> there was no real determination within Telstra to press the '*niggling*' Fox Sports issue through litigation; and
>
> there were '*Cold War warriors*' within Telstra, including Ms Lowes, who were '*fighting a war that should have been left behind*'.

665 Mr Moriarty followed up Dr Switkowski's letter with a detailed letter to Mr Lachlan Murdoch on 15 March 1999. Mr Moriarty stated that the price of US$2.73 pspm put forward by Telstra as appropriate for the supply of Fox Sports to Foxtel, had been based on removing some sporting events from the Fox Sports programming line-up. Telstra was not insisting on US$2.73 pspm as the price and indeed there had been substantial movement in recent negotiations. Mr Moriarty commented on News' claims:

> *'News asserts on the one hand that Fox Sports programming is vastly superior to Seven's and on the other hand that the pricing terms agreed with Austar cannot be regarded as a benchmark because they had to be accepted by Fox Sports in order to prevent Austar from acquiring Seven's sports programming. These claims are not reconcilable.*
>
> *Austar is an experienced and successful operator competing in the same broad market as FOXTEL. That Austar was unwilling to pay more than it did (Austar's average price would be approximately US$3.70 if FOXTEL's subscriber numbers were applied to it) for Fox Sports programming, and News accepted that price demonstrates that neither Austar nor News believed that superior quality of Fox Sports programming created a compelling reason for Austar not to take Seven's alternative offering.*

There is no evidence that Fox Sports programming is so superior that the terms on which alternative programming would be available from Seven are not a relevant competitive benchmark for the pricing terms on which Fox Sports programming should be made available to FOXTEL'.

The letter concluded as follows:

'Telstra is extremely hopeful that it will be possible to mend the rift in the FOXTEL relationship and resolve the Fox Sports programming price issue. However, that will be achievable only if News will:

abandon its claim that the relevant agreements do not constrain the non-exclusive supply of News' programming to third parties;

agree to the Austar deal being unravelled and replaced by a sub-licence from FOXTEL to Austar as originally contemplated;

furnish detailed information to Telstra about Fox Sports programming costs and commitments, with full transparency on assignment and allocation of SANZAR and other costs under related party transactions; and

commit to negotiating a reasonable agreement for the supply of Fox Sports programming to FOXTEL'.

7.16 Foxtel Considers C7: Early 1999

666 On 24 February 1999, a luncheon meeting took place attended, among others, by Messrs Mockridge and Freudenstein of Foxtel and Messrs Mounter and Wood of Seven. At this meeting, one of the Foxtel representatives expressed concern about C7 on Foxtel's line-up because its presence would promote the 7 Network. Mr Wood said that this would not be the case and Mr Mockridge then suggested that Mr Wood get together with Mr Freudenstein to sort out the terms on which C7 might be offered to Foxtel. A meeting between Mr Wood and Mr Freudenstein took place on 17 March 1999.

667 In early March 1999, Mr Mockridge of Foxtel Management became aware of the C7-Austar CSA. He also became aware that Austar had decided to include the *C7 Sports Gold* channel in its general entertainment tier, known as the '*Deluxe*' tier.

668 On 8 March 1999, Mr Freudenstein of Foxtel sent his fax to Mr Macourt, among others, advising that Foxtel had sub-licensed *Fox 8* (an entertainment channel) and other channels to Austar, to be carried on a tier together with *C7*, *ESPN* and *Hallmark* ([652]). The

following day, Foxtel Management's Director of Sales and Marketing, Mr Ansell, sent a memorandum to Mr Mockridge, as follows:

> *'In light of Austar's decision to boost their new Tier with the addition of C7 Sports and ESPN, I believe we should seriously consider a new Tier that includes C7 Sports, ESPN and say the next XYZ channel … [S]elling this for $9.95 (on top of basic at $44.95) makes sense.*
>
> *Is there a way we can fast-track this development?'*

669 Mr Mockridge agreed with Mr Ansell's approach. Since the price paid by Austar for C7 was significantly less than the price that had previously been discussed between Seven and Foxtel, he thought that Foxtel might now be able to acquire C7 '*at a reasonable price*'. Furthermore, since the C7-Austar CSA was to terminate in about December 2001, he considered that Foxtel might be able to negotiate an arrangement for a similar term, thus allowing it to bid for and obtain the AFL pay television rights when they became available. In addition, Mr Mockridge believed it was desirable for Foxtel to be able to include the AFL as part of its programming.

670 By contrast, Mr Macourt was not pleased with Foxtel's decision. He replied to Mr Freudenstein on 10 March 1999:

> *'While I understand the parameters of the sublicense [sic] were approved by the Board previously I am disappointed that the Fox brands are to be included in a tier with direct competitors of News Corporation in C7 and ESPN.*
>
> *My understanding is that Fox 8 is highly regarded by subscribers and clearly Fox is the market leader in brand awareness. This would appear to assist C7 and ESPN in acquiring subscribers where they have been previously unable to do so.*
>
> *Could you please comment on the potential benefit to our competitors in being able to associate themselves with the Fox brand?'*

671 Although Mr Macourt's response of 10 March 1999 was referred to in Seven's opening, Mr Macourt was not asked about it. Even so, Seven relies on the response as demonstrating that Mr Macourt completely identified News with Fox Sports and that he regarded C7 as a direct competitor of News. However, at this time Fox Sports was still a wholly owned subsidiary of News, so a complete identification between the two (if that is what Mr Macourt was conveying) was hardly surprising. Further, Mr Macourt regarded **both**

C7 and ESPN as direct competitors of News, without distinguishing between them. It is not clear from the response why Mr Macourt regarded C7 and ESPN as direct competitors of News, but in evidence he said that he regarded both C7 and the free-to-air broadcasters as competitors of Fox Sports. This response of 10 March 1999 is consistent with that evidence.

672 Mr Freudenstein responded on 11 March 1999. His observations included the following:

> *'while it is nice to think that FOX 8 will be the main driver of the Austar deluxe tier, in reality it will be the sports channels that will drive the tier and FOX 8 will benefit from their presence more than the other way around. While I agree that the FOX 8 brand is important to the channel, lets [sic] not over state it.*
>
> *...*
>
> *I am not sure why News Corporation should be concerned because C7 and ESPN are on a tier above FOX Sports. Therefore FOX Sports will always have more subscribers than those channels and, in addition, any additional subscriber that those channels attract to the platform is additional revenue to FOX Sports on basic. Further, my understanding is that the price paid for both channels, on a tier is approximately A$3.50. At best this tier will penetrate 50%, which equates to a basic price for the two channels in total of A$1.75. Although I am not aware of the details of your deal, I understand that this is significantly cheaper than the FOX Sports basic price to Austar'.*

673 On 17 March 1999, Mr Mockridge sent a memorandum to Mr Lachlan Murdoch, with a copy to Mr Macourt. As Seven placed some reliance on this memorandum, it is necessary to set it out at length:

> *'I mentioned to Peter Macourt on Monday evening that I wished to consider FOXTEL taking an AFL service from C7. While I appreciate that at first consideration this might not appear an attractive idea might I suggest there are a number of reasons for raising it. In particular, Austar has done a particularly cheap deal with C7 to carry the service. Their deal has a pspm of no more than A$2.00, no MSG's and it is being carried in a tier (if the tier penetrates at 40% of basic, this equates to a rate of A$0.80 pspm on basic). In addition, Austar's deal terminates in December 2001 meaning it is linked with the expiry of Channel 7's pay television rights for AFL.*
>
> *We have had a number of approaches from Seven in the last six months about C7* ***each of which I have fobbed off****, including by indicating we would not want to take a channel branded "7" and we would want it to be an AFL only channel.*

I think the advantages of having the AFL channel sooner than later for FOXTEL would be:

> *It would obviously assist penetration (Melbourne penetration now lags Sydney 14.5% vs 19.5%).*
>
> *It would send the message to the AFL that while we wanted to win the deal with them to distribute AFL we would not be prepared to pay an exclusive price.*
>
> *Assuming we did a deal similar to Austar, because it would be a tiered channel, it would have no cash exposure to FOXTEL and as it would terminate in 2001 it would not prevent us acquiring the AFL rights directly (in some respects it might assist by allowing us to more closely be involved in AFL sponsorships).*

While this clearly would give C7 more revenue, relatively speaking it should be significantly cash positive to Fox Sports:

> *Because Fox Sports is on basic any new subscriber we acquire due to AFL will be paying Fox Sports US$5.25 (A$8.50) vs A$2.00 to C7.*
>
> *Similarly, any subscriber we shift from Optus Vision to us will pay Fox Sports in basic first and reduce C7's distribution on Optus (where their rate would be higher).*
>
> *Therefore the only net benefit to C7 vs Fox Sports is where an existing FOXTEL subscriber upgrades to take the AFL tier, in which case C7 is gaining extra revenue whereas Fox Sports has the status quo. However, whilst obviously a proportion of our subscribers would do that, relatively you would expect our existing subscriber base is light on AFL "nuts".*

I would like to discuss this before the FOXTEL Board meeting because I have reported in the CEO's discussion that Julian Mounter has raised the prospect with us (though again they have been slow in following-up).

Of even more immediate issue, Nick Falloon is pushing trying to move us immediately to a deal with Optus to take Warner's [sic] out of Movie Vision, supply Optus with Showtime/Encore and restrict Optus' ability to do satellite.

I think getting an AFL deal will much more quickly deliver value to FOXTEL and I want to reserve any additional channel resources we have to do that rather than pass the benefit to Warners.

I will call you to discuss'. (Emphasis added.)

674 In his statement, Mr Mockridge said that his view at the time was that the absence of a

long-term agreement between Fox Sports and Foxtel would be an impediment to the finalisation of any agreement between Foxtel and Seven relating to C7. This was because, in the absence of such a long-term agreement, Foxtel '*was unlikely to be prepared to enter into an agreement to obtain sports programming from an additional source*'. In this connection, Mr Mockridge stated that he had hoped to be able to persuade Mr Lachlan Murdoch of the merits of obtaining C7. However, shortly after he sent the memorandum of 17 March 1999, he was told by either Mr Murdoch or Mr Macourt that News did not support Foxtel taking C7 while the issue between Fox Sports and Foxtel remained unresolved.

675 In cross-examination, Mr Mockridge was asked about his use of the expression '*fobbed off*' in the memorandum of 17 March 1999. He rejected a suggestion that he meant to convey that Foxtel had given insincere reasons for rejecting the advances of C7. Rather, he was intending to convey that, prior to that time, there had been no serious prospect of coming to a workable agreement with Seven because of Seven's negotiating position. However, from the time he sent his memorandum to Mr Murdoch, Mr Mockridge thought that the prospects for such an agreement might be better. Mr Mockridge denied that his understanding was that News would not support the carriage of C7 in any circumstances. I accept his denial and his explanation for the use of '*fobbed off*' (an expression which, according to the *Macquarie Dictionary*, does not necessarily imply deceit, but can mean simply '*put off*').

676 On the same day, 17 March 1999, Mr Mounter responded to a letter from Mr Mockridge seeking approval from Seven for Foxtel to retransmit Seven's free-to-air signal via Foxtel's cable network. Mr Mounter linked the retransmission issue with Foxtel's carriage of C7. Interestingly, Mr Mounter said that '*[we do] not feel that we are ... in competition with Foxtel (Pay is a very different business)'*.

677 A meeting took place between Mr Wood and Mr Freudenstein on 17 March 1999. Mr Wood advised that Seven was interested in doing a deal for the supply of C7 to Foxtel. Mr Freudenstein made it clear that Foxtel's interest, if any, was in C7's AFL content and that Foxtel would not be prepared to have C7 on basic. The discussion centred on two live AFL games per week and included the possibility of C7 being on a stand alone tier at a price in the range of $4.00 to 5.00 pspm, with no MSG. Mr Freudenstein said that Foxtel would want a lengthy lead time so as to market exclusively live games throughout the Foxtel network.

7.17 Foxtel Management's Board Meeting of 23 March 1999

678 In a conversation between Mr Freudenstein and Mr Wood after the meeting of 17 March 1999, Mr Freudenstein indicated that Foxtel wanted C7 to have two exclusively live AFL matches per week. This meant, as Mr Wood understood it, that the games would be exclusive as against free-to-air television.

679 The CEO's report prepared by Mr Mockridge for the Foxtel Management board meeting of 23 March 1999 recorded that Seven had indicated that it would shortly make a more detailed offer to Foxtel for the carriage of C7. (This was the second meeting to be attended by PBL representatives, Mr McLachlan having previously attended the board meeting of 2 March 1999.) Mr Mockridge also reported that Foxtel was preparing a strategy to acquire the AFL pay television rights. He noted that, while Seven's AFL broadcasting rights contract would not expire until December 2001, it was due to be renegotiated later in the year. Mr Mockridge also reported verbally that management could not recommend a further significant sports commitment so long as the Fox Sports issue remained unresolved.

680 On 25 March 1999, Ms Lowes prepared a summary of the discussion at the Foxtel Management board meeting held two days earlier. She described the meeting as '*tense*'. The summary dealt with the discussion of C7 and the AFL rights as follows:

> *'Tom [Mockridge] mentioned that Seven planned to make an offer on C7. Tom then said that it was impossible for management to know what to do while [Fox Sports] was outstanding. Gerry [Moriarty] and I then asked about seeing the term sheet from 7. Tom said that it was management's practice to show shareholders things if they were worthy of merit. ... Nick Falloon said that the only thing 7 had was the AFL and that we should try to get that rather than 7. Before the discussion moved on, I again asked Tom, in my nicest voice, if we could [see] the offer from 7. Tom, in his nastiest voice, said, "Your request has been noted." (Note: Gerry and I discussed this later. He will ask Julian Mounter (an old friend of his) to send it to us directly.)*
>
> *We then moved to a discussion re the AFL. ... [T]he parties agreed that Tom should lead the effort to acquire AFL rights on a non-exclusive basis. All thought that exclusive would be too much. There was some discussion about the other parties agreeing to stay away from the AFL. The lawyers said that this was not a good idea ... PBL said it was likely to bid for [free-to-air] rights ...'*

There is again no reason to doubt the substantial accuracy of Ms Lowes' summary, perhaps allowing for some literary licence in respect of the tone of voices.

681 On 29 March 1999, Mr Mockridge made some observations about the C7 proposal in an internal memorandum as follows:

> *'2: The C7 deal means we might have the opportunity to take it prior to 2001,* ***but I don't see that happening until Fox Sports is sorted out****. However, if we do, that obviously sends the AFL the message that we don't need the deal to get AFL, but rather we want to deal to improve our coverage of AFL (which is a good position to be in).*
>
> *3: In reality I think Seven's strategy is to secure all free and pay rights again and hope it can multi-channel them,* ***meaning C7 might not be a secure route to getting the rights****.*
>
> *4: This means we have to put even more effective weight on the key point in the submission; that is, the AFL should entrust its Pay-TV product to a proper Pay-TV operator* ***and not permit a free operator on the defensive to be the gatekeeper****'*. (Emphasis added.)

682 Mr Mockridge's evidence was that he regarded it as desirable that the Fox Sports stand-off be resolved as soon as possible, essentially for two reasons. First, the interim arrangement involved a fixed price of US$5.25 pspm and a permanent arrangement would certainly carry a volume discount. Secondly, the issue was increasingly recognised as a distraction for management. I accept that evidence.

7.18 Seven Network's Board Meeting of 26 March 1999

683 A meeting of Seven Network's board was held on 26 March 1999. Mr Mounter's CEO's report prepared for the meeting recorded the following:

> *'C7 has gone to air in its new form and has been generally very well received. Seeing both C7 and Fox Sports, I have to say that the C7 team have done remarkably well with limited resources.*
>
> *We are still negotiating hard to see if we can get carriage on Foxtel for C7 and are in negotiations with Optus for additional channel provision. I have given the approval for re-transmission of our broadcast signal on Foxtel, subject to successful outcome of the C7 talks.*
>
> *Meanwhile, C7 is now available on Austar following the successful completion of negotiations with them*
>
> *...*
>
> *Agreement secured with Austar for delivery of C7 Sport on the platform's general entertainment tier – with expectations of a*

penetration of 50% of Austar's 280,000 subscribers and a fee of $2 per subscriber per month.

...

Initial, positive discussions with Foxtel on the delivery of C7 on a Foxtel tier – under its current branding. This forms part of an overall strategy to secure our Australian Football League franchise from 2002'.

684 The significance of this board meeting is primarily due to some rather extraordinary evidence given by Mr Stokes. In his fourth statement, Mr Stokes said that he had read Mr Mounter's report at the time and recalled that Mr Mounter had told the board meeting that a deal had been negotiated with Austar at $2.00 pspm. Mr Stokes claimed that he told Mr Mounter **outside** the board meeting that Mr Mounter had no authority to conclude a deal with Austar on these terms, and that he (Mr Mounter) should have adhered to a figure of $4.00 pspm discussed with Mr Stokes in October 1998.

685 The minutes of the meeting noted a number of matters arising out of the CEO's report, but neither the Austar arrangements nor the Foxtel negotiations were mentioned. While Mr Stokes claimed that his complaint about Austar had been discussed **outside** the meeting, his evidence was that the Foxtel negotiations were discussed **inside** the meeting and that he had specifically stated at the meeting that C7 should not be on a tier with Foxtel (contrary to Mr Mounter's proposal). Yet the minutes contained no record of any such statement by Mr Stokes, nor of any discussion of the issue. Moreover, it is difficult to understand why Mr Stokes, who is plainly not a reticent man in business matters, was prepared to tackle Mr Mounter at the meeting on the Foxtel issue, yet apparently was not prepared to raise Austar at that forum. I cannot accept Mr Stokes' evidence as to what transpired at or shortly after the board meeting.

686 Mr Gammell claimed that he had discussed the Austar deal with Mr Mounter **before** the board meeting and that he had also told Mr Mounter that he was concerned that negotiations were taking place on the basis that C7 would be placed on a Foxtel tier. Despite receiving no satisfaction from Mr Mounter, Mr Gammell's evidence was that he raised neither issue at the board meeting. As I have recorded in Chapter 5, I do not accept Mr Gammell's account of what occurred before or at the board meeting. Nor do I accept his claim that he was previously unaware of the state of negotiations with Austar.

7.19 Mr Rupert Murdoch Visits Foxtel

687 In early April 1999, following a visit to Foxtel Management by Mr Rupert Murdoch, Mr Mockridge prepared a note for Mr Murdoch. The note dealt primarily with the question of equalisation of the interests of News, PBL and Telstra in the Foxtel Partnership. However, Mr Mockridge also noted that:

> *'Once the dispute over FOX Sports is resolved, FOXTEL can move on and acquire AFL rights (**short-term from C7 and long term directly**), markedly lifting penetration in the southern states (currently Melbourne 14.5% vs Sydney 19.5%)'.* (Emphasis added.)

688 The note prepared by Mr Mockridge was distributed at a meeting held on 8 April 1999, at which Mr Rupert Murdoch, Mr James Packer and Dr Switkowski (among others) attended. I accept Mr Mockridge's evidence that he thought that, as a result of this meeting, the Foxtel partners might resolve the outstanding issues dividing them and that there would then be no insuperable impediment to Foxtel acquiring AFL content through C7 in the short term.

7.20 Seven's Third Proposal: April 1999

7.20.1 The Proposal

689 On 8 April 1999, Mr Mounter emailed Mr Wood and others indicating that he had spoken to Mr Mockridge and promised him a proposal:

> *'So we should submit a, say, six month deal to get it going and while you negotiate a long term deal. This would allow (as with the Austar agreement), us simply to go to AFL for their agreement once Foxtel say "yes".*
>
> *Then when it is up and the viewers would be outraged if it were taken away, Harold [Anderson] and the team could get down to properly negotiating long term agreements with both'.*

690 By a letter of 16 April 1999, Mr Wood provided Mr Mockridge with an '*indicative term sheet*' for both C7 and Olympic programming for the succeeding five years. The covering note explained that:

> *'Seven's preferred position would be in basic for our C7 Sports Channel however you have indicated that you do not feel that you have further room in basic for our service. Accordingly, we have indicated prices for the inclusion of C7 on a first tier both as a stand alone channel and within a general*

> *entertainment tier. The price per subscriber in calendar 2002 and 2003 increases to reflect the increased number of live AFL matches in the service'.*

Mr Wood said that he looked forward to receiving Foxtel's comments on the proposed terms and any counter-suggestions.

691 The term sheet provided for the following:

> a five year term, with no provision for a right of termination if C7 did not retain the AFL pay television rights after 2001;
>
> an indicative price, if C7 was on a general entertainment tier, of $2.50 pspm for 1999 to 2001 and $3.00 pspm for 2002 to 2003;
>
> a stand alone price of $4.00 pspm for 1999 to 2001 and $5.00 pspm for 2002 to 2003;
>
> one channel only;
>
> an MSG of $5 million; and
>
> two live AFL windows per week.

Mr Wood gave evidence that the last point was intended to convey that the AFL games would be provided **exclusively** live.

7.20.2 Discussions Concerning the Proposal

692 Mr Mockridge circulated a copy of Seven's letter of 16 April to Mr Macourt, Mr Falloon and Ms Lowes. On 23 April 1999, Mr Rizzo expressed his '*initial view ... that the offer warrants further and detailed consideration*'. Mr Mockridge responded on 28 April, indicating that Mr Freudenstein was meeting Mr Wood to obtain more details on Seven's proposal. Mr Mockridge said that he would not be in a position to make a recommendation to the forthcoming board meeting (scheduled for 4 May 1999):

> *'partly because I think it unlikely that we would have negotiated Seven to a reasonable position by that time, and partly because ... I do not think Management should recommend a further significant sports commitment whilst the Fox Sports issue is not resolved. This issue also needs to be considered in the context of FOXTEL's wider aspirations in securing the AFL rights'.*

Mr Rizzo replied that he expected the matter would be revisited when Mr Mockridge was in a better position to assess Seven's offer.

693 Mr Wood and Mr Harold Anderson of Seven met with Mr Freudenstein on 27 April 1999. At the meeting, Mr Freudenstein noted that C7 showed only one live AFL game per week. He requested at least two live matches per week commencing in July 1999, together with three replays of Seven's free-to-air matches in the week following the matches. This prompted a discussion about the effect of the anti-siphoning legislation and of the blackout of Saturday afternoon matches on Melbourne free-to-air television. Although Seven had asked for a five year term, Mr Freudenstein said that Foxtel would not agree to a term beyond December 2001, when the AFL broadcasting rights agreement with Seven terminated. Mr Freudenstein also said that Seven would have to ensure that the terms it offered were at least as good as those afforded to Optus and Austar. So far as the selection of matches was concerned, a note of the meeting prepared by Mr Freudenstein recorded the following:

> *'The live match on C7 is currently selected through a consultative process between Channel 7 and the AFL. We suggested that FOXTEL would want to be involved in the selection of matches. For example, Channel 7 will select the first 2 matches of any round, and we select the next 2 matches and then Channel 7 has the remaining matches. The selection has to be 6 weeks prior to the match'.*

694 Mr Freudenstein also noted that he had told Mr Wood that the rates proposed in the term sheet were too expensive. He said in the note that: '*we won't negotiate until we are clear what we will be getting on the channel*'. Mr Macourt annotated Mr Freudenstein's note of the meeting of 27 April 1999 and, in particular, recorded his agreement with Mr Freudenstein's suggestion as to the process for selecting matches.

695 It was agreed at the meeting that Seven would come back to Mr Freudenstein with separate quotes for:

a tier containing C7 and ESPN;

a general entertainment tier; and

a la carte (that is, a stand alone tier for C7).

696 Mr Freudenstein sent a memorandum to Mr Mockridge on 5 May 1999, reporting on the meeting held the previous week. Mr Mockridge's annotations indicate that he was paying

close attention to the proposal, notwithstanding the intimation he had received in March that News did not support Foxtel taking C7 while the pricing issue between Fox Sports and Foxtel remained unresolved.

697 At the Foxtel Management board meeting of 4 May 1999, Mr Moriarty of Telstra asked where discussions had reached on the question of the carriage of C7 on Foxtel. According to the minutes, Mr Mockridge:

> *'advised that a further proposal had been received from C7 but that it was still unacceptable. The CEO further advised that he intended to bring a full AFL strategy proposal to the next FOXTEL Board meeting [scheduled for 22 June 1999]'.*

7.20.3 Seven Clarifies Some Matters

698 On 5 May 1999, Mr Wood sent an email to Mr Mounter, reporting that:

> *'Foxtel have a major issue with C7 [concerning the branding of our sports channel on Foxtel] and it will be a deal "delayer" if not a deal breaker'.*

Mr Mounter, in response, said that Mr Wood should tell Foxtel that Seven had no trouble with '*branding it something other than C7 (which I have already said, several times)*'.

699 On about 6 May 1999, a budget was prepared under Mr Wood's supervision within C7. The budget assumed that C7 would be provided to Foxtel at a price of $2.00 pspm and would be placed on a tier. Mr Wood, in his evidence, said that he considered this figure to be appropriate for budgeting purposes as it was his '*assessment of a reasonably possible outcome, although erring on the side of conservatism*'. He also said that the basis for the $2.00 pspm figure used in the budget was that this was the fee Seven had been receiving from Austar.

700 On 13 May 1999 Mr Wood wrote to Mr Freudenstein addressing a number of matters that had been raised on behalf of Foxtel. The substance of the letter was as follows:

> ***'EXCLUSIVITY OF AFL MATCHES***
>
> *Seven can confirm that there will be two exclusively live AFL matches each week once the service is on the Foxtel platform. Naturally, the number of games will be reviewed again next season but will not decrease. In each time slot (eg. Saturday afternoon, Saturday evening, Sunday afternoon) C7 Sport*

will have second priority in game selection.

BRANDING

Seven agrees to re-brand the sports service to a name that does not necessarily reference Channel Seven as this appears to be a major priority of yours. As we are targeting July 1 for commencement of the service Seven would ask for a grace period of three months, which would be the end of the Football season, to implement this change. This of course, would be dependent on Foxtel agreeing to the MSG or equivalent underwriting. The channel does not currently and will not in the future, carry Seven FTA promos.

MOST FAVOURED NATIONS

Seven would agree to a most favoured nations clause. I'm not sure how this clause would operate in practice as C7 is in basic on Optus, in the general entertainment tier on Austar and is proposed to be in a sport tier on Foxtel.

TERM

Seven would agree to a 2½ year term but would also like you to consider an option to take the channel for a further 2½ years at Seven's election on pre agreed terms, dependent on the retention of the AFL.

PRICING

You have asked us to consider the pricing of C7 in a sports tier along with ESPN. Seven does not believe that being bundled with ESPN would create any more penetration than being on a stand alone basis and therefore our pricing would remain the same as quoted for a stand alone tier. That price is $4.00 per subscriber'.

701 Mr Mockridge was given a copy of Mr Wood's letter to Mr Freudenstein of 13 May 1999 and made handwritten annotations on the document. In relation to branding, he noted that: '*[t]his is important if we are to promote the channel*'. He ticked the suggestion for a term of two and a half years. On the question of price, Mr Mockridge asked: '*What is Austar paying?*'

7.20.4 Branding of C7

702 Mr Wood also followed up the question of branding with Optus. This was necessary because the C7-Optus CSA included a term requiring Seven to brand the service as a '*Seven Network*' production. On 13 May 1999, Mr Wood advised Mr Lattin of Optus that Seven was considering changing the branding of C7, so that it would no longer be branded as

required by the C7-Optus CSA. Mr Wood noted that Mr Lattin had previously indicated that the request did not constitute a problem from Optus' perspective, but Mr Wood nonetheless formally asked for Optus' consent to the change.

703 Despite Mr Wood's optimism, Optus promptly rejected Seven's request. Mr Wood duly advised Mr Mounter of the rejection, adding the comment '*[s]o much for partnerships*'. As News observes, the rejection was a blow to Seven, given that it had agreed with Foxtel to rebrand its service.

7.21 Fox Sports Budget for 1999–2000

704 On 10 June 1999, Mr Macourt informed the Fox Sports board of management that the revised budget for 1999–2000 had been approved. The operating plan within the budget, which seems to have been approved in about May 1999, identified a number of market opportunities and threats, as follows:

> *'Opportunities*
>
> > *Potential synergies with Nine re: rights acquisition, production, etc.*
> >
> > *Synergies with News re: rights acquisition, facilities, etc.*
> >
> > *AFL pay television rights become available after 2001*
> >
> > *Growing maturity of platforms, including ratings-viewing/advertising sales*
> >
> > *Deliver substitute channels to Optus and Foxtel'.*

The document identified internal strengths and weaknesses:

> *'Strengths*
>
> > *Programme inventory – Cricket, Rugby Union, Rugby League, Motor Sports, Grand Slam Tennis, Golf Majors, US and AUS PGA Tours and Premier League Soccer*
> >
> > *Ownership by committed shareholder – News*
> >
> > *Significant cumulative industry experience*
> >
> > *Largest subscriber base and strongest brand*

Long term supply arrangements in place with Austar

Foxtel equity held by News

Weaknesses

Optus – Fox Sports not distributed by platform

Government – Possible tightening of sports anti-siphoning laws

Weak 'exclusive' first tier local programme inventory

The Seven Network holds FTA and pay rights to AFL – quality product

No long term supply arrangements with Foxtel'.

705 The operating plan also identified '*Recent Strategic Initiatives*' and '*Anticipated Strategic Moves by Competitors*'. Among the former was:

> *'Strategic rights acquisitions to combat C7 entry into marketplace – rights acquired include International Cricket, Swimming and Australian Athletics'.*

Among the latter was:

'FTA Networks

- *platforms protecting their franchises in lieu of developing their interests in the pay tv industry including pushing for continued strong anti-siphoning legislation*
- *push to hold strong regulatory position on digital TV/multi-channeling*
- *exploit and develop sports libraries'.*

The plan's operating objectives included:

'Defend against C7 as a competitor in Pay TV'.

7.22 Mr Freudenstein's Term Sheet: May 1999

706 On 20 May 1999, in accordance with a request by Mr Mockridge, Mr Freudenstein prepared a draft term sheet and business case relating to the acquisition of C7's channels by Foxtel. Mr Mockridge annotated the term sheet, which dealt with key issues as follows:

the term was to be from 1 July 1999 to 31 December 2001;

Foxtel was to have the option of carrying C7 on basic, as an a la carte service, on a sports tier or on an entertainment tier;

the name of the channel would be changed and would contain no reference to Seven;

there would be two exclusively live pay television matches per week, all matches to be replayed three times in the week following the game;

Seven had to include quality sports programming during the non-AFL season; and

the pay television matches were to be live and exclusive to pay television commencing in the 2000 season (subject to highlights).

707 The business case was based on creating a new sports tier for C7 and ESPN. The business case assumed that 20 per cent of subscribers would take the tier at $6.95 pspm. The fees payable would be $4.00 pspm in the first two years for C7 and ESPN, increasing to $5.00 pspm. The modelling showed:

an NPV of $27.48 million for Scenario 1 (20 per cent of subscribers take the tier and a three per cent increase in Victorian subscribers);

an NPV of $51.67 million for Scenario 2 (25 per cent penetration and a five per cent increase in Victorian subscribers); or

an NPV of $70.32 million for Scenario 3 (25 per cent penetration and a five per cent subscriber increase in Victoria and a two per cent increase in Western Australia and South Australia).

708 Mr Mockridge's note on the assumption that 20 per cent of subscribers would take the tier was '*too high, particularly with cannibalisation*'. His concluding comment was:

> *'without ESPN the take up will be almost as great as with it, so why not leave it out and keep the margin?'*

Mr Mockridge explained in evidence that '*cannibalisation*' is the process where subscribers take up a new tier at the expense of an existing one. He said that he disagreed with the assumptions, which he thought were overly optimistic and that he did not accept the model.

709 Foxtel prepared a separate model for C7 on a stand alone tier over a 10 year term. This assessed the NPV at $30.5 million over the term, including a terminal value of $10.2 million. The model made no allowance for any MSG payable by Foxtel, but assumed a take up rate of only 10 per cent of Foxtel subscribers.

710 On 24 May 1999, Mr Freudenstein sent a draft term sheet to Mr Wood. The covering note said this:

> *'I have not yet approached the Board about carriage of the channel, as I wanted to make sure that we were happy with the quality and content of the channel. The parameters we need are set out in the attached term sheet. You will see that we have not yet addressed pricing issues, but we will once the rest of the term sheet is substantially agreed'.*

The term sheet, although detailed in form, incorporated the key elements of the draft Mr Freudenstein had prepared on 20 May 1999.

7.23 Seven Network's Board Meeting of 28 May 1999

711 Mr Mounter's CEO's report for the Seven Network board meeting of 28 May 1999 addressed the negotiations concerning carriage of C7 on Foxtel. Mr Mounter recorded that he was keen for the deal to go through before '*tough negotiations on AFL*' commenced. The report continued as follows:

> *'The AFL are making noises about splitting rights and we are told ... that Nine are working flat out to persuade the AFL that they should have Friday nights and they could leave the rest with us and Foxtel.*
>
> *We have put together an imaginative proposal ... which suggests a long term business partnership and sharing of revenue from pay television. At the presentation of this to the AFL I intend, with your blessing, to declare that Seven will never share and that they should expect nothing more from Seven at the next renewal because we simply cannot afford it.*
>
> *I will ask for an answer as to whether we are to partner before October 1. On or immediately following that date, if they are still pushing split rights or have not agreed to our proposals, it is my view that we should announce that we wish to withdraw from the contract at the end of the period and will only be able to do the minimum required under the contract (which is considerably less than we do) from October 1 and after renewal if it is forced upon us.*
>
> *It is my view that Nine cannot accommodate as much as we do and Ten cannot afford the AFL, so this would force the AFL's hand. It is a high stakes strategy, but one we must play soon if we are not to end up in a no-win*

auction in two years time.

It [is] for this reason that we must close a deal with Foxtel as soon as possible, even if terms are not entirely attractive. ***Currently, we are negotiating around $3 to $5 per sub in first tier****'.* (Emphasis added.)

712 Mr Mounter's report was discussed at the board meeting of 28 May 1999. The minutes record that a number of issues arising out of the report were discussed, but none of these related to the negotiations with Foxtel. Mr Stokes' evidence as to what transpired at the meeting was again curious, bearing in mind the content of the minutes. He said that, although he knew that Seven had made an offer to Foxtel, he had not seen Mr Freudenstein's term sheet. Mr Stokes claimed that he became upset when he read Mr Mounter's report, because he realised that the proposed price of $3.00 to $5.00 pspm for the supply of C7 to Foxtel would undermine Seven's negotiating position with Foxtel. Mr Stokes said that he raised the issue at the meeting and dissented from Mr Mounter's report, as did others present at the meeting.

713 Mr Stokes acknowledged that he knew that Mr Mounter had been pursuing a strategy of getting C7 onto Foxtel since early 1999. He also knew that one reason for the strategy was the perception that if C7 was on Foxtel, Seven could avoid competing with Foxtel in relation to the renewal of the AFL pay television rights. Moreover, Mr Stokes had ample opportunity to ascertain the terms on which Mr Mounter was negotiating with Foxtel. Had Mr Stokes dissented from Mr Mounter's strategy at the May 1999 board meeting, it is hardly conceivable the minutes would not have recorded such an important matter. Indeed, Mr Gammell's evidence contradicted that of Mr Stokes, in that his recollection was that the matter had **not** been discussed at the board meeting. I therefore reject Mr Stokes' evidence on this point. I find that he was fully aware of Mr Mounter's strategy at and before the 28 May 1999 board meeting and expressed no disapproval of it at that meeting.

714 Mr Gammell's evidence was that he met with Mr Mounter the day before the board meeting. By that time, according to Mr Gammell, he was concerned about Mr Mounter's approach, having formed the view that it threatened C7's very viability. Mr Gammell claimed that he told Mr Mounter that Seven should not be negotiating with Foxtel to place C7 on a tier, but that Mr Mounter disagreed with Mr Gammell's view. Even so, Mr Gammell, on his account, said nothing at the board meeting about this important disagreement. Mr

Gammell agreed in his evidence that he was duty bound, if he had these concerns, to raise them at the board meeting. I do not accept Mr Gammell's evidence that he raised concerns about the Foxtel strategy with Mr Mounter before the board meeting.

7.24 Seven's Draft Heads of Agreement: 9 June 1999

715 Mr Wood responded to Mr Freudenstein's term sheet of 24 May 1999 by a fax of 9 June 1999, which attached draft heads of agreement drafted by Seven's solicitors. Mr Wood made the point in a covering letter that it was not worthwhile to negotiate without including pricing. Mr Wood's letter noted that Seven currently had pay television rights for (among others) AFL '*until the end of the 2001 season*'.

716 The terms incorporated in the heads of agreement included the following:

> the price was to be $5.00 pspm for carriage on a stand alone tier; $4.00 pspm for carriage on a sports tier; and $3.00 pspm for carriage on a general entertainment tier;
>
> there was to be an MSG of $5 million per annum;
>
> the agreement was to continue until 28 February 2002, but Seven was to have an option to extend the term for a further two years if Seven secured the exclusive AFL pay television rights;
>
> Seven was to use its best endeavours to change the name of the channel;
>
> Seven to ensure that the '*Primary Channel*' was its premier pay television sports channel, but Foxtel had to agree that AFL matches could be included on an '*Overflow Channel*';
>
> Seven was to ensure that during the AFL season the Primary Channel contained '*at least two live home and away matches each week*' and replays of each final match; and
>
> Seven was to consult with Foxtel with respect to the AFL content of the Primary Channel and to provide Foxtel with the proposed schedule six weeks in advance.

717 The price incorporated in the draft heads of agreement was actually higher than the price proposed by Seven on 13 May 1999, in that the stand alone licence fee had increased

from $4.00 to $5.00 pspm. In addition, the heads of agreement contained one particularly odd feature. Seven offered to provide two '*live*' home and away matches per week, not two '*exclusively live*' matches. Mr Mockridge said that he regarded this provision as of critical significance because exclusivity was essential to Foxtel.

718 Mr Wood was closely questioned by Mr Hutley as to why the word '*exclusively*' was omitted from the draft heads of agreement, particularly having regard to the fact that the expression '*exclusively live*' had been used in Mr Wood's letter of 13 May 1999. Mr Wood's evidence was that, on his understanding, Seven's offer was intended to mean exclusively live (as distinct from live and exclusive) and that, for some reason he was unable to identify, the word '*exclusively*' had been omitted from the document.

719 I do not accept Mr Wood's evidence. The importance of exclusivity to Foxtel had been repeatedly brought home to Seven, most recently in Mr Freudenstein's term sheet of 24 May 1999. The importance of exclusivity to Foxtel had also been acknowledged by Mr Mounter in his CEO's report for the Seven Network board meeting of 28 May 1999. Seven's letter of 13 May 1999 had used the expression '*exclusively live*'. Its letter of 9 June, as well as the draft heads of agreement, had been carefully examined by Mr Wood before they were sent. His explanations for the omission of the word '*exclusively*' in that letter were unconvincing. The likelihood is that the omission was deliberate, reflecting Seven's view (acknowledged by Mr Stokes in his evidence) that it could not supply 44 exclusively live matches per season consistently with its agreement with the AFL.

720 On 24 June 1999, Mr Wood observed in an email to Mr Mounter and others that the:

> *'discussions with Foxtel on taking C7 Sport are not-too-surprisingly stalled and the AFL are now talking to Fox [Sports]'.*

Mr Wood rejected a suggestion put to him that his lack of surprise reflected the fact that he understood that Seven's letter of 9 June 1999 had been drafted with a view to stalling the negotiations. I accept Mr Wood's evidence on this point. I also accept Mr Wood's evidence that he attempted, without success, to call Mr Freudenstein between 9 and 24 June 1999 to ascertain Foxtel's response to the draft heads of agreement. In the event, Mr Freudenstein telephoned Mr Wood on 30 June 1999 and told him that the whole idea of C7 on Foxtel could only be considered by the Foxtel board in some weeks' time. Mr Freudenstein added that

C7's price was too high, but declined Mr Woods' invitation to nominate a price.

7.25 Seven Network's Board Meeting of 25 July 1999

721 Seven Network held a board meeting on 25 June 1999. The meeting received and discussed Mr Mounter's CEO's report dated 16 June 1999. Mr Mounter's report included the following in relation to pay television:

> *'Relationships with Optus are strained. They continue to criticise C7's quality, while not recognising that to provide a 24 hour service at that cost is extremely limiting.*
>
> *...*
>
> *Talks continue with Foxtel, but are slow. We have offered a bargain basement deal (of $4-5 a sub), in order to try and win the position which, in my view, is crucial to our negotiations with the AFL for renewal'.*

The minutes of the board meeting, which commenced at 10 am and concluded at 4.30 pm, contained no record of any discussion on this aspect of Mr Mounter's report.

722 Mr Stokes' evidence was that when he read Mr Mounter's report he realised that Mr Mounter had offered a bargain basement deal to Foxtel and that this was in flagrant violation of a previous (unrecorded) determination of the board. Yet, on Mr Stokes' account, he did not mention Mr Mounter's conduct at the eight hour meeting because the board was concentrating on other issues. I do not regard this evidence as plausible. Nor do I accept Mr Gammell's evidence that he understood the reference in Mr Mounter's report to the price being sought from Foxtel on basic or as if on basic (as distinct from on a tier). Mr Gammell's evidence on this point was both inconsistent and unconvincing.

7.26 Foxtel's AFL Strategy Paper

7.26.1 Final Paper

723 The Foxtel Management board meeting originally scheduled for 22 June 1999 was postponed until 8 July 1999. An '*AFL Strategy*' paper was distributed to board members shortly before 22 June. The AFL Strategy paper proposed that the board should note management's intention to participate in discussions with the AFL Commission with the objective of securing the AFL pay television rights for 2002 and following years. The AFL

Strategy paper also proposed that consideration of taking C7 be deferred:

> *'until it can be more clearly assessed as to what extent a decision to take C7 prior to the termination of Seven's existing rights deal with the AFL will detract from a bid by FOXTEL and the other pay-TV operators to secure the rights directly'.*

The AFL Strategy paper recorded that the AFL Commission had indicated that it wished to put in place a fresh agreement by the end of 1999.

724 The reasons given by management in support of the recommendation were these:

> *'Given the strengthening in the Fox Sports schedule over the past two years, FOXTEL now enjoys a powerful brand leadership over both C7 and free-to-air in sport. March 1999 brand research data shows that among those either subscribing to pay-TV or interested in subscribing to pay–TV, FOXTEL is seen as having the best sports by 42% against 17% for C7. Similarly, FOXTEL is considered to have better sports coverage than free-to-air by 51% as against 38%. However, it is clear our one remaining gap is in AFL programming.*
>
> *FOXTEL management believes that FOXTEL should take the opportunity of the re-negotiation of the AFL rights to seek to acquire AFL rights directly. If FOXTEL leaves Seven as the "gate-keeper" on AFL rights, it is unlikely that the network will ever co-operate by releasing sufficient exclusive live pay-TV games to permit AFL to become a true subscription driver for pay-TV. More fundamentally, in assessing its medium-term competitive threats, FOXTEL must assume that the free-to-air networks will seek to expand the use of the digital spectrum granted them by the Federal Government from so-called "enhanced" broadcasts to true multi-channelling. If Seven is left with monopoly control of the AFL product it would then be in an excellent position to attack our subscriber base.*
>
> *It is therefore important for FOXTEL to break the pay rights away from the free-to-air rights and negotiate directly with the AFL for the pay-TV rights to this product. Management is not recommending a bid for the free-to-air rights, given the anti-siphoning laws as they currently stand'.*

725 The final AFL Strategy paper outlined the terms of Seven's offer to supply C7 to Foxtel and stated that Foxtel would require tier penetration of 23 per cent in the first year to break even. The paper identified the quality of C7 as an issue, since its non-AFL pay television rights were '*weak*' and the AFL product was limited compared with Foxtel's deal with the NRL. The paper explained the reasons for not pursuing the C7 proposal as follows:

> *'Clearly an issue with the C7 service is the quality of the channel. The major*

rights it holds apart from AFL are weak. ... Moreover, the AFL product is limited (2 pay-TV games a week) ...

...

FOXTEL has stressed its major interest in C7 is its AFL coverage and this must be maximised, including repeats, in any service taken by FOXTEL.

...

It is unclear what impact a decision by FOXTEL to take C7 now would have on our negotiations with the AFL Commission or the other pay-TV operators. Certainly, Seven would present its non-exclusive supply to all pay-TV platforms as evidence to the AFL that it will be able [to] maximise AFL coverage nationally without doing a direct deal with the pay-TV operators. For this reason management does not believe FOXTEL should consider a deal with C7 until we are able to more clearly determine whether a direct deal with the AFL acceptable to FOXTEL is feasible'.

726 The AFL Strategy paper set out the key components of a likely deal with the AFL. These included the following:

at a minimum, Foxtel would have to match the AFL's put option which, if exercised, would require Seven to take the pay television rights for a fee Foxtel believed to be $15 million per annum;

a possible structure involved a special purpose television production company co-owned by the AFL which would acquire the rights and receive fees from the distributors;

any offer by the company would be on a non-exclusive basis among the three pay television operators;

Foxtel would underwrite any losses, while the AFL would take 25 per cent of the profits, with the balance to be divided among distributors based on subscriber numbers; and

Foxtel would attempt to secure at least three and possibly four games per week '*as pay-TV exclusive*', but Foxtel had to accept that:

> *'a free-to-air broadcaster (most probably the Seven Network) will continue to have a significant number of games, satisfying anti-siphoning legislation, meeting the expectations of the AFL and recognising an exclusive pay-TV service would be prohibitively expensive in any case'.*

727 The projected financial impact of the proposed arrangements, assuming a tier take-up of 14 per cent and an additional 100,000 subscribers over five years, was as follows:

'Calendar Years	***2002***	***2003***	***2004***
Best Case (all 3 distributors agree)	*(4.2)*	*9.8*	*13.2*
Worst Case (neither Optus nor Austar agree)	*(12.5)*	*(2.1)*	*0.4'*

(The figures presumably represent $ millions.)

728 Mr Macourt annotated his copy of the final AFL Strategy paper and agreed that he had carefully studied it. Opposite the observations that Foxtel's one gap in programming was the AFL and that Foxtel should seek to acquire the AFL pay television rights directly, Mr Macourt noted: '*Not critical. May be cheaper to acquire [through] C7*'. He also highlighted the worst case scenario projections for direct acquisition of the rights.

729 Mr Macourt's evidence was that he could not recall having a concluded view that it was cheaper to acquire C7 than the AFL pay television rights. He pointed out, correctly, that he had merely written '*may be cheaper*'. I do not think that there is a sound basis for finding that his view at the time was that the acquisition of the rights at $15 million per annum was necessarily too expensive for Foxtel.

7.26.2 Drafts of the Strategy Paper

730 A number of drafts of the AFL Strategy paper were discovered. Two of the drafts contained the following recommendations:

> '• *The Board authorise management to negotiate with the AFL to form a 50/50 joint venture channel with the AFL which would be granted [exclusive] pay television rights to AFL matches for 10 years from 2002 on the terms set out in detail below.*
>
> *The Board authorise management to enter into a distribution deal with Seven Network Limited ("Seven") to carry the channel C7 (containing all AFL matches made available to pay TV) from 1 July 1999 until 31 December 2001 on the following terms:*
>
> - *C7 would be sold by FOXTEL as a stand alone channel available to customers after purchase of the FOXTEL basic package*

- *FOXTEL would pay Seven no more than $3.50 per subscriber per month (FOXTEL would sell the channel to subscribers for $6.95 per month)*

- *Seven would agree to change the name of the channel to a name agreeable to FOXTEL which contained no reference to channel Seven (this change would occur within 4 months from signing the deal)*

- *FOXTEL would pay Seven a minimum guarantee of $4 million per year (this is necessary to make it worth's [sic] Seven's while to change the name). To cover this guarantee, FOXTEL would need a penetration rate of less than 9% of its basic subscribers in the first year, which is very achievable'.*

731 Under the heading '*Short-Term Deal with Channel 7*' the following appears in the draft papers:

> *'Channel 7 has approached FOXTEL with a willingness to sell FOXTEL non-exclusive rights to C7, the channel which carries all AFL programming which is currently on pay television.*
>
> *FOXTEL has spent a few weeks negotiating with Channel 7, in order to attempt to improve the quality of the channel and the quality of the AFL games available on that channel.*
>
> *Management now believes that FOXTEL can do a deal with Channel 7 within the following parameters'.*

732 A business case in the first of the draft papers assumed that C7 on a stand alone tier would be sold at $6.95 pspm and involve licence fees to C7 of $4.00 pspm increasing to $5.00 pspm. The base case produced an NPV of $27.48 million, while a more optimistic set of assumptions resulted in an NPV of $70.32 million. The second draft business case produced identical outcomes.

7.26.3 Mr Mockridge's Evidence

733 It appears that none of the Foxtel partners discovered drafts of the AFL Strategy paper, although News discovered documents containing recommendations that were included in the final version of the paper. Mr Mockridge's evidence was that his staff (including Mr Freudenstein) had prepared the earlier drafts of the AFL Strategy paper and that he had not participated in their preparation. Mr Mockridge said that his own views were reflected in the

final version of the AFL Strategy paper, not the drafts. While he had been willing to negotiate with Seven about the possibility of Foxtel taking C7, by June he had formed the view that a decision on C7 should be deferred until Foxtel could assess the extent to which taking C7 would adversely affect a bid by Foxtel to secure the AFL pay television rights directly from the AFL. At that time (mid-1999), Mr Mockridge believed that the AFL would make a decision about the rights by the end of calendar year 1999 (a belief recorded in the AFL Strategy paper itself). Mr Mockridge's evidence on these issues is consistent with the contemporaneous documentation and I accept it.

734 I also accept Mr Mockridge's evidence that he had formed the view by early July that it was preferable for Foxtel to deal directly with the AFL than to take C7 even though Foxtel would bear the risk of sub-licensing Optus and Austar. It must be remembered that Mr Mockridge had had discussions with AFL representatives about pay television rights for some time prior to mid-1999. It follows that I do not accept the suggestion made by Seven that the AFL Strategy paper prepared for the board meeting was merely a stratagem or subterfuge designed to keep Telstra at bay on the Fox Sports issue.

735 In his cross-examination, Mr Mockridge explained the reasoning behind his preference that Foxtel Management not deal with C7 until the bidding for the AFL pay television rights had played itself out:

> *'They were not alternatives; the C7 proposal and the Foxtel proposal to the AFL were not alternatives? --- At this point I believed them to be, or at least I believed that C7 would not be – taking C7 would not be helpful to us pitching to the AFL. But it was completely right for Foxtel to go directly to the AFL to get these rights instead of buying it through a competitor.*
>
> *It was going to be, you thought, unhelpful in your approach to the AFL because it might create the impression in the mind of the AFL that if they dealt with C7 they would still have AFL games shown on Foxtel? --- The AFL was dealing with the Seven Network, not C7 as a separate entity. It is Seven Network, our competitor. So the people we were up against were the Seven Network.*
>
> *Your concern about an interim deal with C7, Foxtel/C7, for the next year and a half or so --- ? --- Yes.*
>
> *so far as Foxtel getting the AFL rights was concerned, was that the AFL might draw the inference that if later it dealt with the Seven Network for the pay TV rights, that its programs would still end up being shown on Foxtel through C7; that was your concern? --- My concern was if we were in a competitive*

bid with the Seven Network for the AFL rights, that our strategic advantage was our distribution, and if we didn't play that advantage out then we wouldn't win this competitive bid.

The answer to my question is yes, isn't it, Mr Mockridge? --- Again, can you repeat it so I can listen to it very carefully?

Listen to it carefully. I know it's a long question. So far as Foxtel getting the AFL rights was concerned, your concern about doing an interim deal with C7 was that the AFL might draw the inference that if it ultimately dealt with Seven instead of Foxtel for the pay rights, it would still see its games on Foxtel via C7; wasn't that your concern? --- Yes.

You wanted to leave the AFL thinking that, even if Seven and C7 had the AFL, those games wouldn't be on Foxtel? --- No, not necessarily. I had to have a rationale for the AFL to deal with Foxtel.

Apart from its manifest qualities and subscriber numbers? --- Correct.

Connection with News Limited and so on? --- But if the AFL could go to Seven and get all the benefits that Foxtel could deliver it, why would they deal with Foxtel?'

7.26.4 Telstra's Assessment of the AFL Strategy Paper

736 An internal Telstra paper was prepared in anticipation of the Foxtel board meeting of 8 July 1999. The paper analysed the final AFL Strategy paper that had been circulated by Mr Mockridge, as follows:

'FOXTEL is proposed as the underwriter of the company's losses. As the rights for 2002 onwards have to be bid for later this year, FOXTEL would be assuming considerable subscriber base growth risk not only within FOXTEL but also within Optus and Austar. The feasibility of the deal also appears to assume additional penetration rate assumptions once the rights are secured. The assumed price charged to subscribers for the tier is not provided.

A further risk is the assumption the other pay TV companies would agree to such a structure, as they are not likely to commit to it prior to it being secured. Considering FOXTEL does not compete in Austar's area, Austar is likely to attempt to use the benefits its subscriber base brings to the proposed structure to leverage a "subsidised" deal as it has done in the past.

The paper outlines the current C7 offer. The benefits the proposed structure has over the current C7 offer, in addition to the risky financial benefits, are branding and one or two extra exclusive games a week. The paper mentions the AFL is keen to maintain a strong relationship with an FTA (presumably Seven). Therefore securing more than the current two live exclusive matches is potentially difficult. Taking a C7 branded channel is raised as an issue in

the context of Seven potentially multi-channelling and becoming a competitor. The term of the C7 offer is to February 2002 and multi-channelling by the FTA's [sic] is currently prohibited until after 2005. A reference is made suggesting that if FOXTEL were to take C7 now, it would increase the likelihood of the AFL renewing the pay TV rights with them.

Perhaps the largest flaw in the logic of the paper is the apparent nil value attached to C7's other programming. NSL and Socceroos Soccer, Super 12 Rugby, Sheffield Shield Cricket, Tennis and Golf are considered weak. Tennis and Golf because most events are shown on FTA (much like FOXTEL's World Cup Cricket coverage where Nine showed all the Australian games live). No explanation of why soccer and rugby are considered weak is provided. If C7 were to lose the AFL rights, it is questionable whether the channel would continue to operate. This would leave FOX Sports in a position of strength when it came to negotiating the pay TV rights for the "weak" sports C7 had other than pay TV.

Recommendation

1. Directors ask for a detailed paper be [sic] circulated as soon as possible outlining the reasons why C7 should not be taken until 2002, evidence as to why C7 sports are weak as compared to other sports and all the assumptions behind the proposed structure for 2002 and beyond'. (Emphasis in original.)

7.26.5 Foxtel Management's Board Meeting of 8 July 1999

737 The minutes of the Foxtel Management board meeting of 8 July 1999 recorded that the board did not endorse the recommendations in the AFL Strategy paper, although they were not definitively rejected. The minutes summarised the discussion as follows:

'The CEO outlined the AFL strategy paper and there was discussion of the likely scenarios which might eventuate with regard to AFL. Mr. Falloon advised that it was important to obtain a clear view from the AFL of the rights which were likely to be available and the arrangements under which FOXTEL might bid for those rights.

Mr P. Macourt noted that the submission stressed that the support of News Ltd would be important to the success of any proposal to obtain the rights. He stated that this support would not be forthcoming at this time.

Mr. G. Moriarty indicated he believed that FOXTEL should attempt to conclude a deal with Seven for the supply of C7 in the short term. Mr N. Falloon stated that this would weaken FOXTEL's position in bidding for the AFL rights and that the medium to long term supply of sports was more critical to FOXTEL than short term carriage of C7.

The consensus of the meeting was that the CEO should continue informal

discussions with the AFL Commission and others in order to determine as far as possible the AFL's position on rights, but that the CEO should not accept an invitation to present a proposal to the AFL Commission without further consultation with the Board'.

738 Ms Lowes, as was by now customary, provided a more colourful record of what she described as a '*fiery*' meeting, with Mr Macourt '*very hostile to virtually anything Telstra did or said*'. According to her record, most of the '*fireworks*' had been saved for the AFL discussion:

> *'20. News said that Foxtel could NOT say that it was with News in any discussions with the AFL.*
>
> *21. Peter [Macourt] argued that Foxtel could not justify the $25M plus that would be required to get AFL.*
>
> *22. Both News and PBL argued that getting C7 would actually hurt Foxtel, but the arguments did not make much sense.*
>
> *23. Gerry [Moriarty] strongly pointed out that there [sic] arguments did not make sense – need AFL for Foxtel, too expensive from AFL directly and cannot get from C7. Nick [Falloon] got a bit exercised, but Gerry continued to push.*
>
> *24 Peter finally said that News could not authorise Tom [Mockridge] to go forward with negotiations or discussions with the AFL until FoxSports [sic] was resolved.*
>
> *25. Tom pushed both shareholders to try to address. Peter tried to put the blame on Telstra and admitted that he did not know how to negotiate as "We sent out our number one negotiator [meaning Rupert [Murdoch]] and you did not deal".*
>
> *26. In the end, it was "agreed" that Foxtel should not approach the AFL at this point in time and News/PBL said that Foxtel could not take C7.*
>
> *NOTE: The aftermath of this was interesting. Paul [Rizzo] said to me that it is definitely time for Telstra to take legal action and Gerry agreed. It was absolutely clear that both News and PBL only cared about themselves in this one and were not acting in the best interest of Foxtel. I mentioned that we intended to send a letter to News on this one AND that we were working on a Board paper. Paul and Gerry both seemed very supportive of clear action'.*

739 Mr Macourt did not dispute the accuracy of Ms Lowes' account. However, as News points out, there appears to be an inconsistency between her note, insofar as it stated that the meeting had agreed that Foxtel should not approach the AFL, and the '*consensus*' recorded in

the minutes. Mr Mockridge understood after the meeting that he was to continue informal discussions with the AFL and he did so. To the extent that there is any inconsistency, the minutes are more likely to have been more accurate on this point than Ms Lowes' note.

740 Mr Macourt did not dispute that he had argued that Foxtel could not justify the $25 million that would be required to get the AFL, nor that he had refused to authorise discussions between Foxtel and the AFL until the Fox Sports issue had been resolved. He said that he was also influenced by reluctance to commit News to editorial support for a bid that he thought was unlikely to succeed. He had in mind Seven's advantage in having the first and last right and the problems created by the anti-siphoning regime for a bidder seeking the pay television rights.

741 Despite Mr Macourt's reluctance to accept that he thought direct acquisition of the AFL pay rights was too expensive, it is clear that he both had and expressed a concern about the cost of the rights. I accept, however, that this was by no means a final view and that there were other factors that concerned him at the time about the bid. It is also clear enough that he was unwilling to contemplate taking C7 on Foxtel until the Fox Sports dispute had been resolved.

742 On 20 July 1999, Mr Wood wrote to Mr Freudenstein noting that Mr Freudenstein had not provided any response to the draft heads of agreement forwarded by Seven on 9 June 1999. Mr Wood asked for information on the outcome of Foxtel Management's board meeting. In response, Mr Freudenstein told Mr Wood that Mr Mounter and Mr Mockridge needed to speak to each other. Mr Mounter's days at Seven by then were numbered.

7.27 Fox Sports Pricing Dispute

7.27.1 Ms Lowes Builds a Case

743 In and from July 1999, Telstra undertook or arranged for work designed to establish that C7 could be regarded as comparable to Fox Sports and that its pricing could therefore be taken as a yardstick for Fox Sports. An email of 15 July 1999 to Ms Lowes from Mr de Jong, an in-house lawyer at Telstra, set out the issues. The email was headed '*Fox Sports Reasonableness*', a reference (I infer) to News' obligation under the Umbrella Agreement to offer '*reasonable commercial terms for the supply of Fox Sports to Foxtel*'. The substance of

the email was as follows:

> *'1. I spoke with someone from Henry's team [Henry Ergas, an economist] – he is interested in finding costs for other sports programming to compare with Fox Sports costs.*
>
> *2. AT Kearney [a firm of management consultants] did some work here, but prices were for US markets, so limited usefulness.*
>
> *3. The cost of C7 would be a better comparison, but we need to:*
>
> * *obtain a price for BOTH C7 channels in basic (we only have prices for **tiered** offerings for **one** channel); and*
>
> * *do some analysis as to the relative attractiveness of C7 versus Fox Sports (while the content is different, would C7 have similar, or better, "pulling power" to attract and retain pay TV subscribers? – this is what really counts to the distributor).*
>
> *4. If the "pulling power" of C7 is no less than the "pulling power" of Fox Sports, but the price is significantly lower, it would assist our case. Of course, one might expect Fox Sports to be more expensive if it is exclusive in relation to FOXTEL's major competitor (C7 being non-exclusive).*
>
> *5. As to the first point, can we ask C7 to give Telstra a term sheet (including price) for (a) **each** C7 channel **in basic**, and (b) for **both** in **basic**?*
>
> *6. As to the second point, should we ask AT Kearney to do the work on this (they have done part of the work already)?'* (Emphasis in original.)

Ms Lowes responded as follows:

> *'This is a bit tricky. I am in fairly regular contact with Seven/ACE so I suppose that I could ask. However, it is unlikely to be the best offer we could get as it would not come from serious negotiation. Is there anything in the accounts of Optus that might give us any clue for them? I will asked [sic] ACE if they would give it to us and hint that we want to pull the plug on FoxSports [sic].*
>
> *Re AT Kearney, what do we want them to do exactly? I was a little disappointed in their work in FoxSports – I did not think that it answered the real questions. However, I am happy to bring them back (or to find someone else) if we know what we need/want'.*

744 On 19 July 1999, Ms Lowes prepared a draft paper for the Telstra board meeting of

28 July 1999. The purpose of the draft was said to be to secure approval for Telstra to acquire the remaining 50 per cent of Foxtel and to '*pursue certain legal remedies against News as part of its overall strategy*'. The paper gave examples of the deterioration of the relationship between News and Telstra and added this comment:

> *'News has consistently indicated they would block Foxtel dealing with C7, thereby denying Foxtel the benefit of a competitive negotiation and a market price. Meantime, they are extracting and seeking permanently to extract the highest sports prices in the industry from Foxtel, knowing that Telstra is funding 50% of this, and News only 25%. At the most recent Foxtel Board meeting in July, News indicated that it would not support any attempts by Foxtel to secure AFL programming until Telstra completed the FoxSports [sic] deal with News on its terms'.*

Ms Lowes observed in relation to PBL:

> *'The relationship with PBL has been reasonable to date. However, they increasingly seem to side with News. Also, they have refused to allow Foxtel to take the C7 sports package, citing a view that it was better for Foxtel to allow C7 to fail. (1) Management is concerned that PBL will increasingly seek to promote interests outside of Foxtel rather than Foxtel itself.*
>
> ...
>
> *(1) Their option in FoxSports [sic] is likely to be more valuable if C7 fails'.*

745 A further draft of the paper was prepared but a decision was made not to take it to the board. This appears to have been a consequence of Dr Switkowski's view that the amount of money at stake did not warrant the drastic step of litigation against News. In an email of 27 July 1999, Ms Lowes said that she understood and respected the decision, but nonetheless highlighted that:

> *'we now have a growing issue with News/PBL. Both parties have clearly decided that Telstra will not take strong action and hence are not responding to anything we raise'.*

746 On 30 July 1999, AT Kearney completed a document entitled '*Fox Sports v C7 – Comparison of Content*'. The methodology was said to involve an analysis of free-to-air ratings '*of actual events or similar programs as a proxy for measuring general appeal of sport content*'. The report included a chart comparing the pay television ratings for Fox Sports and C7. This showed Fox Sports as having very much higher ratings, although the disparity was in part due to the relatively smaller number of subscribers having access to C7.

The value of this analysis for Telstra's purposes at the time is not clear and it seems that the mood for litigation had passed in any event

7.27.2 Mr Macourt Replies to Mr Moriarty

747 On 30 July 1999, Mr Macourt wrote to Mr Rizzo of Telstra. The lengthy letter sought to refute an assertion previously made by Mr Moriarty that News had not addressed the issues raised by him in his letter to Mr Lachlan Murdoch of 15 March 1999 ([665]). The thrust of the letter was that the terms for the supply of Fox Sports programming which News had offered to Telstra and Foxtel were reasonable and thus News had met its contractual obligations to Telstra. Mr Macourt rejected a suggestion that the pricing of Austar was a comparator for Fox Sports, on the grounds that the '*benefits to the relevant pay operators are not comparable*' and that:

> *'Austar subscribers represent essential incremental subscribers to support and sustain the quality of the Fox Sports channels for the benefit of FOXTEL'.*

748 The letter included the following:

> *'The current arrangements were put in place with Telstra's approval. News absolutely rejects Telstra's assertion that FOXTEL is suffering a so-called material adverse cost impact as a result of the supply to FOXTEL of the Fox Sports channels. The terms of that arrangement are very reasonable.*
>
> *The Fox Sports channels are critical to the success of the FOXTEL business. News is concerned that Telstra's ultimate desire is to strip FOXTEL of access to the Fox Sports channels, and for some inexplicable reason, move FOXTEL to a point where it takes the sports channels that FOXTEL's competitor has, and which are supplied by a free-to-air operator'.*

7.27.3 Internal Telstra Memoranda: August/September 1999

749 On 8 September 1999, Mr Vicary of Telstra informed Ms Lowes that Senator Richard Alston, the Federal Minister for Communications, Information Technology and the Arts at the time, was to visit Telstra the following day. Mr Vicary, who seems to have reported to Ms Lowes, said that he had undertaken to provide Mr Samarcq, the Director of External Relations, with a short memorandum on '*the messages ... that we will be reeling out this week*'.

750 Mr Vicary duly prepared a document entitled '*Pay TV Brief ACCC Declaration*'. It

included the following material on C7 and Foxtel:

> '• *A number of discussions have been held with representatives of Channel 7.*
>
> • *Channel 7 is interested in the carriage of C7 sports channel on Foxtel and the provision of additional pay to view channels carrying Olympic coverage.*
>
> • ***Channel 7 is not seeking to establish its own Pay TV operation, but wants Foxtel to take its services**. This is a proposition that Telstra is prepared to consider on proper commercial basis.*
>
> • *In Telstra's view, Channel Seven has made a commercially reasonable offer for C7 (or at least close), but has not, as of yet, on the Olympics.*
>
> • *It is highly unlikely that the two other Foxtel partners would allow C7 on Foxtel. Such a deal is extremely unlikely as News and PBL run FoxSports [sic] (the only competitor to C7) and **their stated goal is "to run C7 out of business.**" A deal on the Olympics is possible'.* (Emphasis added.)

751 As News points out, there is no evidence that Mr Vicary had any contact with executives of News or PBL. It is not clear who told Mr Vicary of the '*stated goal*' of News and PBL. The evidence is consistent with the information coming from somebody at Seven, or perhaps from someone within Telstra. In any event, I give little weight to the document on the question of the purpose of the Foxtel partners.

752 Dr Switkowski was cross-examined on Mr Vicary's paper. Dr Switkowski could not recall being told by his executives that the stated goal of News and PBL was to run C7 out of business. Nor had he formed that view himself. I accept Dr Switkowski's evidence.

7.28 Foxtel Management's Board Meeting of 21 September 1999

753 The Foxtel Management board meeting of 21 September 1999 discussed the ACCC's access declaration (formalised on 1 September 1999) and Foxtel's AFL strategy. The minutes recorded the following:

> *'The CEO advised FOXTEL's intention to apply to the Federal Court for a review of the recent decision of the ACCC to declare analogue cable subscription services and the fact that this presented an opportunity for FOXTEL's argument that it operates in a wider television market to be heard in the Federal Court. The CEO indicated that the application would be in the*

name of FOXTEL only as Telstra were unwilling to join the proceedings at this stage, although FOXTEL was receiving good co-operation from Telstra's legal team on the matter.

The CEO referred to discussions with the Seven Network and advised that it was apparent from Seven's actions that they had decided to pursue access via the access regime rather than commercial negotiations with FOXTEL concerning FOXTEL's distribution of the channels.

There was discussion of the AFL rights and Mr Falloon stressed the strategic importance of securing the rights. The CEO reported he had continued to maintain informal contacts with the Commission, which had again indicated it would seek a presentation from FOXTEL shortly. The CEO undertook to circulate a draft of that presentation'.

754 On the day of the meeting, Ms Lowes prepared her own summary of the key points discussed at the board meeting. The summary included the following:

'The AFL came up as the topic moved to C7. Tom [Mockridge] is of the strong view that FOXTEL can get the AFL so does not need Seven. He thinks that the AFL would go for a JV with Foxtel to supply PayTV content. There was some discussion if AFL would go with Foxtel or FoxSports [sic] – we said FOXTEL. (Query – they may be pushing Telstra to pay 50% of the high cost stuff, but … better to start this way and back off in my view.) All agreed that Tom should approach the AFL about a deal here. There was some discussion re Fox Sports but … not much'.

755 On the same day, 21 September 1999, Mr Pretty reported on a '*fruitful*' meeting held with Mr Samuel of Telstra. At the meeting, held at the instigation of the AFL, Mr Samuel indicated that the AFL was interested in a strategic alliance with Telstra that would cover pay television, broadband and narrowband internet rights. According to Mr Pretty, the AFL was clearly looking for a '*soul mate*'.

756 In her reply to Mr Pretty's report, Ms Lowes noted that:

'As an aside, the Foxtel Board discussed the AFL today and authorised Tom Mockridge (on behalf of Foxtel and not FoxSports [sic]) to approach the AFL about setting up a [joint venture] company with the AFL to manage PayTV rights. We will need to be very careful to ensure that we do not end up bidding against ourselves'.

757 Follow up meetings between Telstra and the AFL took place in October 1999. Ms Lowes attended these meetings, which were characterised in a Telstra memorandum as '*"fact finding" on the part of AFL*'.

758 On 16 November 1999, Ms Lowes had a discussion with Mr Samuel in which he advised that the AFL was working on three terms sheets with a view to inviting alliances to come to the AFL. One of the term sheets was to deal with pay and internet rights. Mr Samuel said that Telstra was '*the elephant that everyone knew they had to work with*'. Ms Lowes' view was that '*we might pull this one off, but probably with News*'. She thought that this would be a good outcome.

7.29 Telstra's Response to Seven's Tactics

759 In August and September 1999, Telstra executives commented on Seven's strategy for gaining access to the Foxtel platform (including the retail access claim via the Telstra Cable addressed in Chapter 17). In an email of 30 August 1999, for example, Ms Lowes saw Seven's strategy as a means of preventing C7 folding:

> *'The issue is that Seven are going broke on C7 and that the only way for it to work is for Foxtel to take it in additional [sic] to Austar and Optus. Telstra would LOVE to do this, but ... News and PBL (the owner and soon to be ½ owner of FoxSports [sic]) are actively blocking it at the Foxtel level. This has been conveyed to Seven. They are simply looking at some way to force their way in and I do not see how we can help'.*

760 Dr Switkowski sent an email to Telstra executives following a meeting between him and Senator Alston:

> *'Sen Alston ... raised the issue of Seven access to [the Telstra Cable] and Foxtel, signalling his view that we should tilt in the direction of permitting this to happen. He seemed very sceptical of our claims re exclusivity of contract with Foxtel, tho' subsequently I am told that his view is conveniently coloured and overlooks his own role in the drafting and timing of relevant legislation.*
>
> *On the other hand, it does seem to suit our own agenda to be, and to be seen as, fundamentally cooperative in an open access environment. Also, there is little to fear from adding C7 to Foxtel assuming matters of branding, and most especially pricing, could be resolved.*
>
> *I expect our partners will have different and more parochial positions, as is their right. But I am not sure that Telstra should explicitly align with News/PBL on this one'.*

761 On 10 September 1999, Ms Lowes sent a briefing note to Mr Rizzo on the access issue, together with a draft letter to Mr Mockridge. In the covering email, Ms Lowes was

alive to the benefits of being seen to promote competition:

> *'given the current slant of the press, we could easily highlight the difference in costs on FoxSports [sic] versus C7 and Telstra's desire to promote competition at the content layer. The benefit on this is that it would place additional pressure on News and PBL and would probably assist in shifting public opinion that media greed is more to blame than any access issues. The downside is that it makes very public a long standing dispute ... and probably escalates our need to fix it'.*

In the briefing note itself, Ms Lowes stated that:

> *'Telstra also sees benefit in getting the C7 [sic] on the FOXTEL line-up. There are two primary reasons:*
>
> - *C7 has the AFL*
>
> - *C7 is the only competitor to Fox Sports and it is in Telstra's interests to have an alternative to Fox Sports in the FOXTEL lineup'.*

762 Ms Lowes also reported on a discussion with Mr Mockridge that had taken place several days earlier:

> *'I also stated that Telstra would like to see FOXTEL take some Seven programming to defuse the issue. Tom [Mockridge] agreed that FOXTEL should seek to get the Olympics and highlighted that Seven's terms to date were not acceptable. He also suggested that the deal was likely to get better the closer to the Olympics. I agreed with the general point but asked him to consider moving faster given the circumstances.*
>
> *...*
>
> *The conversation re C7 did not go as well. Tom argued that Seven was a competitor to FOXTEL and that he thought he had a chance of getting the AFL directly and that he did not want to help Seven in any way. I pushed a bit, but ... I do not think that he (or News or PBL) will move here'.*

7.30 News, PBL and Telstra Meet: 22 October 1999

763 A meeting was held on 22 October 1999 between representatives of News, Telstra and PBL. The purpose, according to a briefing paper prepared within Telstra, was to:

> *'[d]iscuss the disagreements between News and Telstra in good faith to settle the ongoing dispute over the proposed programming deal between FOX Sports and FOXTEL'.*

The Telstra briefing paper set out Telstra's position on the Fox Sports pricing issue, as follows:

> '• *Telstra agrees with News's contention that a quality sports line-up is an important component of any Pay TV offering.*
>
> • *Telstra strongly disagrees that the price proposed by News for the programming offered is realistic considering Australian market conditions, FOXTEL's cost and subscriber base, and world-wide comparisons.*
>
> • *Telstra has devoted considerable resources in an attempt to ascertain the true value of the FOX Sports package.*
>
> • *The findings of our research have further strengthened our view of the fair value of FOX Sports to FOXTEL'.*

764 The briefing paper continued under the heading '*FOX Sports – Cost to Foxtel*':

> '• *At News's latest offer price, FOX Sports would consume an inordinate amount of FOXTEL's programming budget.*
>
> • *This price does not appear appropriate considering that FOX Sports has been ranked as the fifth most popular channel by subscribers in surveys.*
>
> • *Strict Australian anti-siphoning regulations limit the value of FOX Sports to FOXTEL and call into question the price being asked by News.*

765 Under the heading '*FOX Sports vs C7*', the briefing paper commented that:

> '• *C7 offer to FOXTEL would have resulted in sports programming costs significantly less than those which would be incurred if the current FOX Sports offer is accepted.*
>
> • *Contrary to News's assertions, research indicates the C7 programming line-up is as attractive to consumers as the FOX Sports line-up'.*

766 Dr Switkowski was cross-examined about the Telstra briefing paper. He agreed that Telstra executives had reported to him the results of the research summarised in the briefing paper. On that basis, he had concluded that it was in Foxtel's interests to carry C7 and '*possibly*' to carry C7 instead of Fox Sports.

767 The outcome of the meeting was inconclusive. The CEO's report to the Telstra board of 26 November 1999 stated that '*the issue will remain unresolved and the tension between the parties is likely to remain'.*

7.31 Foxtel Management's Board Meeting of 26 October 1999

7.31.1 Mr Mockridge's AFL Strategy Paper

768 On the morning of Foxtel Management's board meeting of 26 October 1999, Mr Mockridge sent a draft AFL Strategy paper to Messrs Lachlan Murdoch, Philip and Macourt. The draft paper recommended that the board authorise management to put an offer to the AFL Commission within the following parameters:

> *'•* *at a minimum matching the option the AFL holds to put the pay television rights back to the Seven Network, believed to be valued at $13-14m per annum, making it necessary to begin FOXTEL's offer at $15m;*
>
> • *forming a 50/50 joint venture with the AFL Commission, the joint venture to be the exclusive distributor of pay television rights but the joint venture accepting a positive obligation to on-sell the pay television AFL package to Optus Television and Austar (subject to a minimum subscriber guarantee);*
>
> • *the joint venture would seek rights equivalent to four first run games per week with FTA and library games available for replay (see discussion below) and would package an AFL tier including some AFL magazine programming;*
>
> • *the term of the joint venture would be 10 years with FOXTEL underwriting losses of the joint venture; profits to be split 50/50 and FOXTEL having a first and last right to any AFL pay television programming produced by the AFL in partnership or otherwise if the joint venture is dissolved at termination;*
>
> *...*
>
> • *FOXTEL would procure continuation of News Limited editorial support for AFL in New South Wales and Queensland after the expiry of the existing deal in 2002 ...'*

769 The draft AFL Strategy paper provided the following background:

> *'Over most of 1999 FOXTEL has been in informal discussions with the AFL Commission to assess opportunities for FOXTEL to acquire the AFL rights*

directly when the AFL's existing relationship with the Seven Network expires in December 2001. The Commission has appointed a sub-committee to deal with this issue headed by Graeme Samuel, who I met again last week. Samuel indicates that the Commission will seek to do a deal shortly, possibly as early as before the end of this year. It will proceed by supplying FOXTEL with a term sheet indicating what pay television rights the Commission believes it is able to offer. A difficulty in these discussions is that we understand that Seven enjoys a first and last right with the AFL for FTA rights and the AFL has a "put" option to Seven for pay rights. While naturally FOXTEL is unaware of where the boundary is drawn between free and pay rights, Samuel is confident that sufficient rights can be extracted to be attractive to us. It appears likely this will be in a form where, while most weekly games will be available on FTA in at least one city in Australia, those same games will be restricted to pay television availability in other cities. It is also possible the Commission will seek to offer us a simultaneous broadcast right with FTA games.

Samuel has also indicated that the Commission believes it would not be to its advantage to continue to have both its FTA and pay television rights held by a FTA operator. As a consequence, even if FOXTEL were not to participate in a bid for the AFL, it is likely that the Commission will seek to find a party other than Seven to distribute the rights.

As had been discussed with the Board previously, ***FOXTEL is of the strong view that if Seven is left as the "gate keeper" on AFL rights it is unlikely that the network will ever cooperate by releasing sufficient exclusive live pay television games to permit AFL to become a true subscription driver for pay television****. More fundamentally, in assessing its medium-term competitive threats, FOXTEL must assume that the free-to-air networks will seek to expand the use of the digital spectrum granted them by the Federal Government from so-called "enhanced" broadcasts to true multi-channelling. Seven has already broken with FACTS on this issue. If Seven is left with monopoly control of the AFL product it would then be in an excellent position to attack our subscriber base.*

It is therefore important for FOXTEL to break the pay rights away from the FTA rights and negotiate directly with the AFL for the pay television rights to this product*. Management is not recommending that FOXTEL bid for anything other than pay television rights (ie FTA, internet rights and other applications are not within our business scope and therefore it is more straight forward for FOXTEL not to complicate a bid by seeking to involve them).*

FOXTEL has already had informal discussions with Optus Television and Austar which currently carry C7. Both have indicated their dissatisfaction with that service and we understand that they have a break point if C7 no longer has access to AFL rights, and therefore we believe both distributors would readily accept a sub-licence deal from the joint venture.

Should FOXTEL be successful in acquiring the AFL rights post 2001, FOXTEL would recommend that we negotiate an interim deal with the

> ***Seven Network to carry C7 for the period up to end 2001 in order to get some AFL programming onto the platform'***. (Emphasis added.)

The third and fourth paragraphs of this draft substantially reproduce material in the AFL Strategy paper distributed shortly before 22 June 1999.

770 After Mr Murdoch had seen the draft, Mr Mockridge prepared a final version of the AFL Strategy paper for the board. The only major difference was that the final version removed the last bolded paragraph reproduced above. Mr Mockridge's evidence was that he had been prepared to recommend seeking an interim deal with C7, notwithstanding that the long-term Foxtel-Fox Sports arrangements had not been finalised. (This implied that between June and October Mr Mockridge had formed the view that an interim deal with Seven was compatible with Foxtel's AFL aspirations.) Mr Mockridge said in evidence that he remained optimistic that a deal with C7 could be done, but that he had removed the paragraph following a conversation with Mr Lachlan Murdoch who '*reiterated his view that until Fox Sports was sorted out we shouldn't take C7*'. Mr Mockridge was content in these circumstances to delete the paragraphs in the interests of obtaining the board's support for the recommendation to deal directly with the AFL Commission. Mr Mockridge rejected a suggestion put to him that he had included the paragraph in the draft paper because he had formed the view that if C7 lost the AFL pay television rights it would be '*doomed commercially'* anyway. I accept Mr Mockridge's evidence on those matters.

771 The final AFL Strategy paper had '*Base Case*' and '*Positive Scenario*' models attached. The first showed an NPV of $81.8 million for Foxtel over 10 years, while the more optimistic scenario produced an NPV of $143.1 million. Mr Mockridge accepted in his evidence that the estimate that Foxtel would achieve increased basic penetration with AFL of 1.9 per cent in the southern states and 0.9 per cent in the northern states was '*fair average rather than conservative*'. He also agreed that he would have felt uncomfortable with forecasts that assumed greater increases in basic penetration than those assumed in the '*positive*' model, namely 2.9 per cent for the southern states and 1.8 per cent for the northern states.

772 Mr Macourt acknowledged that the estimate of an NPV between $81.8 million and $143.1 million was higher than the proposal put to the Foxtel Management board in July 1999. He said, however, that he thought at the time that the projected subscriber growth was,

if anything, pessimistic because the penetration rate in Melbourne was six per cent less than Sydney. Since the model showed that only relatively small increases in subscribers were necessary to break even, he regarded the risk of acquiring the AFL pay television rights at the assumed price to be low. While there were some disparities in Mr Macourt's evidence at different points, they were minor. I consider his evidence of his reasoning process at the time of the board meeting to be broadly correct.

7.31.2 The Board Meeting

773 The Foxtel board meeting of 26 October 1999 received the AFL Strategy paper and resolved to approve its recommendation in principle and to authorise management to proceed with an offer to the AFL Commission. A sub-committee was established, comprising Ms Lowes, Mr Falloon and Mr Macourt, to modify the AFL offer as negotiations progressed.

7.32 Optus Seeks Fox Sports

774 On 15 November 1999, Mr Anderson of Optus spoke to Mr Rizzo of Telstra. Mr Anderson said that he wanted Optus out of direct involvement in pay television and raised the prospect of taking Fox Sports in a non-exclusive arrangement. Mr Rizzo told Mr Anderson that Telstra would consider the proposal. Mr Rizzo duly reported the meeting to other Telstra executives.

775 Ms Lowes, in a detailed response later that day, pointed out that the issue was not new, as Mr Anderson had been '*trying to get non-exclusive content for Pay TV for some time*'. Ms Lowes explained why the proposal presented difficulties. In particular, Telstra had invested in Foxtel for telephony defence because Foxtel had better programming and marketing than Optus. Common programming between Foxtel and Optus would undercut Telstra's advantage. Furthermore, Ms Lowes did not think that the economics of any deal would '*stack up*'. Mr Rizzo thought that these were '*compelling points*'. He asked for a final evaluation so that a formal response could be made to Mr Anderson. However, the issue then seems to have faded away for some time.

7.33 Seven's Letter of 17 November 1999

7.33.1 The Letter

776 In a letter of 15 September 1999, Mr Wood responded to a letter from Mr Mockridge

responding to a request by Seven for access to Telstra Multimedia's broadband network. In the letter, Mr Wood observed that:

> *'In light of our prior negotiations concerning the Olympics and C7 Sport, the prospects of reaching a commercial agreement with FOXTEL on terms satisfactory to us does not look promising'.*

777 Despite this gloomy assessment, Mr Wood sent Mr Mockridge on 17 November 1999 a detailed term sheet offering to supply C7 and the Sydney Olympics to Foxtel. Mr Wood said that in view of recent discussions, Seven was prepared to make '*another attempt at a commercial solution*'. The covering letter asked for a response from Foxtel by 30 November 1999. The letter made additional observations including these:

> *'Our 9 June Heads [of Agreement] set out a price for a la carte, a sport tier and a general entertainment tier. As mentioned above, you indicated those prices were too high but you would not indicate what price would be acceptable. Given your reluctance to discuss price with us, we have looked at our fees again and focused on offering a price to Foxtel which is a significant discount on the fees you are paying FoxSport [sic] for the FoxSport channels. As you will see we have offered a price for all the channels (including the Olympics) which is a discount on the price Foxtel has paid FoxSport for the FoxSport channels over the last 12 months together with a simple payment mechanism based on the total number of subscribers to the Foxtel service. The payment mechanism gives Foxtel the flexibility to place the Channels in whichever Foxtel tier it chooses in order for Foxtel to optimise its own channel line up. The fee structure means Foxtel would be paying Seven less than it pays FoxSport.*
>
> ***The enclosed term sheet is Seven's final offer**. Given the time that has elapsed since Seven first approached Foxtel about Seven supplying C7 to Foxtel and the urgency of providing for Olympics coverage, it is important that this matter be brought to a resolution. Foxtel has shown little interest in recent months in progressing the matter. Seven now needs to know where it stands'.* (Emphasis added.)

778 The key provisions of the term sheet included the following:

> Seven would supply the 24 hour sports channel known as '*C7 Sports Channel*' and a part-time general sport pay television channel on a non-exclusive basis and the Olympic Channels on an exclusive basis for pay television;
>
> the term of the agreement was to be 10 years unless terminated in accordance with cl 22 which (among other things) allowed either party to terminate if Seven ceased to hold or have exclusive AFL pay television rights;

the licence fee pspm was to be calculated as a percentage of the fee payable by Foxtel to Fox Sports: for the first 499,999 subscribers the fee would be 80 per cent of the Fox Sports fee and thereafter the fee would reduce on a sliding scale, so that for subscribers above 1.5 million, the fee would be equivalent to 61.9 per cent of the Fox Sports fee;

Seven was to give at least six weeks notice to Foxtel of Seven's free-to-air service broadcast schedule for a particular round of the AFL Competition together with the matches selected for exclusive live broadcast on C7, but Foxtel was to acknowledge that both the schedule and selected AFL matches were subject to change at the discretion of Seven;

subject to any agreement between the AFL and Seven, C7 was to ensure a minimum of two '*live AFL Matches per week*' except during the final series;

Seven was to produce for the period of the Sydney 2000 Olympic Games two complementary channels which would substantially comprise Olympic team sports or Olympic events in their entirety;

Seven was to provide a part-time channel devoted to the 2002 and 2006 Winter Olympics and a full time channel for the 2004 and 2008 Summer Olympics;

Foxtel could terminate the agreement, if over a consecutive four week period during the AFL season when live AFL matches were being played, Seven did not include a minimum of two live AFL matches per week; and

Foxtel was to acknowledge that the overflow channel included NRL games but Foxtel could not broadcast the NRL games and was under no obligation to broadcast the overflow channel.

779 Seven no longer seeks to make out a case that Foxtel's rejection of the offer of 17 November 1999 was, of itself, an exercise of its substantial market power a contravention of s 46 of the *TP Act*. Nonetheless, News contrasts the terms of this offer unfavourably with the earlier offer made by Seven on 13 May 1999. The particular points of contrast that News identifies are these:

The later offer promised a minimum of two live AFL matches per week, but gave no undertakings about the number of games to be supplied on an

exclusively live basis. C7 retained complete discretion about the scheduling and selection of AFL matches.

The later offer made no promises about the branding of the sports channel and Mr Wood's cover letter made it clear that C7 would not in fact be rebranded.

Unlike the earlier offer, the 17 November 1999 term sheet did not contain a '*most favoured nations*' clause.

The earlier offer was for a two and a half year term, but Foxtel was asked to consider an option to extend for a further two and a half years at Seven's election, dependent upon the retention of the AFL pay television rights. The later term sheet provided for a 10 year term and required Foxtel to take C7 in the event that Seven retained the pay television rights to the AFL.

The earlier term sheet proposed $4.00 pspm for C7 on a tier. The fee structure in the later term sheet provided for substantially higher fees and required Foxtel, even if C7 were on a tier, to pay a fee as if it was on basic.

The earlier term sheet indicated that the Olympics could be dealt with separately, while the later term sheet rolled the C7 proposal and the Olympics proposal together.

7.33.2 Mr Stokes' Understanding

780 Mr Stokes' evidence was that he had been given an oral briefing on Seven's 17 November 1999 term sheet, but that his understanding was limited to the contents of the briefing. In particular, he said that he was not told in any detail of the income expected if the offer were to be accepted. Nor had he appreciated that the proposed offer had been described by Mr Wood as a final offer.

781 Mr Stokes was asked in his evidence to make an assessment of the revenue that would have been derived had Seven's 17 November 1999 term sheet been accepted. He was asked to assume:

> the accuracy of the subscriber numbers forecast in Seven's five year business plan prepared for the June 1999 board meeting;
>
> a Fox Sports price of US$5.00 pspm; and

an exchange rate of $1.00 = US$0.65.

782 On these assumptions, Mr Stokes agreed that the term sheet, if accepted, would have produced revenue for C7 of some $47 million in 2002, increasing to about $84 million in 2006. Mr Stokes also agreed that if Foxtel had accepted Seven's proposal, the fortunes of C7 would have turned around immediately from a slight loss to a situation of massive profitability. Mr Stokes further acknowledged that he realised at the time that the 17 November 1999 offer, if accepted, would have cost Foxtel many multiples of the price which had been the subject of earlier negotiations between Seven and Foxtel. Yet Mr Stokes asserted that he considered that Foxtel might have accepted the deal '*because [he] thought it was good value for Foxtel*'. Mr Stokes later resiled from this last assertion and I do not regard it as credible.

783 Some time after 17 November 1999, Mr Mockridge and Mr Stokes had a meeting in the course of which Mr Stokes said:

> *'we will not sell you the Olympic channels unless you also acquire the C7 channels and drop off the bid for the AFL pay rights'.*

Mr Stokes accepted, with some reluctance, that these words conveyed (and, I find, were intended to convey) that Seven would not deal with Foxtel unless it dropped off bidding for the AFL pay television rights.

7.33.3 Foxtel's Response to Seven's Offer

784 Mr Mockridge replied to Mr Wood's 17 November letter on 30 November 1999. The letter included the following:

> *'The offer for all of the channels outlined in the Term Sheet would add in excess of $6.00 per month per subscriber to the cost of FOXTEL's basic service and, with on costs, would require FOXTEL to increase the price to subscribers to our basic service by at least $7.00 per month (a 20% increase on cable). We estimate that the NPV cost of this to FOXTEL is in excess of $340 million assuming that the deal expires at the end of the ten year term (which understates the cost to FOXTEL relative to normal practice). This also assumes that there is no increase in subscribers to compensate. Were we to assume any increase in subscribers, it would be necessarily a very conservative assumption given that our market research shows that the appeal of the C7 channel to prospective subscribers is approximately one-third of that of Fox Sports. Clearly this is not commercially viable for FOXTEL. Furthermore, FOXTEL has consistently stressed to you we are not interested*

in taking any of your services on basic (or an obligation to pay on basic) and therefore I can only assume that your so-called "offer" was drafted with the express purpose of forming part of your legal strategy and was not intended to constitute a serious offer. This view is reiterated by your presenting it as a "final offer" requiring acceptance in all parts by November 30.

***As I am sure you are aware, FOXTEL is not interested in taking C7 in the channel bundle as I believe this will interfere with our negotiations for the AFL rights**.*

...

Shane, I am disappointed that this offer has been couched in the terms that it has. I believe that if this offer was a serious commercial offer it would not have been phrased as Seven's final offer which FOXTEL is required to accept by 30 November 1999. If the Seven Network is interested in negotiating with FOXTEL for the provision of the Olympic channels on the terms I have outlined above, then I would be pleased to discuss this with the Seven Network more fully'. (Emphasis added.)

785 Mr Mockridge sent a copy of his letter to both Mr Stokes and Mr Gammell, with a covering letter. The covering letter said:

'Given the content and tone of Shane's letter, naturally I have assumed it is part of your legal strategy and not a serious commercial offer. As I have said before, FOXTEL remains ready and willing to engage in serious commercial negotiations on the Olympic channels and you will find us flexible financially.

On the AFL, I reiterate my earlier point that we believe it is important we secure the pay television rights to that code and we have no intention of disrupting any free-to-air network's objective of securing those rights'.

786 Mr Macourt did not see Seven's letter of 17 November 1999, but was informed orally of the substance of the offer by Mr Mockridge shortly after the letter was received. Mr Mockridge sent Mr Macourt a copy of his response to Seven of 30 November 1999. Mr Macourt was content with that response because he thought that there was no realistic chance of the Fox Sports issue being resolved before the AFL pay television rights were awarded. Mr Macourt's position at the time was that he opposed C7 being taken on Foxtel until the conclusion of a long-term supply agreement with Fox Sports.

7.33.4 Telstra's Assessment

787 Dr Switkowski received a copy of Seven's letter of 17 November 1999. On 19 November 1999, Mr de Jong was asked to analyse the term sheet. Mr de Jong provided his

comments to Ms Lowes later that day. His comments included the following:

> *'1. Seven says this is their "final offer". This implies they will not negotiate, which is a bizarre position given the many problems with the term sheet. Query what their tactic is here??*
>
> *...*
>
> *7. Clause 7 relating to tiering is clumsily worded. They seem to want to impose an obligation on FOXTEL to ensure that at least 50% of FOXTEL's total subscriber numbers subscribe for the channels – How would FOXTEL ensure this?*
>
> *8. Clause 8 fees are interesting. The fees are pegged to the Fox Sports price (with relatively small discounts), CPI indexed and are payable on ALL basic subscribers. These fees payable would be higher than the fees previously offered.*
>
> *...*
>
> *11. Clause 13 provides only general and vague quality commitments.*
>
> *...*
>
> *12. In clause 15, the promise of 2 live AFL matches per week (except finals) does not say they are exclusive. The promise of 2 AFL qualifying final matches per week does not say whether they are live or exclusive. Seven's obligations are subject to third party agreements, which is a major risk for FOXTEL.*
>
> *...*
>
> *In summary, if this is a "take it or leave it" offer, I cannot see how it is in FOXTEL's interests to take the deal in its current form. The obligations and liabilities on FOXTEL seem to heavily outweigh the benefits to FOXTEL – FOXTEL has some very firm financial and other obligations, while Seven has very vague obligations, often defined by reference to its own discretion'.*

788 Ms Lowes agreed with Mr de Jong's assessment. She thought it was an '*odd term sheet*'. She told Mr Gammell, after quickly skimming the letter herself, that it '*did not look compelling*'. Ms Lowes told Messrs Rizzo and Mockridge on 29 November 1999, that the offer was not acceptable and did not represent discussions that either Foxtel or Telstra had had with Seven on the subject.

7.33.5 Seven's Reply to Foxtel

789 Mr Wood responded to Mr Mockridge's letter of 30 November 1999 at length on 6 December 1999. Mr Wood's response included the following:

> *'**You've now told us, for the first time, that the consideration you're paying FoxSport [sic] is more than $7.50 per subscriber per month – far in excess of what we expected. Now that we know what FOXTEL is paying for FoxSport we understand your concerns with our price – given the starting point of at least $7.50**. Had we known what FoxSport was charging FOXTEL for its channels, we would have come up with a more generous discount formula for our channels. It should not be lost on you that we were seeking to provide a lower priced service for FOXTEL than the incumbent FoxSport product. If our calculations as to the Fox Sport price are correct, we would be very interested in discussing with FOXTEL a greater discount than the one contained in our 17 November offer. Can you please let us know what an acceptable discount would be.*
>
> *...*
>
> *You say that FOXTEL has consistently stressed that it is not interested in taking any of our services on basic. The FOXTEL drafted C7 Sport term sheet you sent to me on 24 May of this year indicates that basic was certainly within FOXTEL's contemplation.*
>
> *...*
>
> *Your letter makes it apparent to us now, for the first time, the reason behind the lack of progress in our negotiations – you say you are "not interested in taking C7 in the FOXTEL channel bundle" because you "believe this will interfere with [y]our negotiations for the AFL rights".*
>
> *I was quite frankly amazed by this because I had understood from my ongoing negotiations with FOXTEL during the course of this year and in particular from the FOXTEL drafted term sheet that FOXTEL was interested in taking C7 Sport. Further, I don't see how our term sheet would interfere with FOXTEL's negotiations regarding AFL rights given that clause 22(b) of that term sheet allows FOXTEL to terminate, without penalty, if Seven ceases to hold the AFL rights. Could you please tell me exactly how obtaining C7 Sport interferes with your negotiations regarding AFL rights.*
>
> *FOXTEL has misled us as to FOXTEL's true intentions in relation to C7 Sport. Your motives in drawing out negotiations and then, at this late stage, saying you are not interested at all are questionable to say the least. We assumed that both our organisations had been negotiating in good faith.*
>
> *Even if you had been open about your intentions from the start, it seems strange that you are prepared to deny FOXTEL subscribers access to AFL coverage for a further two seasons, when in any event FOXTEL is incapable of providing any AFL coverage whatsoever during this period. This is*

particularly so when:

> *it is done simply to provide some assistance in obtaining AFL rights at a later date, at a cost for the AFL programming alone, similar to that which you would pay to obtain the AFL, Olympics and other sport pre-packaged from us in the C7 Sport channels; and*
>
> *having AFL on FOXTEL during this 2 year period may increase subscriber numbers, especially amongst AFL fans which would make the AFL rights more valuable to you.*
>
> ...
>
> *In conclusion, our offer was a final offer because we needed to know where we stood. It is clear now that FOXTEL does not wish to take C7 Sport at any price, due to FOXTEL's own strategies to ensure FOXTEL and not Seven, obtains the AFL rights. Seven reserves all its rights in relation to these matters'.* (Emphasis added.)

790 Mr Stokes also replied to Mr Mockridge's 30 November 1999 letter on 6 December 1999. Mr Stokes expressed disappointment that Seven's offer had been seen as a legal strategy, as it was a '*serious*' and '*balanced*' offer. Mr Stokes said that he would be available to advance any discussions.

791 The bolded passage in Mr Wood's letter to Mr Mockridge was false. Mr Stokes admitted in evidence that he expected at the time that the fee payable to Fox Sports to be greater than $7.50 pspm. Mr Stokes saw Mr Wood's letter before it was sent. I think it likely that Mr Wood also was aware that the letter contained a false assertion, if for no other reason than there had been press reports as early as April 1999 that Foxtel was paying at least $10.00 pspm to Fox Sports. It is probable that the press reports based on '*market intelligence*' had been brought to Mr Wood's attention. This aspect of Mr Wood's letter of 6 December 1999 does neither him nor Mr Stokes any credit.

7.34 Mr Mockridge Sees Opportunities

792 As has been noted, Ms Lowes resigned from Telstra in February 2000. In a memorandum of 28 January 2000 to Mr Lachlan Murdoch, Mr Mockridge saw this as an opportunity for a possible settlement of the Fox Sports pricing issue. He suggested breaking the price into '*components*':

Fox Sports on basic at US$3.00 pspm, with volume discounts;

a Fox Sports tier channel at US$5.00 pspm, also with volume discounts; and

an extra fee of US$0.65 pspm if Fox Sports bought the NRL rights.

The attached models were said to indicate that '*if the penetration of the tier was 75% FOX Sports would be equal or better off*'.

793 According to Ms Lowes' report, the Foxtel board meeting of 8 February 2000 (Ms Lowes' last) was told by Mr Mockridge of a '*good meeting*' with the AFL, apparently held on about 20 December 1999. Discussions were to be held with Foxtel's legal people to see '*what rights could be arranged*'.

794 On 17 February 2000, Mr Mockridge circulated a paper to the directors of Foxtel Management recommending that the board:

> *'authorise FOXTEL management to enter an agreement with News Limited which will involve News Limited exclusively committing to support FOXTEL's bid for AFL rights in return for FOXTEL committing additional advertising expenditure to News Limited publications in order to ensure those publications increase their AFL coverage'.*

795 Telstra's Media Division rejected the recommendation on the ground, among others, that News, even without such an agreement, had a vested interest in ensuring that Foxtel acquired the pay television rights and thus would provide coverage of the AFL in its print media without any cost to Foxtel. Mr Akhurst, who was about to join the Foxtel board, expressed his agreement with the Media Division, but qualified his agreement by noting that he was '*still learning*'.

796 On 23 March 2000, Mr Blomfield advised the directors of Foxtel that Telstra was now willing to support a proposal to commit advertising expenditure to News in return for editorial coverage. The fax did not explain why Telstra apparently had a change of mind.

7.35 Mr Blomfield and Mr Stokes Correspond

797 A meeting took place between Mr Stokes and Mr Blomfield on 5 April 2000. Mr Stokes sought to persuade Mr Blomfield to take C7 on Foxtel. Mr Blomfield's position was that Foxtel wished to acquire the Olympic channel but not C7.

798 Mr Blomfield wrote to Mr Stokes on 27 April 2000. The letter noted that the barriers to Foxtel and Seven reaching a commercial agreement on the Olympics channels were Seven's insistence on a minimum guarantee of $25 million for the exclusive pay television rights and on carriage of C7 on Foxtel as a precondition. Mr Blomfield suggested that the two issues be treated separately.

799 Mr Stokes replied in a letter of 12 May 2000, reiterating that Seven was putting a combined package containing the Olympics channels and C7:

> *'This is precisely what we discussed at our recent April meeting. Seven has previously proposed a price for these channels which is at a significant discount to the FoxSport [sic] fee – starting at 80% of what Foxtel pays FoxSport per subscriber and reducing this fee as subscriber numbers increase. That proposal was for an all inclusive fee including both the Olympic channels and C7. That price still stands – it is an extremely competitive price'.*

800 Mr Stokes added in his letter that at the meeting held on 5 April 2000, he had indicated that if Seven and Foxtel could agree on everything, Seven would be prepared to rebrand C7. Mr Stokes also said that he could not see how Foxtel's acceptance of C7 could interfere with its ambition to bid separately for the AFL '*other than possibly by legal provisions such as the Trade Practices Act*'. A copy of this letter was sent to Dr Switkowski.

7.36 Communications within Telstra: May 2000

801 On 25 May 2000, Mr de Jong sent Mr Akhurst and Mr Greg Willis an email on the subject of '*Seven Access request*'. The email included the following passage:

> *'I think the best option for Telstra in relation to the Olympics is for FOXTEL and Seven to reach a commercial agreement ASAP. This will reduce Telstra's (and, if FOXTEL is found to be a carriage service provider, FOXTEL's) potential damages exposure, and eliminate (or at least reduce) further public criticism of FOXTEL and Telstra for 'blocking' Olympic coverage on FOXTEL. However, Seven appears to be committed to tying the Olympics to the C7 Sport channel (Stokes is still referring to Seven's November 1999 term sheet, which ties the channels). FOXTEL management appear to be totally opposed to carrying the C7 Sport channel. This opposition may be due to FOXTEL management's strategic considerations regarding AFL rights, and/or could be at the direction of News and/or PBL because of their Fox Sports interests, or PBL's FTA interests. Whatever the reason is, we appear to have an impasse'.*

802 Mr Akhurst responded the same day:

> *'Very good Peter. This is very clear and well reasoned. Thank you.*
>
> *A further thought, what legitimate commercial reason could Foxtel have to refuse C7 and Olympics if the price being proposed by Stokes is 80% of the Foxsports [sic] price? Maybe the answer is that Foxtel has an absolute right to decide whether it wants to deal with anyone, irrespective of commercial attractiveness of any particular deal or extraneous agenda. For example, if the access regime does not apply as we claim it does not, then Foxtel could refuse to deal because it didn't like Stokes or any reason it had. But if the regime does apply, then should we as directors of Foxtel be insisting that proper commercial criteria are used for working out the deal with Stokes?*
> *If so, when should we be asking for this to happen? Wouldn't it be best for it to be right now so there was not left in place evidence of improper considerations (if that were in play and I'm not sure it is, although I note your comments ...) and then a change in stance being required in the event the litigation is lost.*
>
> *What do you think?'*

803 Mr Akhurst gave evidence that the description of News' and PBL's position in Mr de Jong's email was consistent with his own understanding and that his questions reflected a concern that '*a commercially irrational refusal to take C7 might have competition law consequences*'. Mr Akhurst's view was that News and PBL had partly been driven by their preference for the commercial interests of Fox Sports at the expense of Foxtel. He considered Mr de Jong's perceptions '*quite plausible*'. However, he said that he was not expressing his own view as to a possible misuse of market power, but asking Mr de Jong for his advice. The documentation is consistent with that evidence and I accept it.

804 On 26 May 2000, Mr de Jong sent a further memorandum to Messrs Akhurst and Willis. He gave four '*legitimate*' reasons for rejecting Seven's November 1999 term sheet. The first three were the high price asked for the supply of C7; the absence of guarantees as to quality; and the excessive length of the term proposed. The fourth was that:

> *'strategically, if FOXTEL wants the pay TV AFL rights after 2001,* ***signing the C7 sport deal greatly assists Seven to compete against FOXTEL to buy those rights****'.* (Emphasis added.)

Mr de Jong continued:

> *'Is a commercial deal possible on C7 Sport? I don't think FOXTEL management is minded to do a deal because of [the adverse consequences for*

Foxtel's AFL rights bid] but if Seven drops the price low enough perhaps they will. However, there is a certain level of asymmetry in the way FOXTEL management deals with News entities (eg Fox Sports) versus the way they deal with Seven. For example, FOXTEL management was much tougher in negotiations with C7 than with Fox Sports. Also, FOXTEL management seem to have no problem putting "Fox" brands onto FOXTEL, but is vehemently opposed to Seven having its branding on the Olympic and C7 Sport channels (although C7 is arguably a competitor while Fox isn't).

Reading the chicken guts, it would appear that News and PBL have much to lose if FOXTEL carries C7. It strengthens Seven, which is bad for [Nine] and bad for Fox Sports. My cynical view is that Fox Sports would like to monopolise the pay TV sports rights market in Australia, and C7 is Fox Sports' only competitor (ESPN is also available in Australia, but I think it is basically a US sport channel resold in Australia).

...

Seven clearly wants a deal on C7 Sport, but they are using the access litigation to pressure on FOXTEL for the best possible deal (hence the high prices and one-sided terms of the November 1999 term sheet)'.

805 On 29 May 2000, Mr Akhurst thanked Mr de Jong for his advice and asked whether it would be prudent for Foxtel to have on record the offer it would find acceptable for the Olympics coverage alone. Mr de Jong replied that Mr Blomfield's letter of 27 April 2000 had made just such an offer, but that Mr Stokes had rejected it.

7.37 Foxtel Agrees to Take the Olympic Channels

806 In mid-June 2000, Mr Stokes abandoned the strategy of bundling C7 and the Olympics in relation to carriage on Foxtel. He did so because, as he said in an internal memorandum, he recognised that Foxtel would never accept bundling of the two sets of rights. In consequence of Seven's change of position, C7 and Foxtel Management reached agreement as to carriage of the Olympic channels. On 7 July 2000, they signed a term sheet which recorded the terms of an arrangement for the carriage of two C7 Olympic Games channels on Foxtel.

7.38 Telstra and News Consider Changes in the Foxtel Partnership: May-July 2000

807 Mr Akhurst was appointed to the board of Foxtel Management on 29 March 2000. By April 2000, the board of Foxtel Management was considering the introduction of a digital

service which would provide enhanced capabilities. By May 2000, Mr Akhurst was discussing with Mr Macourt a redefinition of the scope of Foxtel's activities. One of Telstra's concerns, as Mr Akhurst acknowledged, was that News had '*strong management control*' over Foxtel. Mr Akhurst agreed that his view at the time was that if the totality of issues between the Foxtel partners could be resolved, that would be a '*bigger sum ... than fixing the Fox Sports pricing issue*'.

808 A summary prepared by Mr Greg Willis for Dr Switkowski on 19 May 2000 recorded the position reached in discussions between News and Telstra:

> *'Talks have been held with News –*
>
> - *News see Foxtel as core business, no intention of exit*
> - *News see the value of a Telstra/News alliance*
> - *Understand PBL's non-alignment of interests*
> - *Telstra have discussed the possibility of News proposing to PBL that PBL exit the current arrangement*
> - *News have agreed that the scope needs to be changed in order to maximize Foxtel revenues*
> - *News are considering the possibility of delivering interactive services outside the Foxtel agreement'.*

809 Mr Akhurst explained in evidence the position as he saw it at the time:

> *'What I suggest you had in mind at this time was that in order to achieve agreement with News in relation to all the topics surrounding expansion of scope, you thought it would be necessary to create an improvement in the partnership relationship? --- Yes.*
>
> *The harmony between --- ? --- Build some trust.*
>
> *In order to do that, what you had in mind was solving some easier, smaller issues first? --- Yes.*
>
> *And you were conscious that in that context, there would be the necessity for Telstra perhaps to make some compromises? --- Potentially.*
>
> *...*
>
> *You had in mind that if you were to accommodate the interests of News by*

making compromises on smaller matters, that that would improve the partnership relations to such an extent that News might be more accommodating with Telstra on the bigger matters concerning partnership scope and Foxtel scope of business and so on? --- I don't know that I would have put it exactly like that. I think ---

How would you have put it? --- What I had in mind was that we would sit around the table and identify what issues were of importance to each of the relevant partners and discuss what their objectives were in relation to those issues, and then see which, if any, of those might be soluble. I didn't really know where it was all headed at that point. I wanted to get around the table and explore the territory with them'.

810 Discussions continued between Telstra and News in May and June 2000. A briefing note of 5 July 2000, prepared by Mr Greg Willis in anticipation of a meeting between Dr Switkowski and Mr Lachlan Murdoch, recorded that agreement '*in principle*' had been reached on some issues, although discussions continued '*and could stall*' on other matters. The parties had agreed in principle to expand the scope of Foxtel; to allow the Foxtel partners to bundle Foxtel with their own services (but not with products in competition with Telstra); and to provide for the Foxtel partners jointly to appoint senior officers of Foxtel. The topics on which discussions were continuing included whether Telstra would be the sole supplier of telephony services to Foxtel; whether the obligation of News and PBL to supply Foxtel with content on an exclusive basis should be removed; whether Foxtel should be floated on the sharemarket; and whether agreement could be reached for the long-term supply of Fox Sports to Foxtel. Mr Willis' assessment was as follows:

'The expanded scope of FOXTEL, with the contentious items remaining at the present status, represents an NPV gain to Telstra of $1.8 - $2 B. This is from the increased value of FOXTEL, revenue share and telephony defence.

The same expanded scope represents a NPV gain to News and PBL of $250 M - $450 M each (increased value of Foxtel), as well as additional value from increased subscribers to Fox Sports and through enhanced iTV offerings'.

811 A paper for the Telstra board meeting of 19 July 2000 included a report on negotiations with the Foxtel partners. The paper referred to the board of management having:

'[a] current strategy for revitalising FOXTEL in a manner which enhances Telstra's overall shareholder value'.

812 The paper identified six key issues for Telstra. These included expansion of the scope

of Foxtel's activities; removal of the non-compete obligations; and removal of News' and PBL's exclusive pay television content supply obligations. The paper noted that existing exclusive content requirements remained a key market differentiator between the Foxtel and Optus pay television platforms, but recorded that '*Telstra may be willing to consider exceptions on a case-by-case basis*'.

813 The Telstra board noted at the meeting of 19 July 2000 that:

> *'management is convinced of the importance of expanding FOXTEL's scope of services and of pursuing bundling of core Telstra services (fixed and wireless telephony, narrowband and broadband Internet access) ... opportunities with FOXTEL.*
>
> *The **Board further noted** that management considers that in order for FOXTEL not to be marginalised, the scope of FOXTEL should be expanded subject to satisfactory resolution of the critical issues outlined previously. The Board noted the paper and resolved to approve:*
>
> > *continuing the strategy of negotiating with News and PBL to resolve critical issues (the primary objective being a broad expansion of scope with the alternative being to, at a minimum, achieve a limited expansion of scope); and*
> >
> > *delegation of authority to the Pay TV Subcommittee of the Board to approve the negotiation strategy for critical issues'.* (Emphasis in original.)

814 On 19 July 2000, Mr Greg Willis sent Mr Akhurst some '*Talking Points*' for Dr Switkowski's discussions with the principals at News and PBL. The document recorded that the board of Telstra had '*drawn a number of lines in the sand*'. These included a requirement that the content arrangements for pay television should remain in place.

815 On 23 July 2000, Dr Switkowski sent an email to members of Telstra's pay television sub-committee suggesting that Telstra should release exclusive pay content arrangements on certain conditions:

> *'Following the telephone hookup of the subcommittee last Thursday, the Telstra Leadership Team ... reviewed our Foxtel options on Friday morning following an update by Bruce [Akhurst] of the status of the various analyses etc.*
>
> *I am consequently able to respond to the invitation of the*

subcommittee to document the minimum position we recommend taking with our Foxtel shareholders in the light of developments this week, and our further discussions among the executive team.

The following recommendations are made in the shared belief that doing nothing is not acceptable or viable or desirable, and that an accord that delivers increased shareholder value to all partners while keeping both News and PBL "inside the tent" is the goal we are trying to achieve.

...

There are five major points of contention between Telstra and News/PBL. These are:

*** Pay TV non-competes;*

*** exclusive Pay TV content supply arrangements;*

*** sale of Telstra core products as the sole telephony / ISP offering (and the terms thereof);*

*** float and governance;*

*** management independence.*

The position we put to our partners this week has provoked a strong reaction – both News and PBL are of the view that our current proposal remains onesided, and is unacceptable to them. ...

Telstra management is concerned that this situation, if not resolved quickly, may provide further incentive for News and PBL to seek other arrangements which could create significant new competitive forces such an alliance between Austar, C+W Optus and John Malone's other interests.

I agree that it is crucial that the minimum negotiating parameters be defined and supported by the Board subcommittee such that an acceptable deal can be concluded quickly with our partners. It is the unanimous view of the Telstra management team, as ratified last Friday, that we should negotiate the following minimum position with News and PBL on the five major points of contention:

1) Telstra's core products such as basic telephony / ISP bundled offering with Foxtel will be maintained for the first three years of the new contract after which time Telstra would have first right of refusal to match any offer made by other telephony and ISP provider;

2) Pay TV non-competes will be maintained for three years after

finalising negotiations;

3) Exclusive Pay TV content supply arrangements will be released with the proviso that an acceptable Fox Sports pricing regime be immediately implemented with Foxtel;

4) ...

5) Independent management of Foxtel to be put in place'.

816 On the same day, the Chairman of Telstra, Mr Mansfield, sent an email to members of the sub-committee supporting the views of management as to the minimum position Telstra could accept.

817 An apparently lengthy meeting took place between Mr Macourt of News and Mr Akhurst of Telstra on 27 July 2000. Many items were discussed, including whether the obligations of News and PBL to provide exclusive content to Foxtel should remain. The notes of the meeting do not suggest that the issue was resolved.

818 On 18 August 2000, Mr Akhurst summarised for Mr Mansfield and Dr Switkowski the state of negotiations in relation to Foxtel. Under the heading '*Content Supply*', Mr Akhurst reported as follows:

> *'News and PBL want to be released from their content supply obligations in favour of FOXTEL after 3 years. In the next 3 years News and PBL have suggested programming obligations which are weaker than their current obligations. This will result in less programming delivered to FOXTEL and at higher prices. The News and PBL agenda appears to include being able to supply Fox Sports to Optus, which will harm FOXTEL. It will also allow News and PBL to deliver their content to their own pay TV operation if they are released from the non-compete. News and PBL also want Telstra to assume programming obligations'.*

7.39 Optus Tries Again to Obtain Fox Sports

819 On 28 July 2000, Mr Anderson spoke with Mr Rizzo, then the Chairman of Foxtel. Mr Anderson asked what had become of the promise made six months earlier to sell Fox Sports to Optus. Mr Anderson pointed out that nothing had ever happened. Mr Rizzo responded that he '*wasn't sure its [sic] ours to sell*'. Mr Anderson concluded the email reporting on the meeting on a sceptical note: '*(probably another six months ...)*'.

820 Mr Rizzo responded on 9 August 2000, apologising for the delay. He said that Telstra's consideration had '*been complicated by other factors affecting Foxtel*', presumably a reference to the discussions concerning the restructuring of Foxtel. It does not appear, however, that Mr Rizzo made any further written response to Mr Anderson.

7.40 Further Discussions between News and Telstra: August 2000-January 2001

821 A presentation for a Telstra board meeting on the state of discussions concerning Foxtel, dated 24 October 2000, recorded that the '*Negotiable items*' included '*non-competes & content obligations subject to no damage to FOXTEL*'.

822 A meeting took place between Mr Philip and Mr Akhurst on 1 November 2000. Mr Philip's notes of the meeting record the following:

> *[Mr Akhurst] said that Chris Anderson had told them that he wanted Fox Sports. He said they did not really have any difficulty with this except that FOXTEL Management had told them exclusivity for Fox Sports was extremely valuable (and that this would therefore need to be reflected in the exclusive price/non-exclusive price differential), and that they had great difficulty agreeing to this when Optus was suing them on the cable roll out – he said Optus had recently re-pleaded and re-invigorated this claim, and was seeking in the order of $900 million – he referred to it as a very irritating try on – he was clearly trying to tell me that we should get Optus to drop the claim as the price of getting Fox Sports'.*

823 On 9 January 2001, Mr Akhurst made a presentation by audio-link to the board of Telstra on the negotiations with the Foxtel partners. He did so by reference to handwritten notes. Those notes recorded that:

> *'Bundling, non-competes, branding, use of Telstra infrastructure etc – all pretty much agreed'.*

8. AWARD OF THE AFL PAY TELEVISION RIGHTS

824 In this Chapter I deal with the events leading up to and including the award in December 2000 and January 2001 of the AFL broadcasting rights for 2002 to 2006. As a postscript, I include a brief account of the award of the AFL broadcasting rights for 2007 to 2011, which occurred in 2005. The award to Seven and Ten of the AFL broadcasting rights for 2007 to 2011 through the exercise of Seven's last right of refusal, although not the subject of any complaint in the proceedings, is relevant to significant issues in the case, including market definition.

825 Of necessity, there is material in this Chapter that relates to topics dealt with elsewhere. Equally, material presented elsewhere, particularly in Chapters 7 and 9, relates to the factual matters outlined in this Chapter. Some cross-references are given, but it is important to remember that each Chapter in this judgment is not necessarily self-contained.

8.1 Seven's Entitlements to the AFL Broadcasting Rights

8.1.1 AFL-Seven Licence Extension

826 On 15 November 1996, the AFL and companies related to Seven Network entered into the AFL Licence Extension, which formally gave effect to the agreement made between Seven and the AFL in June 1995 ([510]-[511]). The AFL-Seven Licence Extension took the form of the AFL-Seven Original Licence, but with additional clauses and some amendments. The AFL-Seven Licence Extension extended the AFL-Seven Original Licence to cover the 1999, 2000 and 2001 AFL seasons. Because the formal agreement executed by the parties on 15 November 1996 incorporated the AFL-Seven Original Licence, the consolidated agreement governed the 1993 to 2001 AFL seasons. I shall refer to the consolidated agreement as the '**AFL-Seven Licence**'.

827 Clause 3(a) of the AFL-Seven Licence provided as follows:

> *'The AFL hereby grants to [Seven] for the 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2001 AFL Seasons, the exclusive right to:*
>
> *provide live and delayed free-to-air television coverage (including news coverage); and*
>
> *exhibit or broadcast live and delayed coverage by way of pay television,*

throughout Australia of all AFL matches and events conducted in Australia under the auspices of the AFL …'

The expressions '*AFL Season*' and '*AFL Match*' were defined in cl 1.1, as follows:

'"AFL Match" means any match of Australian football conducted in Australia under the auspices of the AFL including practice matches pre-season competition matches, home and away competition matches and the final series matches;

…

"AFL Season" means the duration of fixtured AFL Matches within any year including the pre-season competition matches, the home and away competition matches and finals series matches but excludes any matches played outside Australia'.

828 Clause 4 of the AFL-Seven Licence dealt with rights fees and payments separately for each '*AFL Season*', although each sub-clause followed a similar form. Clause 4.9, for example, specified the consideration for the 2001 season:

'In consideration of the AFL entering into the terms of this Agreement insofar as they relate to and confer rights in respect of the 2001 AFL Season the sum of THIRTY THREE MILLION DOLLARS ($33,000,000.00) as follows:

(a) the sum of EIGHT MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($8,250,000,000.00) by 1st January 2001; and

(b) the sum of EIGHT MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($8,250,000.00) by 1st April 2001; and

(c) the sum of EIGHT MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($8,250,000.00) by 1st July 2001; and

(d) the sum of EIGHT MILLION TWO HUNDRED AND FIFTY THOUSAND DOLLARS ($8,250,000.00) by 1st October 2001'.

829 The apportionment of the fees payable in respect of each year as between free-to-air and pay television followed the apportionment determined in the extension agreement of June 1995 ([510]). For example, the fee of $33 million for the 2001 season was made up of $20 million for the free-to-air television rights and $13 million for the pay television rights (cl

4.10(i)).

830 Clause 9.2 of the AFL-Seven Licence provided as follows:

> *'The AFL will use its best endeavours to schedule 36 games each AFL Season from 1999 to 2001 that are available for live Australia wide pay television coverage. At a minimum, the AFL agrees that it will schedule 30 games in 1999, 33 games in 2000 and 36 games in 2001 so that they are available for live Australia wide pay television coverage. Scheduling of such games will be agreed between [Seven] and the AFL'.*

831 The AFL agreed to provide at least one live match every Saturday afternoon (22 matches over the season) subject to certain geographical limitations. The AFL also agreed to provide at least six Saturday night games for broadcast on pay television throughout Australia without restriction and at least 12 Sunday matches played in Melbourne for exclusive pay television coverage without restriction (Sch 3).

832 On 15 November 1996, the same parties entered into the '**AFL Copyright Agreement**'. Under the AFL Copyright Agreement, copyright in Australia in all transmissions and recordings of each '*AFL Spectacle*' vested in the Seven company that first transmitted or recorded it. The copyright was assigned until the end of the term of the AFL-Seven Licence Extension (cl 2.1). At the end of the term of the AFL-Seven Licence Extension, copyright reverted to the AFL (cl 2.2). Subject to the AFL-Seven Licence Extension, Seven was entitled to transmit on free-to-air or pay television within Australia the recordings of AFL Spectacles, on an exclusive basis during the term and on a non-exclusive basis in perpetuity (cl 4).

8.1.2 AFL First and Last Deed

833 On 3 September 1997, the AFL and companies related to Seven Network entered into the First and Last Deed, by which the AFL granted Seven a first and last right of refusal over certain free-to-air television rights for the period 2002 to 2011. Seven agreed to make irrevocable offers to the AFL in respect of free-to-air and pay television rights covering the whole of the period. Seven agreed to pay the AFL a total of $20 million as consideration for the rights and benefits under the Deed and also agreed to negotiate a sponsorship package with the AFL (cl 2).

834 The AFL undertook not to grant a licence of the AFL free-to-air television rights to any person except for a 10 year term (2002 to 2011), or for a five year term (2002 to 2006) followed by further licences for the balance of the term (cl 3). The AFL further agreed not to grant a third party a licence for any term unless it first made a written offer to grant the licence to Seven ('*First Offer*') (cl 4(a)). Seven had 14 days in which to accept or reject the First Offer (cl 4(b)). If Seven rejected the First Offer, the AFL was free to negotiate with a third party for the grant of the free-to-air television rights. However, before granting any such licence, the AFL had to make a '*Last Offer*' to Seven on the same terms and conditions offered to the third party (cl 4(d)(i)). If Seven rejected the Last Offer, the AFL had 45 days in which to grant a licence to the third party on the terms and conditions of the Last Offer (cl 4(d)(iv)).

835 Clause 5 provided for the AFL to have a put option, in that Seven irrevocably offered the AFL the right to require Seven to accept a licence for the 10 year term, or the first five year term or further terms totalling five years, on specified terms and conditions. The licence fee if the AFL accepted the offer (that is, exercised its put option) was to be $36 million per annum, subject to CPI adjustments (cl 5(b)).

836 Clause 6 contained a '*Pay Television Irrevocable Offer*' as follows:

> *'In further consideration of the grant by the AFL to Seven of the rights and benefits under clause 4, and subject to Seven obtaining the licence for the Term pursuant to clause 4 or clause 5, Seven irrevocably offers to the AFL to form a 50/50 joint venture between the AFL and Seven ... for the purpose of exclusively exploiting pay television rights in respect of the AFL Competition. This irrevocable offer must be accepted by the AFL within 30 days of a binding licence for the Term being concluded between Seven and the AFL pursuant to clause 4 or clause 5'.*

The joint venture was to contain specified terms and conditions, including a term that the AFL pay television rights 'should be structured so that they are complementary to rather than competitive with, free-to-air television coverage of the AFL Competition' (cl 6(a)). For each year of the term, Seven guaranteed the AFL a minimum return of $15 million (cl 6(d)).

837 The parties to the First and Last Deed agreed that News would provide promotional support to the value of $5 million per annum over a five year period commencing in 1998. Seven was to procure News to provide this promotional support (cl 8). In fact, Seven and

News had previously agreed, as part of the '*Docklands Stadium Consortium Proposal*' (by which Seven proposed that News participate in a bid for the Docklands Stadium in Melbourne, at which AFL matches were played), that News would offer the AFL a promotional package worth at least $5 million per annum.

8.2 Early Interest in the AFL Broadcasting Rights: Foxtel, Nine and Telstra

838 Mr Mockridge of Foxtel Management took the view early in his tenure as CEO (which commenced in January 1997) that it was desirable for Foxtel to include AFL content in its programming, provided that the programming could be obtained on acceptable terms and conditions. Mr Mockridge's view was that exclusive AFL content was a subscription driver, particularly in Victoria, where Foxtel's subscriptions were lagging.

839 Mr Macourt, who in 1997 was News' Chief Financial Officer, held a similar view at the time. He was responsible for inserting a provision into the Docklands Stadium Consortium Proposal, to the effect that News had to be given all AFL pay television rights made available in connection with the Docklands bid.

840 An internal AFL document of 9 July 1998 recorded that Seven had told the AFL that it would not bid if the AFL broadcasting rights package was split between free-to-air and pay television rights. The same document recorded that Nine had expressed an interest in Friday night games, but had indicated that NRL content would be a priority in Sydney and Brisbane.

841 On 21 July 1998, Mr Moriarty (then the Telstra executive responsible for the Foxtel Partnership) and Mr Akhurst met representatives of the AFL, including Mr Jeff Browne and Mr Wayne Jackson. The meeting canvassed the options available to the AFL in relation to the broadcasting rights after 2001. Telstra expressed interest in acquiring the AFL pay television rights (for broadcast by Foxtel) and the online rights. The AFL representatives said at the meeting that the AFL might split the free-to-air and pay television rights.

842 The minutes of PBL's Executive Committee meeting of 6 August 1998 recorded that Messrs Falloon and Macourt had attended a meeting with Mr Jackson of the AFL to discuss the possible acquisition of the AFL pay television rights. The minutes did not identify which entity or entities might be interested in acquiring the rights.

843 Reference has already been made to meetings between Telstra and News representatives on 28 August 1998 and 9 September 1998 ([612]-[616]). At those meetings, the discussions included the possibility of acquiring of the AFL pay television rights for the benefit of Foxtel.

844 A draft presentation to the AFL was prepared within Foxtel in late September or early October 1998. One page included the statement that '*Foxtel is Australia's Leading Pay TV Company and Enjoys the Backing of Australia's Largest Companies*'. Mr Mockridge's comment, recorded on this page, was as follows:

> *'this section needs to present Austar as our ally and Fox Sports franchisee holder i.e together we have access to 400 + 250 = 650k subs growing by 20k+ a month while Optus has 180k and is static i.e conclusion is that C-7 sports channel with Optus/Ch 7 is a dead end and counter productive to AFL's longer term distribution objectives'.*

Mr Mockridge acknowledged in evidence that he wished to create the impression in the AFL that C7 would not be taken by Foxtel even if C7 had the AFL pay television rights. However, he maintained that this was not in fact his view at the time and that he wished to convey the impression, in effect, for negotiating purposes.

8.3 Mr Mounter's Strategy at Seven

845 Mr Mounter took up his position as Managing Director and CEO of Seven on 1 January 1999. On about 1 February 1999, Mr Mounter received a draft report from the Pay/Cable/Satellite Television Committee of Seven. The draft report recommended joint venture arrangements with pay television carriers to ensure that Seven was in the strongest position to retain the AFL broadcasting rights.

846 On 9 February 1999, Mr Mounter sent an email to Mr Wood and others. Copies were sent to Messrs Stokes and Gammell and both (I find) read the email. Mr Mounter set out the lines of communication that were to be followed in relation to Foxtel:

> *'The committee we have set up to strategise our relationship with AFL and Seven Pay Television ... believe that we should urgently seek to place our AFL channel on Foxtel. There is little doubt that if we do not, Fox will make serious efforts to secure rights of their own at renewal time.*
>
> *We have, therefore, authorised Shane [Wood] to re-open lower level*

> *discussions with Foxtel. I have also cleared the way for our broadcast channel to be carried on Foxtel and this opportunity will be used in any negotiations.*
>
> *Meanwhile, I will open discussions with the CEO of Foxtel and Kerry [Stokes] is available to speak to Rupert [Murdoch], if it seems necessary.*
>
> *It is absolutely essential, however, that no one sets up any meetings, has any discussions or makes any moves that have not been cleared by me and discussed with both Seven Pay Television and the AFL group.*
>
> *Pete Gammell and Kerry will, from time to time, on my behalf, be having discussions at top level with Telstra and they will be strategising these with myself'.*

847 The email was discussed at a meeting on 11 February 1999 between Messrs Mounter, Stokes and Gammell. At that meeting, Messrs Stokes and Gammell agreed with Mr Mounter's strategy to get C7 on Foxtel if possible. Mr Stokes acknowledged in evidence that he was aware from February 1999 that one reason for this strategy was to avoid competition for the AFL broadcasting rights when they came up for renewal. It is likely that at this meeting Mr Mounter updated Mr Stokes as to the state of negotiations with Austar.

848 Mr Mounter's monthly report for Seven's board meeting of 26 February 1999 stated that work had begun:

> *'on a strategic approach to regaining the AFL. It is clear we cannot get into a price war for those rights, next time around'.*

As Mr Stokes accepted in evidence, the '*strategic approach*' involved developing an offering for the AFL broadcasting rights that would pre-empt any competitive auction for the rights.

8.4 Foxtel Prepares a Strategy

849 On 24 February 1999, Mr Mockridge prepared a draft outline of a proposal to be put to the AFL in respect of the AFL pay television rights, when they became available. The draft included the following points:

> Foxtel was hoping to work with the holder of free-to-air television rights in order to ensure maximum coverage for the AFL. Seven had been a '*fantastic provider*' of free-to-air coverage, but its expertise was not in pay television. Moreover, Seven had a vested interest in seeing maximum coverage on free-

to-air and as little as possible on pay television because it was a '*competing medium*'.

Foxtel would offer the AFL '*equity in its own channel*'. This would allow the AFL:

> *'to influence programming and game schedules so to best compliment [sic] the free-to-air coverage and best promote the game'.*

An equity deal would also allow the AFL to obtain revenue from pay-per-view programs.

Further participation by News in the AFL could be leveraged through its newspapers.

850 In early March 1999, Mr Boyd, on Mr Mockridge's instructions, began work on a draft presentation entitled '*Network AFL – The Future of the National Game*'. The document remained a work in progress throughout 1999 and no version of it was ever given to the AFL. At the time Mr Boyd commenced work on the draft presentation, he also began preparing financial models setting out the consequences for Foxtel if it acquired the AFL pay television rights.

851 At the Foxtel Management board meeting of 23 March 1999, it was agreed that Mr Mockridge should take the lead in pursuing discussions with the AFL in order to secure the AFL pay television rights on a non-exclusive basis ([680]).

8.5 Seven's Presentation to the AFL: 21 June 1999

852 From early to mid-1999, Seven was uncertain as to when the AFL would decide who was to have the AFL broadcasting rights after 2001. Mr Stokes was, however, aware that the AFL was seeking to promote competitive tension in relation to the rights.

853 In Mr Mounter's CEO's report, prepared in February 1999, he stated that a review had begun of Seven's sports commitments:

> *'targeting a few key sports and trying to get out of the escalating bids for anything and everything which has cost us so dearly.*
>
> *We have also started work on a strategic approach to regaining the AFL. It is*

> *clear we cannot get into a price war for those rights, next time around. We must find other ways, as the company did with Docklands, of strengthening our position'.*

854 Seven Network's board adopted Mr Mounter's report. Mr Stokes agreed that his attitude from this time on, in relation to the renewal of the AFL broadcasting rights, was that Seven should do '*whatever it could to avoid competition on price for those rights*'. The approach Seven adopted was to propose a joint venture with the AFL for the exploitation of the pay television rights and to insist on a single bid for both the free-to-air and pay television rights. Mr Stokes, Mr Wise and others considered that this would maximise Seven's chances of avoiding competition for the rights, since they thought that there would be little interest in the free-to-air television rights.

855 On 21 June 1999, Seven made a presentation to the AFL Commission. The leading role was played by Mr Mounter, but Messrs Wise and Harold Anderson were also present. On 30 June 1999, Mr Anderson forwarded a copy of the written presentation to the AFL. Features of the presentation included the following:

> Seven would not contemplate a '*splitting*' of the AFL broadcasting rights;
>
> Seven would acquire the rights for a 10 year period from 1 July 1999; and
>
> the AFL would take a 30 per cent profit share in C7, underwritten by a guaranteed $15 million annual payment for the period 2002 to 2011 (in addition to the annual broadcast [that is, free-to-air] rights fee of $36 million as outlined in Seven's First and Last Deed).

856 The presentation was supported by a model which assumed that:

> the channel would be on all three major platforms and the total number of subscribers would grow from about 1 million to about 2.7 million by 2010;
>
> Foxtel and Austar would pay $2.00 to $3.00 pspm from 2000, rising by $1.00 for every game moved to pay television exclusively;
>
> Optus would pay the fees set by the C7-Optus CSA; and
>
> a pay-per-view service would be introduced in 2005, with 25 per cent of revenues going to the AFL.

857 The AFL representatives informed Mr Mounter and his colleagues at the meeting that the AFL would be talking to other interested parties over the succeeding two to three months. The proposal put forward by Seven at the meeting, as an AFL Commission document recorded, was withdrawn after Mr Mounter's departure as CEO.

858 Mr Stokes was closely questioned about his knowledge of Mr Mounter's presentation. At first, he insisted that he had not learned of the presentation until some time in July 1999. Mr Stokes also said that Mr Mounter, at the board meeting of 25 June 1999, had merely advised the board in general terms that discussions had taken place, but had not mentioned the presentation to the AFL Commission a few days earlier. In fact, as appeared from documents that were not discovered by Seven until later in Mr Stokes' cross-examination, Mr Stokes wrote a long letter to Mr Mounter on the afternoon of 21 June (the day of the meeting with the AFL Commission). The letter raised many matters of concern to Mr Stokes about Mr Mounter's performance as CEO, including Mr Stokes' disappointment that he had not been asked to join in the presentation to the AFL and that Mr Mounter had not adequately informed the board on Seven's position in relation to the AFL. In his reply, made on the same day, Mr Mounter said that the presentation to the AFL was not '*definitive*' but merely '*opened the door [on] what will be a long discussion*'. Faced with this correspondence, Mr Stokes accepted that his original evidence as to when he had learned of the presentation had been '*wrong*'.

8.6 Foxtel's AFL Strategy Paper

859 Foxtel's AFL Strategy paper and its consideration at the Foxtel board meeting of 8 July 1999 has been considered in Chapter 7 ([723]ff).

8.7 Mr Mounter Leaves Seven

860 The Seven Network board met on 30 July 1999. Mr Mounter did not attend the meeting. After the meeting, Seven issued a press release announcing Mr Mounter's departure from Seven and attributing the departure to '*irreconcilable differences which have emerged over a restructuring of the company*'. The minutes of the meeting record that Mr Stokes '*distributed a confidential paper on his discussions with Mr Julian Mounter regarding [six specified matters]*'. None of the six matters identified in the minutes referred to Mr Mounter's dealings with Foxtel or Austar concerning the supply of C7.

861 When Mr Stokes was first asked about this meeting in cross-examination, the confidential paper identified in the minutes had not been produced. Mr Stokes agreed that the minutes made no reference to any differences between the board or himself and Mr Mounter in relation to his dealings with Foxtel or Austar concerning C7. However, Mr Stokes said that his recollection was that the confidential paper was '*far more developed than the items [in the minutes]*'. A draft of the confidential paper referred to in the minutes of 30 July 1999 was subsequently produced by Seven and admitted into evidence. Mr Stokes was questioned about the document. The draft made no reference to any dissatisfaction with Mr Mounter on the issue of C7's dealings with Austar and Foxtel. The omission can hardly be a consequence of delicacy on Mr Stokes' part, since the draft document appears to have presented Mr Stokes' concerns fully and frankly on each subject addressed. The absence of any reference to Mr Mounter's dealings with Foxtel or Austar is an additional very strong reason for rejecting the evidence of Mr Stokes and Mr Gammell that they had complained to Mr Mounter about these matters in the period leading up to the termination of his employment.

862 There was a conflict between the evidence of Mr Stokes and Mr Gammell as to the precise strategy that was employed to engineer Mr Mounter's departure. It is not necessary to resolve the conflict. It is enough to say that neither version enhances the plausibility of their version of the conversations with Mr Mounter concerning his dealings with Austar and Foxtel. In any event, following Mr Mounter's departure, Mr Stokes took over the position of CEO of Seven and acted full-time in that capacity for the following 18 months.

8.8 Foxtel Management's Board Meeting of 26 October 1999

863 The Foxtel Management board meeting of 26 October 1999 approved a recommendation that Foxtel negotiate directly with the AFL for the pay television rights. The board resolved that a sub-committee be formed to modify Foxtel's offer as negotiations progressed. The events leading up to the meeting and the resolutions of the board have been dealt with in Chapter 7 ([768]-[772]).

8.9 AFL Commission Meeting of 5 November 1999

864 The AFL Commission was updated at its meeting on 5 November 1999 as to the state of negotiations relating to the AFL broadcasting rights. The summary of '*potential rights partners*' indicated, among other things, that:

Seven was expected to propose a joint venture in respect of all broadcasting rights and had said it would not bid on split rights;

Nine had taken a '*very aggressive approach*' and had said that it would not bid unless the rights were split;

News and Foxtel were very interested in the pay television rights and did not necessarily want exclusivity; and

Telstra was very interested in establishing a relationship with the AFL.

865 The update noted that Seven had initially proposed to '*migrate*' games to pay television, with four games being shown on pay television within 10 years. It identified the critical question as whether or not '*migrating ... to subscription television is in line with [the AFL's] mass marketing philosophy*'. The update also recorded that the Broadcasting Committee had concluded that there would:

> *'not be a split of free to air rights, that is, between Seven and Nine. The decision to split will be between free to air and subscription broadcasting'.*

8.10 Seven's Initial Offer: December 1999

8.10.1 Mr Stokes' Warning

866 In anticipation of a meeting between Mr Wise of Seven and Mr Samuel of the ACCC, Mr Stokes sent Mr Wise a letter on 22 November 1999. That letter attached a second letter from Mr Stokes addressed to Mr Wise which Mr Stokes said Mr Wise could show to Mr Samuel but not leave with him. Mr Stokes' second letter identified three options:

the most attractive option was for the AFL and Seven to renegotiate continuance of the existing agreement at the same price and cost;

the second was for the AFL to repurchase Seven's first and last rights; and

the third was for the AFL to split the free-to-air and pay television rights, which would lead to conflict and legal action.

867 Mr Stokes' letter continued:

> *'After two years of research which include the current legal actions against Foxtel and its partners,* ***I believe any attempt by Foxtel to bid for the pay rights or free to air rights would be a violation of the Trade Practices Act****.*

Indeed given the circumstances this would probably be unconscionable conduct.

This is particularly applicable given the ACCC's understanding of the future conduct of PBL and News in approving the PBL/News/Foxtel rationalisation.

To try and circumvent these understandings by using Foxtel as the purchasing agent only increases the risk of their failure in the light of our current court action.

This is obviously going to be a long, involved and serious action which I think all parties would prefer to avoid.

As I have previously explained to [Graeme Samuel], Seven Network need to know where it stands as the commissioning of a replacement program will take 18 months before we can get it to air.

...

Should we not get a response or indeed if the response takes longer than between now and Christmas we will, in the New Year, seek an injunction to prevent any further dealing with the AFL TV rights until such time as we have been given the opportunity to receive the AFL's 'First' offer under the existing First and Last Agreement'. (Emphasis added.)

868 Mr Stokes denied that he was intending to convey to the AFL (through Mr Wise) a threat that Seven might institute legal proceedings against the AFL if it sought to split the AFL free-to-air and pay television rights. I cannot accept that denial. No doubt Mr Stokes' threat of legal proceedings encompassed News, Foxtel and PBL, but the letter did not confine the threat to these parties. Indeed, it is difficult to see how Mr Stokes (as a lay person, not a lawyer) could have thought that Seven could obtain the injunction referred to in the letter without involving the AFL in the litigation. I infer that Mr Stokes intended the letter to be perceived by the AFL as a threat that, if it split the AFL broadcasting rights, it would risk being embroiled in legal proceedings instituted by Seven.

8.10.2 The Offer

869 A meeting between Seven, represented by Messrs Gammell and Wise, and the AFL took place on 15 December 1999. Seven presented an initial offer comprising:

> free-to-air television rights for $36 million per annum (underpinned by the First and Last Deed);

all subscription rights (pay and internet) for $20 million per annum, as part of a joint venture with the AFL, with profits to be shared on revenues above $40 million;

contra of $5 million per annum in advertising time for the AFL; and

sponsorship of $10 million per annum.

The total amounted to $71 million per annum, but the AFL evaluated the '*actual offer*' for broadcast as worth $56 million, plus contra and a share in the joint venture.

870 An AFL '*Broadcasting Update*' of 31 January 2000 described Seven's proposal as essentially a joint venture on all rights other than the free-to-air television rights. The update reported that Seven had indicated that if the free-to-air television rights were split, it would not bid. Nine, by contrast, had said that it would not bid unless the rights were split. News and Foxtel were interested in the pay television rights, but did not necessarily want exclusivity. Telstra was very interested in establishing a relationship with the AFL, but Optus was selling its interest in Optus Vision and did not '*see broadcasting as core business*'.

8.11 Project Chess

871 At some stage during 1999, probably towards the middle of the year, a project group was formed within Telstra which later acquired the name '*Project Chess*'. The group was to consider and develop a proposal that Telstra acquire the AFL broadcasting, sponsorship and internet rights. Project Chess was managed by Mr Rolland, the head of the Online Division of the Convergent Business Group.

872 Telstra representatives, including Ms Lowes (until her departure), met with AFL representatives on a number of occasions between September 1999 and March 2000. Some of these meetings have been referred to in Chapter 7. On 14 December 1999, Telstra's interest in acquiring the AFL pay television and internet rights was the subject of an article in *The Australian.*

873 On about 21 December 1999, a meeting took place at AFL headquarters in Melbourne. The meeting was attended by Messrs Samuel and Jackson and others on behalf of the AFL. Ms Lowes and others represented Telstra. Mr Akhurst of Telstra also attended in place of Mr Moriarty, who was unable to participate.

874 Mr Samuel suggested at the meeting that Telstra consider making a bid for all the AFL broadcast, sponsorship and internet rights, with a view to onselling some of the rights. A number of other possibilities were also discussed. Mr Akhurst did not understand the AFL to be expressing a preference that every bidder should bid for the entirety of the rights. Rather, he took it that the comments were being addressed specifically to Telstra. The Telstra representatives were also informed at the meeting that Optus and Austar could terminate their respective CSAs with Seven if Seven lost the AFL pay television rights.

875 Ms Lowes' more or less farewell message on this topic to Dr Switkowski, shortly before her departure from Telstra, exuded optimism:

> *'We are currently heading to a very positive deal, in my opinion, for Telstra. The plot is for Telstra to get the interactive rights (eg, internet, interactive TV) for a revenue or profit share (ie, very little up-front cash) and to keep the AFL happy by linking this with a sponsorship deal (Foxtel would get the PayTV in this scenario.) The AFL is already very keen to get us involved in sponsorship (their eyes light up every time we mentioned [sic] it) …'*

8.12 Mr Mockridge and Ms Lowes Depart: February 2000

876 Mr Mockridge left Foxtel Management in late February 2000 and was replaced by Mr Blomfield as CEO. On 17 February 2000, shortly before his departure, Mr Mockridge prepared a memorandum recommending that the board authorise an agreement with News requiring News to support Foxtel's bid for the AFL pay television rights, in return for Foxtel committing additional advertising expenditure to News' publications. The memorandum noted that on 26 October 1999 the board had approved in principle a submission to the AFL to acquire the AFL pay television rights.

877 Within a short time of taking office, Mr Blomfield asked Mr Campbell, who happened to be an AFL enthusiast, to become involved in the preparation of a bid for the AFL pay television rights. Mr Campbell took as his starting point Mr Mockridge's memorandum of 17 February 2000. Among the tasks entrusted to him was the preparation of a financial presentation to the AFL.

878 At about the same time, Ms Lowes left Telstra and shortly thereafter commenced working for Seven Network and an associated entity. She was engaged by Seven on Mr Gammell's recommendation and acted, among other roles, as a director of i7 while Mr

Gammell was Chairman of that company. Her departure meant that she had to be replaced on the sub-committee set up by the Foxtel Management board on 26 October 1999 to pursue the AFL pay television rights. Mention has already been made of the fact that Ms Lowes' departure from Telstra was seen as an opportunity by Mr Mockridge for a settlement of the Fox Sports pricing dispute with Telstra.

8.13 Seven's Offer of 17 March 2000

8.13.1 The Offer

879 On 1 March 2000, Mr Jackson of the AFL invited Mr Wise of Seven to make a presentation to the AFL Commission addressing three issues:

> *'• Network strategy for AFL telecasts, including the split between free to air, pay television and other platforms.*
>
> *Programming priority.*
>
> *Joint marketing and promotional opportunities'.*

880 Mr Wise's understanding at the time was that News, Foxtel and Fox Sports were interested in the AFL pay television rights, but that no-one would be interested in the free-to-air television rights at the price Seven was prepared to pay. Mr Wise believed at the time that Nine was not interested in the free-to-air television rights (although Mr Stokes said that he had a contrary belief) and Mr Wise had given no consideration at all to Ten as a potential bidder. Nor did he think that Telstra was a serious competitor for the free-to-air television rights. Mr Wise explained his strategy in evidence:

> *'So is it the position that you believed that the best position to take from Seven's point of view was to offer for the pay and free-to-air rights together? --- Yes.*
>
> *Because one competitive advantage which you saw it had, that Seven had, was that no-one else was interested in the free-to-air rights? --- Again, at the prices that Seven was prepared to pay, yes.*
>
> *You believed that one area where there was likely to be competition with Seven was the Pay TV rights? --- That's correct'.*

881 At a meeting on 18 March 2000 at Seven's Melbourne offices, Mr Wise handed Mr Samuel a letter dated 17 March 2000 addressed to Mr Jackson. The letter contained a

'*proposal*' in relation to the AFL broadcasting and related rights. The proposal was expressed to be without prejudice to Seven's rights under the First and Last Deed. It was '*merely a proposition capable of being acted upon given your agreement to move forward*' but was to '*lapse*' after 30 days. The key elements were these:

> the deal was for all AFL rights, including free-to-air, pay and internet rights;
>
> the proposal was for a 10 year term starting 1 January 2002;
>
> the '*offer*' for the rights was $75 million per annum, inclusive of $5 million contra, escalating by the CPI;
>
> the AFL could take advantage of a '*profit participation scheme for non-FTA rights*', sharing profits equally above an agreed base (set at $25 million);
>
> the AFL would take a more cooperative approach to scheduling, including:
> - completion of a competition round in three days (except for holiday weekends);
> - a 30 game premiership season; and
> - a game every Friday night, Saturday afternoon, Saturday night and Sunday afternoon during the premiership season; and
>
> Seven retained the right, in its discretion, to '*allocate rights*' between mediums.

882 Mr Stokes accepted in evidence that Seven was seeking to lock up the rights for a period of time beyond the five years envisaged in the First and Last Deed. He also agreed that Seven was seeking a '*fairly radical revamping of the competition*'. One reason for doing so, as he explained, was that such a revamp was needed to justify the offer of $75 million per annum.

883 Mr Wise agreed that the term entitling Seven to allocate rights between mediums was an important principle from Seven's perspective because Seven wanted to control the allocation, rather than leaving it to the AFL. Mr Wise said that the term gave Seven '*the ultimate discretion to manage the games between mediums to give us the best outcome*'.

8.13.2 AFL Meeting of 20 March 2000

884 The AFL Commission met on 20 March 2000 and considered a briefing document

prepared by Mr Jackson. Mr Jackson reported that:

> PBL/Nine was not prepared to bid;
>
> Telstra was keen for Foxtel to have AFL content and wanted to carry AFL on the internet;
>
> News had made '*a very impressive presentation*' for internet rights; and
>
> Seven's offer was seen as '*top value*' but the AFL needed to continue a '*strategic partnership*' with News, a view shared by Seven.

The briefing document recommended that the AFL Commission support focussing negotiations on Seven and News, including dealing with a range of '*qualitative issues*'. That recommendation was accepted by the Commission.

8.13.3 AFL's Response to Seven's Offer

885 On 10 April 2000, Mr Jackson responded in detail to Seven's proposal of 17 March 2000. Among other things, the letter rejected the suggested 30 game season and accused Seven of a lack of good faith in seeking to impose a 30 day deadline having regard to the complex issues at stake.

8.14 Project Chess: March-May 2000

886 On 23 March 2000, Mr Buckley of the AFL sent material to Telstra designed to enable it to formulate a formal proposal for AFL rights. Shortly thereafter, the first of a series of '*Chess Deal Strategy*' documents was prepared within Telstra. The document canvassed four main bidding options available to Telstra:

> '• *Bid jointly with Seven for Web, iTV and FTA TV*
>
> *Bid jointly with Foxtel for Web, iTV and Pay TV*
>
> *Bid alone for Web*
>
> *Bid alone for FTA TV and any other rights'.*

887 A meeting was held on 27 March 2000, between representatives from Telstra and the AFL. The '*key outcomes*' emerging from the meeting included:

'Telstra confirmed its interest in AFL rights.

AFL indicated its desire for Telstra to bid for the whole package of rights'.

888 On 7 April 2000, Telstra presented a proposal to the AFL entitled '*"AFL-Telstra" Partnership – Growing the Game for the Supporter*'. The presentation stated that Telstra would bid for the free-to-air and pay television rights, as well as internet, interactive and datacasting rights.

889 A Project Chess document of 19 April 2000 recorded that Telstra had put forward what was described as an '*Original Bid*' of $380 million over five years. A Project Chess '*Overview*' of 12 May 2000 noted that Telstra could benefit from the broadcasting and other AFL rights and that it was in a position to '*deliver a compelling value proposition to the AFL*'. The proposed bid was to be $420 million over five years, plus a share of '*upside*' with estimated value of $50 million. The proposal contemplated that Telstra would onsell the broadcasting rights by disposing of the free-to-air television rights to Seven and the pay television rights to Foxtel.

890 On 28 April 2000, Mr Rolland updated Dr Switkowski on Project Chess, following a meeting with the AFL that day. Mr Rolland recommended taking the project further, in part because if Seven succeeded in its bid Foxtel might be locked out of the AFL. Thus Telstra's bid was '*actually protecting Foxtel*'. In response, Dr Switkowski queried whether Telstra had the resources and skill to implement the proposal.

891 On 9 May 2000, the AFL prepared a document comparing the initial offers of Telstra and Seven. A further discussion between Telstra and the AFL took place on that day (as did a meeting between Foxtel and the AFL).

892 On 19 May 2000, Mr Greg Willis provided Dr Switkowski with the summary to which I have referred in Chapter 7 ([808]). The summary referred to Telstra's proposed bid of $420 million. However, Mr Akhurst said in his evidence that, while he had not been involved in the proposed bid, as events turned out Telstra had not presented the proposed bid to the AFL.

8.15 Foxtel's Presentations to the AFL: May-June 2000

893 As I have noted, on about 9 May 2000, Messrs Blomfield and Campbell of Foxtel Management made a presentation to the AFL Commissioners in Melbourne. The presentation included examples of Foxtel's technical capabilities, and followed a prepared script. The script called for Mr Blomfield to refer to the proposal that a dedicated channel, Network AFL, should operate a joint venture between the AFL and Foxtel. He was also to propose that the channel should be sold to Austar and Optus and to add this comment:

> *'While the AFL is already seen on Austar and Optus, this proposal is the only one that will deliver the FOXTEL audience as well. C7 has been offered to FOXTEL and we have declined'.*

I refer to Mr Blomfield's presentation in more detail later ([2753]).

8.16 Telstra Withdraws from the AFL Bidding: June 2000

8.16.1 Mr Stokes and Dr Switkowski Meet

894 From at least about April 2000, as Mr Wise acknowledged in his evidence, there was much discussion within Seven to the effect that Foxtel could not acquire the AFL pay television rights without contravening the *TP Act*. Mr Wise agreed that the '*principal protagonists within Seven who were pushing that line*' were Mr Stokes and Mr Gammell.

895 On 25 May 2000, Mr Greg Willis of Telstra met with Mr Gammell. The meeting principally related to issues concerning Seven's desire to obtain access to the Telstra Cable. However, Mr Gammell told Mr Willis that Seven wanted all AFL broadcasting rights and that, unless that happened, Seven would have very little content for its sports channel. Mr Gammell also said that Seven was aware that Telstra had bid for the entirety of the AFL broadcasting rights. He observed that this would cause Seven difficulty because it wanted a fully integrated product on all platforms. Mr Willis reported these matters to Dr Switkowski in an email of 29 May 2000.

896 In the meantime, Mr Stokes proposed on 25 May 2000 that he and Dr Switkowski should meet, suggesting a meeting that afternoon. The meeting in fact took place on 31 May 2000, at Mr Stokes' house in Sydney.

897 In response to a request from Dr Switkowski, Mr Willis prepared a briefing paper on

29 May 2000. The briefing identified, on the basis of Mr Willis' conversation with Mr Gammell, two items that were likely to be discussed at the meeting between Dr Switkowski and Mr Stokes, namely the access issue and the bidding for the AFL broadcasting rights. As to the latter, Mr Willis observed that Seven was aware that Telstra had bid for all the AFL broadcasting rights. Dr Switkowski understood from Mr Williams' briefing that if Foxtel obtained the AFL pay television rights, Seven would lose '*potentially vital*' rights. In particular, Dr Switkowski agreed that he understood from Mr Willis' briefing that if Foxtel obtained the AFL pay television rights, it might be difficult for C7 to remain a viable competitor of Fox Sports. Dr Switkowski said in evidence that he could not recall turning his attention to the question of break clauses in Seven's content supply agreements and I do not think at the time he did.

898 After his meeting with Mr Stokes, Dr Switkowski set out in an email his recollection of the substance of the discussion. His memorandum included the following:

> *'[H]e is very concerned about the AFL, and is planning a wideranging [sic] set of legal options to protect his interests.*
>
> *He mentioned that the current contract cost $48m/year ($25m for the rights, and $23m for production costs), and that Seven gets $50m in revenues suggesting it was not a great business and ratings were falling etc etc. On the other hand somewhat in contradiction**, he asserted that losing the AFL would bring Seven down and so our actions could be anticompetitive** etc. He also noted the payTV rights cost $15m/year tho' he believed they should have been set between $5-10m.*
>
> *[H]e thinks we are being foolish in keeping him as an adversary where he will challenge us legally while moving closer to Optus. Suggested we contemplate acquiring 50% of C7 and then taking his content non exclusively across all platforms'.* (Emphasis added.)

I accept Dr Switkowski's memorandum as an accurate summary of the discussion.

899 In the light of the memorandum and the evidence of Mr Stokes and Dr Switkowski about their conversation, I make the following findings:

> Mr Stokes spoke of the loss of rights as likely to bring **Seven** down, although he also said that the loss would bring **C7** down;
>
> Dr Switkowski's understanding was that Mr Stokes was not speaking literally, but was emphasising how important the AFL broadcasting rights were to him

and to Seven and was conveying to Dr Switkowski that the issue was a big one;

Dr Switkowski also formed the view that Mr Stokes was

> *'trying to warn us off the territory, as one would expect, quite predictable commercial behaviour, at the same time as the AFL ... was trying to stimulate maximum interest'*;

Dr Switkowski took the references to legal action as '*mainly for dramatic effect*'; and

Dr Switkowski understood that Mr Stokes' motivation in suggesting that Telstra invest in C7 included a desire to see C7 carried on Foxtel but Dr Switkowski nonetheless appreciated, on the basis of experience, that News and PBL would not permit carriage to take place.

To the extent Mr Stokes' account was inconsistent with these findings, I do not accept his evidence.

8.16.2 Telstra Decides to Bid Only for New Media Rights

900 A report on Project Chess dated 13 June 2000 recorded that as a consequence of a meeting on 2 June 2000 with the AFL, Telstra had decided to bid for the new media rights only, rather than all the AFL rights. The report noted that Telstra now contemplated making an attractive new media offer to Seven '*to ensure an ongoing relationship with the broadcaster*'. In his evidence, Dr Switkowski explained Telstra's change of heart as follows:

> *'During the early part of 2000, the AFL, in the positioning of the upcoming rights – auction of its broadcast rights, was encouraging a number of different combinations of bidders and in the early months of 2000 the view was – and there were people at Telstra who supported that view – that Telstra would bid for all of the rights, and then parcel out various parts of the content to free-to-air and pay TV and other players. As the year unfolded, our conviction that we had the skill set or even that it was a smart business decision to be the lead bidder for all of the rights weakened. I certainly had the view by the middle of the year that Telstra didn't belong in that position, that we should focus on the areas that were right in the middle of our business interests, which was the new media rights, and be a party to some other coalition, if that made sense, for the larger rights process'.*

Dr Switkowski accepted that one factor behind the decision, as the report of 13 June 2000

suggested, was Telstra's desire to maintain the volume of business between it and Seven.

8.16.3 Mr Akhurst Advises Mr Stokes of the Decision

901 At about this time Dr Switkowski had given Mr Akhurst responsibility for media strategy and for dealings with principal media organisations in Australia. Presumably for this reason, Mr Akhurst telephoned Mr Stokes on 7 June 2000 to advise him that Telstra was not proposing to bid for the AFL broadcasting rights, but that Foxtel would probably bid for the AFL pay television rights. Mr Akhurst also informed Mr Stokes that Telstra was interested in the online rights, but thought that it could acquire them '*in a way which doesn't bother [Seven]*'. In the conversation, Mr Stokes said that the exclusion of C7 from Foxtel was a contravention of the *TP Act* and that he wanted C7 to have a place in the pay television industry. Mr Stokes also said that there was a '*real problem*' if C7 could not get on Foxtel.

902 On 8 June 2000, Ms van Beelen, a lawyer within Telstra's Regulatory Department, prepared a chart based in part on Mr Akhurst's notes of his meeting and in part on publicly available information. Her summary of the publicly available information recorded the following:

> '• *AFL content is vital to the distribution of C7 on Austar and Optus*
>
> *Foxtel does not want to carry C7*
>
> *Seven sees this as a threat to the survival of C7'.*

Mr Akhurst read Ms van Beelen's summary.

8.16.4 Mr Akhurst's Understanding

903 Mr Akhurst was cross-examined about the understanding he had reached on the basis of Mr Willis' briefing to Dr Switkowski, the latter's report of his meeting with Mr Stokes on 31 May 2000 and Mr Akhurst's own meeting with Mr Stokes. Mr Akhurst's evidence was that:

> he did not know what the consequences would be for C7 if Seven lost the AFL pay television rights;
>
> it did not occur to him that going into competition with Seven for the AFL

broadcasting or pay television rights, when the AFL was actively encouraging bidders, could be anti-competitive conduct; and

he interpreted Mr Stokes' comments to Dr Switkowski as an attempt to warn Telstra or Foxtel not to bid for the AFL broadcasting rights.

904 Mr Akhurst's evidence on these and related issues was not convincing in every respect. He seemed to say that he did not address the question of whether Foxtel had market power in the context of Foxtel's apparent refusal to take C7 pending the award of the AFL pay television rights. Yet Mr Akhurst had had an exchange of emails with Mr de Jong on the question of whether Foxtel's refusal to take C7 could contravene s 46 of the *TP Act.* While Mr de Jong thought it was justifiable for Foxtel to reject Seven's 17 November 1999 term sheet, it would have been odd if Mr Akhurst, with his background in trade practices law, had not even adverted to the issue of Foxtel's market power. Particularly is this so when Mr Stokes suggested to Mr Akhurst in their conversation that Foxtel had contravened the *TP Act.*

905 Mr Akhurst may not have understood that C7 was in jeopardy through the loss of the AFL pay television rights simply on the basis of Dr Switkowski's record of his meeting with Mr Stokes and Mr Willis' briefing in advance of that meeting. However, Ms van Beelen's chart must have brought home to Mr Akhurst, even if (as Mr Akhurst said) Mr Stokes did not mention the issue, that Seven was asserting the loss of the AFL pay television rights as a threat to C7's survival. Indeed, Mr Akhurst ultimately conceded as much. That is not to say that Mr Akhurst formed the view that such an outcome was inevitable or even likely. But he must have appreciated that Seven was suggesting that the AFL pay television rights were central to the survival of C7.

906 Nonetheless, I accept Mr Akhurst's evidence that he did not think that bidding against Seven for the AFL rights was anti-competitive behaviour. An email Mr Akhurst sent to Dr Switkowski in November 2000, to which I refer later, supports Mr Akhurst's evidence. Nor do I see any reason to doubt his evidence that he interpreted Mr Stokes' conversation with Dr Switkowski as intended to warn Telstra off Seven's territory.

907 Telstra's position on the AFL broadcasting rights was again communicated to Seven at a meeting held on 16 June 2000, between Mr Willis of Telstra and Messrs Gammell and Wise. An internal Telstra note of the meeting recorded that:

'Telstra [was] not playing in Seven heartland (ie FTA & PayTv) with respect to AFL rights'.

8.16.5 Telstra Informs the AFL

908 Mr Willis and other Telstra representatives met with senior AFL representatives on 20 June 2000. Telstra (presumably through Mr Willis) advised the AFL that Telstra was now not interested in the AFL broadcasting rights and could not assist C7 or the AFL '*in getting C7 on Foxtel*'. Telstra indicated its interest in the internet and iTV [interactive television] rights. A possible model discussed at the meeting contemplated that:

> Telstra would acquire exclusive internet and iTV rights;
>
> Foxtel would obtain the AFL pay television rights; and
>
> Seven would retain the free-to-air television rights.

8.17 Foxtel Presents to the AFL

909 From early March 2000, Mr Campbell of Foxtel worked with Mr Boyd to '*fine-tune*' financial models, with a view to them being presented to the AFL. As Mr Campbell said, he erred, if at all, on the optimistic side, although he endeavoured to utilise realistic figures.

910 Mr Campbell prepared a model on 1 June 2000, in contemplation of a meeting between Foxtel representatives and the AFL, to be held on 9 June 2000. It assumed that, if Foxtel had AFL content, there would be a take-up of the AFL tier of 14 per cent of all subscribers in 2002, rising to 17 per cent in 2012. The model further assumed that, if Foxtel had AFL content, subscribers in the southern States would increase by three per cent in 2002, rising to eight per cent in 2011, compared with the position if Foxtel had no AFL content. In the northern States the comparable figures were one per cent in 2002 and three per cent in 2011.

911 On 9 June 2000, Foxtel made its presentation to the AFL in Melbourne. The presentation was led by Mr Blomfield, although Mr Campbell discussed the proposed scheduling of AFL matches on Foxtel. The key points made by Foxtel, which were recorded in a document entitled '*Partnership Proposal*', included the following:

> the AFL and Foxtel would form a dedicated AFL pay television channel as an

equal joint venture, except that Foxtel would underwrite all losses;

the joint venture would pay rights fees to the AFL of $15 million per annum, increasing by $0.5 million per annum for 10 years commencing in 2002;

News would extend its existing sponsorship for an additional five years;

there would be no conflict between the free-to-air schedule and the pay television schedule;

the dedicated channel would be available to Foxtel and '*possibly*' to Austar and Optus; and

heightened international coverage would be provided through News globally.

912 In the three weeks following the meeting of 9 June 2000, Mr Campbell held discussions with representatives of the AFL on a number of occasions, sometimes in person and sometimes by telephone. In these discussions Mr Campbell stressed what he saw as the advantages of News' editorial support for the AFL.

8.18 Telstra and the AFL: June-August 2000

913 A Project Chess update to the Telstra board, prepared on 13 June 2000, dealt with Telstra's proposal to bid only for the new media rights. The update stated that the maximum Telstra was prepared to pay for the rights was $60 million over five years. The document recorded Telstra's need to ensure an ongoing relationship with Seven, said to be worth $14 million per annum.

914 On 24 July 2000, Dr Switkowski attended a meeting with AFL representatives, at the request of the AFL. At that meeting, the AFL representatives encouraged a bid from Telstra for all the AFL broadcasting and internet rights or, alternatively, a bid from a coalition between Telstra and a broadcaster.

915 On 4 August 2000, Mr Greg Willis alerted Mr Akhurst to the possibility that Fox Sports might be a bidder for the AFL pay television rights, with the attendant risk that '*it would tie up most sport content*'. Mr Akhurst responded strongly:

> *'This would be a complete breach of the understanding between us Greg. We need to ... confront News/PBL. They have to be kidding if they think we'd stand for this one!'*

916 In his evidence, Mr Akhurst explained that the understanding to which he referred was between Telstra, News and PBL and was to the effect that Foxtel would acquire the rights. He said he felt strongly about the issue because, in his view, Telstra had been misled by its partners. Mr Akhurst's view was that Foxtel, not Fox Sports, should have the rights. I accept Mr Akhurst's evidence on these matters.

8.19 Fox Sports Decides Not to Bid: July 2000

917 Mr Parker prepared a strategic plan for the Fox Sports board meeting of 20 June 2000. One of the options, Option D, involved Fox Sports acquiring the AFL pay television rights. Mr Parker's assessment, on the assumptions adopted by him, was that acquisition of the AFL pay television rights created an NPV of $81.3 million for Fox Sports. Notwithstanding Mr Parker's modelling, Mr Marquard and Mr Malone's evidence was that from about July 2000, Fox Sports no longer considered the acquisition of the AFL pay television rights to be part of Fox Sports' strategic plan. They each said that the decision not to bid was prompted by the view that, although AFL content was attractive, Fox Sports should focus on acquiring the NRL pay television rights, especially as Austar was entitled to terminate the Fox Sports-Austar CSA if Fox Sports lost those rights. Mr Malone considered that it was not practicable, from a financial perspective, for Fox Sports to bid for both the NRL and AFL pay television rights.

918 There was no evidence of a written recommendation to the board of Fox Sports that it should not bid for the AFL pay television rights. Mr Malone said his '*sense*' was that the board had made a decision, but he could not recall a specific decision to that effect. Mr Malone denied a suggestion that the Fox Sports directors had told him that they preferred to let Foxtel or News bid for the AFL pay television rights. Whatever the basis for the decision, Fox Sports did not demonstrate any direct interest in the AFL pay television rights after about July 2000.

8.20 The AFL's Four Column Chart

8.20.1 The Chart

919 On 13 July 2000, Mr Samuel circulated an email within the AFL which presented and analysed two options and ultimately led to the preparation of what was referred to in the

proceedings as the '*four column chart*'. The analysis, which was relied on by Seven in its purpose case, included the following passages:

> *'Option A focuses on dealing with Seven/C7 with Foxtel becoming part of the AFL's media alliances if and when C7 secures access to Foxtel network or alternatively fails to do so. This option leaves Seven very satisfied but is far from satisfactory from the viewpoint of Foxtel and its partners PBL, News and Telstra – although the latter may be partly satisfied by New Media rights. It runs the risk of retaliation by News/PBL including longer term boycott or reduced promotion in favour of competing codes.*
>
> *...*
>
> *Option B focuses on dealing with both Seven and Foxtel concurrently, seeks to leave Seven reasonably satisfied in that its Optus/C7 contract is intact (which I believe is Seven's real concern), but leaves it up to C7 to secure access to Foxtel without the leverage assistance of AFL. While Seven would dearly love to have the assistance of AFL in putting the squeeze on Foxtel, I think their primary concern is to protect the 30M contract with Optus.*
>
> *...*
>
> *Seven/C7 will pursue court action to secure access for C7 on Foxtel and in such event C7 may become a secondary broadcaster of AFL on the Foxtel network although certainly Foxtel will relegate C7 to a secondary position relative to marketing etc or alternatively may merge its AFL Network channel with C7.*
>
> *...*
>
> *SUMMARY*
>
> *...*
>
> ***Foxtel achieves virtually all that it wants other than the complete and immediate demolition of C7. But in the past, Foxtel have consistently maintained that they are happy with non-exclusive pay TV rights, believing they can "do in" C7 slowly by sheer market power and distribution**. They will still run the gauntlet of the court case, but I do not believe they ever expected that the AFL would be party to an arrangement that would demolish C7 overnight'.* (Emphasis added.)

920 On 14 July 2000, Mr Samuel circulated an amended version of the draft options document under the title '*Negotiating Strategy*'. Among the amendments, the last paragraph in the above extract was modified to read as follows:

> *'Foxtel achieves its goal of vision of AFL games even though it still has to compete with C7. But in the past, Foxtel has consistently maintained that it is*

happy with non-exclusive pay TV rights, believing it can "do in" C7 slowly by sheer market power and distribution. Foxtel and C7 are left in no better or worse position in relation to the current Court case although some of the heat may be taken out as a result of what we have proposed'.

921 On 19 July 2000, Mr Samuel circulated the four column chart, which was headed '*Proposed AFL Multi Media Alliance Structure*'. The chart, or a summary of it, was to be presented to Foxtel and Telstra at scheduled negotiating meetings and, subject to the outcome, to Seven at a later meeting. The chart provided that:

> Seven would obtain the exclusive AFL free-to-air rights to a specific number of games per week (column 1);
>
> C7 and Foxtel would receive the non-exclusive pay television rights to the free-to-air games on a '*collateral basis*' and the pay television rights to the remaining AFL games on an exclusive basis (columns 2 and 3); and
>
> Telstra would acquire the AFL internet rights on an exclusive basis (column 4).

922 It appears from an earlier internal document summarising discussions that, at this stage, the AFL saw Seven as the only bidder for the free-to-air television rights. This was the outcome Seven itself was hoping for since it considered that this maximised its chances of obtaining all the AFL broadcasting rights, including the pay television rights, without competitive bidding. The advantages from the AFL's perspective of Seven taking the rights were said to include Seven's long relationship with the AFL, its commitment to the game and its willingness to protect the AFL brand.

8.20.2 Foxtel Meets the AFL

923 Foxtel representatives, including Messrs Campbell, Nichles and Boyd, met with AFL representatives on 19 July 2000. Discussion centred on the AFL's four column chart. Mr Campbell and Mr Nichles each said at the meeting that the AFL's proposal for non-exclusive rights was unacceptable to Foxtel. The meeting then terminated abruptly. The Foxtel representatives did not retain copies of the chart discussed at the meeting.

924 Mr Boyd made handwritten notes of the 19 July 2000 meeting with the AFL. One of the bullet points recorded by him was '*Don't want to kill C7 overnight*'. Mr Boyd's

evidence, which I accept, was that this referred to a statement by one of the AFL representatives and that after the statement was made someone said '*It won't happen overnight, but it will happen*'. This evidence was not challenged, although News submits that Mr Boyd did not necessarily understand that the AFL did not expect C7 to survive if it lost the AFL pay television rights.

925 Mr Campbell and Mr Buckley of the AFL had a telephone conversation on 21 July 2000. Mr Campbell's internal correspondence following the meeting indicated that, despite what had been said at the meeting on 19 July 2000, Foxtel Management was still contemplating the acquisition of non-exclusive AFL pay television rights. In August, Mr Boyd modelled the AFL's proposal for the non-exclusive supply of AFL content.

8.21 Mr Wylie's Projections: July 2000

926 Seven's board meeting of 28 July 2000 considered a policy paper prepared by Mr Wylie on 23 July which examined Seven's budget for the 2000/2001 year. The budget projected a loss of $13.5 million for pay television for the 2000/2001 year. As Mr Gammell accepted, the budget assumed that C7 would gain access to Foxtel by January 2001 and that C7 would be supplied to Foxtel on a tier at a price of about $2.00 pspm.

927 Although Mr Gammell did not attend the board meeting, he read Mr Wylie's paper and understood the assumptions underling it. Mr Gammell's evidence was that he considered that the sale of C7 to Foxtel on a tier was not a reasonable assumption. Nonetheless, he agreed that he had not sought to amend or register his disapproval of the projections. Mr Gammell claimed that he foresaw a '*binary outcome*' – that is, either C7 would derive no revenue from Foxtel or it would derive considerably more than the projection made by Mr Wylie. Mr Gammell conceded, however, that the budget was unsatisfactory and that he would have preferred that it contained no projection of revenue from Foxtel. Mr Wise gave evidence that Mr Gammell expressed concern to him about the figure of $2.00 pspm assumed by Mr Wylie, but I do not accept Mr Wise's evidence on this point.

8.22 Seven and the AFL: July-August 2000

8.22.1 Seven's Interpretation of the First and Last Deed

928 In the first half of July 2000, newspapers reported that Foxtel was in discussions with

the AFL in relation to the AFL pay television rights. These reports prompted Mr Wise to write to Mr Jackson on 18 July 2000 asserting that, under the terms of the First and Last Deed, the AFL could not accept an offer for the AFL pay television rights until the AFL free-to-air television rights had been dealt with. The terms of the letter are set out later ([…]). This view of the operation of the First and Last Deed was referred to in these proceedings as the '*must means must*' interpretation.

8.22.2 Meetings With the AFL

929 On 3 August 2000, Messrs Wise and Gammell attended a meeting in Melbourne with the AFL Commissioners. Seven's representatives were given a copy of the AFL's four column chart. Mr Wise noted at the time that the chart assumed that the AFL pay television rights would be allocated on a non-exclusive basis to both C7 and Foxtel. He and Mr Gammell told the AFL that a model in which C7 held non-exclusive rights and had access only to the Optus platform would not allow C7 to survive. Mr Samuel said that the AFL needed to get onto Foxtel. Mr Gammell told Mr Samuel that C7 would get on to Foxtel and that Foxtel could not afford to keep C7 off its pay platform.

930 Messrs Gammell and Wise gave evidence that Mr Samuel told them that Foxtel or News had said to the AFL that C7 would **never** get on Foxtel, presumably meaning that this would be the case **even if Seven acquired the AFL pay television rights**. The contemporaneous AFL documentation does not corroborate this evidence and I do not accept it.

931 A further meeting took place between Messrs Gammell, Wise and Samuel on 10 August 2000. At that meeting, which Mr Wise described in a report as '*lively*', Mr Samuel rejected the '*must means must*' interpretation of the First and Last Deed. Mr Wise told Mr Samuel that Seven would not accept either a division of the AFL free-to-air and pay television rights, or a grant of non-exclusive AFL pay television rights. Mr Samuel then identified three concerns with Seven's position on exclusivity: the amount to be paid for the rights; securing the cooperation of News in the absence of a Foxtel bid for the rights; and '*anti-ambush provisions*' (designed to prevent proprietors of venues such as the Melbourne Cricket Ground selling rights to events taking place at those venues).

932 At about the same time Mr Stokes had a '*positive*' meeting with Mr Evans of the

AFL. One outcome of the meeting was that Mr Stokes and Mr Wise became confident that Seven would retain the AFL broadcasting rights. Mr Stokes' evidence was that he remained relatively confident until the Olympics concluded in late September 2000.

933 In his evidence, Mr Stokes acknowledged that the four column AFL proposal had advantages for Seven. It meant that Seven would have the exclusive free-to-air and non-exclusive pay television rights and that it could maintain the C7-Optus CSA. Mr Stokes' first explanation in evidence for Seven's rejection of the proposal was that it did not take account of what Foxtel wanted (that is, exclusivity) and that it would have left Seven exposed on Austar. However, he later accepted that another reason for rejecting the AFL's proposal was that Seven considered '*that Foxtel was to have nothing unless it got it through C7*'. Mr Stokes agreed that by declining to negotiate on the AFL's terms, Seven was running a risk of not getting the rights at all.

8.23 News Considers Acquiring the AFL Broadcasting Rights: July-August 2000

934 In the period leading up to mid-2000, Mr Philip was aware that Foxtel had discussed with the AFL the possible acquisition of the AFL pay television rights. According to Mr Philip, by mid-2000 he had formed the view that in order to negotiate such an acquisition it was necessary to address a number of issues created by the combined impact of the anti-siphoning regime and Seven's relationship with the AFL (as he understood it). Mr Philip's evidence was that, as a result of discussions with Mr Blomfield, he had lost confidence in the latter's ability to address these issues.

935 In July or August 2000, Mr Macourt and Mr Philip decided to investigate the possibility of News bidding for both the AFL free-to-air and pay television rights. This led them (so I infer) to investigate whether Nine and Ten might be interested in acquiring from News the free-to-air television rights, on the basis that Foxtel would acquire the pay television rights. They also had in mind that Telstra might acquire the internet rights.

936 Mr Macourt discussed with Mr Frykberg the possibility that he could assist News in its bid for the AFL broadcasting rights. Mr Macourt also spoke to Mr Falloon, who expressed an interest on Nine's behalf in acquiring the AFL free-to-air television rights. Shortly afterwards, Mr Philip spoke to Mr Greg Willis of Telstra to ascertain Telstra's interest in acquiring the online rights from News. Mr Willis conveyed Telstra's possible

interest in the proposal.

937 On 21 August 2000, Mr Philip sought legal advice on the proposal to acquire the AFL broadcasting rights. In his fax to News' solicitors Mr Philip identified the features of the proposal as follows:

> News might wish to make a bid for all free-to-air, pay and online rights;
>
> News would underwrite the bid by obtaining:
>
> - a put of free-to-air television rights to free-to-air operators (on terms that accommodated the pay television rights and online rights);
> - a put of pay television rights to Foxtel (on terms that accommodated the free-to-air television rights and online rights);
> - a put of online rights to an online operator (on terms that accommodated the free-to-air and pay television rights);
>
> News would add to the bid by providing newspaper support to the AFL;
>
> News might be able to negotiate the situation where the free-to-air operators would give the pay television platforms, in effect, '*exclusive*' games by:
>
> *'Pricing additional games to Nine and Ten at a price* ***at which they may be unlikely to play them*** *(live rights to all games would have to be given to free tv operators to satisfy the anti-syphoning [sic] rules)'* (emphasis added);
>
> and
>
> consistent with Foxtel's aspirations, the pay television rights would need to be offered by Foxtel or News to other pay operators such as Optus, C7 and Austar.

938 Mr Philip suggested that the offer could be constructed in a manner that took account of the fact that the AFL would probably be obliged to offer the free-to-air component of News' proposal to Seven under the First and Last Deed. The structure he had in mind contemplated that the free-to-air operators would '*enjoy a hold back against pay tv of 2 hours for say 4 games per week*'. The free-to-air operators would take a feed of other games from the pay television operators and could '*exercise live rights in that feed on payment of an additional $500,000 per*' (that is, free-to-air operators could broadcast additional matches upon payment of a fee of $500,000 per match).

939 Mr Samuel of the AFL held a meeting with Mr Macourt on 25 August 2000. Mr Samuel sent the four column chart to Mr Macourt on 22 August, in advance of the meeting. According to Mr Macourt, Mr Samuel said that the object of the meeting was not to negotiate but to allow the AFL to explain its preferred outcome, as recorded in the four column chart. Mr Macourt said that he did not follow up the matter because the proposal required agreement between the AFL and Seven before it could be accepted by Foxtel.

940 On 29 August 2000, Mr Philip sent Mr Frykberg an '*AFL Bid Proposal*'. His '*Suggestion*' was as follows:

> *'2. If News wants to increase the prospects of pay tv rights being available to FOXTEL, News might consider bidding for pay tv and free tv rights.*
>
> *...*
>
> *4. A bid by News for such rights could be considered on the basis that News effectively underwrites the bid by getting:*
>
> *(a) a put of free tv rights to free tv operators (on terms that accommodate the pay tv rights and on-line rights);*
>
> *(b) a put of pay tv rights to FOXTEL (on terms that accommodate the free tv rights and on-line rights);*
>
> *(c) a put of on-line rights to an on-line operator (on terms that accommodate the pay tv and free tv rights).*
>
> *5. News could add further attractiveness to the bid by adding newspaper support to the AFL.*
>
> *6. News may be able to negotiate:*
>
> *(a) puts of free-to-air rights for a number of games chosen by free tv 5 weeks out with Nine and Ten (giving pay tv in effect some "exclusive" games by pricing additional games to Nine and Ten at a price at which they may be unlikely to pay them (live rights to all games would have to be given to free tv operators to satisfy the anti-syphoning [sic] rules)), and feeds of games produced by the free tv operators would have to be available (subject to a hold back) to the pay tv operators and on-line rights operators;*
>
> *(b) a put of pay tv rights to FOXTEL for all games but with a 2 hour hold back in favour of free tv for the games chosen by free tv, and the games produced by the pay tv operators would have*

to be available to the free-to-air operators (for replays), and the on-line rights operators; and

(c) a put of on-line rights to Telstra subject to a 24 hour hold back in favour of free tv and pay tv.

7. On the basis that the AFL is probably going to be obliged to offer free tv component of News' proposal to Seven under the Seven's first and last, I suggest constructing the offer as follows:

free tv

(a) there is a particular price for free tv rights;

(b) free tv rights are not exclusive against pay tv or on-line rights but enjoy a 2 hour hold back against pay tv and a 24 hold back against on-line;

(c) the free tv rights can be sub-licensed;

(d) the free tv operator must produce the games on a live basis, and provide live feeds to pay tv operators and on-line rights operators;

(e) the free-to-air operators enjoy a hold back against pay tv of 2 hours for say 4 games per week (chosen by free tv 5 weeks out) but pay tv has simultaneous live rights for the final series and grand final;

(f) free tv takes pay tv's feed of all other games and can exercise live rights in that feed on payment of an additional $500,000 per;

…

pay tv

*(i) the pay tv component would bind News only if the free tv rights **are** sold on the basis described in the free tv offer (as opposed to being conditional on News getting the free tv rights);*

(j) the pay tv rights would include an obligation to produce the balance of the games per week, and provide a feed of those games to free tv and on-line operators:

(k) if free tv exercised live rights to more than 4 games per week, the additional payment made by the free-to-air operators to the AFL would have to be passed on to the pay tv operators;

…

> *8. The end result of this is that News could end up with the free-to-air rights only but this should be OK if News has got underwriting puts in place'.*

941 On 31 August 2000, Mr Macourt wrote to Mr Frykberg asking him to put a proposal together for the AFL rights '*that would secure at least 2 live games for Foxtel together with selected replays*'. The letter proposed that Mr Frykberg should be paid a retainer and receive a very substantial success fee. The letter included the following paragraph:

> *'If News could come to an agreement with any of the free to air broadcasters including Seven over free to air rights it may be possible to secure pay TV rights for Foxtel. I do not believe it is essential that the pay TV rights be exclusive'.*

In his evidence, Mr Macourt said that he did not seriously expect that Seven would '*join this scheme*'.

8.24 AFL Commission Meeting of 27 August 2000

942 The AFL Broadcasting Negotiating Committee prepared a '*Status Report*' on 25 August 2000, which was sent to the AFL Commission ahead of its meeting on 27 August 2000. The report identified a number of objectives including '*Optimis[ing] the Value of the Rights*'. The report summarised the position as follows:

> Seven was '*[f]undamentally opposed*' to the AFL's four column chart, particularly in relation to pay television;
>
> Seven viewed simultaneous broadcasting of live matches either on pay television or on the internet as a '*severe erosion/cannibalisation of the Value of the FTA Broadcast*' and indicated that it might litigate on this issue;
>
> Foxtel had indicated a '*strong preference to deal on an exclusive basis only for rights on Pay Television*' but had not responded formally as to their ability to deliver on '*Anti Ambushing*' requirements;
>
> Telstra had indicated that they were comfortable with the four column chart, but had a strong preference for Foxtel to be a partner on some level;
>
> News had shown a renewed interest in bidding for the free-to-air and pay television rights; and

recent court rulings granting Seven access to the Telstra Cable and to the Foxtel set top box gave them '*broader exposure opportunities*'.

943 The Negotiating Committee identified four options for the AFL Commission:

> Option 1: to license all broadcasting rights to Seven on an exclusive basis;
>
> Option 2: to license the free-to-air television rights to Seven and the pay television rights to Foxtel, in each case exclusively;
>
> Option 3: to license the free-to-air television rights to Seven and the pay television rights non-exclusively to each of Foxtel and C7; and
>
> Option 4: an alliance with News, involving the licensing of the free-to-air and pay rights to News (which would sever the relationship with Seven).

944 The Status Report recommended that the Options 1 and 2 should be '*Park[ed] in the short term*', but Option 4 should be fully explored. Although Option 4 involved the severing of the AFL's relationship with Seven, the Status Report noted that it contemplated that News would onsell the free-to-air television rights to Seven, Nine or Ten, or some combination of them, and would onsell the pay television rights to Foxtel, Optus and Austar.

945 At the meeting on 27 August 2000, the AFL Commission resolved that:

> *'the focus of negotiations be on the Free to Air and Pay T.V. Rights. New media rights should still be pursued but more time be allowed to review all of the options available'.*

8.25 News' Bid Develops

8.25.1 Mr Frykberg Negotiates for a Consortium

946 From about mid-September 2000, Mr Frykberg commenced negotiations with each of Nine, Ten and Foxtel. He also undertook negotiations with the AFL. Mr Frykberg, however, did not approach Seven in relation to the free-to-air television rights. His evidence was that any such approach was unnecessary since Nine and Ten had evinced interest in the AFL free-to-air rights.

947 In his first statement, Mr Frykberg was at some pains to insist that he had not

conducted negotiations with Nine, Ten and Foxtel simultaneously. Rather, he said that he had moved between representatives of each of the organisations to facilitate the formulation of a bid by News. In his cross-examination, he said that he had been given a briefing by Mr Philip about possible problems with the ACCC. For that reason, he understood that there had to be separate negotiations with each of the parties. The following exchange indicates the difficulties confronting Mr Frykberg in taking this artificial approach imposed on him by Mr Philip:

> *'Obviously it was difficult consistently to keep your negotiations with one free-to-air broadcaster from discussing aspects of what was going on with the negotiations involving the other free-to-air broadcaster? --- It was – it had its difficulties because there needed to be – the broadcasters needed to dovetail for the overall offer. But it was still possible to do that without divulging what the other parties were doing. However, you wouldn't need to be Einstein to work it out'.*

Later in his evidence Mr Frykberg acknowledged that he would have told Ten that Nine was prepared to increase its offer for the free-to-air rights and that he may have revealed the precise figures. As he observed:

> '*In the atmosphere of this negotiation there was a lot of toing and froing'.*

948 The negotiations produced numerous examples of News' bid being referred to as a '*consortium bid*', or the parties involved in the negotiations being described as a '*consortium*'. Mr Philip tried valiantly to discourage the use of the word '*consortium*' among those participating in the negotiations, but with conspicuous lack of success. His concern, so he explained, was that he did not '*want to create an understanding [for* TP Act *purposes] where there wasn't one*'. The problem for Mr Philip at the time and in the witness box was that if discussions take place and arrangements are made among members of a group that is described as a consortium, looks like a consortium and acts like a consortium, it probably is a consortium.

8.25.2 News, Telstra and the Internet Rights

949 On 6 October 2000, Mr Philip sent a fax to Mr Greg Willis of Telstra stating that:

> *'[a]s you know News is considering bidding for the audiovisual rights to the AFL. News hopes to secure a put of pay TV / enhanced pay TV / interactive (non-internet) TV rights to Foxtel'.*

Mr Philip confirmed the outline of a put Telstra would give for the internet rights, involving a payment of $21.5 million over five years. This fax appears to be the first written notification to Telstra of a proposal involving put agreements.

950 On 11 October 2000, Mr Willis replied to Mr Philip setting out the basis upon which Telstra would be prepared to consider paying $21.5 million for the internet rights over a five year period. Mr Philip and Mr Frykberg discussed the terms specified in the fax and agreed it would be too difficult to conclude a deal with Telstra for the AFL internet rights.

951 On 13 October 2000, Mr Macourt wrote to Mr Buckley of the AFL confirming News' interest in acquiring free-to-air and pay television rights to the AFL for the five year period, 2002 to 2006. The letter attached indicative term sheets. The free-to-air term sheet proposed a licence fee of $36 million per annum (plus CPI adjustments) for four exclusive live matches per week. In addition, News was to pay $500,000 for every non-exclusive match televised earlier than 14 days after the date it was played (subject to certain exceptions for Perth and Adelaide) and was to bear the GST. The '*Other Rights Term Sheet*' proposed a licence fee of $20 million per annum (plus CPI adjustments) for the exclusive pay television and other non-internet pay rights. Again News was to bear the GST. This term sheet provided for the AFL to give News at least four live pay television matches per week during the 22 week season.

952 On 18 October 2000, Mr James Packer of PBL told Mr Mansfield, the Chairman of Telstra, that PBL had no problem with Telstra bidding for the online rights to the AFL, but that it was critical to keep the bid components together since to split them would play into the hands of the AFL and C7. Mr Mansfield passed on the information to Dr Switkowski. Following discussions with Telstra, Mr Akhurst expressed agreement with a recommendation that Telstra should press on with its separate bid for the AFL internet rights.

8.25.3 Nine's Response

953 Prior to Mr Frykberg opening up discussions with Nine, it had considered from time to time the possibility of acquiring the AFL free-to-air television rights. Nine had told the AFL that it was only interested in a particular package of free-to-air games because of its commitment to NRL content.

954 Mr Frykberg's point of contact with Nine appears to have been Mr Falloon. Internal

Nine memoranda show that Nine was interested in Friday night and Sunday afternoon AFL matches. Mr Yarwood of Nine held discussions with affiliates in Perth and Adelaide to secure their commitment to sharing the costs of obtaining the AFL content.

955 On 10 October 2000, Mr Leckie, then the Managing Director and CEO of Nine, confirmed in a letter to Mr Frykberg that Nine would be prepared to bid for specific home and away and finals AFL matches during the period 2002 to 2006 inclusive. Nine would be willing to pay a licence fee of $20 million per annum (plus CPI), exclusive of GST.

8.26 Seven's Draft Offer of 5 October 2000

956 On 29 September 2000, Mr Wise met with Mr Jackson of the AFL in Melbourne. Mr Wise advised Mr Jackson that Seven would offer $36 million per annum for the AFL free-to-air television rights, $20 million per annum for the AFL pay television rights, plus a profit share and $10 million in contra per annum. Mr Jackson thought that Seven's position looked '*more relevant*'.

957 On 5 October 2000, Seven provided the AFL with a draft offer. The terms were as follows:

> Seven would pay a licence fee of $51 million per annum for all AFL free-to-air, pay and new media rights, on an exclusive basis;
>
> there would be a profit share arrangement for the pay television rights, whereby the AFL would share equally in net revenues from pay services in excess of $30 million derived from Foxtel;
>
> the profit share arrangement would produce a guaranteed return to the AFL of $5 million per annum;
>
> provision for $10 million per annum in contra; and
>
> a requirement that the free-to-air and pay television rights were not to be severable.

958 On 20 October 2000, the AFL Broadcasting Sub-Committee circulated a discussion paper to the AFL Commission. The summary noted that there was now '*serious competition*' for all the AFL rights. The summary continued:

'The AFL now has Two Competing proposals in relation to Free to Air and Pay Television rights. Consistent with what was tabled at the Commission meeting in August ***News Limited*** *have presented a formal proposal to acquire the rights to Free To Air Television, Pay Television and International Television Distribution. The* ***Seven Network*** *has also revised it's [sic] original and ongoing offers and presented a formal proposal to acquire the rights to Free To Air Television, Pay Television and New Media.*

In respect to ***Free to Air Television*** *... the AFL now has two options for its consideration. Option One is an ongoing partnership with the* ***Seven Network*** *and Option Two, contained within the* ***News Limited*** *agreement, is a split rights arrangement from the* ***Nine Network*** *and* ***Channel Ten****. As a result of receiving the competing proposals the AFL is not restricted to dealing exclusively with the Seven Network under the terms of the "Put Option". The AFL still has the protection afforded by the "Put Option" however it can now negotiate additional benefits not contained within the framework of that agreement. ...*

There continues to be strong competition also for ***Pay Television*** *... with the principal parties being the* ***Seven Network*** *and it's [sic] pay station* ***C7*** *and* ***News Limited*** *with the* ***Foxtel Network****. Both parties have indicated they are able to distribute on all platforms ie: Foxtel, Austar, and Optus, which is consistent with the AFL's desire to offer the game on as broad an access point as possible. While the Foxtel group clearly can achieve this unencumbered there remains a question over C7's ability to achieve this as the recent court proceedings have granted C7 access to the Foxtel Cable but not the Set Top Box or the Marketing and Customer Service capabilities of the Foxtel group.*

...

Summary

The AFL now has competing propositions that can be refined to optimise the value of the rights and to achieve key qualitative outcomes as defined in our overall objectives'. (Emphasis in original.)

959 The discussion paper identified four options. It proposed an exploration of a '*News Corp Alliance*' whereby:

'News ... [would] acquire FTA and Pay rights and on sell FTA to Seven, Nine or Ten or a combination of all and [would] on sell Pay rights to Foxtel, Optus and Austar'.

960 The AFL Commission meeting of 24 October 2000 reviewed the discussion paper and noted that:

'the next steps were to include clarifying the differences between the

competing bids'.

It was also noted that a key aspect of the negotiations was '*the balance between the number of games on free to air and ... on Pay T.V'.*

961 On 29 October 2000, Mr Wise sent an email to Messrs Stokes, Gammell and others. He said that Seven's strategy was to secure the AFL rights on acceptable terms and to ensure that '*we maintain the opportunity for C7 and its related access claims*'. He set out the tactics he proposed:

> Seven would put a final offer to the AFL, subject only to refinement of terms relating to scheduling and fixtures. The offer would have a time limit for acceptance. If the AFL did not come '*to the table*' on the offer, Seven would withdraw from negotiations and rely on its first and last rights.
>
> Seven would approach Telstra with an offer to compromise on the issues of access and the AFL. The elements of the compromise would include the following:

- Foxtel would '*implode*' its offer for the AFL pay television rights;

- Seven would provide AFL games, with or without audio, to Foxtel for insertion onto Fox Sports at a price to Foxtel of $25 million per annum;

- C7 would terminate its bid for access to the Telstra Cable;

- Foxtel would guarantee Seven access for up to six non-sports channels at fair market value;

- Seven and Telstra would cooperate on the AFL internet bid; and

- Telstra would increase its spending on Seven.

962 In his evidence, Mr Wise accepted that when he put forward this strategy he contemplated that, if implemented, Seven would be unopposed in its bidding for the AFL pay television rights. He accepted that this strategy, if successful, meant that Seven would

acquire the rights more cheaply than otherwise would have been the case.

8.27 Foxtel's Board Paper of 25 October 2000

963 On 20 October 2000, Mr Boyd of Foxtel Management sent a memorandum to Mr Blomfield attaching revised financial models. The models took account of the fact that two free-to-air channels would be providing AFL coverage instead of one, making it more likely that the four least favourable matches would be available to Foxtel. Mr Boyd summarised the position as follows:

> *'Reflecting the stronger FTA coverage (versus what had been assumed up until now), take-up of the channel in the South during the season has been lowered by 5%. No change has been made in the North as it is not as popular in these states.*
>
> *...*
>
> *Over 5 years the NPV [net present value] impact of these changes is negative $17.9 million (NPV now negative $49.8 million). Over 10 years the impact is $39.5 million (NPV now negative $42.8 [million])'.*

964 On 25 October 2000, Mr Blomfield sent a paper to Foxtel Management board members recommending that:

> *'The Board authorise FOXTEL Management to enter into a put option agreement with News Limited pursuant to which FOXTEL may be required to acquire the exclusive pay television rights to all AFL matches for a term of 5 years commencing 2002 for $20 million per annum (plus CPI on each of 2003-2006) (exclusive of GST)'.*

The paper proposed that Foxtel would be entitled to broadcast four live competition matches per week.

965 Mr Blomfield attached a financial model which had been prepared by Mr Boyd. The model projected an NPV to Foxtel over the five year period of -$23.9 million, without any terminal value. In his evidence, Mr Boyd accepted that the financial model attached to Mr Blomfield's paper did not incorporate the changes Mr Boyd had suggested in his memorandum of 20 October 2000. Mr Boyd agreed that he would have prepared the model after discussing the matter with Mr Blomfield and on the basis of Mr Blomfield's instructions.

966 Mr Macourt's evidence was that he had disagreed at the time with the analysis that led to a NPV of -$23.9 million. He said his principal criticism was that the analysis lacked a terminal value, being the value to Foxtel of additional subscribers, at the end of the period under consideration, that was attributable to the inclusion of AFL content in Foxtel programming. Mr Macourt adhered to this view in cross-examination, notwithstanding that the term of the proposed licence was only five years. Mr Macourt said that the modelling had assumed that every subscriber attracted by the AFL would simply terminate his or her subscription on the day the last AFL game was played. He considered this to be an unrealistic assumption, not least because even if Foxtel lost the rights, the AFL might still be broadcast on the Foxtel platform.

967 Mr Macourt also said that he was unaware that Foxtel's management took the view that the proposal to acquire AFL pay television rights would assist in dealing with C7's access issues. He asserted that he could not recall holding this view himself. Mr Macourt stated that his view was that the strategic benefit of acquiring the AFL pay television rights was that it enabled Foxtel to obtain a quality AFL package. I accept Mr Macourt's evidence on these matters.

968 Mr Philip's evidence was that he regarded Mr Blomfield's proposal '*obviously beneficial*' to Foxtel. In his statement, he identified the benefits as follows:

> *'FOXTEL was likely to have regular live AFL matches in telecast windows acceptable to FOXTEL ... This would enable FOXTEL to have significant control over the presentation of the AFL and the branding of AFL broadcasts. I thought that this was likely to greatly assist FOXTEL to bring its penetration in the southern States into line with the penetration ... in the northern States and, given the popularity of AFL in the northern States, increase overall penetration ... I did not think it would be possible to achieve that by FOXTEL taking C7. Over time, I had formed the view that a pay television business which relied on a sports service that was controlled by a free to air operator would be at a significant disadvantage because of the likelihood that the free to air operator would program that sports service in a way that favoured its free to air service, rather than its pay television operations'.*

969 In his cross-examination, Mr Philip accepted that in October 2000, had he thought about it, he would have realised that if News controlled both the AFL and NRL pay television rights, C7 would have '*a hard time*'. However, he claimed that his concern was pursuing the rights for Foxtel and that he could not remember '*having many cares about C7, to be honest*'.

Later in his evidence, Mr Philip explained that what he meant by this answer was:

> *'I didn't care much about what impact [Foxtel's acquisition of the rights] had on [C7] because I was more concerned at the time about what I was trying to achieve. I didn't give it much thought, is really what I meant'.*

Mr Philip further said that he paid little attention to the projections in the model attached to Mr Blomfield's paper because Mr Macourt did not think much of the model. Mr Philip denied that the '*obviously beneficial*' result he contemplated was that Fox Sports would be rid of its main competitor in the business of supplying sports channels.

970 I think the likelihood is that Mr Philip did advert at the time to the possibility that C7 would suffer significant harm if it both lost the AFL pay television rights and did not succeed in obtaining the NRL pay television rights. I also think it likely that he was not concerned if any such harm was in fact inflicted on C7. However, that does not amount to a finding that Mr Philip did not believe that there were sound commercial reasons for Foxtel to attempt to acquire the AFL pay television rights for itself.

8.28 Flip-Flop Emerges

971 On 27 October 2000, Mr Frykberg advised Mr Blomfield and Mr Philip that:

> *'The AFL is keen on having the games involving the local teams in Perth, Adelaide, Sydney & Brisbane being run in those cities the free-to-air game. The effect of this is that different games would be run on Friday night, Saturday afternoon, Saturday night, Sunday afternoon in all the major cities. It has obvious impact on pay television. You will work out the minuses but one of the pluses is that pay television will probably get the higher picks in some cities than the 5, 6, 7, 8 currently envisaged'.*

This recorded the origin of what became known as the '*flip-flop*', which was ultimately included as a term in the News-Foxtel Licence.

972 As Seven observes, it is common ground that the flip-flop turned out to be detrimental to the value of the AFL pay television rights obtained by Foxtel. The flip-flop was also detrimental to the fortunes of the *Fox Footy channel*, which utilised the rights. Mr Williams, for example, explained the view he held in 2002:

> *'By this time, I had had the opportunity to observe the AFL arrangements in operation for a full season, and understood the full implications of the flip*

flop provision. My understanding by this stage was, and continues to be, that the flip-flop provision effectively meant that FOXTEL was never able to broadcast matches played by a team based in Sydney, Brisbane, Adelaide or Perth until the match had first been played on either the Nine Network or Network Ten, even if the game was produced by FOXTEL. It was my view that the implications of this provision were that:

(a) in Adelaide and Perth in particular, the flip-flop provision meant that FOXTEL's AFL rights gave it no competitive benefit, as it was never able to play the games that were of greatest interest to those markets live;

(b) in the northern States of NSW and Queensland, the relevant Commercial Broadcasters often did not broadcast the matches affected by the flip-flop live, and this meant that there could be a significant delay before the match could be broadcast on the Fox Footy Channel'.

There is, however, a dispute as to how far the responsible News and PBL executives appreciated in 2000 that this was the likely result.

973 Mr Frykberg said that he had assumed throughout his negotiations with the AFL that Nine and Ten would have the first choice of games in each round for free-to-air television. However, he believed that this would not necessarily have the result that Nine and Ten would have the most attractive games (in the sense of the games likely to appeal to the greatest television audiences). He held this view for two reasons:

the free-to-air networks had to select games at least six weeks in advance for most games and up to a year in advance for Friday night games and the playing form of particular teams could change in that time; and

the networks had to choose among certain games played at the same time, which meant that they might not be choosing the five '*best*' games.

974 Mr Frykberg also said that at the commencement of his negotiations, the AFL's preference was that games involving the Sydney and Brisbane teams should be broadcast live in those cities on free-to-air television. As the negotiations developed, the AFL extended this position to include Perth and Adelaide. Mr Frykberg always understood that the AFL saw the flip-flop as a compulsory arrangement in the four capital cities for which it was proposed. As his advice of 27 October 2000 indicated, Mr Frykberg regarded the flip-flop as having a potential negative impact on pay television, but not invariably so. If, for example, a Perth

team was last on the ladder, he thought that that team's game might be less attractive, even in Perth, than a game between two top (non-Perth) teams.

975 In Mr Frykberg's cross-examination, he was taken to negotiations between Nine and News (through Mr Philip), whereby Nine sought the opportunity to show the local game in Adelaide and Perth immediately after the telecast of the national game (even though the local game would already have been under way or completed on pay television). He agreed that the free-to-air operators were generally keen about some form of flip-flop and that Mr Philip had made it quite clear that News and Foxtel would '*prefer to avoid a flip-flop if that were possible*'. Indeed, during the negotiations Foxtel had rejected draft clauses giving effect to a flip-flop. Despite these matters, I accept Mr Frykberg's evidence as to his assessment at the time of the likely effect of the flip-flop.

976 Mr Boyd, who prepared all of Foxtel's financial models, could not recall any discussions about the flip-flop and did not take it into account in his modelling.

8.29 Mr Frykberg Meets the AFL: 30 October 2000

977 On 30 October 2000, Mr Frykberg met with Mr Samuel and other officers of the AFL. In a subsequent fax, Mr Frykberg recorded the following:

> *'Because the Seven first and last on FTA, we are being urged to put as many things in the FTA bid we can to make it hard for Seven to match – ie News and PBL newspaper and magazine support; guaranteeing prime time on Saturday nights in Sydney and Brisbane (something Seven can't do on at least 6 Saturday nights because of its ARU contract); and guaranteeing AFL coverage in as many overseas countries as possible'.*

Mr Philip wrote the words '*no 4D*' next to this paragraph on his copy of Mr Frykberg's fax. Mr Philip said in evidence that his first response was that Mr Frykberg's suggestion might have involved a potential contravention of s 4D of the *TP Act*. However, he said that he subsequently formed the view that the suggestion did not involve any such contravention.

8.30 Telstra Rejects Mr Blomfield's Proposal

8.30.1 Mr Brenton Willis Discusses Modelling

978 On 26 October 2000, Mr Brenton Willis of Telstra rang Mr Boyd to discuss the AFL financial modelling prepared by Foxtel. Mr Boyd declined Mr Willis' request for a '*soft copy*

of the model', on the ground that Foxtel was not providing any of the shareholders with a copy at that stage. Nonetheless, Mr Boyd ran through the model with Mr Willis. The final line of Mr Willis' note of the conversation reads:

> *'NPV negative - Strategic decision for Board. Will assist with dealing with C7 access issues'.*

979 In its submissions, Seven interprets this notation as recording a communication by Mr Boyd to the effect that, although the financial models produced NPV negative results, Foxtel had a strategic reason for proceeding with the proposal. The strategic reason, according to Seven, was that acquiring the AFL pay television rights would have an impact on C7 and remove the access issue. Seven argues that the only way of removing the access issue was to remove C7, or at least make it unviable for C7 to pursue its access claim. Seven says this is evidence that the acquisition of the AFL pay television rights was, from Foxtel's perspective, directed at harming C7.

980 In his evidence, Mr Boyd did not dispute that he was aware that if C7 no longer had the AFL pay television rights, Optus and Austar could terminate their contracts with C7. However, he could not recall anyone within Foxtel expressing the view to him that, in the event of C7 losing the AFL pay television rights and consequently its contract with Optus and Austar, its business would probably be brought to an end. It was not put to Mr Boyd in his cross examination that he was intending to convey in his conversation with Mr Willis that the effect of Foxtel acquiring the AFL pay television rights would be to destroy C7 and I make no such finding.

8.30.2 Telstra Declines

981 On 31 October 2000, Mr Fogarty (General Manager, Pay Television, Telstra) forwarded to Mr Akhurst briefing notes on the proposal that Foxtel enter a put option with News. The briefing notes recommended that Telstra decline to authorise Foxtel to enter into the put option, and included the following comments:

> *'1.* Deal economics are significantly negative or value diluting for FOXTEL. *The proposed deal is more than $20M negative (NPV) to FOXTEL versus the previous deal which was more that $80M positive for FOXTEL. There is no sound overriding strategic benefit for FOXTEL. ...*
>
> *2.* Absence of Overriding Strategic Benefit. ***FOXTEL have indicated***

> ***that acquiring the AFL rights will negate C7 and the issues surrounding the access dispute.*** *This is an overly simplistic view as the AFL is only one part of C7's content lineup/aspirations. Additionally, FOXTEL has historically argued that the AFL is not a major business driver and this is reconfirmed in its financial modelling which shows an increase in subscribers of between 1% - 3% (20K additional subscribers on a forecast base of more than 1.1M)'.* (Emphasis added.)

982 Dr Switkowski agreed that he would have been told of Mr Fogarty's recommendation. He did not recall any reference to C7 being negated. For him the major consideration was the negative NPV analysis.

983 On 1 November 2000, Mr Greg Willis of Telstra informed Mr Blomfield in a letter that Telstra did not believe that:

> *'the current proposal is in FOXTEL's best interests, particularly as the proposal is value-dilutive to FOXTEL'.*

Mr Willis indicated in the letter that if there was an opportunity to restructure the proposal, further consideration might be warranted. Mr Willis also asked for advice as to what discussion Foxtel had undertaken with C7 regarding the AFL pay television rights or AFL content.

984 Mr Akhurst accepted that he had read Mr Fogarty's briefing notes. He also agreed that the language used in the briefing notes suggested that the acquisition by Foxtel of the AFL pay television rights would bring about the end of C7's business. However, Mr Akhurst maintained that he could not recall appreciating that at the time. As I have already found in Chapter 6, I think it likely that Mr Akhurst appreciated at the time that the acquisition by Foxtel of the AFL pay television rights might have produced very serious consequences for C7, including possible cessation of its business.

985 Mr Akhurst was asked whether he had been given an explanation as to why it was not in Foxtel's interests at least to discuss with C7 the terms on which AFL coverage might be made available if C7 won the AFL pay television rights. Mr Akhurst appeared to misinterpret the question as directed to Foxtel's reasons for bidding directly for the AFL pay television rights, rather than trying to acquire them from C7. As I followed his evidence, he gave two reasons:

> if Seven acquired the rights, it would give priority to its free-to-air broadcasting network rather than to its pay television arm; and;
>
> if Foxtel took AFL coverage from C7 prior to the AFL's decision to award the rights, it would make Foxtel's position (as a bidder for the AFL pay television rights) worse rather than better.

986 When his attention was re-directed to the question that had actually been asked, Mr Akhurst said that he had seen no need for Foxtel to talk to C7 about taking its channels in advance of the AFL awarding the pay television rights. Mr Akhurst thought that any such negotiations could await the outcome of the bidding process. He also seemed to suggest that there were doubts, in any event, as to whether Foxtel could negotiate an arrangement with Seven relating to the long-term carriage of AFL content prior to the AFL awarding the pay television rights.

987 Later in the cross-examination, Mr Akhurst was asked what basis there was for thinking that Nine and Ten would treat Foxtel more kindly than Seven when it came to scheduling. When asked whether anyone had addressed the possibility of Foxtel granting a call option to Seven in advance of the award of the AFL pay television rights, Mr Akhurst said that nobody had suggested going down that path:

> *'The context of this, though, is that I'm not running Foxtel. I'm a member of the partnership, and the other partners, who are much more experienced and knowledgeable about getting sporting content, don't believe this is the best way to handle it. So it didn't really matter what I thought from that point of view'.*

988 Mr Akhurst's account of his understanding at the time of the matters to which I have referred in the preceding three paragraphs seems to me to be both consistent with other evidence and convincing. I therefore accept it.

989 Mr Philip was asked about his response to Mr Willis' letter of 1 November 2000. Mr Philip said that he had been unaware of any recent discussions about Foxtel taking AFL programming from C7. The following exchange then occurred:

> *'Did you care, Mr Philip, how the advantages of showing AFL games by taking the C7 channel compared with the advantages of getting the rights directly? Was that a matter of any importance to you? --- It was important to me that I thought there were significant advantages to taking the rights*

directly as opposed to taking them from C7 in relation to AFL.

Why were there, therefore, no discussion to see whether that position might be changed by negotiation at about this time? --- I don't know. I mean, it wasn't for me to conduct those negotiations'.

8.30.3 Foxtel Responds

990 On 2 November 2000, Mr Blomfield replied to Mr Greg Willis as follows:

'The AFL is the most important missing element to the services FOXTEL has to offer consumers. As discussed and supported by the Board last year, the subscription penetration and performance of FOXTEL would improve overall and our performance in the southern states would be brought into line with the northern states if we were to offer AFL. Churn will be reduced particularly in the southern states and the marketing and sales messages will be greatly enhanced if FOXTEL could boast the provision of AFL.

Strategically it is absolutely essential for FOXTEL to obtain the AFL rights via News and therefore in effect directly, rather than as suggested, to seek supply from C7. The News bid with the associated FTA party will provide for a cooperative relationship regarding scheduling of matches and earlier windows for the non live matches. The AFL service, as demonstrated by C7 this year, will not present a consumer proposition that would sustain interest or subscription levels'.

991 Mr Blomfield attached a revised financial model which projected an NPV of $1.1 million to Foxtel over the five year period of the rights. This model assumed that Foxtel would acquire live rights to three matches, rather than four and that the AFL would be on a tier at a price of $9.95 pspm, rising to $10.95 pspm; that the AFL channel would be supplied to Optus and Austar; that Optus and Austar would each pay $6.00 pspm for the AFL channel (rising to $6.50) and, in addition, would each pay '*Sign On Bonuses*' of $4 million per annum (with specified increases); and that the rights fee payable by Foxtel would be reduced from $20 million to $17.5 million per annum (inflation adjusted). The sub-licensing revenue was projected to be $14.8 million in 2002, rising to $18.7 million in 2006. The increased penetration on basic by reason of the AFL was assumed to be two per cent in the southern States in 2002, rising to six per cent in 2006, but was projected to be only one per cent in the northern States.

992 It appears that the change from four exclusively live pay television games to three came about because of pressure from Nine. Originally, Nine and Ten had been offered two

live free-to-air games each week, but Nine insisted on three matches for itself.

993 Mr Akhurst said in evidence that he appreciated at the time that Foxtel's model assumed a substantial increase in sub-licensing revenue, yet incorporated a substantial decrease in the quality of the product (in the sense that Foxtel was to receive only three live pay television matches per week, rather than four). Mr Akhurst maintained that he did not regard the model as simply an arithmetical exercise, as distinct from reflecting a considered judgment. He conceded that he did not know when he received the model what basis there was for assuming a substantial increase in licence fees from Optus and Austar. However, he said that he had later received reassurance on that score from Mr Blomfield. That particular evidence receives some support from the fact that most financial modelling incorporated sub-licences both to Optus and Austar, but one model, prepared for the Foxtel board meeting of 25 October 2000, assumed only a sub-licence to Austar. Mr Boyd could not explain why this had been done, but the re-inclusion of an (assumed) sub-licence to Optus would explain the reassurance Mr Akhurst said that he had received from Mr Blomfield.

8.30.4 Telstra Further Considers Its Position

994 On 2 November 2000, Mr Fogarty sent to Mr Akhurst a short paper outlining the arguments concerning the AFL pay television rights. The paper said that the recommendation by Telstra management not to support the proposal for the put option took account of the following strategic and commercial implications:

> *'FOXTEL entering into a legal obligation to take AFL Pay-TV content from News/FOXSPORTS [sic], even if NPV positive, will assist News/FOXSPORTS to consolidate their position in the Australian Pay-TV market place as the premier and only (excepting ESPN) content supplier of popular sports programming.*
>
> *News/FOXSPORTS currently has the rugby union, is bidding for the NRL rights and obviously wants the AFL. Whilst today this may not be of concern, in the near future it will mean that FOXSPORTS will have market power to effectively require sporting bodies to deal only with FOXSPORTS giving it the ability to negotiate content supply at lower rates. Being the premier provider of sporting content will enable FOXSPORTS to extract monopoly profits from pay TV operators for the supply of that content. Pay-TV operators such as FOXTEL, who do not own the content, become simple distributors and with their negotiating position considerably weakened by not owning the content.*
>
> *Regardless of all the assurances from News/FOXSPORTS our experience to date is that News/FOXSPORTS will always try and drain funds from*

FOXTEL.

The benefits to FOXTEL of granting a put option is also very debatable.

...

The key strategic question is:

Is Telstra happy for News/FOXSPORTS to entrench its position as a dominant sports content provider, to have the direct relationship with the sporting bodies and, with the strategic/commercial impacts upon FOXTEL?' (Emphasis added.)

995 The paper identified a number of options for consideration, should the strategic question be answered '*no*'. These included Telstra bidding for all rights; '*test[ing] the waters*' with Seven in relation to an arrangement with Foxtel; and a '*do nothing*' strategy, which allowed Telstra to drive a potentially better supply arrangement later. The note then observed that:

'*FOXTEL Management have advised that there is no way that the deal will be NPV positive. The underlying assumptions represent an optimistic view of the financial impact.*

The total cost of the deal over five years including rights and production costs is $200 million. We understand that such a sum requires Telstra main board approval'.

996 Mr Akhurst agreed in evidence that he understood Mr Fogarty to be expressing a concern that if News acquired the AFL pay television rights, Fox Sports would become a monopolist as a buyer and provider of pay television sporting content. However, Mr Akhurst said he was sceptical at the time because he knew that there was a range of sports and that it was implausible that one company would buy all the rights. Mr Akhurst also said that he concurred with Mr Fogarty's observation that News would always try to divert funds from Foxtel to Fox Sports. I accept Mr Akhurst's evidence as to his understanding at the time. I think it unlikely that Mr Akhurst would have formed the view that Mr Fogarty (a non-lawyer) was likely to be correct in his assessment, yet would have failed to take any steps to investigate or report on the issue.

997 On 3 November 2000, Mr Blomfield sent a revised AFL financial model to Mr Greg Willis at Telstra. This model assumed that Foxtel would acquire the right to broadcast four

live AFL matches weekly; that Foxtel would pay a licence fee of $20 million per annum (increasing by $0.5 million annually); that Optus and Austar would each pay '*Sign On Bonuses*' of $5 million per annum (increasing by $0.1 million annually); and that Optus and Austar would each pay $6.00 pspm, rising to $6.50 pspm. The model also assumed a greater peak season tier penetration. The NPV to Foxtel over five years was said to be $5.7 million.

998 On the same day, Mr Brenton Willis forwarded briefing notes to Mr Akhurst. The notes stated that the deal remained '*value dilutive*' for Foxtel. Further:

> *'The deal involves significant risk for FOXTEL. The commercial, financial and strategic objectives do not support FOXTEL granting the proposed put option. FOXTEL have conceded in both their forecast subscriber numbers (additional subscribers grow by between 1% and 3%) and in their position vis-à-vis Optus that AFL is not critical to their line-up or overall performance'.*

The analysis estimated the NPV of the proposal to be $1 million, but the '*adjusted NPV*' to be -$12 million, after allowing for Foxtel's advertising and editorial commitments to News.

999 In the evening of 3 November 2000, Mr Fogarty left a telephone message for Mr Blomfield. The message suggested that the numbers in the latest proposal made no sense and the deal appeared to be in the interests of parties other than Foxtel.

1000 Mr Greg Willis advised Mr Blomfield, by a fax dated 3 November 2000, as follows:

> *'Following consideration of the revised proposals, we remain of the view that they are not in FOXTEL's best interests. The proposals involve a total deal outlay in excess of $200M and the assumption of significant risk by FOXTEL for a nominal return.*
>
> *Once again, should there be an opportunity to restructure the proposal then further consideration may be warranted. We would suggest however, that the rights fees would have to be significantly lower, the games covered by FOXTEL would have to include at least some of the "games of the round" and that take-or-pay contractual arrangements be in place with both Optus and Austar.*
>
> *FOXTEL should pursue all opportunities to obtain the AFL programming from all potential bidders, including Channel Seven/C7'.*

1001 Mr Akhurst acknowledged that Mr Willis had sent the fax after a discussion with Mr Fogarty and Mr Akhurst himself. Mr Akhurst said that he agreed with the contents of the fax.

When questioned about his response to Mr Brenton Willis' briefing notes of 3 November 2000, Mr Akhurst said in evidence that Telstra had always regarded $10.00 pspm paid by Foxtel for Fox Sports as too expensive. He agreed that he thought the effective licence fee for Optus and Austar (taking account of the sign on fee) of $12.00 to $13.00 pspm was '*expensive*' and '*unlikely*' to be achieved. He also understood that the proposal involved the three least appealing games for Foxtel (in the sense of the least appealing to the viewers generally). When asked why he had not sought to test Seven's willingness to provide better terms than News, Mr Akhurst maintained that his attitude was that he was not running Foxtel and that other members of the Foxtel Partnership, more experienced and knowledgeable than he about sporting content, thought that direct dealing with the AFL was the way to proceed.

1002 Mr Akhurst gave evidence that he participated in a telephone conference held in the afternoon of 3 November 2000 with Dr Switkowski and Messrs Mansfield, Chisholm and Greg Willis. Mr Akhurst said in his evidence that Mr Chisholm enthusiastically supported the proposal that Foxtel acquire the AFL pay television rights and characterised the cost as '*bird seed*'. In cross-examination, Mr Akhurst was uncertain as to the date of the conversation. It is clear from Dr Switkowski's evidence that Mr Chisholm was indeed enthusiastic about the proposal that Foxtel should acquire the AFL pay television rights and I accept that Mr Akhurst had a correct recollection of the substance of Mr Chisholm's comments. The likelihood is that Mr Chisholm expressed his views to senior Telstra officers both before and after Mr Greg Willis sent the fax of 3 November 2000.

1003 I think that Mr Akhurst's recollection that he agreed with Mr Blomfield's approach in the letter of 2 November 2000 (that the AFL pay television rights should be acquired directly from the AFL) is not correct, having regard to his agreement with Mr Greg Willis' response of 3 November 2000. But it is significant that Mr Willis' fax of 3 November was somewhat more receptive to the proposal for direct acquisition of the rights than Mr Willis' letter of 1 November 2000, in that the 3 November 2000 fax made specific suggestions as to how the proposal could be rendered more palatable. I am satisfied that Mr Akhurst's somewhat more receptive attitude towards the proposal that the rights be acquired directly was influenced by the strong opinions that had been expressed in the meantime by Mr Chisholm.

8.31 '*Killing C7*' Conversations

8.31.1 Mr Falloon and Mr Gammell

1004 Seven places some reliance on a conversation which took place between Mr Gammell and Mr Falloon at a social function on 4 November 1999. According to Mr Gammell's statement, the conversation was to the following effect:

> *'[Falloon]: Why on earth are you bothering to take legal action[?] Hell will freeze over before C7 gets onto Foxtel – you're never going to get on to the system.*
>
> *[Gammell]: All you've ever tried to do is kill C7.*
>
> *[Falloon]: You are a competitor, you are just not going to get on'.*

1005 Insofar as Seven relies on the conversation as evidence of a malign purpose by PBL, that reliance is misplaced. As Mr Gammell readily accepted in evidence, the context for the exchange was a discussion concerning ongoing litigation in relation to C7's attempts to gain access to the Telstra Cable. Moreover, it was Mr Gammell who, on his own account, used the expression '*kill C7*'. Mr Gammell agreed that the expression had been used within Seven to describe the consequences of Seven losing the AFL pay television rights. Mr Wise confirmed that he had used the expression, as had Mr Aspinall and Mr Francis. Indeed Mr Wise said in an internal email of 8 November 1999 that the only value of a bid by Foxtel for the AFL rights was that it '*could be seen as killing C7*'. Mr Stokes himself told the ACCC that '*should Foxtel acquire the AFL rights that would kill C7*'.

8.31.2 Telstra's Answers to Interrogatories

1006 Seven administered interrogatories to the Telstra parties relating to comments made by Mr Blomfield in conversations with Mr Fogarty of Telstra. The answers were admitted into evidence but only against Telstra. The relevant answers given by Telstra were as follows:

> *'In late October or early November 2000, Martin Fogarty had a telephone conversation with Jim Blomfield, both of whom were in Sydney.*
>
> *The conversation concerned a proposal communicated to [Telstra] and others by Foxtel Management ... pursuant to which the Board of Foxtel Management was asked to authorise that company to enter into a put option agreement with News Limited ... pursuant to which Foxtel Management would acquire pay*

television rights to AFL matches for a term of 5 years commencing in 2002. In relation to that proposal, Mr Blomfield stated to Mr Fogarty words to the effect, "Don't you understand that this is about killing C7?".

In or about early November 2000 Mr Fogarty had a further conversation with Mr Blomfield. To the best of [Telstra's] knowledge the conversation occurred by telephone conference call. [Telstra] is unable to identify all of the persons who participated in, or were present during, that telephone conversation but believes that they included a person who [Telstra] understands was then an employee of Foxtel Management and Greg Willis, Jack Simos, Brenton Willis, employees of the Fifth Respondent. All persons were in Sydney.

The conversation concerned a proposal that Foxtel Management grant a put option to News pursuant to which Foxtel Management would acquire certain AFL pay television rights. In relation to that proposal, Mr Blomfield said words to the effect: "Look, this is about killing C7"'.

8.32 Nine Is Asked to Contribute More

1007 In early November 2000, Mr Frykberg asked Nine to increase its contribution to News' bid for the AFL broadcasting rights. On 7 November 2000, Mr Philip sent to Mr Leckie a draft put term sheet providing for a contribution of $21 million (plus CPI) per annum for Friday night and Sunday afternoon matches for free-to-air broadcast during the regular season. On 10 November 2000, Mr Leckie signified Nine's acceptance of the term sheet. Internal Nine working papers suggested that at this price the free-to-air television rights would yield a profitable outcome for Nine.

8.33 Foxtel Management's Board Meeting of 9 November 2000

8.33.1 Preliminaries

1008 A Foxtel Management board meeting took place on 9 November 2000. Some days prior to the meeting, Mr Greg Willis of Telstra raised with Mr Philip three main concerns about the proposal that Foxtel acquire the AFL pay television rights, namely:

> the expense of the rights and the unrealistic assumed subscription take-up;
>
> Telstra's lack of confidence in the assumed income streams from Optus and Austar; and
>
> the looseness of the proposed arrangement.

The concerns were also recorded in a letter from Mr Willis to Mr Philip on 9 November

2000.

1009 On 8 November 2000, Mr Fogarty forwarded briefing notes to Mr Akhurst and the other Telstra directors of Foxtel in relation to the Foxtel Put proposal. The paper compared the '*deal metrics*' of three proposals: the 10 year joint venture proposal of February 2000; the proposal of 2 November 2000 (3 games at $17.5 million per annum); and the proposal of 4 November 2000 (4 games at $20 million per annum). The paper identified a number of key risks, including the unlikelihood of achieving the forecast wholesale tier price for the supply of Foxtel to Optus and Austar of $12.50 to $13.25 pspm. It pointed out that Foxtel would be offered AFL programming by the successful bidder, whoever that ultimately turned out to be, since the AFL had required coverage to be offered to both Austar and Foxtel. The recommendation was as follows:

> *'Directors may like to note that:*
>
> - *The acquisition of AFL coverage at an acceptable price will enhance FOXTEL's programming line-up, especially in the southern states;*
>
> - *The current proposal is approximately twice as expensive on a per subscriber basis ($10-11 vs $5 effective cost to FOXTEL) as that approved by the Board in February of this year;*
>
> - *The current proposal is value dilutive for FOXTEL;*
>
> - *Lack of contractual commitments from Austar and Optus, may expose FOXTEL to a potential shortfall of up to $60-70M NPV;*
>
> - *Potential of FOXTEL to source the AFL from the eventual rights holder at lower cost and risk profile; and*
>
> - *The strategic benefit to FOXTEL as highlighted in the financial and commercial assessment.*
>
> *On the current terms, Telstra management recommend that the Directors decline to approve the granting of this put option proposal.*
>
> *Directors may wish to consider the costs and risks of the proposal against the benefits which are subjective. Directors may also wish to consider a reciprocal call option and that the contract be redrafted so as to be enforceable.*
>
> *Directors may wish to note that the AFL bid conditions require the successful bidder to offer the AFL programming to FOXTEL (and Austar), thereby ensuring that FOXTEL has the option to acquire that programming once the rights have been awarded'.*

1010 Mr Akhurst said that he agreed with some of the points made in the briefing notes. However, by the time he received them he had an open mind as to whether the bid would be '*value dilutive*' for Foxtel, having been influenced by Mr Chisholm's views. Moreover, he did not accept that Foxtel could source the AFL from the eventual rights holder at a lower cost and risk profile than through a direct acquisition, since that was contrary to the advice the management of Foxtel was giving. Mr Akhurst was not directly challenged on this evidence and I accept it.

1011 Mr Philip prepared a response to the concerns raised by Mr Willis with '*significant input*' from Mr Macourt. Mr Philip's letter was sent at about midday on the day of the Foxtel Management board meeting:

> *'As a director of FOXTEL, I think it is beyond doubt that the AFL content will be extremely valuable to FOXTEL if FOXTEL can acquire it on terms that enable FOXTEL to control its use. Where FOXTEL is suitably equipped with the most popular winter football code, i.e. Sydney, FOXTEL has been most successful. It is the duty of the directors of FOXTEL to try and replicate this in other cities, particularly Melbourne.*
>
> *The current proposal put before FOXTEL by News Limited enables FOXTEL to acquire pay tv rights in a way that enables FOXTEL to control the scheduling, production, branding and presentation of the matches. As I have explained to you, this is not an opportunity that has been available to pay tv from the current AFL rights holder, whose free to air interests conflict absolutely with any expectation that reasonable pay tv rights will be available to FOXTEL. Past conduct by that rights holder does not suggest that this will change in the future.*
>
> *You have told us that Telstra has had contact with the current rights holder over this issue, and have been led to believe that an offer of pay tv rights has been made by it to FOXTEL. I am not aware that FOXTEL has received any such offer.*
>
> *In the circumstances, the only way that FOXTEL is going to meet its need for AFL programming is to pursue the rights itself.* ***The only realistic opportunity available to FOXTEL is the proposal put forward by News Limited. To reject that proposal is to deny FOXTEL AFL rights altogether****'*. (Emphasis added.)

1012 Mr Philip addressed Mr Willis' specific concerns as follows:

> *'(1) The current proposal enables FOXTEL to own and control 100% of the channels in which the AFL programming is inserted. As such,*

FOXTEL can control pricing decisions and the marketing of the channel. This supports FOXTEL management's expectation of tier pricing at $9.95, and higher take up rates. While the current proposal includes 3 live games, all other games are available for replay. Put simply, I think the current proposal will equip FOXTEL to work harder to achieve increased take up rates at the suggested pricing. Your suggestion that the additional increase in subscribers because [off] the AFL is only 1-3% is wrong. The model presented to you as directors of FOXTEL moved from 2% to 6% over 5 years. I think that is an extremely conservative forecast. It is reasonable to expect that FOXTEL will be able to achieve subscriber number differentiation with Optus in Melbourne similar to that achieved in Sydney once it carries the winter football code. This alone would suggest an additional increase in subscribers because of the AFL of 4% to 6% per annum from Year 1.

You mentioned to me last night that the level of investment did not seem to stack up against the modelled increase in NPV, particularly when compared with the NPV available under the Network AFL proposal. If you are going to make a comparison like this, you must compare apples with apples.

The Network AFL proposal suggested an NPV of $81.8 million based on 10 years with a 10 year terminal value (effectively an expectation [that] the rights would be sustained over 20 years). If the same assumptions are made in relation to the current proposal (which is quite legitimate with the benefit of an exclusive right of negotiation to renew, which is available under the current proposal), the NPV of the current proposal is in fact $135.4 million.

I attach a model of the current proposal based on the same assumptions as the Network AFL proposal to demonstrate this.

If you consider the proposal in the context of its commercial importance to FOXTEL, you cannot conclude that the rights are too expensive.

(2) You have said you have little confidence [that] the revenue streams indicated will available from Optus and Austar.

Your assertion of what Optus is paying ($4 per subscriber per month) is wrong. Our information is that Optus is paying approximately $35 million for the channel in which the AFL is the key programming. That gives a per subscriber cost to Optus of $14.60. The decision of Optus to take FOXTEL's offer of AFL programming will be a cost to its business. Optus will analyse it the same way I have analysed it above. The programming has commercial importance to Optus just as it has to FOXTEL. I expect Optus to take the programming for this reason, and because the programming will be better than what Optus currently gets (one live game). However, if Optus does not take the

programming, you cannot simply back out that revenue stream from FOXTEL's model. If that were to happen, you must conclude that there would be a significant boost in the take up rates for FOXTEL, and a significant increase in the kick to total subscriber numbers to FOXTEL. To analyse this in isolation, as you have done, is not justified.

(3) The proposed agreement deals precisely with all the key elements of the arrangement. It is consistent with our experience [of] dealing with rights of this nature ... We think the proposal will be enforceable. If you think there is anything loose about the terms of the agreement, I am sure we can build it into any final agreement that is entered into'.

Mr Philip sent a copy of this letter to Mr Falloon.

1013 Before the board meeting, Mr Akhurst met with Mr Rizzo and Mr Greg Willis. Mr Akhurst, after consulting with them, decided to support the proposal that Foxtel enter a put option with News to facilitate a single bid for the AFL broadcasting rights, at a fee for Foxtel of $17.5 million per annum. Mr Akhurst said that he made the decision for a number of reasons, including the following:

the weight of opinion expressed by the Foxtel executives stressed the importance of acquiring the AFL pay television rights and that position had been supported by Mr Chisholm and Dr Switkowski;

the AFL had expressed a preference for a single bidder for both sets of rights and it was better for Foxtel that there be such a bid since, according to the Foxtel partners, Seven would exploit the free-to-air rights to the full if its bid was successful;

the model provided by Mr Philip suggested a positive NPV over the longer term and used a 10 year time frame, rather than the five year time frame incorporated in earlier models considered by the Telstra Media Division; and

support for the News proposal would help to create a climate of confidence between Telstra and the other Foxtel partners.

1014 The cross-examination of Mr Akhurst demonstrated that one of the reasons he gave was insupportable and that he might well have probed further the accuracy of everything he had been told by Mr Philip. But the questioning, in my opinion, did not satisfy me that Mr Akhurst's views were not sincerely held at the time.

8.33.2 The Board Decision

1015 The Foxtel Management board meeting of 9 November 2000 approved the recommendation that Foxtel should seek to acquire the AFL pay television rights:

> '*subject to Telstra's satisfaction with additional financial and legal information to be forwarded by FOXTEL management*'.

The approval was to the proposal that Foxtel pay $17.5 million per annum for three AFL games. Mr Akhurst understood the approval to be '*in principle*' and to be subject to further modelling and the resolution of any drafting issues.

1016 At the board meeting, Mr Blomfield indicated that the reason that subscriber levels were higher in Sydney than in Melbourne was because Foxtel had live NRL content, but not live AFL pay television rights. Mr Blomfield said that he expected the differences to be evened out if Foxtel got the AFL pay television rights, but that the model presented to the board had not factored in this expectation. The discussion at the meeting was to the effect that the model should reflect the expectation. Mr Blomfield also said that Optus and Austar might well be prepared to pay more than had been assumed. (This account is based on Mr Akhurst's oral evidence, which was not challenged.)

8.34 ACCC Foreshadows Non-Intervention

1017 On 13 November 2000, whether by coincidence or otherwise, a series of newspaper articles suggested that the ACCC would have little reason to intervene in the '*bidding war*' for the AFL broadcasting rights. Mr Allerton commented on the articles in an email to Mr Stokes on the same day. Mr Stokes then wrote a lengthy letter to the AFL. Mr Stokes observed, no doubt sagely, that long experience had taught him not to negotiate in the press. He also asserted that the decision of the Full Court on the access dispute would '*ensure that C7 will be available on the Foxtel system prior to the commencement of the new proposed contract*'. As both Mr Stokes and Mr Gammell (who drafted the paragraph) knew, there was no foundation for this assertion. Mr Gammell admitted as much in his evidence. Mr Stokes was not prepared to concede that the statement was misleading, but it plainly was.

8.35 Seven Network's Board Meeting of 17 November 2000

1018 Aspects of Seven Network's board meeting of 17 November 2000 and the more or less concurrent annual general meeting of Seven Network are dealt with in Chapter 9 ([…]).

It is relevant to note here that a paper prepared by Mr Francis was tabled at the board meeting. The paper dealt at some length with the latest press coverage concerning the bidding for the AFL broadcasting rights. At the meeting, the board noted that Seven's current offer for the AFL broadcasting rights was $56 million. Mr Stokes informed the meeting that:

> *'the focus had been on ... C7, which would not have a good prospect without the AFL'.*

1019 Ms Plavsic made handwritten notes on her copy of the board paper. The notations apparently recorded a discussion to the effect that News, Fox Sports and Foxtel would be '*ACCC fodder*' if they acquired both the AFL broadcasting rights and the NRL pay television rights. The notations also referred to the drawing up of a paper trail and the possibility of Seven ending up with the NRL pay television rights. It is not clear whether the discussion recorded by Ms Plavsic took place at the board meeting (Mr Stokes denied that it did) or elsewhere. Nonetheless, it is clear enough that at about that time, senior executives at Seven were looking to make out a case based on anti-competitive conduct against News, Foxtel and Fox Sports, should Seven fail to obtain either the AFL or NRL pay television rights.

8.36 Mr Frykberg's Discussions: Mid-November 2000

1020 In mid-November 2000, Mr Frykberg asked Mr Campbell of Foxtel to prepare a financial model, based on an initial rights fee of $22.5 million per annum for three live pay games over a five year period. The model prepared by Mr Campbell incorporated some '*flip-flop arrangements*' in local markets serviced by Nine and Ten. Mr Campbell's evidence was that the model produced a positive NPV.

1021 During this period, there was discussion within Foxtel and between Mr Frykberg and the AFL in relation to the flip-flop. News and Foxtel asked Mr Frykberg to press the AFL on the issue. While he continued to request that the flip-flop be optional, Mr Frykberg said that he had always assumed that the AFL would insist on arrangements that, in effect, if not in form, were compulsory.

1022 On 22 November 2000, Mr Frykberg told Mr Buckley of the AFL that he was running into some difficulties with partners on scheduling:

'specifically the broadcast of local team games on FTA in the local markets.

The problem is that this has the potential to seriously dilute the value of the pay games because they may never be able to have any local games live, which means they can't use the AFL to grow their markets, which means they say: why are we paying this much etc, etc, etc'.

1023 On 28 November 2000, Mr Frykberg sent a document to Mr Browne of the AFL addressing scheduling issues, including the details of the flip-flop. Mr Frykberg proposed an amendment to make the terms of the flip-flop more favourable to Foxtel. He did so because he had been requested to press the issue by a combination of people, including Messrs Macourt, Philip and Blomfield.

8.37 Seven Complains to the ACCC: 22 November 2000

1024 On 22 November 2000, Seven's solicitors wrote to the ACCC drawing its attention to Seven's:

'very real concerns about the potential for misuse of market power by the PBL/News/Telstra consortium in relation to the current bidding process and its outcome'.

The letter urged the ACCC to intervene to prevent the misuse of market power.

1025 The following day, Mr Stokes sent a copy of the ACCC's 1998 press release (which recorded the ACCC's intention to monitor the conduct of the Foxtel partners) to Mr Evans, the Chairman of the AFL Commission. In his evidence, Mr Stokes agreed that his strategy was intended to discourage News, PBL, Foxtel and Telstra from bidding for the AFL broadcasting rights. He also agreed that he considered that one way of deterring the AFL from entertaining any such proposal was to elicit the interest of the ACCC in a bid by News or the consortium.

8.38 Telstra: Early November – 6 December 2000

1026 Dr Switkowski was overseas from 4 to 10 November 2000 and, on his return, was preoccupied by Telstra's forthcoming annual general meeting. On 9 November 2000, Mr Stokes told Mr Rolland of Telstra that he wanted to work with Telstra on the understanding that Telstra would bid separately for the internet rights. Mr Stokes proposed joining i7 and Telstra.com. Dr Switkowski received a copy of Mr Rolland's memorandum relating to the

conversation and asked Mr Akhurst for his reading of the situation.

1027 Mr Akhurst responded as follows:

> *'Ziggy, I think Kerry seems pretty desperate. I don't see much advantage to us in combining i7 and T.com by giving equity to 7 in T.com ... Separately, I note Kerry is threatening to sue us if Foxtel obtains the AFL Pay TV rights.* ***Hard to see what we've done wrong other than support Foxtel as it competes for the rights and if successful, isn't he just a sore loser?'*** (Emphasis added.)

The reference to a threat to sue appears to have been to a newspaper article of 18 November 2000, in which Mr Stokes was reported as saying that Seven might not only sue Foxtel for denying access, but would have an additional claim for '*impressive*' damages if it lost the AFL pay television rights. The article reported Mr Stokes as '*admitt[ing] C7 would have a "very limited" future without the AFL rights*'.

1028 Telstra points out, correctly, that the last sentence of Mr Akhurst's email corroborates Mr Akhurst's evidence that he did not think that Telstra's support for Foxtel involved anti-competitive conduct. Telstra also submits, perhaps with less force, that the reference in the article to C7's '*very limited future*' supported Mr Akhurst's evidence that he did not believe the loss of the AFL rights would '*kill C7*'.

1029 On 22 November 2000, Dr Switkowski initiated a telephone conversation with Mr Samuel and Mr Evans to ascertain the status of the bidding process for the AFL broadcasting rights. Dr Switkowski's report of the conversation included the following:

> *'1) ...*
>
> *2) [T]he deadline for FTA and pay TV will be in the first half of December, with a decision expected by Xmas eve. Actual date sounded fairly fluid. Was advised not to be led by newspaper reports. Will be for formal and final offers – sudden death for pay TV; subject to last right of refusal by Seven for FTA.*
>
> *3) AFL confirmed that Ian Frikberg [sic] was the man representing our consortium. (Steve Wise for Seven).*
>
> *4) [C]onfirmed that there is no favourite, nor stalking horse in this process; and that the attention seemed to be on the qualitative elements of the competing proposals. The Foxtel bid was described as being an "interesting package", but I did not sense we were off the mark re dollars.*

> *5) Advice was that bidders work with the AFL to get their offers properly designed and specified.*
>
> ***Seems to me that we are probably doing everything right so far'***. (Emphasis added.)

1030 Mr Akhurst left Australia on 27 November 2000 and returned on 7 December 2000. In an email before his departure, Mr Akhurst summarised the position for Dr Switkowski:

> *'Closed bids are due on Friday. All the press speculation is guess work – even the AFL doesn't know what News will bid, the various conditions and extra items. They think free rights are around the $40M and pay $20M level from some earlier exchanges – but they really don't know and we are intending to keep it that way. The risk for us is that a competitor comes over the top with their sealed bid and that this leaves News out of the running. But Foxtel will still have a chance of getting the programming as it has the best pay subscriber numbers and the winner is almost sure to approach Foxtel. 7 has a last right to match on FTA only. I would imagine that it's likely we will be asked during this week to front up with some more money. Greg can model this for us. The trade practices issues need to be carefully managed as litigation is likely given the nature of the various parties, irrespective of the merits'.*

Dr Switkowski's response noted that he had met Mr Samuel by chance the previous day and that his:

> *'reading of [Mr Samuel's] signals is that the preferred outcome is News/PBL; Foxtel; Telstra for FTA, payTV and Interactive respectively; with Seven; Foxtel; Telstra combination being next best. My sense is that these are the two alternatives in play'.*

1031 As I have noted, Mr Akhurst agreed with the view of the Telstra Media Division that the successful bidder for the AFL pay television rights would approach Foxtel, but he did not agree that Foxtel would necessarily be in a position to dictate terms. Mr Akhurst also said that he referred to trade practices issues in his email to Dr Switkowski because he thought that litigation on trade practices grounds seemed to be '*the natural course*' for '*these particular parties*'. He denied that he had formed the view that Foxtel was enhancing its market power. I accept Mr Akhurst's evidence as to his state of mind on this issue.

1032 Dr Switkowski said that he agreed with Mr Akhurst's assessment at the time and that he understood Mr Akhurst to be referring simply to the possibility of Seven litigating. Dr

Switkowski was challenged on his understanding:

> *'MR SHEAHAN: Mr Akhurst goes on to say that he imagines that it's likely that we will be asked during this week to front up with some more money? --- Yes, I see that.*
>
> *That was an expectation I think that you shared, really; is that fair? --- I did.*
>
> *And your judgment about that was based upon your assessment of the enthusiasm of News to ensure that the AFL rights ended up with the News consortium? --- Enthusiasm of both of our shareholders, shareholding partners, News and PBL, for winning the AFL rights, yes.*
>
> *...*
>
> *Wasn't it your impression at this time that News and PBL saw the acquisition of the AFL rights for Foxtel in particular as having some strategic value, that is to say, as having value beyond the revenues attributable to the acquisition? --- I mean, I think I would answer "yes" for all of us in evaluating the appeal of the AFL rights as going beyond a simple numerical calculation of near term economics.*
>
> *Of near term economics? --- And by that I mean we shared the view that quality sports content had high value in a subscription television environment, that there were a range of ways in which we might work with the AFL that could not easily be quantified, and that the opportunity to win the rights came up at infrequent intervals five years apart. All of those considerations would then be added to a straight financial evaluation.*
>
> *...*
>
> *You understood, at the time of this e-mail, that AFL coverage was immediately available to Foxtel if it wanted it and could agree suitable terms with C7; correct? --- Some form of AFL coverage, yes.*
>
> *And the nature of that coverage would be a matter of negotiation between Foxtel, C7 and perhaps Seven as well? --- That's correct.*
>
> *What cropped up every five years was not an opportunity for Foxtel to have AFL coverage, but an opportunity for Foxtel to control the AFL rights; correct? --- Correct.*
>
> *[That] was key to the strategic considerations that you have mentioned in relation to having the AFL ... coverage on Foxtel; correct? --- That was the outcome we were seeking, yes.*
>
> *What I want to suggest is that News Limited, and PBL in particular, as you understood it, saw strategic value in Foxtel having the AFL rights under its control, not merely in Foxtel having AFL coverage; you agree with that? --- That sounds plausible, yes.*

I want to suggest to you that what you understood was that they saw a strategic value in Foxtel having the AFL rights because it would have the consequence that C7, Fox Sports' competitor, would not have them? --- That was not exactly my consideration at all.

Do you say it is just a line of reasoning down which you didn't travel? --- It was certainly a line of reasoning down which I did not travel'.

I accept this evidence by Dr Switkowski.

8.39 Mr Stokes Contemplates Withdrawing from the Bidding

1033 Mr Stokes was overseas from 26 November 2000 to 8 December 2000, but was in contact with his executives by email and, on occasions, by telephone. On 27 November 2000, Mr Stokes sent to Messrs Gammell, Wise and others a draft letter to Mr Evans of the AFL, stating that Seven proposed to withdraw from the bidding process. Mr Stokes' draft letter complained of Seven's competitors receiving a bidding advantage by reason of the AFL's willingness to split the price of the AFL free-to-air and pay television rights. Mr Gammell advised Mr Stokes that the time was not yet ripe to withdraw. Mr Stokes accepted that advice.

1034 On 28 November 2000, during an international flight, Mr Stokes dictated notes that (as he said in evidence) reflected his true thoughts at the time. The notes included the following:

'I believe the AFL will not give us a last look at pay. Even though Ron Evans has said to me our 40 year relationship is important and highly valued, I think if we are going to achieve our objective, it may be time for a tactical retreat to the high ground.

...

***The future actions that we would then have against Foxtel, News and PBL would be considerably strengthened** particularly if we were to include phrases [such as] unable to compete because we haven't had access to Foxtel and its subscriber base to formulate our numbers.*

...

If we are going to do this we should publicly do this prior to 7th of December so the other side have ample opportunity to reduce their bid.

> *... I confidently expect with the ten day timetable News will take some sort of legal action to prevent the NRL accepting our offer. That would be the icing on the cake, particularly if the AFL were aware of that and we then took the course of action I am suggesting'.* (Errors corrected and emphasis added.)

1035 Mr Stokes accepted that the reference to '*future actions*' was to possible future legal proceedings. However, he subsequently denied that he already had in mind suing Foxtel, News and PBL. I do not accept that denial. It flies in the face of the objective evidence.

8.40 AFL's First Offer: 28 November 2000

8.40.1 The Offer

1036 On 28 November 2000, the AFL made an offer to Seven pursuant to cl 4(a) of the First and Last Deed. The offer provided for Seven to broadcast five free-to-air matches per round, plus finals and other matches, for a fee of $50 million per annum (inflation adjusted), plus $500,000 (also inflation adjusted) for each additional match broadcast. The offer was for a five year term. A copy of the offer was sent to Mr Stokes in Beijing. Mr Stokes said in evidence that it became apparent to him that the AFL was seeking to proceed on the basis that separate offers would be entertained for the free-to-air and pay television rights. Mr Stokes agreed in his evidence that the AFL's strategy remained unacceptable to him.

8.40.2 Seven's Response to the AFL's First Offer

1037 Seven responded to the AFL's first offer on 5 December 2000. The letter claimed that the offer did not comply with the requirements of cl 4(a) of the First and Last Deed. The letter also asserted that the financial terms included in the purported offer were '*so out of line with proper market realities and so uncommercial as to be lacking in bona fides*'.

1038 The minutes of the AFL Commission's meeting of 11 December 2000 recorded that the AFL did not necessarily agree with Seven's comments, but was '*willing to try and satisfy Channel 7's requests*'. The minutes also noted that Seven had not acknowledged that the First and Last Deed dealt only with the free-to-air television rights. Seven's position at the time was that the first and last rights related to pay television as well.

8.41 Mr Gammell and Mr Macourt Meet: 4 December 2000

8.41.1 Mr Philip's Fallback Scenarios

1039 Shortly before 4 December 2000, Mr Philip prepared a document entitled '*Fallback Scenarios*'. The concerns motivating Mr Philip appeared in the document itself:

> '• *Ten is proving difficult on scheduling against pay – we could lose them.*
>
> *Nine is getting edgy on MCG and we could lose them.*
>
> *Foxtel/News only interested in pay rights (AFL free rights only required to deal with anti-syphoning [sic] laws).*
>
> *Assume Seven wishes to get AFL free tv rights, and maintain business of supplying AFL to Optus at least non-exclusively, and that Seven's NRL bid is a nuisance bid'.*

This was not the first such document prepared by Mr Philip. He had prepared a similar document on 21 November 2000, because he was concerned that News might lose the support of Nine and Ten for the bid.

1040 The Fallback Scenarios document presented an alternative strategy, in case News' plan to obtain all the AFL rights failed. The strategy contemplated an agreement between News and Seven, whereby Seven would grant News a put option in respect of the AFL free-to-air television rights at $40 million per annum. Thus, as Mr Philip proposed in the document, if News won the free-to-air television rights it could '*offload them onto Seven, who were the ones who really wanted them*'. In addition, Seven and Foxtel would each grant a call option to the other in respect of non-exclusive AFL pay television rights for $9 million per annum. Mr Philip's alternative strategy also contemplated that C7 would grant Foxtel a call option in respect of the non-exclusive NRL pay television rights for $11 million. Foxtel would give Fox Sports a call option in respect of the non-exclusive NRL pay television rights acquired from C7 for the same fee. In his evidence, Mr Philip agreed that the aim of the strategy, as outlined in the document, was to enable Foxtel to obtain the non-exclusive AFL pay television rights for $9 million. Mr Philip said his assumption was that the AFL would be unlikely to deal with Foxtel in respect of the pay television rights only and thus the only bidder for the rights would be Seven.

1041 In anticipation of a meeting to be held on 4 December 2000 between Mr Gammell and Mr Macourt, Mr Philip prepared a draft of a formal call option whereby C7, if requested by Foxtel, agreed to sell to Foxtel the non-exclusive AFL pay television rights. Mr Philip said that he prepared the document on his own initiative, with a view to giving it to Mr Macourt before the meeting. His recollection was that he did not in fact have a chance to do so.

8.41.2 The Meeting

1042 The evidence relating to the meeting of 4 December 2000 had some unusual, if not extraordinary features. The only written record of the meeting is an unsigned typed note, the contents of which were dictated, not by Mr Macourt but by Mr Philip. According to both Mr Macourt and Mr Philip, Mr Macourt compiled rough handwritten notes after the meeting. Mr Philip then dictated the final note on the basis of Mr Macourt's rough notes and his answers to Mr Philip's questions.

1043 The typewritten note is in the form of a record of conversation, although it does not purport to be a complete *verbatim* account and, indeed, Mr Gammell agreed that certain things were said that were not recorded in the note. Mr Philip rather oddly said that he could not recall why he recommended preparation of the note in the first place, other than it seemed to be an important exchange of views. Mr Philip's concern to have a record is particularly odd given his propensity to encourage the deletion or destruction of records that might be relevant to potential legal proceedings.

1044 Mr Gammell's evidence was equally odd. He said nothing about this meeting in his first statement and dealt with it only in his third statement, after he had read the note prepared by Mr Philip. Mr Gammell himself had taken no notes of the meeting. Yet in his third statement he provided a detailed account of the conversation (which had occurred four years earlier), based on the note supplemented by Mr Gammell's own recollection. Mr Gammell's account contained additions to and deletions from the version that had been prepared by Mr Philip after his discussions with Mr Macourt.

1045 Certain conclusions can be drawn about this conversation with reasonable confidence. Mr Gammell told Mr Macourt that Seven needed the exclusive AFL or NRL pay television rights or otherwise C7 would have no business. Mr Macourt expressed disagreement with that claim and challenged the quality of C7's content. There was also discussion about C7

taking non-exclusive AFL pay television rights as part of an arrangement with Foxtel.

1046 Mr Gammell's evidence of this part of the conversation was as follows:

> *'In December 2000, when you spoke to Mr Macourt, he again offered you non-exclusive rights, didn't he? --- Yes.*
>
> *And he did so on the basis, as you understood it, that that would permit C7 to survive with its Optus contract; isn't that so? --- That was his view.*
>
> ***That was his view, and he expressed it to you, didn't he? --- He expressed his view, yes**.*
>
> ***And it was clear to you from what he said to you that he had no concern as to whether C7 survived or not? --- Yes**.*
>
> *...*
>
> *Because, as you understood it, he was content for C7 to retain its relationship with Optus; isn't that so? --- Well, he was not really looking out for C7's interests, I have to say.*
>
> *But that is what you understood he was saying to you, isn't it; that he was content for C7 to retain its relationship with Optus? --- No, I recall him just saying that he was content to have non-exclusive for him.*
>
> ***And he explained the reason that he was prepared or happy for C7 to have non-exclusive rights as being that it would permit C7 to continue its relationship with Optus? --- He held that view**.*
>
> *And he said that to you? --- Words to that effect'.* (Emphasis added.)

1047 Mr Gammell's account has the conversation concluding with him extending an invitation to Mr Macourt for Fox Sports and C7 to reach an agreement as to the bidding process:

> *'[Mr Gammell]: There is no point in us having non-exclusive rights [to the AFL] because it will not help us get onto Foxtel. We won't get any deal because Packer will not allow it to happen.*
>
> *What if we agreed that the bidding continue and then whoever gets the rights will allow the other to take half those rights[?] That way we'd both get half of both the NRL and AFL.*
>
> *Mr Macourt: I will speak to Packer about that and get back to you'.*

8.41.3 Significance of the Conversation

1048 In his oral evidence Mr Gammell accepted that his suggestion to Mr Macourt was an '*extraordinary thing to propose*' and '*unique*' in his experience. Yet Mr Gammell maintained that he had forgotten the conversation when he made his first statement. Mr Gammell denied that he was proposing to Mr Macourt that the bidding for all NRL and AFL rights be rigged. Later in his evidence, he said that he had recognised at the time that there was a risk that what he was proposing breached the *TP Act* and that advice would therefore be needed. (Prior to giving the later evidence, the Court was briefly adjourned to enable Mr Sheahan to give Mr Gammell any necessary advice as to the possible consequences for him of this evidence.) Mr Gammell said that what he had in mind was a competitive process, followed by some kind of matching right in the unsuccessful bidder. He denied discussing the idea in advance with Mr Stokes.

1049 For the most part, I prefer Mr Macourt's account of the conversation to that of Mr Gammell, insofar as they are in conflict. I do not regard Mr Gammell as a reliable witness when it comes to recalling conversations or the substance of undocumented transactions. The circumstances in which Mr Gammell came to recollect the conversation with Mr Macourt do not inspire confidence in the accuracy of his version.

1050 There is one exception to my preference for Mr Macourt's account. I think it is likely that Mr Gammell was correct in substance when he recalled that the conversation concluded with his suggesting a sharing of rights between Foxtel and C7. This part of his evidence was potentially adverse to his interests, in that it exposed him to the possibility of criticism for floating a proposal that, if implemented, might have involved a contravention of the *TP Act*. Mr Gammell's recollection also dovetails, to some extent, with Mr Philip's contemplation of a cooperative arrangement through call options and (as I find) Mr Philip's discussion of that proposal with Mr Macourt in advance of the meeting. Furthermore, if Mr Gammell (or Mr Macourt, for that matter) had suggested a cooperative bidding arrangement during the conversation, this would explain Mr Philip's desire to prepare what was probably a sanitised version of the conversation.

1051 Mr Macourt said that he could not recall any discussion about the sharing of rights, as

distinct from mention of Foxtel and C7 acquiring non-exclusive AFL pay television rights. The note of the conversation made no reference to the sharing of rights. However, Mr Macourt, upon being reminded of Mr Philip's Fallback Scenarios document agreed that it was likely that he had discussed the document with Mr Philip. Mr Macourt also agreed that the practical effect of Mr Philip's proposal, if implemented, would have been that neither party would have needed to offer the AFL more than $9 million for the rights because each would have been assured of getting the non-exclusive rights for that amount. Mr Macourt's evidence is thus not diametrically opposed to Mr Gammell's on this particular point.

1052 News contends that Mr Gammell's admission that he and Mr Macourt discussed Foxtel and C7 taking the AFL pay rights on a non-exclusive basis is inconsistent with Mr Macourt (or News) having the objective of destroying C7. News points out that Mr Sumption cross-examined Mr Macourt in relation to the AFL's four column chart on the basis that if C7 acquired the non-exclusive AFL pay television rights, neither Optus nor Austar would have been able to terminate its content supply agreement with C7. The relevant passage is as follows:

> *'If you knew, as you plainly did, that you believed there were break clauses in both the Optus and Austar agreements with C7, you appreciated, didn't you, that those break clauses would operate in the event that AFL rights were no longer possessed by C7? --- Yes.*
>
> *So it must have been obvious to you when you saw this [the four column chart] in August of 2000 that, if this proposal went forward, those break clauses would not operate? --- Sorry, those break clauses would not operate?*
>
> *HIS HONOUR: In other words, Optus and Austar would not be able to break their contracts because C7 would retain the AFL rights? --- Sorry, yes.*
>
> *MR SUMPTION: You would have appreciated that at the time? --- Yes.*
>
> *It follows, doesn't it, that this proposal would have enabled C7 to continue to supply two of the three platforms? --- Yes.*
>
> *And that's why you didn't like it, isn't that right? --- No, it is not right'.*

1053 Seven's response to News' contention is that by 4 December 2000, Mr Macourt was aware that there was a possibility that News' bid for the AFL broadcasting rights would not proceed. All that Mr Macourt was discussing with Mr Gammell was a possibility that would arise only if News' plan to acquire the AFL pay television rights exclusively for Foxtel fell

through. It follows, according to Seven, that Mr Macourt's proposal to Mr Gammell was not inconsistent with Mr Macourt having the objective of destroying C7 by means of News' and Foxtel's bid for the exclusive AFL pay television rights.

1054 The evidence to which I have referred shows (despite Mr Philip's refusal to concede the point) that Mr Macourt had seen Mr Philip's Fallback Scenarios document before he (Mr Macourt) met Mr Gammell on 4 December 2000. Even so, it is not entirely clear what Mr Macourt was proposing to Mr Gammell. If it was an arrangement intended to **replace** News' planned bid, the proposal would be inconsistent with Mr Macourt wanting C7 destroyed since the offer, if accepted, would have permitted C7 to retain the fruits of the C7-Optus CSA and the C7-Austar CSA. If, however, Mr Macourt was suggesting an arrangement to take effect only if News' bid failed, or if the bid did not go ahead (for example, because Nine and Ten pulled out), his proposal would not necessarily have been inconsistent with his having decided that News and Foxtel should bid for the AFL pay television rights in order to destroy C7's viability as a sports channel provider.

1055 Mr Macourt did not explain in his evidence precisely what he conveyed to Mr Gammell. In the absence of such an explanation, I think it likely that Mr Macourt was canvassing the idea of a cooperative approach in the event that the News' bid did not go ahead. Nonetheless, it is clear from Mr Gammell's evidence that Mr Macourt explicitly stated that he (Mr Macourt) was happy for C7 to have the non-exclusive rights so that C7 could continue its relationship with Optus. If Mr Macourt truly had the objective of destroying C7 (if necessary by making a predatory bid for the AFL pay television rights), the making of such a statement would have been duplicitous. If Mr Macourt had that objective, he certainly would not have been happy for C7 to continue its relationship with Optus, let alone survive as a viable sports channel.

1056 Mr Macourt was cross-examined after Mr Gammell had given evidence. Mr Macourt was questioned about the conversation of 4 December 2000 with Mr Gammell, but it was never put to him that he had acted duplicitously. Mr Sumption contends that Mr Macourt could have been in no doubt that his evidence was being challenged. He also says that he chose not to cross-examine Mr Macourt in detail about the events in the last six months of 2000 because the relevant acts were done by Mr Philip '*by way of delegation*'.

1057 I think that this submission overstates the extent to which Mr Philip took over the process. Mr Macourt continued to play an important role, not least as a News decision-maker at the teleconference of 13 December 2000. Without insisting on a rigid interpretation of the so-called rule in *Browne v Dunn* (1893) 6 R 67, I would have thought that if I am to be invited in effect to find that Mr Macourt acted duplicitously in his dealings with Mr Gammell on 4 December 2000, it would have been helpful if the allegation had been made directly to Mr Macourt and he had been given an opportunity to respond. While there is no doubt that Mr Philip was perfectly prepared to act in a deliberately dishonest manner in his dealings with third parties (in particular, Telstra), and while Mr Macourt on his own evidence did not always behave with perfect propriety in his commercial dealings, I am not satisfied that Mr Macourt acted in a duplicitous manner in the course of his conversation with Mr Gammell.

1058 It follows, in my opinion, that the conversation of 4 December 2000 lends support to Mr Macourt's denial that he understood that News' bid for the AFL pay television rights was for the substantial purpose of destroying C7.

8.42 Foxtel Develops Its Bid for the AFL Pay Television Rights

1059 On 1 December 2000, Mr Boyd prepared a financial model on the basis of an instruction from Mr Blomfield to equalise the market penetration of Foxtel in the northern and southern states. He thought at the time that an earlier model prepared by him had done exactly that, but he later realised that in fact that was not so.

1060 In early December 2000, Mr Frykberg told Mr Philip that it might be necessary for News to pay up to $30 million for the AFL pay television rights. Following that conversation, Mr Philip told Mr Blomfield that $20 million might not get Foxtel the rights, and that $25 million or $30 million might be required. Mr Philip asked Mr Blomfield to prepare '*models which indicate what assumptions need to be made to support an acquisition at $25 million and $30 million*'. Mr Philip said in evidence that:

> *'I intended that FOXTEL might use these models for the purpose of convincing Telstra to support FOXTEL's acquisition of the AFL rights. For my own part, I did not place a great deal of reliance on the models ... I saw the acquisition of the AFL rights as a strategic acquisition and I did not necessarily expect it to be cash flow positive for FOXTEL'.*

He also said that he asked Mr Blomfield to start by assuming a licence fee of $25 million and

$30 million and then work out what facts were required to produce a positive NPV.

1061 Curiously enough, Mr Frykberg himself did not give evidence that he had told Mr Philip that up to $30 million might be required to obtain the AFL pay television rights. Mr Philip gave that evidence and for tactical or other reasons, was not challenged by Seven on it. Indeed, Seven specifically accepts that Mr Frykberg told Mr Philip that the then current bid of $17.5 million per annum for the AFL pay television rights would not be sufficient and that it might have to be $25 million or even as high as $30 million.

1062 The fact that Mr Frykberg gave Mr Philip this advice is, in my view, a matter of some significance. Although Mr Philip and Mr Frykberg worked closely together, Seven does not suggest that Mr Frykberg was party to, or knew of, any strategy to kill C7 by means of Foxtel paying more for the AFL pay television rights than their true value. Why, then, would Mr Frykberg advise Mr Philip as he did, unless he thought that up to $30 million was the price required to succeed in a competitive auction?

1063 On about 5 December 2000, Mr Philip told Mr Boyd that the bid needed to be $30 million. Following this conversation, Mr Boyd prepared a $30 million model and faxed a copy of that model and an earlier $25 million model to Mr Philip and to Mr Blomfield.

1064 At about this time, Mr Blomfield informed Mr Campbell that the fee for the AFL pay television rights was likely to be $30 million. Mr Blomfield also told Mr Campbell that Telstra had yet to be convinced of the value of the rights and thus Foxtel needed to show them that '*this is a good decision*'. In his statement, Mr Campbell said that he understood that it was up to him (and others) '*to try and make the financial model work with a rights fee of $30 million*'. Mr Campbell explained further in his oral evidence:

> *'What did you mean to convey by saying it was up to you to make the financial model work? --- To take that figure of $30 million that Jim Blomfield had told me to put in as the new rights fee, go back to the AFL, put that figure into the AFL model, look at the penetration rates, look at the business model very, very carefully and see, if we are going to be spending $30 million, what is it that the number comes out to, what is the NPV, what does the business case look like, taking that $30 million into account and all of the things that we would need to do to make the AFL successful.*
>
> *How would an increase in the fee to $30 million, for example, affect penetration? --- In and of itself, it wouldn't have. But I consulted with our*

general manager of commercial operations at that stage, basically our head of sales and marketing, and I explained to Nick Nichles at the time that the rights fee is going up significantly higher, "Nick, what does that do to alter what you would do as the head of sales and marketing to be able to achieve an outcome that makes this a sensible and a smart decision for Foxtel's business?" Nick's response to that was, "Well, we have a door-to-door sales force. We have 600 to 800 staff in Melbourne. I will have to redirect some of my marketing and expenditure and marketing activity and selling activity into selling the AFL and making sure that we obtain penetration rates and sales rates for basic that are going to be what you need to get". So I consulted with the person who ---

So the effect of that, if I have understood what you have said correctly, is that there would be a diversion of resources to marketing and that would offset any negative impact of the higher fee that would be required to recoup the $30 million; is that what you are saying? --- That's what I'm saying, yes.

...

All right. And, on the basis of that conversation, you, I take it, felt comfortable that you could include in a model penetration rates that were more or less consistent with the penetration rates you had assumed previously? --- No, they were more aggressive.

You would actually get a greater penetration rate because of the more intensive marketing; is that what you are saying? --- That's correct'.

1065 The $25 million model prepared by Mr Boyd recorded an NPV of $13.1 million, while a rights fee of $30 million per annum produced an NPV of -$5.8 million. The first model assumed an increased take-up of the Foxtel basic package (with the AFL) in the southern States of 10 per cent in 2002, increasing to 18, 25, 28 and 30 per cent in each subsequent year. The increased take-up of the basic package in the northern States was assumed to be a constant one per cent. The $30 million model was based on the same assumptions.

1066 On 1 December 2000, Mr Philip sent a memorandum to Mr Hartigan and Mr Macourt in advance of a proposed meeting with the AFL. Mr Philip was prompted to send his memorandum because of press speculation that the News proposal involved a '*consortium*'. The somewhat optimistic advice conveyed by the memorandum was as follows:

'In any meet and greet you have with the AFL next week, it is important that:

(a) you, Ten, Nine and FOXTEL do not present yourselves as a "consortium";

(b) News can present itself as a bidder, and introduce Nine, Ten and FOXTEL as proposed sublicensees;

*(c) consistent with the negotiations News has undertaken **separately** with each of Nine, Ten and FOXTEL, it is important for the details of those separate sublicensing arrangements **not** to be discussed with the AFL in the presence of other sublicensees – Ten can talk about its games, Nine can talk about its games and FOXTEL can talk about its games;*

(d) there must be absolutely no suggestion that the bid from News is the only bid the AFL is going to get from News' sublicensees – that is, FOXTEL, Nine and Ten are absolutely free to make separate bids if they wish to;

(e) in relation to pay television, it is important to understand that News accepts the AFL's requirement that News' pay television sublicensee, FOXTEL, will be obliged to offer pay television non exclusively on reasonable commercial terms to each of Optus and Austar'. (Emphasis in original.)

8.43 Seven Again Considers Withdrawing

1067 Following the AFL's first offer, on 1 December 2000 Mr Gammell reworked the draft letter withdrawing Seven from the bidding. The redraft accused the AFL of not acting in good faith. Mr Stokes later amended Mr Gammell's draft, but the letter was still not sent.

1068 In the meantime, on 1 December 2000, Seven's solicitors wrote to the ACCC. The purpose of the letter was to allay the ACCC's concern that intervention against News' bid for the AFL rights would create another problem:

> *'namely a monopsony in which C7 would be the only bidder for the AFL pay TV rights currently being offered for sale'.*

1069 On 5 December 2000 Mr Francis prepared a draft media release announcing the withdrawal of Seven from the AFL negotiations. Mr Francis' covering email to Messrs Gammell and Wise (among others) noted that the current thinking was that the draft should be used '*as a thing to talk to – rather than release*'. The draft media release itself included a passage suggesting that as the AFL had split the free-to-air and pay television rights, Seven would participate in negotiations for the pay television rights. This and a similar statement in a '*Questions and Answers*' document prepared on the same day suggests that the management of Seven erroneously assumed that it would have an opportunity to bid for the

AFL pay television rights **after** the AFL had disposed of the free-to-air television rights.

1070 On 5 December 2000, Mr Stokes sent an internal email as follows:

> *'what we want to achieve is first, the pay rights more important than the FTA. Second, the FTA rights but only at the right price, no higher than our previous bid that was more than we should [have] submitted. We can pay more for the pay rights if we don't have the NRL.*
>
> *Preferred outcome all rights but no more than previous bid of 56m cash. We could go as high as 25m for pay, without FTA.*
>
> *If it wasn't for the last right, I'd actually like to walk away from the AFL. I do want to retain an action ... for abuse of market power ... providing that we have [a] reasonable case'.* (Errors corrected.)

8.44 Foxtel's Board Paper of 6 December 2000

1071 After receiving the models prepared by Mr Boyd on 5 December 2000, Mr Philip asked him for a model based on a rights fee of $28 million per annum. This figure was chosen because it was the maximum fee that produced a positive NPV, given the assumptions adopted by Mr Boyd. Mr Philip also asked for a model which allowed for a $30 million per annum fee, but also incorporated an accelerated take-up rate in the southern States. The NPV in the revised $30 million model came in at $2.3 million. In this model the take-up rates for the basic in the southern States were increased for each of the five years so that they became the following: 15, 20, 25 and 30 per cent (for each of the fourth and fifth years).

1072 Mr Philip agreed that he was perfectly content to ask for models which would show that the acquisition was cash flow positive notwithstanding that he did not necessarily expect that it would produce a positive cashflow for Foxtel. He accepted that he had the models prepared because he wished to persuade Telstra to support the proposal, although he qualified that response by stating that there was no point in producing a document for Telstra that '*didn't stack up*'. Mr Philip never asked Mr Boyd or anyone else at Foxtel to identify the most reasonable assumptions about penetration rates that Foxtel could achieve with AFL content.

1073 Mr Blomfield circulated a Foxtel board paper on 6 December 2000. The paper, which attached Mr Boyd's $30 million model, recommended that:

> *'The Board authorise FOXTEL Management to enter into a put option agreement with News Ltd pursuant to which FOXTEL may be required to acquire the exclusive Pay television rights to all AFL matches for a term of 5 years commencing 2002 for $30 million (plus CPI on each year 2003-2006) (exclusive of GST)'.*

Mr Blomfield's fax asked for a response within 48 hours.

1074 The board paper addressed the assumptions contained in the model, as follows:

> *'In the meeting of the 9th it was agreed FOXTEL should present a more aggressive subscriber uptake based on removing the gap in penetration and performance between Melbourne, Adelaide, Perth and the Sydney market.*
>
> *While all previous models have assumed increases in penetration over and above what is already expected, none have specifically redressed the imbalance between FOXTEL's penetration in northern and southern states – highlighted by the fact that while FOXTEL in Sydney enjoys 19.5% market penetration, in Melbourne the figure is only 14.0%.*
>
> *This revised model levels that Sydney, Melbourne imbalance on a wider scale. It assumes that after five years with the AFL, FOXTEL's take-up in southern states (where AFL following is strongest) will be equal to FOXTEL take-up in northern states.*
>
> *It should be noted that the revenue assumed from Optus could be quite conservative, bearing in mind the importance of AFL programming to Optus' current sports offering'.*

An attachment to the paper noted a number of substantial changes to the put option that had been made since Telstra reviewed the draft in early November 2000. The changes noted included the introduction of the flip-flop.

8.45 Telstra Rejects the $30 Million Proposal

1075 On 5 December 2000, Mr Philip informed Mr Greg Willis that in his view up to $30 million would be required to obtain the AFL pay television rights. Mr Willis duly informed Mr Akhurst, who discussed the matter with Dr Switkowski. Mr Akhurst then advised Mr Willis that he and Dr Switkowski were:

> *'not very excited about $30M – we'll have to think very carefully about this and maybe start indicating we are possibly beyond our bottom line for footy'.*

1076 On 7 December 2000, Mr Philip sent to Akhurst some '*Notes on Sports Proposals*'.

The notes covered both the AFL and NRL pay television rights (the NRL aspect is dealt with in Chapter 9 ([…]). As to the AFL, Mr Philip said this:

> *'FOXTEL's acquisition of AFL rights (3 live games and 5 replays) remains compelling, particularly for the kick this would give to FOXTEL in Victoria, South Australia and Western Australia.*
>
> *FOXTEL Management's financial analysis supports this.*
>
> *The acquisition remains strategically very important for FOXTEL, particularly in building brand association with the major southern State winter sport.*
>
> *In anticipation of scope expansion, the proposed acquisition includes interactive pay television rights – the AFL is a perfect candidate for interactive pay television.*
>
> *At a bid price of $30 million, the AFL is not too expensive.*
>
> *FOXTEL Management's numbers are conservative in relation to resale revenues from Optus, bearing in mind the importance of AFL to Optus' sporting line up'.*

1077 A meeting of Telstra executives on 8 December 2000 considered both the Foxtel proposal and Fox Sports' proposal to acquire the NRL pay television rights. (The NRL aspects of the meeting are also dealt with in Chapter 9 ([1311]-[1313]). Mr Fogarty circulated briefing notes recommending that the board of Telstra decline to approve the proposed variation to the AFL put option proposal by which the rights fee would increase from $17.5 million to $30 million per annum and other changes adverse to Telstra (including the flip-flop) would be made. The briefing notes suggested that the financial risk to Foxtel over five years would be $100 million, of which Telstra would be required to fund $50 million. Appendix A to the briefing notes analysed the subscriber take-up assumptions embodied in the Foxtel $30 million financial model. Appendix A estimated that every percentage point shortfall in the additional subscriber uptake reduced the NPV by about $3 million.

1078 Mr Akhurst's position at this stage was that, although he understood the basis of the Media Division's opposition to Foxtel's acquisition of the AFL pay television rights, he did not agree that the proposed increase in the bid for the rights should simply be rejected. Rather, he believed that Telstra should maintain the position that it was '*not comfortable*'

with the proposed increase, in order to ensure that neither News or Foxtel proposed yet further increases in the price.

1079 Mr Greg Willis wrote to Mr Philip on 8 December 2000. He advised that, after discussions among Telstra's executives and board members, Telstra was not comfortable moving beyond the AFL proposal agreed at the November 2000 Foxtel board meeting, namely a fee of $17.5 million per annum for three games plus additional funding for advertising and editorials, producing a total of $20 million per annum for the AFL pay television rights. This language was similar to that used in previous communications between Telstra and News.

8.46 Mr Philip's Fax of 9 December 2000

1080 On 9 December 2000, Mr Philip sent a handwritten fax to Mr Akhurst. The contents of the fax, which primarily concerned the NRL pay television rights, and the extensive evidence concerning it are dealt with in Chapter 9 ([1316]ff).

1081 Telstra gave consideration to the requests made by Mr Philip in his fax. It should be noted, however, that when Mr Akhurst told Mr Philip (on 11 or 12 December 2000) that Telstra would not take the naming or internet rights, he also told Mr Philip that he was agreeable to setting up a meeting of the Foxtel partners to finalise a decision on the bid for the AFL pay television rights.

8.47 Seven Again Approaches the ACCC: 12 December 2000

1082 A meeting took place between Seven (including Mr Gammell and Seven's legal representatives) and the ACCC on 12 December 2000. Seven's legal representative said that advice had been received that Seven had little prospect of success in any action against the Foxtel consortium in respect of the bidding for the AFL broadcasting rights. However, the advice had suggested that the ACCC could intervene under the *TP Act* to seek an injunction. In the course of the discussion, Mr Gammell said (as recorded in the ACCC's note of the meeting) that:

> *'should Seven not acquire the AFL broadcast rights, its pay TV sports channel, C7, will fail, thus resulting in rights holders being confronted with a monopoly buyer when premium sports rights next become available'.*

Mr Gammell said nothing at this meeting about Seven's bid for the NRL pay television rights, nor did he raise the possibility that the bid might succeed. Assuming the NRL bid was bona fide, it was potentially misleading for Mr Gammell to assert, without qualification, that C7 would fail if it did not obtain the AFL pay television rights. As Mr Stokes accepted in his evidence, if Seven acquired the NRL pay television rights, C7 would not have failed (at least not when it did).

1083 Seven's solicitor followed up the meeting of 12 December 2000 with a telephone call to the ACCC the following afternoon. The ACCC's representative told the solicitor that the ACCC was not keen to intervene in a competitive bidding process. The representative observed that the AFL was '*confident that there will be additional bidders when the rights next become available*' and that it would be difficult for the ACCC to intervene, given the AFL's view.

8.48 Teleconference of 13 December 2000

1084 On 13 December 2000, a teleconference took place between representatives of Telstra, Foxtel, News, PBL and Fox Sports. The discussions that took place during that teleconference are dealt with in Chapter 9 ([1353]ff).

8.49 Seven Presents to the AFL: 14 December 2000

8.49.1 The Bid

1085 Seven made a presentation to the AFL commencing at about 7.30 pm on Thursday, 14 December 2000. By this time, Mr Stokes was aware that C7 had not obtained the NRL pay television rights. The presentation consisted of a written proposal, compiled over the previous two to three weeks, and an audio-visual presentation, part of which was scripted. Messrs Gammell, Wise, Francis and, to a lesser extent, Stokes participated in the preparation of the documentation.

1086 The written proposal incorporated a bid of $60 million per annum for all free-to-air and pay television rights for the period 2002 to 2006. In addition, Seven offered $4 million in contra and $8 million in sponsorships, club development and the promotion of a Seven-AFL online venture. The offer for all AFL broadcasting rights was made notwithstanding that, as Mr Wise acknowledged in his evidence, Seven appreciated that the AFL wanted

separate bids for the AFL free-to-air and pay television rights.

1087 Among many other points, the written proposal:

> asserted that splitting of the rights was potentially damaging for the code;
>
> emphasised Seven's investments in and contributions to AFL; and
>
> promised live and exclusive coverage of:
>
> *'up to three matches, depending on scheduling of matches, and complete replays of the other five matches in each round on C7'.*

1088 The document also contained some statements that were inaccurate. It incorrectly stated, for example, that Seven had reached in principle agreement with Telstra on a proposal for a sports site on the internet and that C7 had distribution rights such that it could reach all pay subscribers in Australia. In addition, the words '*up to*' were deliberately inserted in Seven's proposed commitment to indicate that this level of live and exclusive coverage on C7 was not guaranteed. As Mr Wise pointed out in evidence, Seven's contract with Optus required Seven to supply only 16 games per season.

1089 At the conclusion of the presentation, a conversation took place between Mr Stokes and Mr Evans of the AFL, to the following effect:

'Mr Evans:	*Will you make a separate offer for free to air?*
[Mr Stokes]:	*No. But I will make a separate offer for pay at $30 million per annum.*
Mr Evans:	*We're not interested in that'.*

1090 A conversation in such bald terms leaves unresolved the content of the pay television rights for which Mr Stokes was prepared to offer $30 million per annum. Mr Stokes explained in his evidence what he meant:

> *'What you really intimated to Mr Evans was that Seven would be prepared, should it come to that, to offer $30 million for the pay rights; correct? --- Yes.*
>
> *What pay rights were you referring to, Mr Stokes? --- I was anticipating a continuation of the existing rights that we had, Mr Hutley.*
>
> *So you were anticipating this, you tell his Honour: that the pay rights*

proffered by the AFL would be rights materially identical to the rights that Seven already had under the agreement which was expiring; is that right? --- Yes.

Those rights you considered to be worth $30 million; correct? --- Yes'.

8.49.2 Seven's Evidence on the Quantum of the Bid

1091 There were some unsatisfactory features of Seven's evidence concerning the decision to bid $60 million per annum for the AFL broadcasting rights. Mr Stokes' evidence was that the decision was made before Thursday, 14 December 2000 (the date of the presentation to the AFL), probably on the previous weekend. He said that this was the culmination of a series of discussions involving Ms Plavsic, Mr Gammell, Mr Wise and Mr Anderson. A consensus was reached that a single offer should be made for both free-to-air and pay television rights. Mr Stokes said that although Seven had been prepared to offer $30 million for the AFL pay television rights, no mention was made of this in the presentation to the AFL. According to Mr Stokes, the offer of $60 million per annum was the best Seven could make, having regard to likely costs and revenues and strategic considerations.

1092 Mr Gammell's recollection was that the decision was made at a meeting between himself, Mr Stokes and Mr Wise on the morning of 14 December 2000. Mr Stokes had said at the meeting that Seven was '*pushing the edge of the envelope*' and that $60 million per annum was the best price Seven could offer pay without overpaying.

1093 Mr Wise's evidence was that he had calculated the appropriate bid to make for the AFL broadcasting rights and that he had explained his reasoning process at a meeting held with Mr Stokes and Mr Gammell in the morning of 14 December 2000. Mr Wise said his calculations were based on:

> the minimum price fixed for the AFL rights by the First and Last Deed, namely $36 million for the free-to-air television rights and $15 million for the pay television rights;
>
> the fact that the AFL had decided to proceed to a competitive process, notwithstanding that Seven had put forward a draft offer on 5 October 2000 amounting to $56 million per annum, in addition to a profit sharing arrangement in respect of the pay television rights; and

C7's entitlement to a $30 million per annum MSG from Optus under the C7-Optus CSA.

1094 According to Mr Wise, the critical risk to be factored into the bid was that C7 would not be shown on Foxtel. He reached this conclusion in part because he thought that C7 could be expected to recover costs of about $12 million from Optus and Austar. He calculated that the benefits of carriage on Foxtel should be assessed at $3.00 pspm, a figure he said was derived from C7's offer to Foxtel of November 1999. Mr Wise's understanding at the time (so he said) was that Seven's earlier proposal was equivalent to 80 per cent of the fee paid by Foxtel to Fox Sports, being $7.50 pspm, so that C7 was to be paid $6.00 pspm. The figure of $3.00 pspm was simply 50 per cent of $6.00 pspm, reflecting an MSG of 50 per cent penetration for a tier carrying C7. Mr Wise said that the total cost to Foxtel of purchasing the C7 channel at $3.00 pspm would be less than the cost of purchasing the AFL pay television rights directly and that production costs and the value of non-AFL programming had been factored in.

1095 Mr Wise's evidence did not withstand cross-examination. He acknowledged that he had been wrong in claiming that his calculations had been based on the terms of C7's November 1999 offer. He then asserted that they were in fact based on discussions between Mr Stokes and Mr Blomfield in late 2000, discussions he had not previously mentioned. Mr Wise also admitted that by December 2000, he knew that Foxtel was paying Fox Sports approximately US$8.00 pspm, not $7.50. Perhaps more significantly, Mr Wise admitted that the figure of $12 million to be recouped from Optus and Austar, reflected Seven's internal accounting, not the amounts (exceeding $35 million) likely to be derived by C7 from those platforms. Finally, Mr Wise agreed that his calculations concerning the comparative costs of Foxtel acquiring the AFL pay television rights directly from the AFL or from C7 had been '*seriously flawed*'.

1096 The likelihood is that the final decision to pitch the bid for the AFL broadcasting rights at $60 million was made at a meeting on the morning of 14 December 2000. This conclusion is supported by the fact that a draft presentation of 13 December 2000 recorded a proposed cash bid of $56 million for the AFL broadcasting rights. The final decision was probably made by Mr Stokes and Mr Gammell in consultation with Mr Wise. Mr Stokes' recollection on these matters was unreliable.

1097 I accept News' submission that regardless of what Mr Stokes may have said at the meeting, the offer made on 14 December 2000 by Seven was neither the most that Seven could have reasonably offered, given the potential benefits (had they been assessed correctly), nor what Seven believed the broadcasting rights to be worth once the true value of the AFL pay television rights was taken into account. The latter proposition is supported by Mr Stokes' offer of $30 million for the pay television rights alone, and his evidence concerning that offer, as well as the fact that Mr Stokes wrongly assumed that there would be a further opportunity for Seven to bid separately for the AFL pay television rights if its offer for the broadcasting rights was unsuccessful.

8.50 Execution of the Puts

1098 On 14 December 2000, Foxtel Management executed the Foxtel Put. The key terms of the Foxtel Put were as follows:

> *'If requested by News (**Licensor**) and in consideration of $10, Foxtel (**Licensee**) agrees to acquire the following rights from News on the following basis:*
>
> *1. Rights: exclusive right to broadcast the matches as defined in Clauses 5 and 6 (**Matches**) throughout the Territory in the Medium throughout the Term with right to sublicense and all other related rights, the subject of this agreement. **Licensee must offer pay television rights to Austar for Austar's territory on terms no less favourable than these terms (this does not oblige FOXTEL to offer exclusivity). Licensee must also offer pay television rights to Optus on reasonable commercial terms.** Licensee may broadcast the Matches in any channel as part of its basic or tier service or as part of an a la carte service.*
>
> *Medium: any means of broadcast by pay television, enhanced pay television, pay per view and interactive (non internet) pay television to residential and commercial subscribers, including by way of cable, MDS or satellite.*
>
> *2. Territory: Australia.*
>
> *3. Term: 5 years commencing with the first Match played in 2002 and terminating with the last Match played in 2006. Licensee is granted a 3 month exclusive first right of negotiation to renew.*
>
> *4. Licence Fees: $30 million per annum (plus CPI on each of 2003-2006). All fees are exclusive of GST which must be paid by Licensee on Licensor's tax invoice.*

...

5. Matches: live (pay television matches only), replay and highlights rights to all regular season, finals series matches, State of Origin, Ansett Cup (or replacement) matches and other AFL organised or sanctioned matches. Licensor will require AFL to conduct at least 8 regular season matches per season week to give Licensee at least 3 live pay television matches per week.

...

6. Free to air matches: 5 regular season matches per season week, plus finals series matches plus, two thirds of the Ansett Cup (or replacement) matches, plus State of Origin matches.

All other matches are regarded as pay television matches.

...

17. If free to air television rights are exercised in any of the pay television matches earlier than 14 days after the day the match is played (except for:

(i) the use of excerpts of a match (no more than 3 minutes per match per program) in news and sports programs;

(ii) the televising in Perth and Adelaide of any matches involving a team based in such city (regardless of where such pay television match is played) provided that the telecast starts no earlier than the end of the pay television telecast of the relevant match in the relevant city); and

(iii) the broadcasting of substitute matches by News' free to air licensees in accordance with Clause 32 [the flip-flop];

Licensor will require AFL to pay to the Licensee an amount of $500,000 for every such match, 2 business days after the relevant telecast'. (Emphasis added.)

1099 On the same day, Mr Philip signed the Nine and Ten Puts on behalf of News. Each of the Puts took the form of a letter (from Nine and Ten respectively) offering to acquire from News certain AFL free-to-air television rights for the purpose of any offer News elected to make for the AFL rights. The substance of each letter was very similar. Nine's letter was as follows:

'This letter sets out the terms of our offer as well as the terms of our agreement relating to the acquisition:

1. Each offer made by News to acquire free television rights to the AFL must include an offer that is sufficient for News to sublicense to Nine free to air television rights on the basis of the term sheet in Schedule 1.

2. News must, in relation to the relevant season, offer and deal solely and exclusively with Nine with respect to the free television rights contained in Schedule 1.

3. Subject to News acquiring free television rights to AFL, News sub-licences to Nine free television rights on the basis of the term sheet set out in Schedule 1. Nine agrees to accept such licence on the basis of the term sheet set out in Schedule 1.

4. Nine has entered into this arrangement on the basis that:

(a) the only AFL regular season matches available for free-to-air telecast are those scheduled on Friday, Saturday and Sunday; and

(b) Nine is aware that News intends to enter into an arrangement with another free-to-air broadcaster, such arrangement not to be inconsistent with the rights the subject of this Agreement'.

1100 Each of the attached term sheets provided for licence fees of:

'$23 million per annum (plus CPI for each of 2003-2006) plus $500,000 for every non-exclusive match or part thereof, that is televised by [the free-to-air broadcaster] earlier than 14 days after the day it is played ...'

Nine's term sheet defined '*Exclusive Nine matches*' to mean '*3 regular season matches per season week*' as well as certain minor matches. Ten's term sheet defined '*Exclusive Ten matches*' to mean '*2 regular season matches per season week, plus finals series matches*' as well as certain minor matches. All other matches were to be regarded as '*non-exclusive matches*'.

8.51 Consortium Presents Its Bid

1101 News presented its written bid to the AFL Commissioners on 14 December 2000. The substance of the bid was as follows:

> News would pay $46 million per annum (CPI adjusted) for the AFL free-to-air television rights (in effect funded by Nine and Ten pursuant to the Nine and

Ten Puts);

News would pay $30 million per annum (CPI adjusted) for the AFL pay television rights (in effect funded by the Foxtel Put);

News would contribute $10 million per annum contra (in effect shared by the free-to-air and pay broadcasters); and

News would provide newspaper and marketing support to the AFL.

1102 Consistently with the terms of the Nine, Ten and Foxtel Puts, the AFL free-to-air television rights (described as '*Exclusive Matches*') comprised:

five regular season matches per season week;

all finals series matches; and

some additional minor matches.

News or its sub-licensees could televise non-exclusive matches on free-to-air television, but in that case News had to pay $500,000 for every non-exclusive match televised earlier than 14 days after the match.

1103 News' offer set out detailed provisions for the selection and scheduling of matches. The provisions included arrangements for the flip-flop, the effect of which was that free-to-air operators in Sydney, Brisbane, Adelaide and Perth could substitute each of the scheduled pay television matches for the regular free-to-air match if the substitute match involved a team based in the relevant city.

1104 Presentations were made to the AFL on behalf of Foxtel, Nine and Ten on 14 December 2000 in Melbourne. Foxtel's representatives were Messrs Lachlan Murdoch, Philip, Hartigan, Akhurst and Blomfield. According to Mr Akhurst, the presentations, doubtless in accordance with Mr Philip's wishes, were separate and each was '*closed*' to the other parties.

8.52 AFL Accepts News' Bid

1105 On 16 December 2000, Mr Jackson, the CEO of the AFL, sent to the AFL Commissioners a document entitled '*AFL Broadcasting Rights – Analysis of Final Offers*'. The analysis was prepared under the supervision of the AFL Broadcasting Sub-Committee

and recommended that News' bid be accepted, subject to legal sign off. The analysis contained a comparison of the two bids as follows:

'***Seven Network. Total Net Present Value = $240.9 million***

	2001	***2002***	***2003***	***2004***	***2005***	***2006***	***Total***
1 FTA and Pay Rights Fees	*60*	*60*	*60*	*60*	*60*	*60*	*300*
2 New Media Rights Fees	*2*	*2*	*2*	*2*	*2*	*2*	*10*
3 Direct Payments to AFL/Clubs	*2*	*2*	*2*	*2*	*2*	*2*	*10*
Total	*64*	*64*	*64*	*64*	*64*	*64*	*320*

News Consortium. Total Net Present Value = $338.8 million

	2001	***2002***	***2003***	***2004***	***2005***	***2006***	***Total***
4 FTA and Pay Rights Fees	*38*	*38*	*78.3*	*80.6*	*83.1*	*85.5*	*403.5*
5 New Media Rights Fees		*8*	*8*	*8*	*8*	*8*	*40*
6 International Payments		*1*	*1*	*1*	*1*	*1*	*5*
Total	*38*	*47*	*87.3*	*89.6*	*92.1*	*94.5*	*448.5*

Discount Factor 7.5%

CPI Factor 3%'.

1106 The analysis based the recommendation on six factors:

'1. The News Consortium bid is clearly a financially superior offer. ($100 million NPV for the five year period.)

2. The News Consortium bid is less restrictive in the following areas:

- *Scheduling and Programming changes by the AFL*

- *Obligations on the Clubs, Officials, Players and Coaches*

- *Dealing with other Media.*

3. The copyright position on AFL vision is stronger with the News Consortium which delivers significant upside Commercial Value.

4. The additional support in Print and Press is more definitive and has measurable Commercial value.

5. The AFL has less confidence in the Management of the AFL Brand under the existing Seven Network Structure than in previous years.

6. The potential value of all three Networks and Subscription services bidding for the rights at the end of this five year period'.

1107 The analysis also noted two key concerns if the News bid were accepted:

'1. The Consortium group is an alliance of competitors and as such will present a challenge to manage and control.

2. The 39 year agreement relationship with the Seven Network will be broken'.

It should be noted that this document did not suggest that a relevant factor in the AFL's decision was a concern that C7 might not be able to get on to the Foxtel platform even if Seven acquired the AFL pay television rights.

1108 Before the AFL Commission met on Monday, 18 December 2000, the AFL requested amendments to the term sheets attached to News' bid. According to Mr Philip, over the weekend of 16 and 17 December 2000 and early on Monday 18 December 2000, he negotiated '*separately*' with the AFL, Nine, Ten and Foxtel about the amendments. He revised the bid documents and '*separately*' secured the agreement of Nine, Ten and Foxtel to the amendments.

1109 One of the amendments had the effect of making the flip-flop compulsory, rather than optional, for the free-to-air broadcaster. In its final form, the flip-flop read as follows:

'For AFL's free to air sublicensees' free to air telecast in each of Sydney, Brisbane, Adelaide and Perth, the free to air sublicensee must substitute each

of the regular season pay television matches scheduled by the AFL for Saturday afternoon, Saturday night and Sunday afternoon ("substitute match") for the regular season free to air match (or for Sunday afternoon, one of those matches) ("free match") selected by that free to air sublicensee for that Saturday afternoon, Saturday night or Sunday afternoon), but that free to air sublicensee must only do this for a particular city, and not otherwise, if the substitute match involves a team based in that city (regardless of where the substitute match is played)'.

As I have already found, Mr Frykberg understood throughout the negotiations that the AFL contemplated that the flip-flop would be compulsory.

1110 The AFL Commission's meeting on 18 December 2000 lasted from 8 am until 2 pm. The minutes recorded detailed discussion of the competing bids and noted that the financial analysis clearly demonstrated the superiority of the News bid. The Commission resolved that a sub-committee should review all the information and make a final decision.

1111 The Commission again met at 7.30 am on 19 December 2000 and considered a report responding to certain questions raised at the previous day's meeting. The Commission resolved that:

'The AFL accepts News Limited offer delivered on 14 December 2000 subject to:

(a) Receipt of an amended document incorporating all of the amendments required by the AFL as advised to News Limited, in a form acceptable to the AFL; and

(b) The rights of Seven under the Deed of First and Last Rights'.

8.53 Mr Mansfield Congratulates Dr Switkowski

1112 Mr Mansfield sent Dr Switkowski an email on 20 December 2000 including a quotation from a newspaper article:

'Even though there is a bit to go, the AFL result looks great – well done ...

"While Packer and Murdoch may have paid top dollar for AFL, they cannot lose. The rise in Foxtel's value that will come from this deal will more than make up for the extra programming costs".

"Australia becomes a one-Company town fro [sic] Pay TV, with Foxtel calling the shots. While Optus TV and Austar may survive,

> *Foxtel's dominance means that it would control the market in programming."*
>
> *Sounds bloody good to me. If we can get the revised [relationship] sorted out, this is a big one for us'.*

1113 Dr Switkowski agreed that Mr Mansfield was expressing enthusiasm for an outcome whereby Foxtel would call the shots in the pay television market in Australia. Dr Switkowski also agreed that his own perception was that if Foxtel won the AFL pay television rights it would increase its prospects of outcompeting Optus. That followed from Foxtel '*having in its inventory a wide range of content, including important sports*'.

8.54 Documents Are Signed

1114 The AFL and News (through Mr Lachlan Murdoch) signed the amended term sheets on Tuesday, 19 December 2000. The term sheet provided that the AFL was not to deal with the free-to-air television rights otherwise than in accordance with the term sheet (except that the licence fee of $46 million could be varied if the rights were sold, on or before 22 January 2001, to a person other than News). If the AFL had not sold the free-to-air television rights on or before 22 January 2001 in accordance with the term sheet, it would be taken to have sold them to News on the specified terms.

1115 Under the heading '*Pay Television*', the term sheet provided as follows:

> *'Rights: sole and exclusive pay television, enhanced pay television, pay per view and interactive (non internet) pay television rights with right to sublicense. Licensee must require that its sublicensee offers pay television rights to Austar and Optus on reasonable commercial terms. If there is a dispute between News and Optus or Austar as to the reasonableness of the terms on which the signal is offered, that dispute will be settled by reference to Arbitration under the NSW process ie. Sir Lawrence [sic] Street'.*

1116 The term of the agreement relating to the pay television rights was five years, commencing in 2002, with News having a three months exclusive first right of negotiation to renew. The licence fee was $30 million per annum, plus CPI for each of the 2003 to 2006 years, plus GST. The other terms were consistent with those put to the AFL on 14 December 2000.

1117 Mr Philip then informed Mr Blomfield that News had won the pay television rights

and that, once the free-to-air television rights had been resolved (having regard to Seven's last rights), News would be able to offer Foxtel the pay television rights. He had similar conversations with Nine and Ten. News ultimately acquired the AFL free-to-air television rights, in accordance with the term sheet signed 19 December 2000, on the expiry of Seven's rights under the First and Last Deed on 25 January 2001.

8.55 Seven Declines the Last Offer

1118 Seven's board met at 5.15 pm on 19 December 2000. Mr Wise advised that Seven would probably not succeed in the bidding process and that it would now negotiate under the last right for the free-to-air television rights. No mention was made of Seven's failure to acquire the NRL pay television rights.

1119 On 9 January 2001, Mr Wise sent a note, simultaneously resigned and aggressive in tone, to Mr Stokes, observing that '*[c]ash is king*'. His comments provide an insight into the motivation for the current litigation:

> *'Our strategy to go legal is the only commercial avenue, it would be better that we could negotiate with News, but they have shown they don't want to … It is critical we get them with a good old fashioned kick in the balls, satisfying and make them feel somewhat less comfortable … While our objective will be to take them for conspiring to kill C7 other less spectacular outcomes are still important'.*

1120 The AFL made a last offer to Seven pursuant to cl 4 of the First and Last Deed on 12 January 2001. In substance, the offer took the form of the free-to-air term sheet attached to the News offer. On 18 January 2001, Mr Wise wrote a lengthy letter disputing that the offer complied with the AFL's obligations under the First and Last Deed. Mr Buckley of the AFL responded on 23 January 2001. He rejected Seven's contentions and confirmed that Seven had only until 26 January 2001 to accept the last offer.

1121 In the meantime, on 16 January 2001, Mr Wise prepared a draft strategy paper in relation to C7. The paper included the following as part of an '*action plan*':

> *'Freehills [solicitors] to discuss with the ACCC the change in circumstance now that bids from Foxtel and Seven have been received. Intervention will no longer create a monopoly bidder, as C7 would take at Foxtel price, ie the market has established a price for Pay. Positive response here would impact ongoing strategy'.*

Mr Wise agreed in evidence that he had contemplated that C7 would be prepared to offer the price Foxtel had agreed to pay for the AFL pay television rights, on the basis that the price of $30 million per annum had been established by the market.

1122 Seven Network's board met on 23 January 2001. The board had before it a detailed paper prepared by Ms Plavsic which recommended against renewal of the AFL free-to-air television rights largely on grounds of cost. The minutes of the meeting recorded that a number of matters were discussed. These included the importance of AFL content to the Melbourne, Adelaide and Perth markets; the status of the AFL as a '*mature product*' with regard to revenue potential; the fact that, although the AFL was a very important product for Seven, the cost was difficult to justify; and the potential for Seven to develop '*new strong product to compensate for the loss of AFL*'. The consensus of the meeting was that Seven should decline the last offer. Discussions were, however, deferred to the next day.

1123 The issue was further discussed at a two hour board meeting on 24 January 2001. A majority of directors agreed not to renew the AFL free-to-air television rights, subject to receiving advice on the effect of the decision on Australian content quota and other matters.

1124 The Seven board finally resolved at a meeting held on 25 January 2001 not to renew the AFL free-to-air television rights on the terms presented. Mr Wise wrote to Mr Buckley at the AFL on the same day giving written notice that Seven would not match the last offer. Seven reserved its rights. The AFL duly informed News of Seven's decision.

8.56 Execution of the Licences

1125 There appears to be no direct evidence that the various put options were formally exercised in writing. Be that as it may, on or about 25 January 2001, the News-Nine Licence, the News-Ten Licence and the News-Foxtel Licence were signed by the respective parties.

8.57 Seven Again Requests the ACCC's Intervention: 24 January 2001

1126 On 24 January 2001, Mr Stokes wrote to Professor Fels requesting urgent intervention by the ACCC. Mr Stokes brought to Professor Fels' attention '*significant new matters*', including the following:

Seven believed that the purchaser of the rights was not News but a consortium;

the only way the consortium could offer $46 million per annum for the free-to-air television rights (plus contra and other costs) was if the offer had been heavily subsidised; and

the acquisition of the rights would enable the consortium's members to '*behave strategically*'.

Mr Stokes sought to allay a possible concern of the ACCC:

> *'If the Commission is concerned about AFL losing the benefit of the Consortium's all rights offer (ie Pay, Free to Air), Seven is prepared to enter into an appropriate arrangement with the AFL for all those rights which delivers substantially the same economic and other benefits to the AFL as the Consortium has offered, on the understanding that the Consortium's pay offer is in line with that reported in the press'.*

Mr Stokes' understanding at the time was that the pay television rights component of the consortium's bid was $30 million per annum.

1127 Mr Stokes was cross-examined on his approach to the ACCC. The passage is revealing:

> *'So it was Seven's position that for that package of rights, namely the free-to-air and pay, they were prepared to pay whatever the consortium was paying; correct? --- In cash terms, yes.*
>
> *You see, you thought your understanding of what you described as the consortium had paid by way of cash represented reasonable value for the totality of the rights involved; correct? --- No.*
>
> *I see. You didn't think it was reasonable value, did you? --- No.*
>
> *Were you prepared to pay an unreasonable price? --- Yes.*
>
> *You were prepared to use your shareholders' money to acquire rights which weren't worth it; is that correct? --- No, Mr Hutley.*
>
> *So you thought the rights were worth it? --- There was a strategic benefit in having our business and the subscription television that outweighed short-term losses.*
>
> *I see. So the value to you of the totality of these rights was equal to what the consortium was paying; correct? --- Yes.*

...

Now, you say that the AFL had agreed that there would be three exclusive pay games; do you see that? --- Yes.

You told his Honour earlier today that for one exclusive pay game Seven would be prepared to pay $30 million; correct? --- Yes.

You were prepared to pay $30 million for the AFL pay rights on 14 December; correct? --- Yes.

That was for one exclusive game; correct? --- Yes.

You had found that the AFL had entered into an arrangement disposing of its pay rights which involved practically three live and exclusive games; correct? --- Yes.

And they had done it for $30 million; correct? --- Yes.

A bargain for the person who paid $30 million for three games; correct? --- Certainly price was satisfactory, yes, Mr Hutley.

A bargain from your point of view, Mr Stokes? --- I wouldn't use that term, Mr Hutley.

You thought one game was worth $30 million, Mr Stokes, didn't you? --- Yes.

Three games at $30 million was a bargain from your point of view, wasn't it? --- No.

Reasonable? --- A good price, yes.

A good price. On 14 December 2000, had Seven wished to, it could have put a proposal to the AFL that there be three live and exclusive games to pay had it wanted to; correct? --- Yes.

It chose not to do anything of that variety; correct? --- Yes.

You see, by 24 January 2000, Mr Stokes, you realised that your whole strategy had miscarried, that's correct, isn't it, with respect to the AFL rights, your strategy had miscarried; correct? --- Our strategy – no.

I see. You had lost the rights; correct? --- Yes.

You were prepared to pay the AFL Commission the amount for the rights which News had paid; correct? --- Yes.

You had simply failed, that is Seven had simply failed to put before the AFL

Commission the best proposition that Seven could reasonably afford for that package of rights; correct? --- No.

Well, it could afford whatever News had proposed on 24 January 2001; correct? --- Made that decision, yes.

It could have afforded it on 14 December 2000; correct? --- Yes'. (Emphasis added.)

8.58 Seven's Understanding of the First and Last Deed

1128 On about 11 July 2000, Mr Gammell drafted a letter to the AFL which asserted that under the First and Last Deed:

'the AFL cannot accept an offer for the Pay TV rights from Foxtel, Telstra or anyone else for that matter, nor can the AFL grant the Pay TV rights to anyone, until the free-to-air rights have been dealt with'.

The draft letter stated that cl 6 of the First and Last Deed provided, in summary, that:

'subject to Seven obtaining the licence for the free-to-air rights under clauses 4 or 5 of the Deed the AFL must accept Seven's offer to the AFL to form a 50/50 joint venture for the purpose of exclusively exploiting pay television rights in respect of the AFL Competition'.

The assertion made by Mr Gammell was the '*must means must*' proposition to which reference has already been made. The letter was sent to the AFL on 18 July 2000.

1129 Mr Wise gave evidence that the draft letter reflected his understanding at the time as to the effect of the First and Last Deed, in combination with the anti-siphoning regime. Mr Wise explained that Mr Gammell and Mr Stokes urged that interpretation on him and that he had accepted it. Moreover, he had held that view until January 2001 and had made strategic decisions in relation to the AFL broadcasting rights on the assumption it was correct.

1130 Mr Stokes said that he had read the First and Last Deed and formed the view by 14 December 2000 on the basis of the anti-siphoning provisions, that the AFL could be compelled to undertake an auction for the AFL pay television rights after it had disposed of the free-to-air television rights. I infer that Mr Stokes changed his view in January 2001, in consequence of legal advice received by Seven. However, it was the view adopted by Mr Stokes, Mr Gammell and others within Seven until the receipt of the legal advice. As Mr

Gammell said in his statement:

> *'It was my expectation that if Seven Network's all rights bid for the AFL rights was not accepted, not only would Seven Network be given the last right of refusal over the free-to-air rights, but it might (and should) also be given the opportunity to submit a further separate bid in respect of the pay television rights'.*

1131 As News points out in its submissions, the correct construction of cl 6 of the First and Last Deed is not in issue in these proceedings. There is little doubt, however, that the view held by Mr Stokes and Mr Gammell influenced the approach taken by Seven to its bidding for the AFL rights. In particular, it helps to explain why Seven did not structure its bid so as to offer $30 million cash per annum for the AFL pay television rights notwithstanding that Mr Stokes thought that that figure represented a '*good price*' for a purchaser.

8.59 Postscript: Award of the AFL Rights for 2007 to 2011

1132 The evidence relating to the award of the AFL broadcasting rights for 2007 to 2011 is subject to a stringent confidentiality regime. For the most part, there is no disagreement among the parties as to the significant events, which are set out in an agreed chronology. There is little point in reproducing the agreed chronology since it cannot form part of the published judgment. However, I outline briefly the key events, but in a manner that is designed to avoid the disclosure of confidential information.

8.59.1 Preliminaries

1133 On 8 March 2005, Seven and Ten established '*Agreed Guidelines*' governing a joint approach to negotiations with the AFL concerning the broadcast rights in respect of the 2007 to 2011 seasons. The Guidelines assumed that there would be eight home and away matches each week, with six matches available for free-to-air broadcast and two matches available for pay television.

1134 On 15 March 2005, Mr Leckie, by then the CEO of Seven, sought the AFL's consent to assign Seven's rights under cl 4 of the First and Last Deed to Seven and Ten in accordance with cl 12.7 of the First and Last Deed. On 17 May 2005, the AFL publicly announced its acceptance that Seven could partially assign to Ten the right to receive First and Last offers in relation to the new round of AFL broadcasting rights.

1135 In April and May 2005, discussions took place between Nine and Foxtel with a view to countering the alliance between Seven and Ten. Following a series of discussions, on 29 June 2005 Foxtel sent Nine a proposal regarding the manner in which Nine and Foxtel could share the AFL broadcasting rights for the forthcoming licence period.

8.59.2 Offers

1136 On 22 July 2005, Mr Campbell, then the Foxtel Management executive in charge of dealings with the AFL, submitted a proposal to the AFL for the acquisition of the AFL broadcasting and internet rights on behalf of Foxtel and Nine. The proposal contemplated that Nine and Foxtel would each broadcast four live matches per week, in accordance with an agreed schedule.

1137 On 31 August 2005, Mr Falloon forwarded a proposal to the AFL under which Seven and Ten would obtain five live and exclusive free-to-air matches per round, thereby enabling the AFL to enter a separate agreement for the three remaining live and exclusive pay television matches per round. Under the proposal, Seven and Ten also had the right to broadcast all finals matches. Seven and Ten offered the AFL a put option for the balance of the rights (that is, in respect of the remaining three weekly matches) in the event that the AFL failed to reach agreement for the pay television rights with Foxtel. If the AFL exercised the put option, it was to use its best endeavours to schedule games so that a maximum return could be reached for all eight weekly games on free-to-air television.

1138 On 12 October 2005, the AFL sent to Seven and Ten a notice of its first offer for the AFL free-to-air broadcast rights pursuant to the First and Last Deed. The first offer set out the terms and conditions upon which the AFL would grant a licence to Seven and Ten for the AFL free-to-air television rights for 2007 to 2011. Following a letter from solicitors on behalf of Seven and Ten asserting that the first offer was not a valid notice in accordance with the First and Last Deed, the AFL delivered a fresh notice on 21 October 2005. In substance, the terms of the first offer did not change.

1139 On 2 November 2005, Mr Falloon wrote to the AFL challenging the validity of its revised first offer. Mr Falloon's letter included an offer on behalf of Seven and Ten for all eight weekly AFL matches plus the finals matches. The term was to be six years, from 2007 to 2012.

1140 On 9 November 2005, Seven and Ten submitted a revised offer to the AFL for the AFL broadcasting rights. The offer encompassed the rights for the 2007 to 2012 seasons. The AFL was to use its best commercial endeavours to sell pay television rights for up to three matches per week within specified parameters. If the AFL could not reach agreement with Foxtel to purchase the pay television rights, then Seven and Ten would be able to direct the AFL to sell those rights to third parties.

1141 A board meeting of Seven Network held on 11 November 2005 resolved that the company should proceed with negotiations for the AFL broadcasting rights on terms substantially as outlined in a paper tabled at the meeting. The tabled paper recommended that Seven proceed with negotiations on terms substantially as outlined in the offer of 9 November 2005. The paper included the following observations:

> *'In ours and Ten's view whilst Foxtel will undoubtedly play hardball if we win,* ***it will ultimately have to agree to make a reasonable pay offer, as it cannot be without the AFL in the southern states*** *(which are the main areas it has concentrated on to increase its penetration given it has almost reached maximum penetration in Sydney and relies on Melbourne Perth and Adelaide for future growth where AFL is key). In addition, Ten and Seven have structured other aspects of their offer to appeal to Foxtel ...'* (Emphasis added.)

1142 On 10 November 2005, the AFL's solicitors confirmed that the offer made on behalf of Seven and Ten on 9 November 2005 would remain open until at least 5 pm on 15 November 2005. The letter also confirmed that the AFL could negotiate with any third party for the sale of its television rights until 5 pm on 18 November 2005.

1143 On 11 November 2005, a meeting took place between the AFL and PBL. At this meeting, the AFL representatives indicated that the AFL would accept a bid for all free-to-air television rights (that is, encompassing eight free-to-air games), including sub-licensing rights to other free-to-air and pay television broadcasters.

1144 On 12 November 2005, PBL sent a fax to the AFL setting out the terms on which Nine would be prepared to negotiate for the AFL broadcasting rights for the 2007 to 2011 seasons. The terms included the acquisition by Nine of the sole and exclusive right to broadcast on a free-to-air television service all eight AFL matches in each round, as well as the finals matches. Nine would also acquire the sole and exclusive right to sub-license the

broadcasting rights to free-to-air or pay television operators.

1145 On 28 November 2005, the AFL's solicitors requested that Seven and Ten provide written confirmation that they had rejected the AFL's revised first offer. I infer that Seven and Ten had in fact already rejected that offer.

1146 On 16 December 2005, Seven and Ten made a revised offer to acquire the AFL broadcasting rights for the period 2007 to 2011. The major changes to the offer previously made on 9 November 2005 concerned a decrease in the proposed term (five instead of six years) and an increase in the licence fees.

1147 On 20 December 2005, the AFL advised Mr Blackley of Ten that the AFL had rejected the offer of 16 December 2005. On the same day, Mr Blackley informed the AFL that Seven and Ten would leave their offer open until further notice. Mr Blackley provided the AFL with a letter which consolidated the financial terms set out in the letter of 16 December 2005 with the other provisions set out in the offer of 9 November 2005.

1148 In late November 2005, Mr Campbell of Foxtel had discussions with AFL representatives in relation to scheduling issues. Agreement was not reached as to a schedule that met Foxtel's requirements. Further discussions concerning scheduling issues took place between PBL and the AFL on 21 December 2005.

1149 On or shortly before 23 December 2005, PBL and Foxtel reached agreement on the terms of an offer to be made by PBL for the AFL broadcasting rights for 2007 to 2011. PBL and Foxtel agreed that in the event the PBL offer was successful, PBL would sub-license to Foxtel the right to broadcast AFL matches on pay television on specified terms.

8.59.3 Last Offer

1150 On 23 December 2005, PBL submitted an offer on behalf of Nine for the AFL broadcasting rights. Nine was to acquire the sole and exclusive right to broadcast on free-to-air television all eight AFL matches in each round as well as AFL finals matches for the period 2007 to 2011. Nine would have the right to sub-license to other free-to-air or pay television broadcasters (for a maximum of four matches per round). The AFL was to agree to certain scheduling requirements specified in the offer.

1151 In the afternoon of 23 December 2005, the AFL's solicitors forwarded to PBL a formal acceptance by the AFL of PBL's offer. On the same day, the AFL forwarded to Seven and Ten a notice pursuant to cl 4(d)(i) of the First and Last Deed (as amended by the May 2005 Deed of Assignment). The notice constituted a last offer to Seven and Ten for the grant of a licence on the terms of the PBL offer.

1152 A paper relating to the AFL's last offer to Seven and Ten was submitted to Seven Network's board meeting of 2 January 2006. The authors of the paper included Mr Leckie and Seven's Chief Financial Officer. The paper suggested that if Seven and Ten could not do a deal with Foxtel, they would need to explore alternatives such as sub-licensing to other pay operators or new operators. The paper recorded management's view that Foxtel would have to acquire the pay sub-licence from Seven and Ten, thus allowing Seven and Ten to '*dictate the pay television offering*'. The paper recommended that Seven should explore the opportunity with Ten to accept the last offer.

1153 Seven Network's board meeting of 2 January 2006 resolved that Mr Leckie '*subject to Board approval*' conduct negotiations with Ten concerning acceptance of the last offer and acquisition of the AFL television rights.

1154 On 4 January 2006, the board of Seven Network resolved that Seven and Ten should match PBL's last offer for the AFL broadcasting rights and that Seven should execute all necessary agreements to give effect to the arrangements.

1155 Seven and Ten reached agreement on revised '*Agreed Guidelines*' on 5 January 2006. The revised Agreed Guidelines provided that Seven and Ten would accept the AFL's last offer and, to that end, vary the earlier agreement between them in certain respects.

1156 On 5 January 2006, Seven and Ten notified the AFL in writing that they accepted the last offer. In consequence, Seven and Ten acquired the AFL broadcasting rights for the period 2007 to 2011 on the terms set out in the PBL offer of 23 December 2005.

9. AWARD OF THE NRL PAY TELEVISION RIGHTS

1157 In this Chapter I deal with the events leading to the NRL PEC awarding, in December 2000, the NRL pay television rights for 2001 to 2006 to Fox Sports. As I have already explained, the matters addressed in this Chapter cannot be regarded as separate from the events recounted elsewhere in the judgment. Nonetheless, the focus is on the circumstances surrounding the award of the NRL pay television rights for 2001 to 2006.

1158 I have explained in Chapter 3 the relationship between the parties involved in running the NRL Competition and in awarding the NRL pay television rights. Both in the contemporaneous documentation and at the hearing, the expression '*NRL*' was used in a variety of senses, often very loosely. In this Chapter, I sometimes use the expression without identifying precisely whether I mean the NRL Partnership, NRLI, NRL Ltd, the NRL Competition or the NRL pay television rights. Sometimes the context makes the identity of the relevant entity (or partnership) clear. Sometimes, the parties themselves, whether in the contemporaneous documentation or at the hearing, have left the precise meaning unclear, and I have not attempted to resolve the ambiguity.

9.1 Background: NRL Agreements

1159 Prior to 1998, Foxtel held the pay television rights to the Super League competition, while the pay television rights to the rival ARL competition were held by Optus. The free-to-air television rights to both competitions were held by Nine.

1160 The Super League dispute was resolved in 1998, when News and ARL agreed that the two rival competitions should merge. The terms of the agreement were recorded in the Merger Agreement of 14 May 1998, which annexed the NRL Agreements.

1161 Under one of the NRL Agreements known as the '*NRLP Australian Free-to-Air Television Rights Licence Agreement*' ('**NRL Free-to-Air Licence**'), Nine acquired the NRL free-to-air rights for a term of 10 years commencing on 1 January 1998. The '*base licence fee*' was $13 million per annum, increasing by the CPI from 2000 onwards. Nine also received a right of first negotiation and last refusal in respect of a further five year licence agreement.

1162 The NRL Free-to-Air Licence conferred on Nine the right to televise all NRL Competition matches (including finals). However, Nine was to select two matches in each round at least five weeks prior to the round, after consultation with the NRL Partnership. Subject to limited exceptions, if Nine broadcast any other match in each round earlier than 14 days after the match was played, Nine was obliged to pay the NRL Partnership $300,000 per match. Nine's two designated time slots were Friday night at 8.30 pm and Sunday at 4 pm, although these could be altered with the agreement of the NRL Partnership.

1163 Another of the NRL Agreements, the '*NRL-News Pay Rights Agreement*', granted News the NRL pay television rights for a period of three years from 1 January 1998. The licence fee payable by News was $16 million for 1998 and 1999 and $18 million for 2000. News was entitled to broadcast weekly NRL Competition matches, but could not broadcast either of Nine's matches earlier than one hour after Nine's Sydney telecast of the matches had concluded. News' time slots for the weekly pay matches were subject to change if Nine and the NRL Partnership agreed to alter the two free-to-air slots. The NRL-News Pay Rights Agreement also granted News the first right of negotiation and last right of refusal over the NRL free-to-air television, pay television and internet broadcast rights for the period 1 January 1998 to 1 January 2023. These rights were, however, subject to Nine's rights under the NRL Free-to-Air Licence.

1164 News sub-licensed the NRL pay television rights to Foxtel (by the '**Foxtel Pay TV Rights Programming Agreement**') and to Optus (by the '**Optus Pay TV Programming Agreement**'). The licence fees payable by Foxtel to News were $8 million for each of 1998 and 1999, and $9 million for 2000. The same fees were payable by Optus. Thus Foxtel and Optus, in effect, reimbursed News in equal shares for the licence fees payable to the NRL Partnership.

1165 The Optus Pay TV Programming Agreement provided that if News obtained the NRL pay television rights for the years between 2001 and 2021, it had to offer to sub-license those rights to Optus on terms no less favourable than those offered by News to Foxtel. If the pay television rights were not sub-licensed to Foxtel, News had to offer the rights to Optus on the terms set out in the agreement.

1166 Foxtel and Optus each secured non-exclusive rights to broadcast the same NRL

matches as were included in News' licence agreement with the NRL Partnership. Foxtel and Optus entered into an agreement pursuant to which production of the NRL programming was allocated between them. Each party agreed to provide the other with feeds of the coverage for which it was responsible for producing. In the event, Foxtel contracted with Fox Sports for the latter to produce, on Foxtel's behalf, the games allocated to it. Fox Sports was also licensed to incorporate coverage of all NRL matches into the Fox Sports channels, except for a weekly game that Foxtel broadcast as part of the *Fox 8* channel. Optus contracted with a third party for the production of its matches.

1167 Optus Vision initially sub-licensed the non-exclusive NRL pay television rights to SportsVision. After SportsVision went into liquidation, Optus inserted NRL programming into C7's overflow channel ('*C7 Sports (Blue)*').

1168 On 15 May 1998, Optus Vision and the NRL Partnership executed the '**Optus Partners Funding Deed**', which recited that the NRL Partnership had requested Optus to provide '*Transitional Funding*' and that Optus, wishing to ensure access to NRL programming for pay television, had agreed to do so. Clause 4.1 of the Optus Partners Funding Deed provided as follows:

> *'If during the first 25 years of the NRL Competition (commencing on and from the 1998 Season) the NRL Partnership:*
>
> *(a) grants pay television rights to FOXTEL, the NRL Partnership will offer the same pay television rights to Vision or Optus (at Optus' discretion) on the same terms (including as to price) as that offered to FOXTEL;*
>
> *(b) does not grant pay television rights to News or FOXTEL, the NRL Partnership will offer non-exclusive pay television rights to Vision or Optus (at Optus' discretion); and*
>
> *(c) offers Australia-wide pay television rights to a person other than News or FOXTEL ("**third party**"), the NRL Partnership will offer the same pay television rights to Vision or Optus (at Optus' discretion) on the same terms (including as to price) as offered to that third party'.*

9.2 Fox Sports Considers Bidding

1169 Mr Malone took up his position as CEO of Fox Sports on 25 January 2000. Shortly thereafter, he instituted regular meetings to discuss rights acquisition. The co-called

'*Acquisition Team*', which included Mr Marquard and Mr Dobbs, agreed in early 2000 that it was desirable for Fox Sports to acquire the NRL pay television rights on an exclusive basis. One consideration was that Austar could terminate the Fox Sports-Austar CSA if Fox Sports lost the NRL pay television rights and Fox Sports was dependent upon Foxtel for its NRL programming. Another was the desirability of Fox Sports using the exclusive NRL pay television rights to promote the Fox Sports brand.

1170 In early April 2000, Mr Marquard, in consultation with Mr Malone, prepared a paper for the Fox Sports board meeting of 14 April. The paper included these points:

> *'While the current arrangements have been financially advantageous to FOX Sports, a question mark remains whether this arrangement is sustainable. Will FOXTEL continue this program supply agreement with FOX Sports if FOXTEL are awarded the next NRL contract?*
>
> *Initial discussions with FOXTEL indicate that the template for the current arrangement will not necessarily continue if FOXTEL were to be the successful bidder for the 2001 NRL rights.*
>
> *At the same time, FOX Sports considers that the acquisition of key strategic programming is central to our business and that there are a number of risks associated with not holding NRL rights directly. In particular, if FOX Sports does not have NRL rights for 2001-2006, Austar may terminate the long term Austar distribution agreement'.*

1171 The paper recommended that the board authorise management to enter into negotiations directly with the NRL for the purchase of the NRL pay television rights for 2001 and beyond. The recommendation was approved at the Fox Sports board meeting of 14 April. The board also authorised management to discuss with Optus the possible licensing of NRL pay television rights to Optus.

1172 Following the board meeting, Mr Marquard prepared draft '*NRL Deal Points*', providing for Fox Sports to acquire the exclusive NRL pay television rights for five years, with it having an option to extend the arrangement for a further two years. The document did not specify a proposed fee. Mr Malone and Mr Marquard then attended a meeting with Mr Moffett and Mr Gallop. Mr Moffett indicated in the course of the meeting that the NRL considered that a fee of about $21 million to $22 million per annum was likely to be acceptable for the NRL pay television rights.

1173 The Fox Sports board met again on 20 June 2000. Those attending the meeting included Mr Malone, Mr Marquard, Mr Parker, Mr Philip and Mr Falloon. A board paper reported that management had discussed with the NRL the possibility of Fox Sports acquiring the NRL pay television rights and '*distributing NRL across all subscription platforms*'. The paper also recorded management's expectation that:

> *'the value of the NRL rights will be in the order of $21,000,000 annually in the first year, with increases thereafter. The rights would be held for 5 years, with a 2 year option, bringing the rights into line with those licensed by the NRL for FTA television''.*

The minutes of the meeting noted that the acquisition of the NRL pay television rights '*was tied up with a number of other matters*'. Management would revert to the NRL '*once we were in a position to make a meaningful bid*'**.**

1174 The meeting of 20 June 2000 also had before it a '*Revised draft Strategic Plan*'. One option referred to in the plan involved Fox Sports acquiring both the NRL and AFL pay television rights. According to Mr Marquard, the draft strategic plan was '*an evolving document that was frequently amended over time*'.

9.3 Seven Considers the NRL Pay Television Rights

1175 On 7 July 2000, Mr Wood sent a briefing paper to Messrs Anderson, Gammell and Wise relating to C7 and the NRL pay television rights. The briefing paper, which had been prepared by Mr Wood and an in-house lawyer, noted that C7 '*needs NRL to balance the "southern states" bias of the AFL*'. It also observed that C7 was of interest to the NRL, particularly the member clubs, because by dealing exclusively with Fox Sports the NRL was not reaching Optus subscribers and was '*putting all its eggs in one basket*'. The recommended action was as follows:

> *'*
> - *join with Optus Vision to bid for the NRL rights, and*
> - *reach agreement with Optus Vision regarding the cost of those rights and the production costs'.*

The recommendation assumed that Optus would pay the rights fees, while the production costs would be borne by C7 at an initial cost of $3.1 million per annum based on three NRL regular season games per week. The proposal envisaged a term of five years. According to

Mr Wood, this proposal later became part of ongoing discussions with Optus.

1176 Mr Wise's response to the email containing the 7 July briefing paper said that Seven needed:

> *'to develop a model for the financial impact of this. Potential costs, share between Seven and Optus, impact on subscription ... If we lost AFL would the NRL contract allow us to keep C7 together ...'*

The 2000/2001 budget for C7, which was prepared by Mr Wylie on 23 July 2000, made provision for $3.4 million for the '*Purchase of the Pay TV rights for Rugby League*'.

1177 Mr Stokes said that he read Mr Wood's briefing paper on 7 July 2000 and that led him for the first time to consider the possibility of making an offer for the NRL pay television rights for the 2001 to 2007 seasons. While (as he said) he was sceptical of whether C7 would be allowed to obtain the rights, given News' involvement in Rugby League, he instructed Mr Gammell to investigate the possibilities.

1178 Discussions took place periodically between Seven and Optus from late July 2000. In the course of those discussions, the Optus representatives indicated that Optus was willing to relax the terms of the C7-Optus CSA in relation to the AFL content required. The discussions also included a proposal for Optus to take over payment of the NRL pay television rights fee, with C7 to meet production costs.

9.4 Fox Sports' First Offer

1179 At the Fox Sports board meeting of 22 August 2000, the board approved the acquisition by the company of the NRL pay television rights as set out in the accompanying budget. The amount to be offered was $21 million per annum initially, increasing to $24 million per annum by 2007. The board noted that the shareholders would need to speak to Telstra about the possibility of Fox Sports licensing the NRL pay television rights to Foxtel and Optus. The CEO (Mr Malone) was asked to follow up with Mr Lattin regarding Optus' interest. (The need for Fox Sports to speak with Telstra arose out of TCNL's obligations to Telstra under the Umbrella Agreement. TCNL was obliged to use all reasonable endeavours, where Fox Sports held exclusive rights to televise sports events, to procure that Fox Sports offered the rights to Foxtel exclusively. PBL was also obliged, under the Program Rights

Deed of 3 December 1998 to ensure that it and its associated entities, including Fox Sports, provided Foxtel with the first right to refuse and last right to match proposed grants of licences to third parties.)

1180 Mr Malone held discussions with Mr Lattin in late August or early September 2000 concerning Optus' interest in taking NRL programming from Fox Sports. Mr Lattin advised Mr Malone that Optus was interested in the Fox Sports channels, not in a raw feed of NRL matches.

1181 At some time after Fox Sports' 22 August 2000 board meeting, not precisely identified in the evidence, Fox Sports made a formal offer to the NRL Partnership. The offer was for non-exclusive NRL pay television rights for 6 years for $21 million per annum (rising with inflation). The offer contemplated that the NRL would offer the same deal to Optus.

9.5 Telstra Consents to Fox Sports' Bid

9.5.1 Consent

1182 On 29 August 2000, Mr Philip wrote on News' letterhead to Mr Akhurst of Telstra pointing out that Foxtel's NRL pay television rights expired later in the year. The letter noted that an opportunity existed for Fox Sports to acquire the NRL pay television rights:

> *'Fox Sports would pay the cost of producing the coverage, and could then supply coverage to FOXTEL as part of the Fox Sports Two channel.*
>
> *The rights are available from the NRL on the basis that the coverage is also offered to Optus Vision. Optus Vision has had rights to the NRL competition over the last 3 years on terms the same as FOXTEL.*
>
> *... Fox Sports will not seek any additional payment from FOXTEL for [providing coverage on Fox Sports Two]. The proposal therefore represents a significant immediate saving to FOXTEL'.*

1183 Mr Philip asked Mr Akhurst to advise whether Telstra had any objection to implementing the proposal '*involving, as it does, the supply of the NRL competition coverage by Fox Sports to Optus Vision*'. Mr Philip also observed that the issue of the long-term supply of the Fox Sports channels to Foxtel could be dealt with separately. At the time, Foxtel was paying $9 million per annum to receive non-exclusive NRL pay television rights,

under a sub-licence from News.

1184 On 1 September 2000, Mr Greg Willis of Telstra, at Mr Akhurst's request, faxed a series of questions to Mr Philip. These related to '*the proposal to include NRL coverage in Fox Sports Two and the supply by Fox Sports of NRL coverage to Optus*'. Mr Philip provided answers in a fax sent the same afternoon.

1185 On 4 September 2000, Mr Willis confirmed his earlier oral advice to Mr Philip that Telstra consented, on certain conditions, to the supply by Fox Sports of the proposed NRL coverage as previously outlined by Mr Philip. The specified conditions included a requirement that Fox Sports would not seek any payment from Foxtel in respect of the proposed NRL coverage. The consent related to the NRL coverage and did not extend to supplying the balance of the content of the *Fox Sports 2* channel.

1186 Mr Akhurst had no objection to Fox Sports bidding for the NRL pay television rights, as distinct from the AFL pay television rights, because he understood that Fox Sports was already the supplier of NRL content. Mr Akhurst at the time did not realise that Fox Sports obtained its NRL pay television rights by way of a sub-licence from Foxtel.

9.5.2 Fox Sports Seeks to Supply NRL to Optus

1187 On 4 September 2000, Mr Philip sent a copy of Mr Willis' fax to Mr Falloon at PBL. Mr Philip told Mr Falloon that he intended to send the correspondence to Fox Sports '*with a suggestion they cut a deal with Optus asap*'. Mr Philip then sent Mr Malone of Fox Sports a copy of the correspondence with Telstra.

1188 At this stage Mr Malone was aware that Telstra had not consented to the supply of the complete Fox Sports package to Optus, but had consented only to the supply of NRL coverage. On 11 September 2000, Mr Malone sent to Mr Macourt and Mr Falloon a draft letter which he intended should be sent by Fox Sports to Optus in relation to the provision of NRL coverage to Optus. The draft letter proposed that Fox Sports would acquire the NRL pay television rights from '*the NRL*'. Fox Sports would arrange for the production of all NRL pay television matches and would license NRL pay television rights and coverage to Optus on a non-exclusive basis. Fox Sports was to provide to Optus a '*dirty feed*' of all NRL matches: that is, a coverage branded as '*Fox Sports*' and featuring use of the Fox Sports logo.

The draft letter included a restriction requiring Optus to incorporate NRL content in a channel '*currently wholly owned by Optus*' and to obtain Fox Sports' consent to the designated channel before incorporating or compiling '*NRL rights*', such consent not to be unreasonably withheld.

1189 The draft letter was prepared primarily by Mr Marquard, with the participation of Mr Malone. Mr Marquard said that he had included the restriction because he wanted to prevent Optus from incorporating Fox Sports' coverage of NRL matches into C7's channels. He considered that there was a benefit to Fox Sports in being the only sports channel to show NRL matches. He had taken the view that the incorporation of NRL matches into C7's channel on Optus, from 1998 to 2000, had given C7 a '*windfall benefit*' through a brand association with Rugby League programming, without C7 having invested heavily in the product.

1190 According to Mr Malone, his objective in approving the restriction was to secure an exclusive brand ownership of NRL content on Fox Sports. Mr Malone accepted that the proposed restriction would allow Optus to incorporate NRL content on its own channel, such as '*NRL on Optus*'. However, he maintained that there was a big difference between permitting NRL content to be carried on an Optus channel and permitting it to be carried on a sports channel, such as ESPN or C7, which competed with Fox Sports. Mr Malone agreed that, as he saw it, the most likely outcome, in the absence of the draft clause, was that NRL content would be shown on C7.

1191 Mr Philip apparently received a copy of the draft letter prepared by Mr Marquard and Mr Malone. He returned a copy of the draft to Mr Marquard, with his editorial comments endorsed.

1192 An offer, including the channel restriction, was dispatched to Mr Lattin of Optus later on 12 September 2000. Mr Lattin replied on 14 September 2000, rejecting Fox Sports' offer. Mr Lattin restated Optus Vision's position that it was interested in taking '*the complete Fox Sports package*' rather than '*an NRL only Fox Sports package*'. Of course, Optus had a right under cl 4.1 of the Optus Partners Funding Deed to receive an offer for the NRL pay television rights on the same terms as those offered to Foxtel. Optus also had a right under the Optus Pay TV Programming Agreement to a sub-licence of the NRL pay television rights

from News (if it acquired the rights) on terms no less favourable than those offered to Foxtel.

1193 In October 2000, Mr Philip had a number of communications with Mr Greg Willis at Telstra. Mr Philip noted that Optus was unlikely to take an NRL-only package and he sought Telstra's consent to Fox Sports providing Optus with the balance of *Fox Sports 2*. On 11 October 2000, Mr Willis conveyed Telstra's refusal to consent. Mr Willis said that Telstra did not agree that *Fox Sports 1* or *Fox Sports 2*, or any programming included in those channels, be supplied to Optus.

9.6 C7 Expresses Interest in the NRL Pay Television Rights

1194 On 12 October 2000, Mr Crawley of C7 reported in an internal email that he had spoken briefly to Mr Moffett about the NRL pay television rights. Mr Moffett had indicated that the NRL would be '*working to wrap this up asap'*. The email also recorded that '*Optus, as usual, are inactive*'. Mr Wood of C7 said in his evidence that by this time Optus had '*decided to sit back and see what happened*'.

1195 On 19 October 2000, Mr Wood sent a letter to Mr Moffett, CEO of NRL Ltd, as follows:

> *'As you know, over the last few months both Harold Anderson and I have expressed interest in relation to C7 acquiring pay television rights to the NRL. As we still do not know what pay television rights are available or the process involved in attempting to acquire these pay television rights, could you please let me know as soon possible:*
>
> *(a) what pay television rights the NRL will be selling;*
>
> *(b) the term of those rights;*
>
> *(c) the process and timeframe in relation to the negotiation and acquisition of those rights.*
>
> *I would be grateful if you could provide the above details prior to our scheduled meeting on November 13 to enable C7 to determine an appropriate offer'.*

Mr Wood acknowledged in his evidence that until about this time Seven's tactic, so far as the NRL pay television rights were concerned, was '*to either stand in Optus' shoes or to do something with Optus*'.

1196 On 25 October 2000, Mr Wood provided Mr Lattin with Seven's comments on Optus' proposal to outsource to Seven the production of its channels. Mr Wood said that Optus would be required to exercise its right to match Fox Sports' bid for the NRL pay television rights, subject to Seven's approval of the fee, and would have to obtain the rights for both cable and satellite delivery. If Optus was successful, the parties would split the rights and production costs equally.

9.7 Fox Sports Makes a Second Offer

1197 On 26 October 2000, Mr Marquard finalised an '*NRL Options Paper – Fox Sports*'. Copies of the draft were provided to Messrs Philip and Macourt and to Messrs Kleeman and Mr Falloon of PBL. Mr Philip had previously discussed the contents of the draft with Mr Marquard. Mr Philip and Mr Marquard were aware of the NRL Partnership's obligations under the Optus Partners Funding Deed and News' obligations to Optus under the Optus Pay TV Programming Agreement.

1198 The NRL Options Paper identified two principal alternatives for Fox Sports:

> acquire Australia-wide NRL pay television rights on a non-exclusive basis; or
>
> acquire Australia-wide NRL pay television rights on an exclusive basis.

Option 1 was explained as follows:

> *'Under this alternative, Fox Sports would acquire Australia wide non-exclusive rights for $21M plus inflators (but NRL would only be permitted to sell to Optus or Optus Vision). This right is non-exclusive because Optus or Optus Vision have the right to be offered non-exclusive rights. However, Optus may elect for reasons of its own, not to acquire the rights which are offered to it by the NRL'.*

1199 The NRL Options Paper pointed out that the NRL was free to impose an obligation that NRL programming could only be compiled in a channel wholly owned and branded by the licensee. The NRL Options Paper continued as follows:

> *'2.8 Specifically, we suggest that the NRL's agreement with Fox Sports include the following terms:*
>
> *(a) the NRL be prohibited from licensing pay TV rights to any other party except Optus or Optus Vision and then only on terms which are no more favourable than those granted to Fox*

Sports. Any licence of pay TV rights by the NRL to Optus or Optus Vision must contain clauses mirroring clauses (b), (c) and (d) below;

(b) Fox Sports may only telecast NRL programming as stand-alone Fox Sports branded NRL programming or may compile and telecast NRL programming into a channel or channels which are wholly owned and branded Fox Sports channels, except in relation to one game each week during the regular season of each NRL competition which may be compiled into a non sports dedicated channel;

(c) Fox Sports is prohibited from sub-licensing the NRL rights to any other party, except to pay TV operators which distribute Fox Sports' channels or its stand alone NRL programming and then only to the extent of and for the purpose of enabling those operators to comply with section 132 of the Broadcasting Services Act;

(d) ...

2.9 The offer by the NRL to Optus or Optus Vision would then mirror the terms set out in the agreement with Fox Sports'.

1200 The consequence of these proposals, if implemented, would have been to require the inclusion of provisions in an agreement with the NRL Partnership in any offer made by the NRL Partnership to Optus pursuant to the matching provisions of the Optus Partners Funding Deed. In his evidence, Mr Philip acknowledged that he knew Optus did not want to produce its own programs and thus he knew that the proposed requirement would make it unattractive for Optus to match Fox Sports' bid. Mr Philip acknowledged that another objective was to:

'try to engineer a situation in which Optus would be unable to incorporate the NRL games into C7's channels even if Optus took the rights directly from the NRL'.

1201 Mr Philip accepted that the term requiring Fox Sports to do its own production was a '*device*' to achieve the desired outcome. Nonetheless, he denied that the '*whole purpose*' of the exercise was to restrict Optus to its own branded channel, and to prevent Optus incorporating NRL content on C7. He maintained, unconvincingly, that the '*purpose was to secure for Fox Sports control over the production of all of the NRL Pay TV games*'. However, he denied that he intended to achieve control over the quality of production of the NRL pay television games by eliminating C7.

1202 Mr Marquard acknowledged that the relevant provisions were designed to ensure that Optus could incorporate NRL coverage only on a wholly Optus owned and branded channel. One of his purposes was to ensure that Optus could not continue to incorporate NRL content on the C7 channel, even if Optus acquired the NRL pay television rights directly from the NRL. In his view, this made it much more likely that Optus would deal with Fox Sports. Mr Marquard appreciated that Optus would be hesitant about the burden of producing a single sport channel, since Mr Lattin had previously indicated that Optus wanted to take *Fox Sports 2*. Mr Malone's position was similar.

1203 A board meeting of Fox Sports was held on 27 October 2000. The final version of the Options Paper was discussed at the meeting. Members of the board were informed that Optus had rejected Fox Sports' first offer; that Optus had a contractual right to take the NRL pay television rights directly from the NRL Partnership, independently of Fox Sports; and that Fox Sports had developed a strategy to circumvent Optus' contractual right.

1204 The Fox Sports board noted that the NRL Partnership was contractually obliged to offer to Optus the same rights as were offered to Fox Sports. The board authorised management to enter into an agreement with the NRL to acquire non-exclusive NRL Partnership pay television rights as set out in Option 1 in the Paper. This resolution was clearly intended to adopt the strategy outlined in the Options Paper and in fact the final offer made by Fox Sports on 13 December 2000 included provisions intended to implement the strategy.

1205 On 27 October 2000, Fox Sports offered the NRL Partnership $21 million per annum (increasing to $22 million per annum from 2003 and to $23 million per annum from 2005) for the NRL pay television rights for six years from 1 January 2001, with additional amounts payable for promotional spending (at least $17 million over the term) and production costs (in the order of $35 million over the term). The offer made no explicit reference to GST. Fox Sports proposed that if Optus took up an offer of the NRL pay television rights, the amount of $132 million payable over six years would be shared between Fox Sports and Optus.

1206 A meeting of the NRL PEC took place on 2 November 2000. Mr Philip and Mr Macourt formally disclosed that they were directors of Fox Sports. The meeting noted that

Fox Sports had made '*an attractive offer which allowed for the [P]artnership to meet its contractual obligations to Optus'* and that C7 had been asked to provide a proposal. It was agreed that '*unless C7 made a better offer the [P]artnership should proceed to accept the Fox Sports offer*'.

9.8 C7 Discusses Making an Offer

1207 On 29 October 2000, Mr Wood informed Mr Gammell of a meeting that he had held with Austar concerning the NRL pay television rights. Mr Wood thought that Austar had a strong incentive to back Seven in its bid for NRL pay television rights '*as they have a very onerous $US contract with Fox Sports which falls over if Fox cannot deliver the NRL*'.

1208 Mr Gammell reported this development to Mr Stokes on 3 November 2000, observing that:

> *'Maybe we will not be able to win it, but we can certainly get someone's attention'.*

The '*someone*', as Mr Gammell agreed in evidence, was Fox Sports, Foxtel and News. Mr Stokes, in his response to Mr Gammell, described the Austar development as '*intriguing*'.

1209 On 6 November 2000, Mr Wood had a telephone conversation with Mr Moffett. In reply to Mr Wood's query about the bidding process, Mr Moffett (as Mr Wood agreed) said in substance that the

> *'process and timetable are matters solely for us. You just need to give us your best offer as soon as possible'.*

Shortly afterwards, Mr Wood passed on Mr Moffett's comment to Mr Gammell and also told Mr Gammell about the existence of News' first and last right of refusal over the NRL pay television rights.

1210 On 7 November 2000, Mr Wood sent a fax to Mr Moffett as follows:

> *'In our telephone conversation you indicated that you were not prepared to outline the tender process or timetable in a written form but said that this process was solely at your discretion. You said that C7 could bid for any package of rights but also said that Channel 9 had an exclusive free to air window on two games for the next eights years and that News Limited had a*

first and last option over all Pay TV rights. You did however state that you had to act independently in the best interests of the NRL and the clubs when assessing offers for Pay TV rights.

...

C7 is a serious bidder for the pay TV rights to NRL Premiership matches for the 2001 and following seasons.

...

Rather than just give you a back of an envelope figure, we'd like the following information so that we can give you a considered bid.

...

David, C7 is a serious bidder if the process is fair and transparent. The information I've asked for will enable us to give proper consideration to the value of the rights and to offer the NRL a genuine and competitive price. We're in a position to move quickly, as soon as you can provide the information ...'

1211 Mr Moffett responded to Mr Wood's letter on 8 November 2000, as follows:

'Your description of our conversation is not entirely accurate.

Put simply, we are happy to receive a proposal from you in respect of Pay TV rights for rugby league matches conducted under the authority of the NRL Partnership. That said, we are under no obligation to engage with you in any tender process in respect of those rights, to respond to any proposal, or to refrain from conducting our affairs as we see fit'.

The letter provided certain information and requested that any proposal be received by 5 pm on Friday, 10 November. Mr Stokes acknowledged that he had read the letter and that he had accepted what Mr Moffett had said in it.

1212 On 10 November 2000, Mr Wood circulated an '*NRL Proposal*' to the Seven Network directors. The NRL Proposal contained the following:

'• *We believe that the NRL have already received a bid for all Pay Television rights in the order of $20 million per annum, and time is now of the essence.*

• *Moffet has told us that News Limited has a first and last option over all Pay Television rights. Channel Nine also have an exclusive free-to-air window on two games for the next eight years as well as*

exclusive live rights to State of Origin and domestic test matches.

- *Austar have indicated that if we had a compelling package of Rugby League rights they would be willing to renegotiate the C7 agreement for the delivery of two channels with a substantial minimum guarantee.*

- *C7 can have two complimentary [sic] objectives in this process;*

    1. *Ramping the price that News Limited/Foxsports [sic] would have to pay for NRL rights which will affect PBL far more than News Ltd.*

    2. *Perhaps securing a package of NRL rights which could be delivered on all platforms and be a subscription driver in the Northern states.*

- *I believe that we should respond by making two bids, one for all Pay Television rights which should be in the vicinity of $30-40 million dollars p.a. and another for a package of two to three games exclusively live in the order of $15-20 million p.a.*

- *I will set up a conference call around midday tomorrow for further discussion of this proposal'.*

A conference call in fact took place the following day, in which Mr Wood, Mr Stokes, Mr Gammell and Mr Lewis participated.

1213 On 13 November 2000, Mr Anderson signed two letters drafted within Seven, both of which were addressed to Mr Moffett. The letters were identical, except that one contained a paragraph stating that a formal offer was being made by C7 for the NRL pay television rights because there was some doubt whether Seven would retain the AFL broadcasting rights. As the NRL did not discover either version of either of these letters, the probabilities are that neither version was sent. However, the draft letters foreshadowed that C7's offer would have '*a cash value of between AU$40 to 50 million per annum*'.

1214 Mr Stokes' evidence was that the foreshadowed offer of $40 million to $50 million was '*reasonably aggressive*'. He acknowledged that no business case had been undertaken to support the proposal notwithstanding that the proposal, if pursued successfully, would have committed Seven to up to $400 million over eight years. Mr Anderson acknowledged that a recommendation to offer $40 million per annum for the NRL pay television rights was '*extremely aggressive*'.

1215 Mr Anderson, Mr Wood and Mr Crawley (General Manager in charge of production for C7) met with Mr Moffett and Mr Gallop on 13 November 2000. The C7 representatives indicated that C7 intended to make a substantial bid for the NRL pay television rights, but it is not clear on the evidence what figures, if any, were mentioned (although Mr Anderson's recollection was that $40 million had been mentioned). According to Mr Anderson, he sought an assurance from the NRL representatives that the NRL had '*independent decision making authority [from News]*'. Mr Moffett replied:

> *'Yes. I have ... responsibility to get the best possible deal for Rugby League.'*

However, Mr Moffett also told Mr Anderson that the ultimate decision rested with the NRL Partnership.

1216 In the afternoon of 13 November 2000, Mr Anderson faxed a letter to the NRL. The letter referred to the '*substantial verbal offer*' made at the meeting earlier that day and sought an extension until 17 November 2000 for C7 to make the formal offer. Mr Moffett replied on the same day acceding to Seven's request '*on the same basis as stated in my letter of 8 November 2000*'.

9.9 Events Leading to C7's First Offer

9.9.1 Seven's Draft Note

1217 In mid-November 2000, someone within Seven prepared a '*draft note*' directed to Mr Anderson. The draft note was dated 16 November 2000, but there was conflicting evidence as to when it was in fact prepared. The unsigned draft note included the following:

> *'Given the current problems we may face with the AFL, if we are to retain any prospect of developing C7 as a viable pay sports channel, we must have one of the marquee sports.*
>
> *...*
>
> *The NRL is not on the anti-siphoning list ... The opportunity exists to acquire all rugby league games on an exclusive basis, which would provide C7 with a very competitive product.*
>
> *...*
>
> *I believe that it is possible to have a venture with Austar who have informed us they contribute up to $20 million p.a. I think it is possible to negotiate*

with Optus, non-exclusive, to keep our $30 million contract in place.

...

I recommend that we bid $50 million, bearing in mind the Foxtel connections still have first and last right, but this is a figure that would normally have every chance of success unless, there is a conscious effort to put us out of business'.

1218 This draft note appears to have been succeeded by a second unsigned memorandum. The latter bore the date 15 November 2000 and was addressed to Mr Stokes, with the author being recorded as '*Harold [Anderson]*'. The second memorandum was in similar terms to the draft note and repeated the mistaken assertion that the NRL Competition was not on the anti-siphoning list. However, it corrected the erroneous suggestion in the draft note that C7 had an opportunity to acquire **all** Rugby League games exclusively, pointing out that the opportunity existed only for the NRL pay television rights. The second memorandum recommended a bid of $60 million for the NRL pay television rights (not $50 million).

1219 Mr Anderson duly signed a memorandum to Mr Stokes in the terms of the second unsigned memorandum. However, the memorandum signed by Mr Anderson was dated 14 November 2000. While there is some mystery about the sequence of events, nothing of substance turns on it. Contrary to News' submissions, the evidence does not support a finding of a deliberate backdating of documents with an intent to deceive.

1220 In his first statement, Mr Stokes claimed that he telephoned Mr Love (whom Mr Stokes thought was '*in charge of the NRL*') on 14 November 2000, shortly after reading Mr Anderson's memorandum of the same date. According to Mr Stokes, he was in his North Sydney office with Mr Anderson. Mr Stokes said that he asked whether Seven would receive a fair go, since there was no point in participating unless it would be treated properly. Mr Love answered affirmatively and said that the '*best bid will win [and we] are very keen for Seven to bid*'. He also told Mr Stokes that if Seven could show that its bid had something for the clubs, that would be helpful. Mr Stokes' evidence on this conversation was hotly contested.

1221 Mr Anderson accepted in his evidence that, regardless of when the memorandum had been prepared, he had not undertaken any systematic assessment of the value of the NRL pay television rights. Mr Anderson said that he had recommended the figure of $60 million on

the advice of Mr Wood but had not enquired what work, if any, Mr Wood had undertaken.

9.9.2 Quay Apartments Meeting

1222 According to Mr Gammell, in about mid-November 2000 he attended a meeting at the Quay Apartments in Sydney with Mr Anderson (of Seven Network), and Mr Love and Mr Politis (neither of whom he had previously met). Mr Gammell claimed that after introductions, in the course of which Mr Love said he was representing the NRL's interests in the negotiations, the conversation proceeded as follows:

'I said:

> *We are really concerned about this process. There are conflicts of interest. Have you got legal advice as to the construct of the partnership and can the News people be excluded from making the decision? Can you really act for the NRL? We do not just want to be the stalking horse. Can you deliver the rights?*

Either Mr Love or Mr Politis said:

> *We represent the independent and impartial face of the NRL. We are not affiliated with News. We are going to make sure this is a proper process and fair deal. We want to ensure that there is fair play and the NRL gets the best deal. It is not our intention to get Seven involved as a stalking horse to get the price up. That doesn't achieve anything. We want you to genuinely win these rights'.*

There was a contest as to the contents of this conversation and the likely date of the meeting at which the conversation occurred.

9.9.3 Mr Stokes Speaks with Mr Moffett

1223 According to Mr Stokes, in about August or September 2000 he telephoned Mr Moffett and a conversation to the following effect took place.

'[I said]:

> *We would like to make an offer. A very serious offer to buy the rights. But we will only do so if we can be confident of being dealt with on equal commercial terms. Can you assure me that proper governance would be applicable, given the role that News plays in both the ownership and representation of rugby league?*

Mr Moffett said:

> *I assure you the NRL will act with total propriety at all times. Confidentiality will be observed and the relevant bamboo walls will apply.*

I said:

> *If we make an offer it will be significant, and it will be in excess of what News is currently reported to pay.*

Mr Moffett said:

> *News are intending to offer a similar amount to that which they are currently paying, or possibly less. According to News, we are currently being paid more than the code is worth.*

I said:

> *I will get back to you with an offer'.*

1224 Mr Stokes' evidence on this point was challenged, including his recollection of when the conversation occurred. Mr Gammell's evidence was that he had not instructed Mr Wood to seek the NRL pay television rights directly until about October or November 2000, at approximately the same time as Mr Wood had informed him of the meeting with Austar concerning the NRL pay television rights. The likelihood, in my view, is that the conversation between Mr Stokes and Mr Moffett occurred shortly after this, in about early to mid-November 2000.

9.10 C7's First Offer for the NRL Pay Television Rights

9.10.1 The Offer

1225 On 16 November 2000, under cover of a fax from Mr Anderson, C7 made its first written offer for the NRL pay television rights. The covering note, which was addressed to '*David Moffett NRL*', was as follows:

> *'Please find attached C7's offer for NRL rights. This offer is confidential. If confidentiality is breached C7 Pty Limited reserves the right to withdraw the offer.*
>
> *...*
>
> *It will be submitted to the Seven Network Board for approval tomorrow morning. It has the Chairman's recommendation. Confirmation of the offer will be conveyed to you by 5.00 pm tomorrow'.*

1226 The offer was expressed to be for '*all home and away season NRL matches (5 per week) but excluding Free to Air matches*'. The offer noted that two NRL home and away matches would be selected each week by Nine. The terms of the offer included the following:

> *'**Term***
>
> *Seven years from 1 January 2001 (ie: 2001-2007). NRL will grant to Seven a right of first and last refusal to any and all pay television rights (as described in this letter) for a further period of five years.*
>
> ***The Offer***
>
> *(a)* ***Cash***
>
> *AUD$60 million per annum + GST paid quarterly in advance comprising:*
>
> *(I) $30 million payable to the NRL; and*
>
> *(II) $30 million payable directly to the clubs as club appearance fee and sponsorship to compensate for lost gate receipts*
>
> *(b)* ***Contra***
>
> *AUD$10 million per annum + GST to promote the NRL on the Seven Network*
>
> *(c)* ***Subscription Discount***
>
> *C7 Pty Limited will rebate 10% of any subscription fee to any of C7's Pay TV channels both existing and future paid by a confirmed member of a NRL club, to that NRL club (to a maximum of AUD$20 million per annum) during the Term'.*

9.10.2 Seven Network's Board Meeting of 17 November 2000

1227 Seven Network held both a board meeting and its annual general meeting on 17 November 2000. The board meeting convened at 9.20 am, adjourned at 10.30 am so that directors could attend the annual general meeting, and reconvened at 1.30 pm. The topic of the NRL pay television rights were discussed at the board meeting both before and after the adjournment. The minutes record the following in relation to C7's bid for the NRL pay television rights:

'The Chairman advised that the Broadcast rights to [NRL] could be available and that consideration had been given to lodging a bid for this product and preliminary discussions had been undertaken.

The Chairman outlined to the Board the NRL matches which would be of interest to the Company, ***that both Free-To-Air and Pay Rights were available*** *and that other pay-TV operators had expressed interest in taking the service.*

The Directors agreed that this would be a major sports right and would be a very important product for Seven if the AFL rights were not renewed.

A copy of the proposed bid was tabled, which is subject to Board approval, offered [sic] $60 million for exclusive rights to the NRL.

...

The proposal to bid for the NRL Broadcast rights was discussed, and it was agreed that this would be an important product for the Sydney market. It was noted that there is an estimated loss of $20 million per annum, if the coverage was unable to access Foxtel, and it may prove difficult to sell the service to Austar and Optus. It was acknowledged that there would be an oversupply of football if Seven were able to retain AFL rights and also obtain the NRL rights ...

The Directors discussed the proposal and expressed frustration that if Seven cannot secure the rights to the AFL nor the NRL there would be no other major sports available for broadcast by Seven.

It was RESOLVED to approve the submission of the bid for the broadcast rights for the NRL, on the terms outlined in the document as tabled and amended. The Directors in approving the bid were of the view to be co-operatively involved with the NRL regarding their re-structuring plans for the future of the game and, if any additional games became available as a result, then they would be added to the Pay TV schedule. The Directors also consider that observer status for Seven on the NRL Board would be appropriate and would raise concerns that a conflict of interest exists where Seven's competitors were present at NRL Board meetings'. (Emphasis added.)

1228 It will be noted that the first two paragraphs of the extract from the minutes repeat a misconception about the available NRL rights that had also been recorded in the draft note dated 16 November 2000. Both Mr Stokes and Mr Gammell gave oral evidence that, although the minutes had been confirmed at the board meeting of 26 January 2001, they were incorrect, in that Mr Stokes had not told the board that both free-to-air and pay television rights were available. This evidence was disputed by the Respondents and I do not accept it.

The minutes were likely to be accurate on this point.

1229 The board meeting of 17 November 2000 concluded at 3.05 pm. At 3.43 pm Mr Anderson sent a fax addressed to Mr Moffett at '*NRL*' advising that the Seven Network board had approved the offer outlined in the letter of 16 November. The approach was said to come with additional elements to be added to the original offer. These were set out as follows:

> *'The Board in approving the offer was of the view that they would like C7 involved in major decisions relating to the League and confirmation that the rights to any additional games that become available automatically reside with C7 exclusively.*
>
> *The Seven Network Board considers that the magnitude of the offer justifies C7 having an observer on the NRL Board.*
>
> *The Seven Network Board expects impartiality to be an important part of the process. Some directors of the NRL will have a conflict of interest in respect of this offer. We expect that they will not participate in decision making related to the offer.*
>
> ***The Offer***
>
> *The Rights fees and the appearance fees (AUD$60 million total) are offered on the basis that they will [be] used for the advancement of the game and not for distribution to share holders.*
>
> *...*
>
> ***Conditions of Offer***
>
> *... we wish to make it a condition of offer that C7 is consulted on scheduling and competition format'.*

9.10.3 Confidentiality Agreements

1230 According to Mr Stokes' evidence, supported by Mr Gammell, Seven Network's board meeting of 17 November 2000 resolved that the directors of Seven and certain employees should enter into confidentiality agreements relating to C7's bid for the NRL pay television rights. The minutes of the board meeting, however, do not record any such resolution. Nonetheless, between 21 November and 4 December 2000, 22 directors and employees of Seven, including Mr Stokes and Mr Gammell, entered into confidentiality deeds. In each deed the '*Recipient*' of the '*Confidential Information*' (both of which were

defined terms) acknowledged that any breach of the undertakings could result in irreparable harm to Seven. The Recipient agreed to maintain the confidence of the Confidential Information and to prevent its unauthorised use or dissemination.

9.10.4 Newspaper Reports

1231 Several articles appeared in the media on 18 November 2000 reporting comments made by Mr Stokes at Seven's annual general meeting. One of the articles, in the *Daily Telegraph*, reported that the Seven Network had launched '*a $250 million bid for control of rugby league pay TV rights*' over five seasons. An article in the Melbourne *Age* reported that Mr Stokes had

> *'warned that he will launch a large damages claim against Foxtel if the pay TV company's refusal to allow access to Seven's pay TV channels leads to Seven losing the AFL rights'.*

1232 On 20 November 2000, an article by Mr Roy Masters appeared in the *Sydney Morning Herald* under the heading '*Leaking of Stokes TV offer may mean $150m down the drain for NRL*'. The article stated that an offer of $250 million had been made for access to five live games per week on C7 over a period of five years. Mr Masters claimed that a confidentiality clause in the offer might '*void the deal, following publication of the details*'. Mr Masters reported that the offer to the NRL had become public knowledge through a News publication. He said that NRL clubs had been made aware of the C7 offer '*to guard against the possibility of a fait accompli deal*' and that Mr Hill, chairman of the NRL board and president of the Newcastle Knights, had become involved in negotiations.

9.11 Fox Sports and the NRL Partnership Assess Their Positions

1233 On 13 November 2000, while C7 was dealing with the NRL PEC, Fox Sports sent a draft licence agreement to the NRL. The draft incorporated terms previously set out in the NRL Options Paper presented to the Fox Sports board on 27 October 2000. The terms included the following:

> *'3.1 ... Licensee acknowledges that Licensor has existing contractual obligations ... owed to Cable & Wireless ... or Optus Vision Pty Limited.*
>
> *...*

> *4 ... Notwithstanding anything contained in this agreement to the contrary, the Rights may be telecast on subscription television only on the basis that the pay television channel or channels that includes the Matches is completely branded with the primary brand of the Licensee or the Other Pay TV Licensee and no other brand [subject to a partial exception for one Match per week]'.*

1234 Mr Marquard first became aware of C7's bid for the NRL pay television rights when he read the newspaper reports relating to the bid. Mr Marquard, Mr Parker and Mr Malone discussed the C7 bid on 20 November 2000. On that day, Mr Parker prepared a revised summary of Fox Sports' 10 year financial model. The revision was based on three '*Scenarios*':

> Scenario A assumed that the NRL pay television rights would be bought and matches produced for between $26 million and $31 million per annum and that NRL content would be provided to Foxtel at no additional cost. Austar was to remain a customer, but there would be no sale to Optus. When compared with Fox Sports' '*base case*' strategic plan, the '*value impact on Fox Sports*' was -$188.1 million.
>
> Scenario B assumed the same rights and production costs, but with NRL content being supplied to Foxtel at an additional US$0.50 pspm. Austar would remain a customer and Optus would take the NRL product for $8 million to $9 million per annum. The '*value impact*' of Scenario B was -$58 million.
>
> Scenario C assumed that the NRL pay television rights would not be acquired, that Foxtel would remain a customer of Fox Sports on current terms and that the Austar deal would be terminated. Fees from hotel subscribers would fall by 60 per cent, advertising revenues attached to the NRL would be lost and '*[o]ngoing advertising revenues [would] fall [pro rata] with reduced sub numbers*'. This produced a '*value impact*' on Fox Sports of -$543.8 million.

1235 Later on the same day, Mr Parker sent Mr Kleeman and Mr Macourt summaries of financial models based, respectively, on annual NRL pay television rights costs of $30 million, $40 million and $50 million. Mr Parker noted that the models showed that '*loss of Austar as a customer is, in all of these cases, [a] less attractive option than paying increased NRL fees*'. The attached models showed the '*value impact*' of the three Scenarios with

increased licence fees, as follows:

> Scenario A: -$240.9 million at $30 million per annum; -$321.3 million at $40 million per annum; and -$401.6 million at $50 million per annum.
>
> Scenario B: -$111.8 million at $30 million per annum; -$193.8 million at $40 million per annum; and -$275.8 million at $50 million per annum.
>
> The '*value impact*' of Scenario C remained at -$543.8 million.

1236 On 20 November 2000, Mr Moffett sent Mr Anderson a fax on NRL Ltd letterhead setting out a '*number of fundamental issues [with C7's offer], largely arising from our existing commitments*'. The issues included the following:

> the NRL Partnership was obliged to offer non-exclusive pay rights to Optus and thus (so it was implied) could not grant exclusivity to C7;
>
> News held a first and last right over the NRL pay television rights extending beyond 2007 and thus (so it was implied) the NRL Partnership could not grant a first and last right to C7;
>
> the NRL Partnership's arrangements with the NRL clubs required payment of all broadcasting revenue to the NRL Partnership and thus (so it was implied) the cash component of C7's offer could not be divided between the NRL and the clubs; and
>
> the NRL Partnership's existing free-to-air arrangements with Nine prohibited venue advertising and player marking identification with other free-to-air broadcasters.

1237 The letter referred to the fact that NRL matches were subject to the anti-siphoning legislation. It included the following statements:

> *'Please be assured that, despite the speculation in the media, we are continuing to treat your offer as confidential. We trust you will also treat this response and all other communications as confidential.*
>
> *Finally, we wish to place on record that we are not concerned about any conflict of interest issues in the consideration of your offer'.*

A copy of the letter was sent by Mr Anderson to Mr Gammell and Mr Stokes accepted that

he was apprised of its contents.

9.12 C7 Prepares a Second Offer for the NRL Pay Television Rights

9.12.1 Towards $70 Million Cash

1238 At 4.13 pm on 20 November 2000, Mr Wood sent an email to Mr Gammell and Mr Anderson proposing a structure for the cash component of C7's offer as follows:

'Guaranteed Base: *(based on 250k subs)*	*$30 m*
500k subs	*$45m*
1000k subs	*$60m*
2000k subs	*$75m'*

Mr Gammell responded at 6.48 pm by proposing a discussion '*after we see the colour of the NRL's eyes*'. He also observed that Mr Stokes '*is still serious about putting a serious number forward*'.

1239 At 8.50 am on 21 November 2000, Mr Wood presented Mr Gammell with another option, in the form of a two tiered bid, as follows:

> *'1. $30m for 3 pay TV matches live per week;*
> *the other 2 pay TV matches on a 24 hr delay; &*
> *the 2 FTA matches on a 2 hr delay.*
>
> *OR*
>
> *2. $20m for 2 pay TV matches live per week;*
> *the other 3 pay TV matches on a 24 hr delay; &*
> *the 2 FTA matches on a 2 hr delay.*
>
> *This values the total Pay TV package at $50m (plus any extras we throw in), gives Austar an out and a reason to take our service, the ARL and non-aligned clubs a win and (hopefully) limits our exposure to $20m - $30m.*
> *If we win we get something we can manage and to lose News have to pay $50m + to get us out of the picture.*
>
> *It may also have some interesting implications with Optus' right to match!'*

1240 On the same day, Mr Gallop forwarded to Mr Wood a draft long form licensing

agreement. The draft, among other things, specified which NRL matches would be subject to the licence and provided for Nine to have the right of first selection of two weekly matches. The draft also showed the licensors to be NRLI and ARL trading in partnership as the NRL Partnership. Mr Gammell received a copy of the draft agreement the following day. Mr Gammell did not dispute in his evidence that Seven never communicated to the NRL Partnership whether it agreed or disagreed with the draft terms.

1241 On 23 November 2000, Mr Francis sent an email to Messrs Stokes, Gammell and others within Seven. The email included the following passages:

> *'We have undertaken a lot of work in moving from "Seven as victim" to "Seven holding the cards", and my concern is that we do not turn press support on its head – and be seen as "the whinging network that complains and threatens legal action".*
>
> *...*
>
> ***We have also been careful not have our fingerprints on any story in the press in the past ten days'***. (Emphasis added.)

1242 On or shortly after 21 November 2000, Mr Wood had a meeting with Mr Gallop and Mr Moffett at Fox Studios. According to Mr Wood the conversation included the following:

> *'I said:*
>
> > *We don't want to waste our time. Can you tell me who is on the NRL Partnership Committee which will allocate the rights? Can you tell me where they come from?*
>
> *Mr Moffett said:*
>
> > *Under the NRL structure, all the key commercial decisions are made by the NRL Partnership Board. There are six people on the Board. Two are nominees of News Limited. They are Macourt and Philip, Looseley [sic] is an independent appointed by News. Colin Love is from the ARL and John McDonald is from the QRL. And then there is Nick Polites [sic] from Easts.*
> >
> > *...*
>
> *I said:*
>
> > *If we put in a better bid, are these guys going to accept it?*
>
> *Mr Moffett said:*

The News block is balanced by other members, and they will make a rational decision'.

1243 On 23 November 2000, Mr Anderson forwarded to Mr Gammell a draft revised offer to the NRL for the NRL pay television rights. The draft offered a cash component of $60 million per annum (exclusive of GST), comprising $30 million payable to the NRL and $30 million directly to the clubs '*as club appearance fee and sponsorship to compensate for lost gate receipts*'. At 7.05 pm that evening, Mr Gammell distributed a revised draft of the letter of offer. Mr Gammell said in the covering note that '*I think I have [Mr Stokes] on side with the structure*'.

1244 The revised draft stated that the offer was $70 million for exclusive NRL pay television and internet rights. The structure of the offer was as follows:

*'**Term***

Seven years from 1 January 2001 (ie: 2001-2007).

(a) The Offer is in cash $70m per annum plus GST payable quarterly in Australian dollars payable as follows:

No. OF SUBSCRIBERS	*TOTAL FEE PAYABLE*	*DISTRIBUTION TO NRL*	*CLUB APPEARANCE FEES & SPONSORSHIP PAYMENTS*
0-500,000	*$40m*	*$30m*	*$10m*
500,000-750,000	*$50m*	*$32m*	*$18m*
750,000-1,000,000	*$60m*	*$34m*	*$26m*
1,000,000+	*$70m*	*$36m*	*$34m*

The fee payable in any year is dependent upon the total number of subscribers connected to the Pay TV systems that carry the NRL product.

The appearance fee & sponsorship payments to the clubs are paid into a pool to be distributed pro-rata to the clubs in compensation for loss of gate receipts due to the wider distribution of the NRL product.

(b) ***Contra***

AUD$10 million per annum + GST to promote the NRL on the Seven Network or any affiliated company'.

1245 Mr Gammell discussed the revised offer with Mr Stokes who agreed with its terms. A copy of the draft was sent to Mr Stokes on 24 November 2000.

9.12.2 An ACCC Interlude

1246 A meeting or teleconference took place on the morning of 24 November 2000 between Messrs Gammell, Anderson, Wise and Wood. The participants discussed Seven's approach to the ACCC at a meeting scheduled for later that day. Following the morning meeting, Mr Wise sent an email to Mr Gammell (with copies to the others) attaching a revised draft offer to the NRL. The email was as follows:

> *'I am still uncomfortable about this, as it relates to our positioning with the AFL.* ***I know we can say it was a dummy bid****, but that just encourages them to the same response on FTA. We may say they will anyway, but I am more focused on the regulators view, I am worried that we pull a response that this is just a big boys fight! I think a bid at $50m + contra (which should be inclusive of gst)* ***gets us there*** *but keeps us in the frame for our positioning on AFL.*
>
> *Maybe I just have cold feet!*' (Emphasis added.)

1247 A telephone hook-up took place at 10.30 am on 24 November 2000 between Messrs Alexander and Cassells of the ACCC and Mr Wood of C7 and Ms Davies of Freehills. Mr Cassells' note of the discussion records the following:

> *'Mr Alexander asked what would happen to C7 if it lost the rights to the AFL. Mr Wood said C7 would go out of business. He made the following points:*
>
> > *AFL is the primary driver of the C7 channel;*
> >
> > *C7's program supply agreement with Optus has a termination clause if C7 doesn't have the AFL; and*
> >
> > *The program supply agreement with Austar expires in 2001 and Austar has indicated in current negotiations about the renewal of supply that it will also want a termination clause in any renewed contract to cover the probability that C7 does not have the AFL.*
>
> *Mr Alexander asked whether C7 wouldn't have anything else worthwhile to supply. Mr Wood said that:*
>
> > *in the summer, C7 broadcasts the Pura Cup cricket competition and*

the National Soccer League but these are not in the same league as the AFL;

it currently has the rights to 5 NRL games which it shares on a non-exclusive basis with Foxsports [sic] as an outcome of the Superleague settlement and these are broadcast on the weekend C7 channel, but these rights have now expired and there is no guarantee that C7 will get any new rights for 2001 onwards;

indeed, it is most unlikely that they will get any new rights since the NRL is 50% owned by News.

...

Asked about the reported $250m bid by Seven for the NRL pay TV rights, Mr Wood said this was true ***but it was a question of survival****. News has last option for 25 years and the most likely outcome would be that News would match its bid.* ***He said the bid was to annoy News and that was about it****. He observed that Foxsports [sic] had only bid $20m for the pay rights and half of that would be transferred back to News through its half ownership, and the rest would go to Nine'.* (Emphasis added.)

Ms Davies' note of the same meeting includes the following passage:

'There was discussion about bidding for the pay rights for the NRL. Shane [Wood] said that Seven was looking at survival. However, News has the first and last rights for 25 years and so the chances Seven succeeding are remote. News will match whatever offer is made by Seven as of course they get 50% of it anyway through their ownership of NRL. He characterised Seven as being annoying but that's about all. AFL by far is Seven's best chance'.

9.12.3 Back to $60 Million Cash

1248 At 4.31 pm on 24 November 2000, Mr Wood's assistant distributed to Messrs Stokes, Gammell and Anderson a revised draft offer to the NRL PEC and a draft covering letter to be sent by Mr Anderson. The draft covering letter included the following:

'Please find attached our revised offer of NRL Pay TV rights. We were disappointed to see that News Ltd papers carried the story of C7's last bid within 12 hours of us confirming the offer. I trust that this will not happen again.

You will see in the attached offer that we are insisting that the revenue be distributed primarily to the clubs so that the money can be used to develop the code, as opposed to persuing [sic] the corporate objectives of the NRL.

> *There has been some speculation that C7 is not serious about it's [sic] bid for NRL rights however, C7 requires a premium sport such the NRL to drive it's subscription business. While I consider the attached offer to be well above market rates C7 needs this property to ensure its survival'.*

The revised draft offer was expressed to be for $80 million per annum. However, it appears that this figure included contra of $10 million, since the cash offer was for a maximum of $70 million per annum inclusive of GST.

1249 Early on 25 November 2000, Mr Stokes forwarded a revised draft of C7's second offer for the NRL pay television rights to Messrs Gammell, Anderson and Wood. The covering email recorded that Mr Stokes had made minor changes and, after discussion with Mr Gammell, had taken off the last sum on the table. The effect of the changes was that the rights fee of $70 million for over one million subscribers had been removed and the maximum rights fee was shown as $60 million for 750,000 to one million subscribers. However, the first paragraph of the revised draft still referred to an offer of $80 million per annum.

1250 In his cross-examination, Mr Stokes could not remember why he had reduced the cash component of the offer from $70 million to $60 million. However, he later recalled thinking at the time that $60 million was the '*top priority we should pay*' for the rights.

1251 In his witness statement, Mr Stokes said that on 25 November 2000 he had held a meeting at his home with Mr Hill (a director of both ARL and NRL Ltd) and Mr Politis to discuss C7's bid for the NRL pay television rights. Mr Stokes stated that prior to the meeting he had been told by Mr Gammell that the NRL Partnership was controlled by a board which consisted of three News representatives and three people independent of News. According to Mr Stokes, the following exchange occurred at the meeting:

> *'Mr Politis said:*
>
> > *What happens if you get both the NRL and the AFL?*
>
> *I said:*
>
> > *Our offer for these rights is regardless of the AFL. Anyway it appears as though we don't have a right to the pay rights on AFL under the first and last, and so we need to have a driver on sports to survive. That is why we are making such a large offer for these rights.*

Later in the meeting I said words to the following effect:

> *In light of the Partnership Committee structure, how will you deal with the News conflicts?*

Mr Hill said:

> *It will be dealt with in the same way as it has been in the past. People step out of meetings or withdraw where there are conflicts.*

Mr Politis said:

> *Although the conflicts certainly exist in theory, in practice it seems to work OK'.*

In his cross-examination, Mr Stokes could remember nothing of this conversation without reference to his statement.

1252 On Sunday, 26 November 2000, Mr Wood, Mr Lewis and Ms Jordan of Clayton Utz met with Messrs Gallop and Moffett. The meeting '*work[ed] through*' C7's draft second offer. Ms Jordan's notes of the meeting show that either Mr Gallop or Mr Moffett explained that the NRL PEC dealt with financial matters, while the board of NRL Ltd dealt with football matters. The draft discussed at the meeting indicated that the maximum cash offer was $70 million for more than one million subscribers. However, a handwritten notation states that the tiered offer would be '*revised in the morning*'.

1253 On 27 November 2000, Mr Hill sent an email to Mr Wood regarding the meeting of Saturday 25 November 2000. The email included the following:

> *'One of the outcomes of Saturday's meeting ... was that the break-up of the figures would change to benefit the clubs more and thus to ensure their support.*
>
> *I rang [Mr Stokes] after the meeting and went through with him what we thought.*
>
> *40 26 14*
> *50 29 21*
> *60 32 28 and so on*
>
> *[Mr Stokes] agreed that those changes could be made'.*

1254 On 27 November 2000, at 9.41 am, Ms Moyes of Seven sent Mr Gammell and Ms Jordan a further draft of C7's second offer for the NRL pay television rights. This was in the form sent later on the same day to the NRL Partnership.

9.12.4 C7 Makes Its Second Offer

1255 At 2.45 pm on 27 November 2000, Mr Anderson sent a fax to Mr Moffett communicating C7's revised offer. The covering letter said this:

> *'Please find attached our revised offer for NRL Pay TV rights. We still believe confidentiality to be in the best interests of both parties.*
>
> *You will see in the attached offer that we are insisting that the revenue be distributed primarily to the clubs so that the money can be used to develop the code, as opposed to providing a cash return to News Limited.*
>
> *There has been some speculation that C7 is not serious about it's [sic] bid for NRL rights however, C7 requires a premium sport such as the NRL to ensure the viability of it's [sic] subscription business. While I consider the attached offer to be well above market rates C7 needs this property to ensure its survival'.*

1256 The letter of offer was addressed to Mr Moffett '*Chief Executive Officer National Rugby League*'. The offer was said to be '*$70 million per annum for exclusive Pay Television and Internet rights to the NRL*'. The fee payable was described as follows:

> *'(a) The Offer is in cash A$60M per annum including GST payable quarterly in advance as follows:*
>
> *The fee payable in any year is dependent upon the total number of homes subscribing to the Pay TV services that carry the NRL product.*

NO. OF SUBSCRIBERS	*TOTAL FEE PAYABLE*	*DISTRIBUTION TO NRL*	*CLUB APPEARANCE FEES & SPONSORSHIP PAYMENTS*	*JUNIOR DEVELOP-MENT*
0-500,000	*$40m*	*$25m*	*$14m*	*$1m*
500,000-1,000,000	*$50m*	*$28m*	*$21m*	*$1m*
1,000,000+	*$60m*	*$31m*	*$28m*	*$1m*

The appearance fees & sponsorship payments to the clubs are paid into a

> *pool to be distributed pro-rata to the clubs in compensation for loss of gate receipts due to the wider distribution of the NRL product.*
>
> *While I understand the NRL Partnership currently has a revenue distribution arrangement which may not be able to accommodate this dissection, I believe the magnitude of the offer justifies the request to accommodate this payment methodology'.*

The letter stated that contra would amount to $10 million per annum, including GST.

1257 In his evidence, Mr Gammell acknowledged that it may have been his idea to include the paragraph referring to '*compensation for loss of gate receipts*'. He also acknowledged that he had made no inquiries and did not know whether any diminution in gate receipts could justify a payment of $28 million per annum to the clubs. He said that in retrospect it would have been better to say that the payments were '*in support of the clubs*' *finances generally*'.

1258 The letter of offer also included the following features:

> C7 would obtain marketing and hospitality entitlements;
>
> C7 would also be entitled to '*on-sleeve logo recognition for every team*';
>
> the licence fee would be reduced by $1 million for every match broadcast by Nine above its allocation of two free-to-air matches per week; and
>
> C7 would be granted '*an observer on the NRL board*'.

1259 Mr Gammell gave the following evidence as to the second and third of these features:

> He appreciated that the terms governing the supply of NRL free-to-air matches to Nine prohibited player clothing to be identified with other free-to-air broadcasters; that the choice of '*C7*' for the logo recognition could be interpreted as identifying the clothing with another free-to-air broadcaster; and that Nine would be likely to object to the terms. (Mr Gammell also maintained, however, that the object of the logo requirement was to promote C7 and that any promotion of Seven was a '*collateral benefit*'.)
>
> Mr Gammell was involved in including in the offer the clause relating to a $1

million penalty, despite knowing that under the then current terms with the NRL Partnership, Nine only had to pay $300,000 for each additional match it chose to broadcast. Mr Gammell acknowledged that the effect of the penalty was to transfer to the NRL Partnership the financial risk associated with an event over which it had no control and, for that reason, would be highly unattractive to the NRL PEC. (Mr Gammell also said that the reason for including the penalty provision was to protect C7, which would be paying a very high price for the rights – more than $300,000 per game.)

One of Mr Gammell's objects in requiring portion of the licence fees to be paid to the clubs was to '*create dissension within the [NRL PEC]*'. Mr Gammell acknowledged that the effect of the offer was to create a conflict for the members of the NRL PEC who were interested in the clubs and that he intended to highlight that conflict. Mr Gammell also acknowledged that he wished to create dissension between News and ARL and that he realised the form in which the offer was structured would not be particularly appealing to News. However, he claimed that he had thought that the offer might have some appeal to News because of the amounts being retained in the game.

1260 Mr Wood went overseas on 27 November 2000 and, after his return on 2 December 2000, played a relatively minor part in C7's bid for the NRL pay television rights. All decisions, so far as he was concerned, were then in the hands of Mr Gammell and Mr Anderson.

9.13 C7's Second Offer Is Considered

1261 On 27 November 2000, a fax was sent from '*NRL Legal*' to Mr Philip. This set out a list of issues to be resolved in relation to C7's second offer for the NRL pay television rights. One issue identified was as follows:

'What platform will carry C7:

- *Optus Vision.*
- *Foxtel.*
- *Telstra cable (grouped with other channels) – depends on outcome of ACCC arbitration and litigation …*

- *Austar [?]*

Even if C7 view prevails, how long will it be before they get up and on-air on Foxtel cable [?]'.

1262 Other issues included:

whether the NRL Partnership would accept distribution to clubs;

the rights with respect to players' jerseys and ground signage; and

the $1 million penalty.

The issues identified in the fax were incorporated in a further document headed '*NRL Pay-TV Negotiations*'.

1263 A document prepared by '*NRL Legal*' on 27 November 2000 compared in chart form aspects of the respective Fox Sports and C7 offers. In relation to '*Proposed Platform/Sub-licensing*', the chart recorded that Fox Sports would be on Foxtel and Austar. The column for C7 contained only a question mark under this heading.

1264 A meeting of the NRL PEC took place in the evening of 28 November 2000. Shortly before the meeting, Mr Philip prepared an analysis of C7's second offer. He estimated the '*Cash to NRL*' as $22.73 million exclusive of GST, on the basis that there were '*no guarantees fees will exceed minimums based on 500,000 subscribers*'. Mr Philip assessed the offer as having a '*Potential Total Cash*' value of $15.93 million per annum, allowing for '*Foregone Internet Revenues*' ($2 million per annum) and '*Foregone Naming Rights Sponsorship Revenues*' ($2 million per annum), assuming Nine showed four games per season over and above its allotted two games per week. (The latter assumption would involve a net penalty to the NRL Partnership of $2.8 million – that is, 4 x $1 million, minus 4 x $300,000.) Mr Philip compared this with the Fox Sports offer which he recorded as being worth a guaranteed $22 million per annum, with internet and naming rights left unencumbered. Mr Philip gave evidence that he took the document to the NRL PEC meeting where he made some points based upon its contents.

1265 The minutes of the NRL PEC meeting recorded that C7's second offer was tabled. The NRL PEC resolved to respond to C7 on a number of matters, including the following:

*'(a) **Optus***

... ask C7 for an "unbundled offer" [in relation to Optus] dealing with Pay Television rights only.

(b) Channel Nine Payment Provision

... advise C7 that:

(a) the payment of $1 million per match if Nine elects to take extra matches pursuant to its rights was unacceptable;

(b) the maximum amount NRL would be prepared to pay was $300,000 (or $150,000 to each of C7 and Optus in the event that Optus accepted non-exclusive rights) within 3 days of receipt of that amount from Channel Nine.

(c) Subscribers/Sub-Platform/Sub-Licensing

It was noted that there were a number of related issues which require[d] precise commitment in order to ensure that rugby league was available to as many fans as possible.

(d) Distribution of License [sic] Fees

... advise C7 that its position [on distribution of licence fees to clubs] was unacceptable as distributions were a matter for NRL's discretion to distribute revenue in the best interests of the game [and] should not be fettered in any way.

...

(g) Player jerseys/signage on and at grounds

The likely reaction of Channel Nine to the placement of C7's logo on jerseys and ground signage, was discussed. It was resolved to highlight this issue to C7'.

1266 A meeting of the CEOs of the NRL clubs took place on 30 November 2000, at 10 am AEDST. The meeting was chaired by Mr Moffett and attended by Mr Gallop. At 10.10 am AEDST on that day Mr Crawley sent an email to Mr Gammell, who was in Perth. The email was as follows:

'The NRL + club CEOs meeting begins 10am Sydney time. David Gallop has called to see if you are comfortable with offer being tabled? with restrictions mentioned yesterday regarding no paper leaving the room'.

Mr Gammell gave evidence that he did not recall seeing the email. However, the reference to a conversation the previous day confirms that Mr Gammell had approved disclosure of C7's bid to the CEOs on a confidential basis.

1267 The minutes of the meeting recorded the discussion concerning the competing bids, as follows:

> *'D Moffett discussed the current negotiations with C7 and Foxsports [sic]. The current offer from C7 was distributed by D Gallop. D Gallop discussed the issues included in the offer and answered questions posed by the CEO's [sic]. The confidential nature of the offer was stressed to all participants'.*

1268 Mr Gammell held a telephone conference with Messrs Love and Politis at 2.30 pm AEDST on 30 November 2000, after the meeting of CEOs had concluded. Mr Gammell said in evidence that Mr Hill had arranged the meeting so that Mr Gammell could discuss C7's bid with ARL's representatives on the NRL PEC. Mr Gammell's notes of the meeting show that there was discussion about some of the '*major issues that have arisen*'.

1269 In his evidence, Mr Gammell agreed that there had been talk at the meeting about GST. He acknowledged that it had been made clear by Messrs Moffett, Love and Politis that any bid should be exclusive of GST, yet C7 had deliberately framed the offer to be inclusive of GST. Mr Gammell could not remember why C7 had not acceded to the request, but pointed out that it was merely a mathematical exercise to convert the bid to one exclusive of GST.

1270 At 2.08 pm on 30 November 2000, Mr Moffett sent a fax to Mr Anderson responding to C7's second offer.

> ***'1. Optus/Channel 9***
>
> *As advised previously, NRLP [NRL Partnership] has an obligation to Optus in respect of Pay Television. Your offer for Pay Television rights includes various terms that make it impossible for NRLP to fulfil its obligation to ... Optus.*
>
> *...*
>
> *If you wish to proceed with your offer NRLP requires the offer in terms which deal only with Pay Television.*

...

NRLP would be happy to receive a separate bid for any additional rights but any Pay Television offer cannot be conditional on the granting of those rights.

...

We do not anticipate that Channel Nine will readily accept the distinction between C7 and a free to air affiliate of the Seven Network, particularly bearing in mind the form of your logo and the makeup of your name.

2. Subscribers/Platform/Sub-licensing

There are a number of related issues which we seek your position on:

(a) we require a precise definition of how it is proposed to calculate the number of subscribers.

(b) can you give a commitment regarding the proposed platforms which will carry NRL for the term of the agreement;

(c) will all or some NRL matches be available on a basic service or a tiered service or pay per view or a combination (please provide full details); and

(d) ...

3. Distribution of Licence Fees

A number of contracts entered into by NRLP, including the 14 Club Agreements, require all broadcasting revenue to be exclusively paid to NRLP. We do not accept the proposal to oblige the NRLP to distribute the licence fees between NRL, the Clubs and a junior development program. Distributions are a matter for NRLP and we would need compelling reasons why NRLP's discretion to distribute revenue in the best interests of the game should be fettered in any way.

...

6. Payment Provision for Extra Matches on Channel Nine

We cannot agree to a payment of $1 million per match of Nine elects to take extra matches pursuant to its rights. We would be prepared to pay you $300,000 (or $150,000 to each of you and Optus in the event that Optus accepts non-exclusive rights), within 3 business days of receipt of that amount from Channel Nine.

7. Observer on Board

We do not agree to a C7 representative being an observer on the PEC or NRL Board. However, we would agree to hold weekly meetings with representatives of C7 at an operational level and invite representatives of C7 to meet with NRL Board members to discuss any concerns on a regular basis.

8. GST

NRLP requires any licence fees and contra to be exclusive of GST'.

1271 Mr Moffett's letter asked C7 to indicate whether the matters set out in his earlier letter of 20 November 2000 (which the later letter incorrectly said had been dated 21 November 2000) were acceptable to C7. Mr Moffet requested C7's response by Monday, 4 December 2000. A copy of his letter was forwarded to Mr Gammell.

1272 Despite the request for C7 to respond to the issues raised in the letter of 20 November 2000, C7 never did respond.

9.14 Terms of the Offer Are Disclosed

1273 At 2.51 pm AEDST on 30 November 2000, Mr Stokes spoke from China with Mr Tim Allerton, who provided public relations services to Seven through City Public Relations Pty Ltd. After saying initially that he did not recall the conversation, Mr Stokes accepted that he had asked Mr Allerton to brief the press about C7's offer. Mr Stokes claimed that '*it may have been a defensive reply that we were making at the time*'. In re-examination, Mr Stokes explained that a '*defensive reply*' was a response to a previous article or item in the media.

1274 At about 4.50 pm on 30 November 2000, Mr Ray Hadley appeared on Radio 2UE in Sydney with compere Mike Carlton. The transcript of the interview is as follows:

'RAY HADLEY: *Today there was a presentation to the chief executives of the 14 NRL clubs, and I can reveal details of that exclusively to your listeners. They've all signed up confidentiality agreements but someone couldn't keep their trap shut so I'll tell you what happened. It's an offer over seven years, $60 million a year. Now there's a couple of complex issues here.*

MIKE CARLTON: *$60 million a year?*

HADLEY: *Yes, made up of this, $28 million to the National Rugby League, $21 million to the 14 member clubs, $1 million in junior development, that makes $50 million, and $20 million in contracts to publicise those Pay TV games on the Seven Network.*

Now the problem arises, they've got $1.5 million each, they'll be ecstatic with that news, on top of the $2 million a year they get already from the NRL which comes from News Limited.

Now here's the fly in the ointment. The decision will be made by a six member partnership board, three members of the board, Nick Politis from the Sydney City Club, the chairman of that club, Colin Love, chairman of the ARL, and John McDonald, chairman of the QRL.

But here's where it gets interesting. The other three members come from News, because News fund the NRL.

...

If it's split three/three there's no provision for a casting vote, and the clubs will be up in arms if in fact the NRL partnership board knock back this unbelievable offer, from C7/Channel Seven. So I think there's a fair bit of, you know, tit for tat in this, Channel Seven and C7 are obviously very upset at Fox and Channel Nine muscling in on their AFL'.

1275 At 5.14 pm on 30 November Mr Anderson, Mr Wood and Ms Plavsic received an internal email reporting that Ray Hadley had revealed on radio the details of C7's proposal to the NRL. The email reported that Mr Hadley had said that confidentiality agreements had been breached. The email was forwarded to Mr Gammell about an hour later. There is no evidence that any of the recipients expressed concern about the apparent disclosure of the terms of C7's bid.

1276 At about 6.13 pm, Mr Hadley repeated much the same material on 2UE as he had broadcast earlier. He referred to the problem that C7 have to '*make it viable somewhere between 500,000 and a million subscribers*', suggesting that he was aware that C7 had made a tiered bid.

1277 At 6.36 pm on 30 November, Mr Francis sent an email to Mr Stokes, Mr Gammell and others, as follows:

> *'A note to let you know that Tim Allerton and I have been out in the market this afternoon on the NRL – following the briefing of the club presidents by the NRL Executive.*
>
> *Keeping with the relative confines of commercial confidentiality –* ***although that's been blown by the verbal club presidents*** *– we've put forward our arguments on News' three representatives on the six member NRL broadcast rights committee and ACCC implications.*
>
> *It will be interesting to see how the Telegraph writes the story tomorrow'.* (Emphasis added.)

1278 The following day, 1 December 2000, a series of articles appeared in national and local newspapers discussing the terms of C7's offer to the NRL PEC. An article by Mr Roy Masters in the *Sydney Morning Herald* provided further details of the offer. The article included the following passages:

> *'The Seven supremo has bulked up in the arm wrestle over pay-TV football rights. National Rugby League clubs were excited last night following the tabling of the richest TV deal in Australian sport a half-billion-dollar bid for pay-TV rights from the Seven Network's subscription arm, C7 Sport.*
>
> *Clubs would receive $2 million each per year for seven years if the five live rugby league games shown by the Kerry Stokes-owned network attracted one million pay-TV subscribers. But chief executives fear Fox Sports, 50 per cent owned by Rupert Murdoch's News Ltd, will exercise a first-and-last-rights tender which would cut them out of any direct payment.*
>
> *Because News Ltd also owns 50 per cent of the NRL, conflict-of-interest questions are certain to be raised when the NRL board votes on the two bids.*
>
> *...*
>
> *C7, a content provider for sports programming available to the three pay-TV channels Foxtel, Optus Vision and Austar has made a cash-heavy offer, tiered in accordance with the number of subscribers who take the NRL package. A constant contra component of $10m and a payment of $1m for junior development applies, irrespective of the number of subscribers attracted.*
>
> *The three-tiered deal involves:*
>
> > *A payment of $50m, of which $40m is cash, with $25m paid directly to the NRL and $14m to the clubs if the number of subscribers is 500,000 or less.*

A payment of $50m cash, of which $28m is paid to the NRL and $21m to the clubs if the number of subscribers is between 500,000 and 1 million.

A payment of $60m cash, where $31m is paid to the NRL and $28m to the clubs if the number of subscribers exceeds one million'.

1279 An article was published the same morning in the *Australian Financial Review* written by Mr Luke Collins. The article included the following:

'Seven's offer is based on a sliding scale which depends on the number of pay-TV subscribers to its channels featuring the code.

...

Under the bid, if C7's coverage is between 500,000 and one million households, Seven is offering about $50 million cash annually, with about $28 million flowing to the NRL and $21 million directly to the clubs.

If the number of pay-TV households exceeds one million which would require C7 to be picked up by Foxtel the company will pay $60 million cash a year, again split between the NRL and the clubs. Both offers are for seven years and include additional advertising and other non-cash elements.

...

Key Points

News Corp executives make up half the panel to decide on the NRL pay-TV rights.

League insiders are worried the panel's impartiality may be compromised'.

1280 At 6.16 am on 1 December 2000, Mr Allerton sent an email to Messrs Stokes, Gammell and Francis referring to briefings he had given to the press:

'I briefed Ray Hadley, the main League commentator at 2UE yesterday and he pushed our line about the attractiveness of our offer and the fact that a conflict of interest may exist in the partnership committee making the final decision, before he was pulled up by Hartigan during the evening and straightened his line.

I also briefed Roy Masters (SMH) and Luke Collins (AFR) who pushed our lines very hard, while Dean Ritchie from the Telegraph wrote a very straight piece on our offer – which is the best we can hope for!

The coverage looks great this morning [Steve] Crawley is happy) and we do not have any fingerprints on it.

Pete, I will send over copies of the articles this morning'.

1281 Mr Stokes was asked in evidence about the effect of Mr Masters' article:

*'MR HUTLEY: Now, you knew that it was Seven's position that from 1 December 2000 it was the position of Seven, which you were a party to, that nothing about the NRL offer was confidential; that's correct, isn't it?---**I accept that nothing from 1 December was confidential**. It had all been covered in that, certainly in that article, yes.*

***And you would agree with me that Seven did nothing to establish any new relationship of confidence between it and the NRL, did it?---Not that I am aware of, Mr Hutley**'.* (Emphasis added.)

1282 On 4 December 2000, Mr Francis sent an email to Messrs Stokes, Gammell and Wise concerning a follow-up article on the bid for NRL rights:

'A nice piece from a close Packer confidante – following, no doubt a conversation with Steve Crawley.

It's a nice follow-up to the Roy Masters article in the Sydney Morning Herald on Friday on C7's bid for NRL.

I spoke to Roy, but the real hard yards were clearly done by Steve Crawley who has a close personal relationship with Masters and Gould.

It probably also helps that both Gould and Masters are on our C7 rugby league payroll, but we won't worry about that'.

1283 Mr Philip's evidence was that he read a number of the newspaper articles and '*inferred ... that the details of Seven's bid had been made available generally to the media*'. He also said that he thought that there may have been a leak from C7 to Mr Masters.

9.15 Further Discussions

1284 According to Mr Philip, shortly after 1 December 2000 he had a conversation with Mr Macourt in which they agreed that the effect of the newspaper coverage would be that C7's bid would be perceived as being better than that of Fox Sports. It was also agreed that Fox Sports would have to be seen as having offered at least $39 million per annum for the

NRL pay television rights. Mr Philip said that this figure was based on Mr Masters' report that C7's offer was for $25 million to be paid to the NRL and $14 million to the clubs if the number of subscribers did not exceed 500,000.

1285 Mr Philip gave evidence that, as from 1 December 2000, he did not consider the offers made by C7 before that date to be confidential. Nor did he consider that C7 was serious in claiming confidentiality. Rather he considered it a tactical device to prevent Mr Macourt and him from participating fully in the bidding process and to enable C7 to justify termination of any agreement resulting from the NRL PEC's acceptance of its offer. Mr Philip also claimed that, while he regarded himself as free to use the details of C7's bid, he did not wish to expose himself or Fox Sports to a spurious claim for disclosure of confidential information. He therefore thought it undesirable for him to disclose the details of C7's offers in his own dealings.

1286 Mr Philip said that from early December he began to formulate ways for Fox Sports to finance a revised bid for the NRL pay television rights. As part of that process, he decided that he would attempt to persuade Telstra to contribute to the bid through the NRL naming and internet rights and to approve Fox Sports' licensing of NRL coverage to Optus. At about this time, he also prepared the '*Fallback Scenarios*' document to which reference has already been made ([1039]).

1287 On 4 December 2000, Messrs Gammell and Anderson met with Messrs Moffett and Gallop. No notes were made of the meeting. Mr Gammell's account of what was said is as follows:

> *'I said:*
>
> > *We are concerned that you have already shown that you want to change the rules by virtue of pulling out the appearance fees. Why do you want us to keep changing the bid? All you're doing is taking away pieces of value particularly for the clubs. We will construct an offer to you which we will be submitting which will take all of that out as you requested and we will build it on a per subscriber base. You should accept the best financial offer.*
>
> *Either Mr Moffett or Mr Gallop said:*
>
> > *We'll decide what's in the best interests of the NRL, no one else, so we'll work out how the media rights will be sold. But we are trying to*

make sure that the bid is capable of being accepted. We need to make sure that what you offer to provide will be equivalent as far as the rights to be sold are concerned. So you need to take out offers for internet rights, as they may impact on other rights.

I said:

Fine. We don't mind if you accept elements of our bid, we'll make sure our bid can be accepted in part. You keep knocking us back on technicalities, so I'll make sure there are no problems on that front. But you should be putting the bid up for decision. Either someone will top it or you will have our bid. There is no downside for you. We really want you to accept our offer. To the extent you cannot accept parts of it, exclude those bits you cannot accept but accept the offer because we want to know that the best offer has been put up, and you haven't just been pushed into a corner and told to sign.

Either Mr Moffett or Mr Gallop said:

You have to remove the $1 million penalty regarding Nine.

I said:

No, we can't do that or we will be exposed.

Mr Moffett said:

We have been told that you won't get on to Foxtel and you are not going to get access.

I said:

Yes we are going to. We have constructed this bid so that there is a strong incentive for you to apply pressure through your clubs. We will give you a good minimum and we want you to participate alongside us and we want to encourage you to help us to get on to Foxtel, and when you do help us get onto Foxtel you get more money. You're only being told one side of the story by News. We have won the protected contractual rights litigation and, with the assistance of the ACCC, we are confident of winning access to the cable. You should get your own advice about this and not rely on what News tells you.

Mr Gallop said:

Well, that's interesting. We have never heard it put that way'.

Mr Gammell was cross-examined about this account. Neither Mr Moffett nor Mr Gallop gave evidence.

9.16 C7's Third Offer for the NRL Pay Television Rights

9.16.1 The Offer

1288 C7 made its third offer for the NRL pay rights on 5 December 2000. The offer was addressed to Mr Moffett as CEO of '*National Rugby League*'. The offer was not expressed to be confidential, a fact of which Mr Stokes said he was unaware at the time. Mr Gammell collaborated in the drafting of the offer.

1289 The letter stated in the opening paragraph that the offer was $66.5 million for the sole and exclusive NRL pay television rights, together with an option to acquire marketing and hospitality rights for $3.5 million. The offer was for seven years (2001 to 2007 inclusive) and included five home and away matches per week, but not the '*Free-to-air Matches*' as defined in the letter (that is, two home and away matches each week selected by Nine, as well as finals matches and State of Origin matches). C7 also sought rights to the Free-to-air Matches on a delayed basis.

1290 The rights fees were described as follows:

> *'The Offer is in cash up to $A62.5M per annum including GST payable quarterly as follows:*
>
> *The fee payable in any year is dependent upon the total number of homes subscribing to the Pay TV services that carry the NRL product.*

NO. OF SUBSCRIBERS	***TOTAL FEE PAYABLE***
0-500,000	*$36.5m*
500,000-1,000,000	*$48.5m*
1,000,000+	*$62.5m*

> *C7 understands that as a result of the increased Pay TV rights fees, the NRL will increase its distribution to the clubs by $7m p.a. from $28m p.a. to $35m p.a.*
>
> *NRL represents and warrants to C7 that the provisions of the partnership arrangements between National Rugby League Investments Pty Limited (**"NRLI"**) and Australian Rugby Football League Limited (**"ARL"**) known as the National Rugby League Partnership include as at the date of this letter, arrangements pursuant to which a further $8m p.a. may be distributed to the*

> *NRLI and ARL. C7 requires any surplus to be applied in the best interests of the NRL competition. Once the existing distribution arrangements have expired, NRL will ensure that apart from any distribution of money to participating clubs all monies paid by C7 will be retained by the NRL for use in junior development and for the best interests of NRL Competition'.*

In addition, contra was to be $4 million, inclusive of GST. The figure of $66.5 million presumably represented the maximum total fee of $62.5 million plus contra of $4 million.

1291 The offer contained the following provision relating to the number of subscribers:

> *'The number of subscribers will be the average number of subscribers each quarter. C7 will keep accurate records in relation to the number of subscribers. NRL (including its external auditor) will be entitled, at its cost, to conduct an audit for the purpose of verifying subscriber information and will be given all necessary assistance and access to perform this task'.*

1292 If Nine broadcast more than two free-to-air matches in a week, the licence fee payable by C7 was to be reduced by $1 million per match, but could not be reduced below $25 million per annum, including GST. C7 was to have an observer on the '*NRL board'* if it was discussing or deciding upon issues relating to scheduling or broadcasting. If C7 was successful in obtaining the exclusive NRL pay television rights, it would have the option of purchasing for $3.5 million (inclusive of GST) marketing and sponsorship entitlements, including '*on-sleeve logo recognition for every team*'.

1293 Mr Stokes was questioned about his understanding of the statement in the offer that the fee payable was '*dependent upon the total number of homes subscribing to the Pay TV services that carry the NRL product*'. Mr Stokes' evidence was that the fee would be determined by reference to the total number of subscribers to the platform that carried the NRL, regardless of the number of subscribers that actually took C7 and its NRL service (for example, if C7 was on a tier). Mr Stokes' explanation for this apparently onerous construction of the offer (from Seven's point of view) was contained in the following passage:

> *'HIS HONOUR: Mr Stokes, why would Seven agree to pay a fee to the NRL calculated by reference to the total number of subscribers if, for example, only 50 per cent of subscribers took a service from C7 that included the NRL? --- The original price we had offered, your Honour, was 60 million.*
>
> *Yes? --- Part of the philosophy for the table was to give the rights holders, the*

NRL themselves, an incentive to help us get on to Foxtel. We were always confident that we were prepared to pay $60 million, and that didn't have any conditions on it. We felt that by having it by the homes passed, not by subscribers to our channel, that was a fair alternative.

But you would have to negotiate with Foxtel to get on Foxtel, wouldn't you? --- If we indeed were to be, yes, we would.

It would not be assured, would it, in those circumstances that Foxtel would put C7 on basic or at least put the NRL through C7 on basic? --- No, it wouldn't be'.

1294 Mr Macourt's contemporaneous note on his copy of C7's offer was that the formula was '*not clear [whether it meant] tier subscribers or basic*'. Mr Macourt said in his statement that by the time of the NRL PEC meeting on 13 December 2000 he was satisfied that payment was to be calculated by reference to the number of subscribers to tiers taking C7. He was not challenged on this evidence. Mr Philip said that at the time of the offer he did not think that it referred to the number of homes carrying the platform, as distinct from those actually taking the C7 channels.

9.16.2 Legal Advice

1295 Early in the morning of 6 December 2000, Mr Finch SC gave advice in conference to Seven's solicitors, Freehills. The purpose of the meeting was to discuss whether any action was available to Seven in relation to the bidding process for the AFL free-to-air and pay television rights. The effect of Mr Finch's advice was that the ACCC had a maximum 60 per cent chance of restraining Foxtel or Fox Sports from acquiring the AFL pay television rights, but that Seven would have fewer prospects of success in any action it might bring itself.

1296 Two days later, on 8 December 2000, Mr Finch gave further advice in conference on similar issues. He expressed the view that if C7 won the NRL pay television rights, this would be fatal both to an action for damages by Seven under the *TP Act* and to any proceedings brought by the ACCC seeking restraining orders against the bidders for the AFL broadcasting rights.

9.16.3 Seven Clarifies

1297 On 6 December 2000, Mr Anderson, on behalf of C7, faxed a letter to Mr Moffett as '*Chief Executive Officer National Rugby League*' confirming that acceptance of the pay

television rights, as described in the offer of 5 December 2000, was '*not contingent on C7 being granted the Marketing and Hospitality rights as described [in] the offer'*. The letter stated, however, that if the pay television offer was accepted, C7 '*would require a first and last option over the Marketing and Hospitality rights'*. The letter, which was not expressed to be confidential, was drafted by Mr Gammell as a response to one of the complaints made by Mr Moffett about the terms of C7's 5 December offer.

1298 By a fax to Mr Gallop sent on 7 December 2000, Mr Anderson '*further clarif[ied]*' C7's position, as follows:

> *'If C7 is successful in obtaining exclusive Pay Television Rights to the NRL as described in our letter of offer AND the NRL are offering marketing and hospitality rights as we have detailed, then C7 would require the first and last option to acquire those marketing and hospitality rights'.*

Although Mr Anderson signed the letter, he did not draft it. Mr Gallop duly sent a copy of the letter to Mr Philip. Once again the letter was not expressed to be confidential.

9.16.4 The Offer Is Revealed

1299 The *Sydney Morning Herald* of 7 December 2000 published an article by Mr Roy Masters revealing some of the terms of C7's 5 December offer. The article included the following passages:

> *'C7 has improved its NRL offer but remains wary of Channel 9.*
>
> *Kerry Stokes's subscription arm, C7, has made a revised pay-TV offer to the National Rugby League, shedding the merchandising conditions of the deal but maintaining insurance against "an act of bastardry" by rival Kerry Packer.*
>
> *C7 has removed from its bid the demand for ground signage, sleeve logo, Internet and tables at corporate functions.*
>
> *It has offered to pay for these services. This means the half-billion-dollar offer for the next seven years is for pay-TV rights only.*
>
> *However, C7 insists a clause remains, allowing for a discount of $1 million for each additional free-to-air game Packer televises on his Nine Network.*
>
> *An insider described the clause as insurance against "an act of bastardry" by Packer, who owns 50 per cent of rival pay-TV bidder Fox Sports. A clause in the existing free-to-air deal between Packer and the NRL allows Nine to buy*

additional free-to-air games per week for $300,000 each.

This means Packer could outlay $1.5 million for the five pay-TV games available weekly, broadcast them at 2 am daily and deprive C7 of content.

Nine has never exercised this option but pay-TV rights over the past three years were shared between Fox and Optus, meaning that any games taken would have undermined Packer's relationship with News Ltd, partners in carrier Foxtel and program maker Fox Sports.

Nevertheless, C7 has offered the NRL a floor price for the rights which exceeds Fox Sports' present offer of $22 million a year.

In other words, if Packer stripped C7 of games, the NRL would still receive more than the rival bidder has tabled.

C7's revised offer follows a letter from the NRL expressing concern about aspects of the original deal'.

Mr Stokes denied reading this article at the time it appeared.

9.17 Fox Sports' Meeting of 5 December 2000

1300 In the meantime, the board of Fox Sports met at 11 am on 5 December 2000. The minutes recorded the discussion relating to the NRL pay television rights as follows:

'Nick Falloon stated that he wanted to know what process was in place by the NRL before the company made a revised offer. It was noted that the NRL had not done this to date. In the meantime, management continued to work on revised bid figures, noting that the press indicated that its initial bid was below that of C7's apparent bid. It was agreed that Management would continue to consult with the board regarding this issue, pending a revised bid to be made to the NRL in the near future'.

1301 Mr Malone attended the meeting as the CEO of Fox Sports. Prior to the meeting, he circulated a report that set out the position that had been reached to that point in relation to Fox Sports' bid for the NRL pay television rights. At the meeting, Mr Malone outlined what the newspaper articles had revealed about C7's bid. He expressed the view that it was imperative for Fox Sports to increase its bid so as to '*win this deal*'.

1302 Both Mr Philip and Mr Macourt attended this meeting. Both knew the contents of C7's bid. However, Mr Macourt's evidence was that neither he nor Mr Philip confirmed the accuracy of the newspaper reports. According to Mr Macourt, this was because they were

acutely conscious of the conflict of interest they faced having regard to their membership of the NRL PEC.

9.18 Mr Philip Attempts to Persuade Telstra

9.18.1 First Attempt

1303 As noted in Chapter 8, on 5 December 2000, Mr Greg Willis of Telstra reported to Mr Akhurst that Mr Philip had contacted him concerning the bid for the AFL broadcasting rights. In the conversation, Mr Philip expressed the view that Optus would not take NRL programming unless it got *Fox Sports 2*. Mr Willis noted in his email that Telstra had not allowed this to be done because it would break the program supply arrangements with Foxtel. Mr Philip suggested that if Optus would not take the NRL, Foxtel should pay an additional $8 million per annum for the NRL pay television rights.

1304 In the morning of 6 December 2000, Mr Philip faxed a draft term sheet to Mr Gallop. The term sheet set out a proposal by which Telstra could become the naming rights sponsor of the NRL Competition. The fee was to be $5 million per annum plus CPI increases. Mr Philip sent this fax after discussing with Mr Gallop the possibility that Fox Sports might be able to persuade Telstra to take up the naming rights as part of the bid for the NRL pay television rights.

1305 Later on 6 December 2000, Mr Philip sent a fax to Mr Greg Willis at Telstra Media headed '*NRL and AFL*'. Mr Philip referred to separate documents in which Mr Blomfield of Foxtel Management had supported an earlier request by Mr Philip to Telstra to endorse Foxtel's bid of up to $30 million per annum for the AFL pay television rights. Mr Philip's fax attached two draft term sheets detailing proposals Mr Philip had previously put to Mr Willis. One term sheet provided for Telstra to acquire internet rights, including advertising and sponsorship rights to the transmissions, for an aggregate sum of $5 million per annum. The second term sheet related to naming rights. Mr Philip also enclosed a draft agreement which provided that Telstra, if requested by Fox Sports, would agree as follows:

> *'(a) to offer to enter into agreements with NRL on a date nominated by Fox Sports (not after 31 January 2001) in accordance with the attached term sheets;*
>
> *(b) on the condition that Fox Sports procures supply of NRL coverage to*

> *FOXTEL as part of Fox Sports 1 and 2 for no additional fees (other than as provided under (c) below) (with the right to take 1 match per week live on Fox 8), Telstra has no objection to Fox Sports supplying the NRL coverage to any person including C7, provided Fox Sports does so on no better terms than the NRL coverage is made available to FOXTEL;*
>
> *(c) to FOXTEL (and Telstra must procure its directors on FOXTEL to vote in favour of such payment), paying Fox Sports $8 million per annum ... for 6 consecutive years, unless Fox Sports secures the agreement of C7 or Optus Television to acquire NRL coverage from Fox Sports.*
>
> *Telstra's obligations are conditional on NRL selling NRL pay tv rights to Fox Sports for 6 years commencing 2001 on or before 31 December 2000'.*

1306 Apart from Mr Philip's approach to Telstra on 29 August 2000 in relation to the supply of Fox Sports to Optus ([1182]), this was the first proposal put by News to Telstra concerning Fox Sports' acquisition of the NRL pay television rights. As I have previously noted, Telstra's consent to the supply of Fox Sports to a third party was required because of cl 7 of the Umbrella Agreement. This provided that where News or its '*Affiliates*' (including, for this purpose, Fox Sports) held exclusive rights to exhibit sporting events, News had to ensure that the rights would be made available exclusively to the '*Alliance*' (that is, Foxtel).

1307 Shortly after Mr Philip sent the fax to Mr Willis, Mr Gallop faxed a document to Mr Philip analysing C7's offer of 5 December 2000. Mr Gallop observed that the offer was still not for the NRL pay television rights only and that the option to take up marketing and hospitality rights for $3.5 million could not be offered to Optus. He pointed out that the fee would be reduced to $22.5 million (exclusive of GST) if Nine took extra matches. Mr Gallop also raised a number of issues relating to the bid, including the restrictions on future distribution of money and the fact that the offer effectively prevented the NRL Partnership from granting internet rights to any other party.

1308 On 7 December 2000, Mr Philip faxed Mr Akhurst some notes he had prepared ahead of a scheduled meeting between Mr Akhurst and Mr Willis. The notes covered aspects of both Foxtel's bid for the AFL pay television rights and Fox Sports' bid for the NRL pay television rights. Mr Philip's observations on the NRL bid included the following:

> *'FOXTEL currently pays approximately $13 million (rights fees plus production) for non-exclusive NRL rights.*

NRL is the major winter sport in Queensland and New South Wales.

The NRL rights may be acquired by C7. If this occurs it is prudent to expect that FOXTEL will be expected to pay C7 in excess of current costs (particularly bearing [in] mind the reported prices being offered by C7) to recapture the NRL.

Fox Sports is prepared to bid for NRL with the support of FOXTEL and Telstra to enable Fox Sports to supply NRL as part of Fox Sports 1 and 2 for no additional fees.

To achieve this, Fox Sports must better the C7 bid.

To do this, Fox Sports needs:

> *(a) Telstra's assistance in the form of a bid for NRL internet rights, and naming sponsorship rights, for the aggregate amount of $10 million per annum;*
>
> *(b) fall back support from FOXTEL in the event that Fox Sports cannot resell NRL coverage to C7 or Optus Television to defray part of the cash component of the Fox Sports bid – Fox Sports seeks a fall back commitment from FOXTEL in the amount of $8 million if Fox Sports cannot secure the agreement of C7 or Optus Television to acquire NRL coverage from Fox Sport [sic].*

*To ensure that this arrangement **only** works as a fall back, Fox Sports is happy to authorise FOXTEL to sell NRL coverage to C7 and Optus Television on behalf of Fox Sports, and only pay Fox Sports the difference between $8 million per annum and the amount FOXTEL secures for Fox Sports from C7 or Optus.*

Also, Fox Sports would use all reasonable endeavours to secure the agreement of C7 or Optus Television to take NRL coverage from Fox Sports so that this arrangement minimises the prospect of FOXTEL having to pay Fox Sports the $8 million per annum fee'. (Emphasis in original.)

1309 Mr Philip sent the same notes to Mr Willis. As Telstra points out, the final three paragraphs quoted above do not suggest that a purpose of the bid for the NRL pay television rights was to kill C7. However, in cross-examination, Mr Philip was asked about the notes:

> *'MR SUMPTION: As I understand that document, you were suggesting to Mr Akhurst that the NRL rights might well be acquired by C7, weren't you? --- I was, but on the same basis as the statements I make about the handwritten fax, that statement was not true. That was a statement I made to try and convince him that there was a jeopardy in not supporting the proposal*

that I was putting to him.

I see. So your evidence is that, in addition to lying to Mr Akhurst in the fax, the manuscript fax, you also lied to him in this document two days earlier? --- Yes, I think it's the same – it's the same issue'.

(The reference to the '*handwritten fax*' in this answer is to one written by Mr Philip to Mr Akhurst on 9 December 2000, which is referred to at [1316].)

1310 On the same day, 7 December 2000, Mr Philip sent Mr Akhurst a copy of the material he had sent Mr Willis the previous day. The covering note included the following:

'I have been trying to contact you about NRL/AFL.

I put some ideas to Greg last week but have not heard back from him yet.

...

On the NRL, I am trying to get support for a Fox Sports bid that enables NRL to be delivered to FOXTEL as cheaply as possible, hopefully for no charge, in the face of C7's bid for NRL, which would inevitably involve FOXTEL paying full freight to C7 to recapture NRL coverage. Things are moving very fast on this, and I need to know whether you can help?'

1311 As noted in Chapter 8 ([1077]), a meeting of Telstra executives took place at 10 am on 8 December 2000. Prior to the meeting, Mr Fogarty of Telstra Media sent the participants briefing notes relating to the proposed News-Foxtel Put in respect of the AFL pay television rights and the Fox Sports proposal to acquire the NRL pay television rights.

1312 The NRL briefing paper recorded that News had requested Telstra's consent to the payment by Foxtel of $8 million for NRL coverage if Fox Sports was unable to on-sell its NRL coverage either to Optus Vision or C7. It also recorded that News had requested Telstra's support by taking sponsorship and internet rights. However, the paper noted that there was little support within Telstra for taking the rights. The paper recommended that:

'Telstra may consider that the $8M pa payment to FOX Sports ($4M being Telstra's share) should be made in order to obtain the "exclusive" content for FOXTEL and maintain a competitive advantage over other competing Pay TV operators. If Optus TV or C7 carry the NRL then FOXTEL should not make any payment to FOX Sports'.

1313 In support of this recommendation, the briefing paper characterised the proposed $8

million obligation on Foxtel as '*akin to a payment for "exclusivity" of NRL Pay TV content, without formal agreement to provide such*'. Strategically it was important that Optus not receive Fox Sports programming. The paper continued as follows:

> *'By declining consent to FOX Sports providing FOX Sports Two to Optus or other parties and accepting the $8M pa payment by FOXTEL to FOX Sports, FOXTEL will have effective "exclusive" coverage of the NRL. FOXTEL should then be able to leverage off this "exclusive" carriage of NRL and acquire disaffected Optus subscribers, thereby benefiting FOXTEL and, also Telstra via its telephony winback. Telstra would incur half of the $8m cost (ie $4m) but its overall position should be enhanced through:*
>
> *1. An increase in the value of its investment in FOXTEL as a result of FOXTEL acquiring additional subscribers[;]*
>
> *2. The additional revenue share those subscribers generate; and*
>
> *3. The value derived through telephony winback customers'.*

1314 Following the meeting, Mr Willis wrote to Mr Philip addressing issues both in relation to the AFL and NRL pay television rights. The former has been addressed in Chapter 8. As to the latter, Mr Willis rejected the sponsorship and internet rights proposals. He reconfirmed Telstra's prior agreement to Fox Sports offering NRL pay television rights to Optus, provided Fox Sports supplied NRL coverage to Foxtel at no extra cost for the period Fox Sports held the rights. Alternatively, Telstra was prepared:

> *'to consider a payment by FOXTEL of $8m pa where FOXTEL has exclusive pay TV rights to all NRL coverage, with a right to sub-licence'.*

1315 Mr Philip gave evidence, which I accept, that following receipt of this letter, he decided to keep dealing with Telstra directly through Mr Akhurst.

9.18.2 Fax of 9 December 2000

1316 On the evening of 8 December 2000, at his home Mr Philip wrote by hand a fax to Mr Akhurst. The fax was headed '*Private and Confidential*'. The text of the fax appears below, set out as nearly as possible in its original form:

> *'**NRL***
>
> *1. The C7 offer we need to beat is, p.a.:*

$33m rights	*$6m production*	*$4m contra*

that is, $43m p.a.

2. *That is the base offer. It has extra payments for subscribers over 5000,000, getting up to $60m p.a. for rights – we think we counter this "blue sky" with the dependable subscribers that Fox Sports has in Austar and Foxtel.*

3. *Before the C7 offer came along Fox Sports was prepared to bid p.a.:*

$21m rights	*$6m production*	*$4m contra*

and put NRL into [Fox Sports 1 and 2] for no additional charge to Foxtel. However, that bid will ***not*** *now win the rights.*

News cannot go higher than outlined in para 7 below because it then becomes better for News to let NRL accept the C7 bid and see what happens.

4. *Foxtel currently pays $13m p.a. for NRL and Optus pays $13m p.a. These amounts include rights and production. These contracts ended this year.*

5. *With Telstra covering half the $13m p.a., the proposal in 3. above would* ***instead*** *have cost Telstra* ***nil****.*

6. *To better the C7 offer the Fox Sports bid needs to be p.a.:*

$34-$35m rights	*$6m production*	*$4m contra*

7. *I can get Fox Sports to pay p.a.:*

$25m rights	*$6m production*	*$4m contra*

leaving a gap of $9m – $10m p.a.

(with Foxtel supporting Fox Sports with a payment of $8m p.a. if Fox Sports cannot sell NRL to Optus).

8. *My proposal is that Telstra helps by filling the gap of $9-10m for* ***value*** *– that is NRL naming rights and internet rights. We can get these rights from NRL because C7's bid includes terms that prevent NRL ever getting any value for internet and naming rights.*

9. The proposal would be p.a.:

$9-10m naming rights and internet rights	*$25m rights*	*$6m production*	*$4m contra*
ξ	ξ		
from Telstra	*from Fox Sports*		

(with the Foxtel support payment of $8m p.a. if a sale cannot be made to Optus).

10. I am confident this bid can win.

11. The bid works out (if the $8m p.a. is paid) at:

Telstra:	$13-14m	[Editor's Note: This graphic cannot be reproduced by electronic publishing.]
News:	*$15.5m*	[Editor's Note: This graphic cannot be
PBL:	*$15.5m*	reproduced by electronic publishing.]

12. Foxtel needs NRL. If Foxtel tried to win the bid, a winning bid would cost $45m p.a., which would cost Telstra $22.5m. My proposal costs Telstra only $14m, with News and PBL paying way above their $11.25m share (together paying $8.5m over their share p.a.)

*13. **Also**, Telstra **gets** naming rights and internet rights for its share. Telstra is way head.*

14. The proposal is for a 6 year deal.

15. For the $8m p.a. I am sure Foxtel can have the right to control whether NRL is offered to Optus and on what terms. Also, at a bid of $45m, I know Optus will not pick up NRL rights direct from NRL (even at half that bid). This means that Optus will be looking to get rights from Foxtel/Fox Sports.

16. C7 has vocal supporters on the NRL. They are pushing for a decision on Tuesday. We need to move fast. If Foxtel loses NRL the impact will be tragic. At C7's bid price the price C7 will charge Foxtel will be extortionate, and we will be forced to put it in basic (or pay as if it is).

AFL

> *17. To get AFL and build our southern state subscribers we need to bid $30m p.a. – if we don't we will* ***not*** *win.*
>
> *18. Remember that winning means Foxtel becomes the supplier of AFL to Optus and Austar. Think of the future*
>
> *19. The AFL will call for final bids* ***any*** *time after Tuesday when Seven's first expires.*
>
> *20. If Ziggy [Switkowski] still has a problem on AFL we should have an urgent meeting of principals*
>
> *Ian Philip'.* (Emphasis in original.)

1317 The fax was sent to Mr Akhurst at 2.09 pm on Saturday, 9 December 2000, but was not received by him until Monday, 11 December 2000. It appears that the fax was sent to Mr Akhurst's Melbourne office and from there was sent on to Mr Akhurst in Sydney. Mr Philip also sent a copy of the fax to Mr Falloon.

1318 The evidence relating to this document was quite extraordinary. Mr Philip admitted that he destroyed his own copy of the document after he had faxed a copy to Mr Akhurst (and, presumably, a second copy to Mr Falloon). The reason he wrote the document, rather than have it typed, was to avoid creating an electronic record. Mr Philip said that he telephoned Mr Akhurst prior to sending the fax asking him to destroy it as soon as he had read it.

1319 Mr Akhurst denied that he had received such a request, and pointed out that he did not in fact destroy the copy sent to him. However, I prefer Mr Philip's admission against interest on this point, particularly as it appears to be common ground that Mr Akhurst and Mr Philip spoke by telephone on the Saturday, albeit briefly, shortly before the fax was sent. A discreditable explanation for Mr Akhurst's denial is that acknowledging that he was requested to destroy the fax might suggest that he was aware that Mr Philip was improperly communicating confidential information. However, I think it more likely that Mr Akhurst simply forgot that the request had been made, bearing in mind that he plainly did not comply with Mr Philip's suggestion. It is likely, given that PBL did not discover a copy of the fax, that Mr Philip made a similar request to Mr Falloon with which Mr Falloon complied.

1320 Mr Philip said that the reason he took these measures was because he believed that if

someone at Seven came to see the fax it might have been alleged that he (Mr Philip) had disclosed confidential information concerning C7's bid for the NRL pay television rights, even though he did not consider any material relating to the bid to be confidential. Despite his admissions, Mr Philip claimed that the fax did not in fact reveal the terms of C7's bid. Rather, the figures contained in it reflected his assessment of what Fox Sports needed to do in order to make a bid that could be publicly perceived as at least equivalent to C7's bid.

1321 In his third statement, prepared on 5 December 2005, the 43rd day of the trial, Mr Philip explained at length that a number of the statements in the fax were, to his knowledge, untrue or misleading. Mr Philip identified the misleading portions of the document as follows:

> *'(a) I knew C7's offer of 5 December 2000 was not as I described the "C7 offer" in paragraph 1 of my fax.*
>
> *(b) In my fax, I suggested that the reason Fox Sports needed to make a bid worth $39 million was that, if Fox Sports did not do so, the NRL Partnership would accept the C7 bid. I did not believe that that was true at the time I sent my fax. By that time ... I had already decided to vote against the C7 bid if it came to be considered by the NRL Partnership Executive Committee and I knew the C7 bid could not be accepted without a unanimous decision of the PEC. My real concern at the time I wrote the fax to Mr Akhurst was to reach a position where Fox Sports could put forward a bid that could be presented publicly, and also to the ARL's nominees on the PEC and to the NRL clubs, as worth $39 million. I wanted to avoid News Ltd being criticised for making the NRL accept a lower bid than the C7 bid. I was influenced in that desire by the criticism News Ltd had received in relation to the Superleague competition and the exclusion of Souths from the NRL Competition.*
>
> *(c) ... I did not believe that that [the last sentence in par 3 of the fax] was true at the time I sent my fax. If Telstra did not agree to fill the gap of $10 million that I refer to in my fax, I was considering putting a similar request to Foxtel or seeking PBL's consent to increasing the cash amount of the Fox Sports bid. However, if all of those approaches failed, I thought News Ltd would fill the gap itself. ...*
>
> *(d) In paragraph 13 of my fax, I said, in relation to my proposal:*
>
> *"Telstra is way ahead."*
>
> *To the extent that I was asking Telstra to fill a gap of $10 million that I represented might not otherwise be filled, the statement was not true.*

(a) ... Although I believed that the ARL nominees on the PEC were keen for a decision to be made [as stated in par 16], that was not the true reason I had for making the statement that "We need to move fast." The true reason was that I was concerned that the AFL might award the AFL rights to Seven in the near future. I thought that, if that happened, C7 was likely to withdraw its NRL bid. If C7 withdrew its NRL bid, then I thought it would still be necessary to present the Fox Sports bid as worth at least $39 million in order to avoid News Ltd and the NRL PEC being criticised for not accepting the C7 bid while it was open. However, I was concerned that the PBL-appointed directors of Fox Sports would not support Fox Sports making a cash bid of $25 million, or higher, in the absence of a competing bid from C7. I thought it was likely that they would regard the fear of public criticism as News Ltd's problem, not PBL's, and would not approve Fox Sports paying any extra for the rights in order to avoid that criticism, even though I did think they would prefer to preserve Fox Sports' contract with Austar by gaining NRL rights for Fox Sports. ... As a result, I thought that, if the AFL rights were awarded to Seven, there was likely to be a bigger "gap" to fill in order to present an NRL bid worth $39 million and that News Ltd was likely to be forced to bear a greater cost in filling that gap, and possibly the entire cost.

(b) ... At the time I sent my fax, for the reasons I give in paragraph (b) above, I did not believe that there was a real chance that C7 would be awarded the NRL pay rights [and thus the last two sentences of par 16 were misleading]'.

9.18.3 Telstra Analyses Mr Philip's Proposal

1322 Shortly after noon on 11 December 2000, Mr Fogarty sent a fax to Messrs Akhurst and Brenton Willis analysing Mr Philip's proposals. He recommended that Telstra's position remain unchanged. Mr Fogarty's fax included the following:

'The Pay TV team has approached Telstra Retail Marketing (Holly Kramer) and Telstra.com about the relevant rights. Both groups declined to take the rights.

Fox Sports could sell the Naming and Internet Rights to any interested party.

The numbers within the fax are simplistic and overstated. The Naming and Internet rights have zero value. The breakdown of costs/revenues understates the value to FOX Sports by ignoring the revenue that FOX Sports receives from Austar and any other revenue streams such as interactive of which are not aware'.

1323 At 3.39 pm that afternoon, Mr Brenton Willis sent Mr Fogarty an email attaching spreadsheets. They were said to show that the numbers provided by Mr Philip were '*overly simplistic*' and that all the '*potential and substantial upside*' rested with Fox Sports, not Telstra. The email contained a sentence strongly relied on by Seven in these proceedings:

> *'As we have consistently maintained we should not be part and parcel of the wider objective (**as explained to us in confidence by Jim Blomfield) of "killing" C7**'.* (Emphasis added.)

Mr Akhurst denied knowledge of this email or of any wider objective by Foxtel or anyone else to kill C7.

1324 Late in the afternoon of Monday, 11 December 2000 or early the next day, Mr Akhurst told Mr Philip that Telstra would not take the naming and internet rights as he had proposed, but that Telstra was agreeable to a meeting of principals as Mr Philip had proposed.

1325 At 11.14 am on Wednesday, 13 December 2000, Mr Brenton Willis sent Mr Fogarty a further email setting out information relating to Mr Philip's proposals. Mr Willis made these observations about C7 and Mr Philip:

> ***'C7***
>
> *If C7 acquire the NRL then they will be forced to offer it to FOXTEL. It is a condition of the granting of the NRL rights that it [sic] be offered to FOXTEL. In order for C7 to generate a return they will have to negotiate with FOXTEL. The risk of C7 demanding an extortionate price is a furphy. FOXTEL will simply reject the offer and C7 left with the NRL liability.*
>
> *The C7 access dispute is about forcing FOXTEL to the negotiating table to allow C7 to gain access for its sporting channels directly on FOXTEL. As you are aware Telstra is supportive of FOXTEL showing C7's channels as it improves FOXTEL's offering but we have faced difficulties because News and PBL via FOX Sports are C7's direct competitor.* ***Indeed, FOXTEL have stated that an objective of the present rights bidding frenzy is to "kill C7"****.*
>
> ***Telstra being on notice of FOXTEL/FOX Sports objectives should not be a party to "killing" C7.***
>
> ...
>
> ***Ian Philip***

I am also very concerned at the conflict of interest that Ian Philip has. He is an alternative FOXTEL director, a director of the NRL and involved in the NRL's assessment of the pay TV rights, is a director of News and acts on FOX Sports behalf, which is the entity bidding for the NRL rights. Ian has disclosed the confidential C7 offer for the NRL to FOX Sports and to Telstra. He has also seemingly manipulated figures to his advantage in presenting them to Telstra for approval yet we are unable to question him as to their authenticity or source'. (Emphasis added.)

Mr Akhurst also said that he was unaware of this email from Mr Willis to Mr Fogarty.

9.18.4 Mr Philip's Second Fax: 12 December 2000

1326 As a result of Mr Akhurst's advice that Telstra was not interested in the NRL naming and internet rights, Mr Philip prepared a second handwritten document at his home in the evening of 11 December. He faxed a copy of the document to Mr Falloon at 7.46 am on 12 December 2000, although in evidence Mr Philip said that he could not remember sending the fax to Mr Falloon. Twenty minutes later, at 8.06 am, Mr Philip faxed the document to Mr Akhurst. The version faxed to Mr Akhurst added the bolded words in parentheses at the end of sub-paragraph 2(a) (set out below), indicating that it is probable that Mr Philip discussed the draft with Mr Falloon before sending it. The document faxed to Mr Akhurst was as follows:

'1. If Telstra cannot take naming and internet rights to NRL then Foxtel can, as you suggest.

2. I suggest the following:

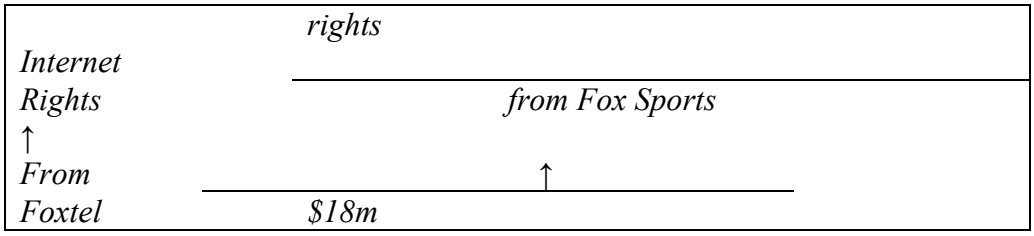
*(a) Foxtel buys the NRL naming and internet rights (even if scope does not change Foxtel can put its foot on video streaming this way) for $10m (**Foxtel could on-sell the naming rights**)*

(b) Foxtel pays Fox Sports $18m for NRL as inserted in [Fox Sports 1 and 2] plus the right to decide how and if NRL is sold to Optus

(c) Fox Sports bids $25m for NRL rights and bears $4 m contra and $6 m production.

3. This way Fox Sports can present a bid of $45m to NRL made up as follows:

$10m naming	*$25m pay TV*	*$6m Production*	*$4 contra*



4. *This gives the **same** cost allocation between Telstra/PBL/News as my last proposal – **it is weighted in favour of Telstra***

Telstra	$14m	(1/2 of ($10m + $18m))
PBL	*$15.5m*	[Editor's Note: This graphic cannot be
News	*$15.5*	reproduced by electronic publishing.]

5. *Bruce, this is urgent. Please call me with your OK on the above, and a time for principals to finalise the AFL bid today'.* (Emphasis added, except in par 4.)

1327 Mr Philip admitted that he wrote the fax by hand in order to avoid creating an electronic record of it and that he destroyed his handwritten copy. Mr Philip said that he could not remember asking Mr Akhurst to destroy his copy of the document. Given that Mr Philip asked Mr Akhurst to destroy the first fax and that Mr Philip destroyed his own copy of the second document, it is plausible that he did ask Mr Akhurst and Mr Falloon to destroy the second document, even though it did not seem to reveal any information about C7's bid that could be regarded as confidential. However, the substance of Mr Philip's proposal in the second fax was freely discussed at the teleconference in which Mr Philip participated on 13 December 2000. Moreover, Mr Akhurst sent a copy of Mr Philip's second fax to Mr Fogarty. In the absence of an admission by Mr Philip, I am not satisfied (if it matters) that he asked either Mr Akhurst or Mr Falloon to destroy their copy of the second faxed document. In fact neither did.

1328 Mr Macourt did not see either of Mr Philip's handwritten faxes at the time they were sent. However, Mr Macourt knew that Mr Philip was attempting to persuade Telstra to participate in a revised offer. Mr Macourt also agreed that Mr Philip told him of the substance of the proposal in the second fax.

9.19 A Meeting Between Mr Stokes and Mr James Packer?

1329 According to Mr Stokes, at some point during the weekend of 9 and 10 December 2000, he had a meeting with James Packer. Mr Stokes' account of the conversation is as follows:

> *'Mr Packer:*
>
> > *I've come to tell you that we're going to take the AFL rights off you. We're all going to get together to take those rights. We don't really want to do it but News are making us.*
>
> *I said:*
>
> > *Why would you want to spend all the extra money?*
>
> *Mr Packer said:*
>
> > *Well, that's what we're going to do. And I hear you're trying to do something with the NRL rights.*
>
> *I said:*
>
> > *Yes, you haven't left us with any choice.*
>
> *Mr Packer said:*
>
> > *I can't believe News would have left the back door open. We've gone and closed all the gates and got everything set and they go and leave a huge back door open. But it doesn't matter what you spend, I would not be against Rupert when it comes to getting the NRL rights.*
>
> *I said:*
>
> > *I understand very clearly what it means to go up against the both of you, but I am not going to be run out of my own country and Seven will remain a competitor'.*

1330 There are a number of difficulties with Mr Stokes' account. The first relates to the timing of the conversation. Mr Stokes was overseas from 26 November 2000 to 8 December 2000. He gave evidence that Mr Packer's secretary telephoned him (Mr Stokes) on his mobile telephone, saying that Mr Packer wanted to see him. No records were tendered supporting the making of such a call or the holding of a meeting on the weekend identified by Mr Stokes. Nor did Mr Stokes make any notes of the conversation with Mr Packer. It appears that his first account of the conversation to a third party was to Seven's solicitors in

early 2003, well over two years after the event.

1331 Mr Stokes placed the date of the meeting with Mr Packer by a '*process of elimination*'. After referring to his diaries (which did not record the meeting) and other documentation relating to his movements, he thought that this weekend was the only time the meeting could have happened. However, it is implausible that on the weekend of 9-10 December 2000 Mr Packer would have made the first statement attributed to him by Mr Stokes. By that time, Seven was actively promoting the intervention of the ACCC to prevent a combined bid by News, PBL and Foxtel for the AFL broadcasting rights. Newspaper articles had been published about the proposed bid. Mr Packer is hardly likely to have been bringing Mr Stokes news of something that had been common knowledge for a long time. Similarly it would be odd if Mr Packer had said during a meeting on that weekend that he had heard that Seven was trying to do something with the NRL pay television rights. By early December 2000, as PBL points out, C7's bids for the NRL pay television rights had attracted extensive publicity and indeed the details of its second bid had been published in the press.

1332 Seven, in its Reply Submissions, attempts to make a virtue out of necessity by citing an email from Mr Stokes' personal assistant to Mr Packer which was sent at 7.02 pm on Friday, 24 November 2000. The email gave Mr Packer Mr Stokes' mobile number and confirmed that it was in order for Mr Packer to call Mr Stokes the next day (Saturday), 25 November. Seven submits that the email supports Mr Stokes' account of the conversation, except that Seven says that I should find, contrary to Mr Stokes' evidence, that the meeting took place during the weekend of 25-26 November 2000.

1333 By 25 November 2000, although accurate details of C7's first bid had not appeared in the media, there had been speculation about the contents of the bid in newspaper articles appearing on 18 and 20 November 2000. It is quite possible, therefore, that Mr Packer, on 25 November 2000, might have said words to the effect of '*I hear you're trying to do something with the NRL rights'*. However, Seven had expressed concern about the proposed joint bid for the AFL broadcasting rights well before 25 November. It is highly unlikely that Mr Packer would have said to Mr Stokes that he had come to tell Mr Stokes that a group was going to get together to take the rights off Seven. Mr Stokes accepted that around 9 and 10 November he had become aware of press articles reporting the fact of a bid for the AFL

broadcasting rights by a consortium. Mr Stokes had made some public comments on the subject at or shortly after Seven's annual general meeting on 17 November 2000. On 22 November 2000, Seven's solicitors had written to the ACCC expressing Seven's concern about the potential for misuse of market power by '*the PBL/News/Telstra consortium*' in relation to the bidding for the AFL broadcasting rights. Even as early as 25 November 2000, Mr Packer (as he surely would have known) would not have been conveying new information to Mr Stokes about the joint bid for the AFL broadcasting rights.

1334 Secondly, the absence of any record of the conversation until more than two years had elapsed is significant. In his evidence, Mr Stokes vacillated about whether, by November 2000, Seven was contemplating legal action against Foxtel and others in respect of the consortium's bid for the AFL broadcasting rights. Mr Stokes ultimately conceded that by mid-November 2000 he was indeed giving serious consideration to instituting legal proceedings against the parties bidding for the AFL broadcasting rights. Mr Stokes had little choice in making that concession, since in an email he sent to Mr Gammell and Mr Wise on 18 November 2000, he referred to the strengthening of '*future actions that we would ... have against Foxtel, News and PBL*'. By '*future actions*' Mr Stokes meant (as he accepted) possible future legal proceedings.

1335 I accept Seven's submission that Mr Stokes is not a person who is in the habit of making notes of conversations. It is nonetheless curious that if Mr Stokes thought that Mr Packer's comments important, he did not cause a record to be made or did not communicate by email the fact of the conversation much earlier than he did. It is clear, although Mr Stokes did not accept this unequivocally, that he had been told long before November 2000 that he should keep a record of anything which might provide evidence of collusion between News and PBL. In fact, Mr Stokes did not communicate his recollection of the conversation to his solicitors until more than a year after Gyles J had delivered an important judgment in the preliminary discovery proceedings.

1336 Thirdly, in my opinion, it is implausible that Mr Packer would have said to Mr Stokes that PBL did not want to take the AFL broadcasting rights off Seven and that News had '*made*' PBL participate in the bid. As Mr Stokes knew, Nine had sought to acquire the AFL free-to-air rights on separate occasions over a number of years. In these circumstances, it would have been extraordinary for Mr Packer to plead helplessness.

1337 A fourth difficulty is that, as I have explained elsewhere, Mr Stokes' evidence was characterised by strong tendency to reconstruct events as he wished them to have been rather than as they were. I approach his uncorroborated evidence of conversations, in so far as his account is favourable to Seven's interests, with considerable caution. For the reasons I have given, there are particular grounds to view his account of the conversation with Mr Packer in this way.

1338 I appreciate that it is necessary to pay due attention to the fact that Mr Packer was available to give evidence, but was not called by PBL. His unexplained absence from the witness box could justify an inference that his evidence would not have assisted PBL. Certainly, Mr Packer's absence from the witness box requires me to think carefully before rejecting Mr Stokes' evidence in whole or in part. Nonetheless, the fact that Mr Packer did not give evidence does not mean that I must accept Mr Stokes' account, having regard to the fact that his version was directly challenged in cross-examination. I must assess the evidence in its entirety, including any inference that may be available from Mr Packer's unexplained absence from the witness box.

1339 I think it probable that a meeting took place between Mr Stokes and Mr Packer in late November 2000, most likely in the course of the weekend before Mr Stokes' departure on 26 November for his overseas trip. Mr Stokes said in evidence that he and Mr Packer discussed in some depth free-to-air television. I think it likely that a conversation took place which included references to the competing bids for the AFL broadcasting rights, especially the free-to-air rights. In that context Mr Stokes may well have asked Mr Packer why PBL was prepared to pay so much for the free-to-air rights. I do not accept, however, that Mr Packer told Mr Stokes that PBL, News and Foxtel were all going to get together to take the AFL broadcasting rights away from Seven. Nor do I accept that Mr Packer said that Nine did not '*really want to do it*', but had been forced by News to participate in the bid. Similarly I am unable to accept that Mr Packer made observations in the conversation about News leaving '*the back door open*', at least in a context suggesting that News and PBL were joining forces to deprive Seven of both the AFL and NRL pay television rights.

9.20 Ms Ireland's Letter of 13 December 2000

1340 On 11 December 2000, Mr Gallop wrote to the Director of Legal Affairs at Foxtel Management (Ms Ireland). The letter stated that the NRL had received an offer from C7. Mr

Gallop inquired about the latest position in the litigation concerning use of the Telstra Cable. Specifically, Mr Gallop asked for advice as to the '*possible scenarios which may arise over the next 12 months*'.

1341 Ms Ireland replied on 13 December 2000, providing a detailed account of the then current litigation and access arbitration. Prior to sending the letter, she forwarded a draft to Mr Gallop asking him to confirm that he was happy with it. In the final version sent on 13 December 2000, Ms Ireland noted that there were still many issues to be determined before the ACCC could make a final determination about access. These included the following:

> '• *whether there is any capacity on the cable and, if so, how much capacity is available;*
>
> *how any available capacity should be allocated between access seekers, including between C7 and TARBS;*
>
> *whether C7 is entitled to access to the conditional access system (the system that encrypts or scrambles the signal), subscriber management system (the system that feeds information about the programs to be broadcast to each subscriber) and customer call centre and, if so, how;*
>
> *whether C7 is entitled to access to FOXTEL's STUs [set top units in the subscribers' premises by which Foxtel's programs were delivered] (FOXTEL maintains that it is not obliged to provide access to its STUs even if it is a carriage service provider because there is no capacity in relation to the service it provides);*
>
> *how C7 physically interconnects its own facilities with any service it is supplied with eg. if C7 provides its own call centre, how this call centre connects to and feeds information to the subscriber management system (if that system is made available to C7); and*
>
> *what is the price for access to the carriage service and any ancilliary [sic] services'.*

1342 Ms Ireland said that Foxtel estimated that it might be 12 months before the ACCC could make a final determination as to access. While the ACCC had power to make an interim determination, Foxtel's view was that this was inappropriate and Foxtel might challenge any such determination.

1343 Under the heading '*Summary*', the letter concluded as follows:

'• *If FOXTEL's appeal in relation to the validity of the 1999 Declaration is upheld, then access will not have to be granted to anyone at all.*

If FOXTEL's appeal from the decision that it is a carriage service provider is upheld, then FOXTEL will not be required to give access to its STUs or provide any other services. The effect of this is that C7 will have to put its own STUs into the home which will mean there are 2 STUs if the C7 subscriber is also a FOXTEL subscriber.

There are still many issues to be determined about the nature and scope of access before the ACCC can issue a final determination about the terms and conditions of access.

***Under no circumstance can C7 force FOXTEL to include the C7 channels in FOXTEL's channel-line up whether on basic or in a tier, even if C7 does ultimately gain access to FOXTEL's STUs**. FOXTEL also cannot be obliged to market the C7 channels. The C7 service will be a separate service and C7 will be solely responsible for the marketing of this separate service to attract subscribers'*. (Emphasis added.)

1344 Seven does not suggest that there was anything misleading or inaccurate in Ms Ireland's letter. It says, however, that the letter communicated that:

'(a) Foxtel declined to carry the C7 channels as part of the Foxtel Service;

(b) it was possible that C7 would not obtain access to the [Telstra] Cable;

(c) there was likely to be considerable delay before C7 could obtain access to the [Telstra] Cable; and

(d) even if C7 did obtain access to the [Telstra] Cable, this would not confer upon C7 the same advantages as if it was carried on the Foxtel Service – in particular, C7 would not be part of Foxtel's channel line-up'.

9.21 C7 Finalises Its Offer

1345 On 11 December 2000, Mr Moffett wrote to Mr Anderson of Seven confirming the NRL Partnership's position in respect of internet rights and marketing and hospitality rights. The letter included as follows:

'Put simply, we do not accept that you have provided an offer for Pay TV rights only.

Additionally, your position would preclude us from selling those rights to other organisations.

Please let me know if this is your final position on these issues by noon tomorrow'.

1346 Mr Gammell gave evidence as to his understanding of the position of the NRL Partnership at the time:

'You understood that because of the contractual relationship which existed involving the partnership executive committee, there was an obligation to afford to Optus a chance to match any offer for the NRL pay rights which should be accepted by the partnership executive committee; correct? --- Yes.

And it had to be for the pay rights, correct? --- Yes.

And the position was being advanced by Mr Moffett that your proposal simply did not constitute a proposal which was capable of being offered to Optus in accordance with the obligations of the partnership executive committee; correct? --- Yes'.

1347 On the morning of Tuesday, 12 December 2000, Mr Gammell prepared a draft response to Mr Moffett's fax, although he did so '*in a bit of a rush*'. The draft formed the basis of C7's reply, which was signed by Mr Anderson and sent later on that day. The reply identified the contents of C7's offer:

'We are very surprised that you have taken the position that we have not "provided an offer for Pay TV rights only." As you know we have only requested that, in the event that Marketing rights are subsequently offered by the NRL, that C7 be provided with a fair opportunity to match any offer you may receive.

...

In regard to the internet restriction we are prepared to relax the 3 minute limitation per match as noted in our offer of 5th December 2000.

...

C7 is at a loss to understand how its offer cannot now be taken forward to the partnership Board for its consideration. Conflict of interest issues can then be dealt with and the competitive matching process can commence. A continuation of such prevarication over these minor issues prior to consideration by the Partnership Board cannot be demonstrated to be in the best interest of the game or the clubs.

Our offer of 5th December 2000, with the subsequent change to marketing and hospitality rights as per our letter of 7th December 2000, and the alteration to internet conditions as described above, constitute our formal

offer, subject to government legislation relating to anti-siphoning and anti-hoarding laws'.

Mr Gammell accepted that this was a '*somewhat aggressive letter*', but denied that the letter had been designed to bring Seven's ramping exercise to an end as soon as possible, in the light of Mr Finch's advice

9.22 Analysis of the Bids

1348 On 12 December 2000, Mr Moffett sent Mr Macourt a fax attaching a financial analysis of C7's offer and Fox Sports' offer of October 2000 for the NRL pay television rights. Mr Moffett asked for comment. The analysis identified two major variables built into C7's offer: first, the fees depended on subscriber levels and, secondly, there was uncertainty as to whether Nine would broadcast only two games per week, broadcast two games per week and another 12 matches over the season, or broadcast three games per week.

1349 The summary identified three alternative cases:

*'**Best case** (including benefit to Clubs) – Subs over 1M, C9 no additional games*

C7 offer $303.6M Foxsports [sic] offer $123.8M

***Probable** – Subs 500K – 1M, C9 take 3 games per week*

C7 offer $172.4M Foxsports offer $123.8M

***Worst case** – Subs < 500K, C9 take 12 games*

C7 offer $151.4M Foxsports offer $123.8M'

It will be seen that in each of the three cases the C7 bid was assessed as superior in financial terms.

1350 Between Friday, 8 December 2000 and Wednesday, 13 December 2000, Mr Parker prepared financial models in connection with Fox Sports' proposed bid for the NRL pay television rights. On 8 December 2000, for example, Mr Parker prepared a model which he sent to Mr Marquard at Fox Sports, Mr Falloon at PBL and Mr Macourt at News. The model analysed the implications for Fox Sports if it acquired the NRL pay television rights for a total consideration of $26 million per annum, including production costs. In the model the

'*Current Position*' and '*Scenario C – Lose Austar*' were unchanged from previous models.

1351 Scenario A modelled a purchase of the NRL pay television rights, sale to Austar on the existing terms, receipt of $8 million per annum from Foxtel and no sale to Optus Vision. Scenario B was similar to Scenario A, except that it incorporated the expansion of Fox Sports to two full channels. Scenario A produced a '*5 year cash to Fox Sports*' of -$88 million, while the comparable figure for Scenario B was -$107.4 million.

1352 On the afternoon of 13 December 2000, Mr Parker sent to Mr Macourt and Mr Kleeman a model assessing the impact on Fox Sports and Foxtel of Fox Sports acquiring the NRL pay television rights for $30 million per annum. Mr Marquard saw the model before Mr Parker sent it. The model showed the following:

> on Scenario A (Fox Sports pays $30 million; Foxtel pays $18 million; 1.5 channels; no sale to Optus Vision), the five year cash value to Foxtel, compared with the base case (no NRL, no Optus Vision), was -$33.7 million and to Fox Sports was -$53.8 million;
>
> on Scenario B (the same, except that there would be two channels), the five year cash value to Foxtel was -$25.2 million and to Fox Sports -$73.5 million; and
>
> on Scenario C (no NRL; Fox Sports loses Austar), the five year cash value to Fox Sports was -$253.3 million, while the '*Value impact*' on Fox Sports was -$543.8 million.

9.23 Teleconference of 13 December 2000

9.23.1 Lead-up

1353 In the afternoon of Tuesday, 12 December 2000, Telstra organised a teleconference call to take place at 11.15 am the following day, Wednesday, 13 December, to discuss the bids for the AFL broadcasting rights and the NRL pay television rights. The meeting was described in emails as '*AFL/NRL Meeting*'. Mr Philip was invited to participate. Mr Philip arranged for representatives of PBL and for Messrs Macourt and Blomfield to participate in the teleconference.

1354 At 9.13 am on 13 December 2000 Mr Philip created a document headed '*Pay Television – National Rugby League – C7/Foxtel*'. He agreed in cross-examination that the document was a draft call option in respect of the NRL pay television rights to be granted by C7 to Foxtel. Mr Philip said that he '*topped and tailed*' another document to create the draft call option. I accept that evidence, as the document is very similar to the Fox Sports-NRL Licence prepared by Mr Marquard and executed later on 13 December 2000.

1355 Mr Philip said that he could not remember why he created the draft call option, particularly at such a busy time. Mr Philip denied, however, that he created the document because he thought that there was a serious prospect that C7 would acquire the NRL pay television rights. Mr Philip stated that he had no intention of voting in favour of C7's bid, regardless of the comparative values of the two offers. He also did not expect the meeting of the NRL PEC to give serious consideration to the C7 offer which, in any event, he did not think was capable of acceptance.

1356 At 9.30 am on 13 December 2000, Mr Fogarty faxed Mr Akhurst a page from Foxtel's budget papers outlining the cost to Foxtel of the NRL pay television rights. In an email sent at 10.18 am, Mr Fogarty referred to a discussion the previous day concerning pricing of the NRL rights and confirmed that the cost was $10.1 million in 1999/2000 and was expected to be $9.8 million in the current financial year (2000/2001). The email also observed that Mr Philip had previously said in meetings that Optus paid $30 million or $36 million per annum for AFL content, but that the true figure was $25 million per annum.

1357 At 9.43 am on 13 December 2000, Mr Fogarty sent two briefing papers to Dr Switkowski, and Messrs Akhurst, Moriarty, Rizzo and Greg Willis. One concerned the bid for the AFL pay television rights and included a recommendation:

> *'that the Directors decline to approve the increase in the put option proposal, because the programming is too expensive, FOXTEL is unlikely to achieve its subscriber take-up or wholesale price from OptusTV/Austar, and whoever wins the rights will deal with FOXTEL because of its existing subscribers'.*

1358 The second briefing paper concerned Fox Sports' bid for the NRL pay television rights. It recommended that Telstra decline the proposal:

> *'The fax of 12 December from Ian Philip puts forward a revised proposal whereby FOXTEL buys the Naming and Internet Rights ($10M) and*

contributes additional funds to FOX Sports for the NRL coverage ($18M).

Proposals to date

1. *Telstra consented to allow FOX Sports to supply the NRL to Optus TV on condition that the NRL coverage was provided to FOXTEL at no cost. Additional price to FOXTEL was nil.*

2. *Telstra subsequently consented to FOXTEL paying FOX Sports an additional $8M pa for metropolitan exclusivity. Additional price to FOXTEL was $8M.*

3. *12 December proposal is for FOXTEL to pay $28M per annum ($18M pa to FOX Sports for the NRL coverage and $10M pa for the naming and internet rights). Additional price to FOXTEL is $28M.*

The NRL bid is from FOX Sports. FOX Sports outlays are reduced by this proposal. FOX Sports holds the rights for six years. They gain revenue from AUSTAR and additional sources (BSkyB, FOX Cable ...). Any upside from the proposal accrues to FOX Sports.

The NRL has not had a "naming sponsor" for two years. We consider that FOXTEL will find it very difficult to on-sell the naming and internet rights. The NRL and/or FOX Sports should be selling these rights.

Conclusions

Telstra is being tied to the FOX Sports bid despite not being a party to FOX Sports. Telstra would then be party to any legal proceedings as a result.

The value of the naming and internet rights do not change whether held by Telstra or FOXTEL.

This proposal is the highest cost to FOXTEL and Telstra of those put. ($28M versus, $8M versus zero).

Whoever wins the bid will deal with FOXTEL as it has the highest number of subscribers (700K vs Optus 230K and Austar 430K).

The pricing is over and above the present FOX Sports pricing of $US5.25 pspm.

Recommendation

The present proposal should be declined as not being in FOXTEL's interest. Telstra should use the rejection to leverage a better proposal from News/Fox Sports and consider approaching C7 for a call option'.

1359 Prior to the meeting, Mr Philip sent a fax to Mr Blomfield at Foxtel attaching '*deal documents*' Mr Philip had provided to Telstra. Mr Philip added this:

> *'They may ask you [at the meeting] about financial impact on Foxtel - $28M for NRL pay tv rights, internet rights and naming rights, plus control of licensing to Optus. It is supported by News and PBL'.*

1360 Dr Switkowski received a briefing from his '*senior executive team*' responsible for these matters prior to the teleconference. The briefing included a review of the contents of the papers prepared by Mr Fogarty.

9.23.2 The Teleconference Takes Place

1361 The teleconference took place as scheduled. It started at 11.23 am and finished some time after 12.30 pm. The participants were:

> **Telstra:** Dr Switkowski, Mr Akhurst and Mr Moriarty (in Dr Switkowski's Melbourne office); Mr Willis and, for part of the conference, Mr Fogarty (in Telstra's Sydney office); and Mr Rizzo for part of the conference (in another location);
>
> **Foxtel:** Mr Blomfield, Mr Macourt and Mr Philip;
>
> **News:** Mr Macourt and Mr Philip (who acknowledged that he was also there as a director of Foxtel);
>
> **PBL:** Mr James Packer (who joined the meeting at 12.30 pm), Mr Falloon and Mr Kleeman; and
>
> **Fox Sports:** Although Mr Philip and Mr Macourt were directors of Fox Sports, Mr Philip did not see himself as representing Fox Sports, but acknowledged that he was conveying to the meeting what Fox Sports was prepared to do.

1362 There is only one contemporaneous file note of the teleconference in evidence. It is a four page handwritten note prepared by Mr Fogarty, apparently during the meeting itself. Clearly enough, since the meeting ran for at least an hour and a quarter, the notes are not a *verbatim* account of what transpired. The position is further complicated by the fact that the note records that the Telstra representatives went '*off-line*' for a short time towards the end of

the meeting.

1363 Nonetheless, the notes provide a sound basis for reaching conclusions as to the substance of what was said in the course of the meeting, as follows:

> Mr Philip began, saying that two proposals required serious consideration. These were the NRL pay television rights for 2001 to 2006 and the AFL broadcasting rights for 2002 to 2006.
>
> Mr Philip stated that Fox Sports was bidding against C7 for the NRL pay television rights. Fox Sports' bid was important if '*we want to keep [the NRL] and control ... it*'. Mr Philip warned that if C7 won the bidding contest Fox Sports would lose subscribers and C7 would demand an extortionate price for its channels.
>
> Mr Philip then said that the proposal he was putting forward for the NRL pay television rights was reasonable. He stated that a bid of $45 million per annum '*inclusive*', with $35 million in cash going to the NRL, would be needed to beat the C7 bid.
>
> Mr Falloon asked whether naming rights to the NRL Competition could be on-sold. Mr Macourt said they could, except to a competitor of Nine.
>
> Mr Philip then set out the structure of the proposal, in terms similar to those recorded in his second handwritten fax to Mr Akhurst. The proposal was for Fox Sports to bid $30 million per annum, plus $6 million per annum for production and $4 million per annum for contra. In addition, Foxtel would pay $5 per annum million for naming and internet rights and pay $23 million to Fox Sports for NRL programs. The end result would be that Telstra would bear $14 million of the total cost and PBL and News would each bear $15.5 million (the same figures as appears in Mr Philip's second handwritten fax). Part of Telstra's commitment involved its agreement to Foxtel making the exclusivity payment to Fox Sports if Optus did not wish to acquire any NRL rights. If Foxtel sub-licensed the rights to Optus, Foxtel would retain the benefit.
>
> Discussion then took place concerning the proposal. Mr Akhurst stated that the:

> *'Sponsorship people [are] now in favour of doing it. Whatever you think will put Foxtel in the best position'.*

Mr Falloon said that:

> *'If we get the rights ... for less then we will pass it on to Foxtel'.*

This comment appears to have been a reference to Optus exercising its right to match any arrangement for the NRL pay television rights, in which case the amount payable by Fox Sports would be reduced and the amount payable by Foxtel would be reduced accordingly.

After discussion, support was expressed for Mr Philip's '*weekend proposal*' – that is, so it would seem, the proposal put in his second handwritten fax to Mr Akhurst. Those present agreed that the proposal should include a payment of $10 million for naming and internet rights and what is recorded in the note as an $8 million payment, presumably by Telstra in the event of Fox Sports not being able to license the NRL rights to Optus. Any '*upside*' from Optus was to go to Foxtel. Mr Philip was to detail what had been agreed.

Mr Falloon asked for clarification about the amounts to be paid. The response was recorded by Mr Fogarty as '*First 8 from Optus to Foxtel! Any upside from Optus goes to Foxtel*'. As PBL points out, the need for clarification arose because the proposal was now somewhat different from that originally put by Mr Philip. Telstra was now to pay $5 million for naming and internet rights, rather than $10 million. Foxtel was to pay $18 million to Fox Sports, rather than $8 million, but was to receive the benefit of sub-licensing revenue from Optus and a reduction in fees should Optus exercise its matching rights.

Attention turned to the AFL pay television rights. The notes recording Mr Philip's introduction to this topic were as follows:

> *'Key programming in Southern States*
>
> *C7 atrocious*
>
> *3 live games per week. Dependable time slots*
>
> *AFL should be pursued. Rights of this calibre are competitive*
>
> *We need $30M pa. Encouragement from AFL based on a good*

bid for both Pay TV and FTA'.

Discussion followed. The notes recorded the contributions as follows

'Paul [Rizzo]:
50% more than previously considered.
Economics barely breakeven, and 2nd quality product, not exclusive.

Greg [Willis]: substantial risk from onselling to Optus/Austar. $12 pspm.

Jim [Blomfield]: There is risk in anything of this type.

Paul [Rizzo]: a collective view. Technical people have considered brief and are concerned.

Bruce [Akhurst]: Is there any blue sky in this?

Ian [Philip]: No part of deal dictates what is supplied to Optus. Could offer a lesser product.

*Nick [Falloon]: Main piece of programming FOXTEL does not have "**aggressive**" Business model is break even so do it!*

Jim [Blomfield]: without these products we will be stuck at lower 20% penetration.

ZES [Switkowski]: How does Stokes fund/justify these bids[?]

Gerry [Moriarty]: Nine would get the FTA rights.

Nick [Falloon]: We expect a matching bid from 7.

Gerry [Moriarty]: This is about C7 not giving a decent offering.

Nick [Falloon]: This bid is about the AFL defining the pay rights. If Stokes wins Pay & Free he will use his rights to continue to offer poor Pay.

Gerry [Moriarty then] read our piece and raised each point.

*Nick [Falloon]: raised issue of selling **Fox Sports to Optus TV**. We could offer them a package to replace C7. Telstra has always said NO! to offering Fox Sports to Optus'.* (Emphasis in original.)

At this point, the Telstra representatives went off-line to discuss the issues among themselves. The notes recorded Mr Willis as saying the following:

> *'Nine outrates them, we are arming Fox Sports and Gerry and Paul are right – we will be embroiled legally. We should not agree'.*

The probabilities are that Mr Willis said this only to Mr Fogarty (who was with Mr Willis in Sydney and was taking notes).

The Telstra representatives returned to the meeting and Dr Switkowski said words to the following effect:

> *'We will support the bid as proposed. We are increasingly demanding of ourselves. We stand shoulder to shoulder to push this forward. A show of solidarity only at next meeting.*
>
> *I think we've made the right commercial decision and I wish the bidding teams good luck'.*

9.23.3 Dr Switkowski's Evidence Concerning the Teleconference

1364 Dr Switkowski gave evidence to the following effect, which I accept:

During the teleconference, Mr Akhurst was Telstra's principal spokesman on behalf of Telstra in relation to the NRL pay television rights as he (Dr Switkowski) had not previously been involved with that issue. Dr Switkowski's participation related primarily to the acquisition of the AFL broadcasting rights and Foxtel's grant of a put option in favour of News in respect of the AFL pay television rights.

Although Telstra's Retail Division was inclined to the view that the naming rights were not worth $4 million (the remaining $1 million was allocated to the internet rights), Dr Switkowski considered that Telstra should pay that amount to support the acquisition of the NRL pay television rights for the benefit of Foxtel.

Dr Switkowski knew that Telstra's nominees on the Foxtel Management board had already agreed that Foxtel should grant a put option to News for a fee of $17.5 million per annum, and should provide $2.5 million for advertising and editorial support. He understood that Telstra was being asked to support an increased bid for the AFL broadcasting rights.

Dr Switkowski had the following understanding about the commercial

considerations relevant to Telstra's assessment of the proposals developed by News, Foxtel and PBL for the acquisition of the AFL broadcasting rights:

> *'(a) that acquisition of the AFL pay rights was perceived by Foxtel Management staff, and by News and PBL, to be highly desirable, if not essential, to permit Foxtel to increase its subscriber numbers in the AFL States, and that these rights only became available for acquisition every so often. I knew that sports, and in particular major sports like the AFL, were key drivers for any pay TV business ...;*
>
> *(b) that there were views held within the Telstra Media division that Telstra should not support the acquisition of the AFL pay rights by Foxtel at the proposed increased bid price;*
>
> *(c) that a bid by News for both the AFL pay and FTA rights had a better chance of succeeding than a bid by Foxtel for the AFL pay rights alone because it was the AFL's preference to deal with a single bidder for both the pay and FTA rights, and that a successful bid for both rights would ensure that Foxtel could maximise the value of the pay rights by reaching an agreement in relation to selection and cooperative scheduling of matches to be shown on FTA and pay TV respectively;*
>
> *(d) that if Seven and C7 did not retain the free-to-air and pay rights to the AFL, this would be a cause of conflict between Seven and the Foxtel partners and that Mr Stokes was likely to institute legal proceedings to challenge that outcome; and*
>
> *(e) that, if Telstra opposed the proposed bid for the AFL rights by News, with the consequence that Foxtel did not acquire the AFL pay rights, this would increase the degree of tension that existed between Telstra and the Foxtel partners'.*

During the teleconference, Dr Switkowski formed the belief that the modelling undertaken by News and Foxtel in relation to the proposed acquisition of the AFL pay television rights by Foxtel for $30 million was '*marginally economic on reasonably aggressive assumptions*'. Dr Switkowski had previously discussed the assumptions underlying the models with Mr Akhurst. Based on these discussions and his experience, Dr Switkowski considered the assumptions to be aggressive but not

unreasonable. He also considered that even if some assumptions proved not to be achievable, '*the downside risk ... was small relative to the size of the investment and possible benefits to Foxtel of acquiring the rights*'. (Dr Switkowski was challenged on these matters, but the cross-examination showed that he had paid attention to the modelling and formed the view that the numbers were plausible and were based on defensible forecasts about take-up rates.)

When the Telstra representatives went off-line, Dr Switkowski said to his colleagues that, while this was not a big decision for Telstra in money terms, he was satisfied with the modelling and considered that it was important to trust the judgment of Telstra's partners. He also said that it was not sensible to try to save a few million dollars and miss out on the rights.

Dr Switkowski at no time during the conference call considered what the effect would be for Seven or C7 of News succeeding in its bid for the AFL pay television rights.

Dr Switkowski did not believe that:

> *'there was any connection between the bids for the AFL and NRL rights apart from the fact that they were both rights that FOXTEL wanted to broadcast and the bidding process for each set of rights was to occur at the same time. Accordingly, I never understood that agreement by Telstra or the other FOXTEL partners concerning any arrangement or bid for either set of rights was dependent or conditional upon there being any arrangement concerning the other set of rights'.*

Dr Switkowski made:

> *'a judgment call about whether all of these things would come together at the same time to produce this sort of an outcome, there was a small risk to Telstra'.*

9.23.4 Mr Macourt's Evidence Concerning the Teleconference

1365 Mr Macourt had a poor recall of the teleconference, but did not dispute the accuracy of Mr Fogarty's notes. Mr Macourt said that his main concern at the time about C7's offer for the NRL pay television rights was that it '*was going to vanish*'. However, he did not think it appropriate in front of the other participants to contradict Mr Philip's statement that there was a serious risk of C7 winning the NRL pay television rights. Nor did Mr Macourt

think it useful to tell Telstra and PBL about his concerns as they would not have been at all troubled and indeed might not have supported the package. He agreed that Mr Philip was conveying to the meeting that News needed Telstra's support to avoid C7 obtaining the NRL pay television rights. Mr Macourt said that he did not believe what Mr Philip was saying was correct, since he (Mr Macourt) knew that News had the last rights. Even so, he did not contradict Mr Philip's statements because he did not wish to disadvantage the NRL Partnership.

1366 Mr Macourt agreed with the suggestion, put to him in cross-examination, that:

> *'the outcome of the telephone conference [was] an agreement between Foxtel, FoxSports [sic], News, PBL and Telstra that the bids for both NRL and AFL would proceed on the basis proposed by Mr Philip'.*

9.23.5 Mr Philip's Evidence Concerning the Teleconference

1367 Mr Philip also did not dispute the substantial accuracy of the notes prepared by Mr Fogarty. Mr Philip admitted that, despite what he said at the meeting, he did not believe that there was a serious risk that C7 would succeed in obtaining the NRL pay television rights. Nor did he think that Mr Macourt believed that there was such a risk, since he knew that Mr Macourt would not be voting in favour of a C7 bid. Mr Philip was not worried about Mr Macourt correcting him at the meeting because Mr Macourt would have known that the untrue statements were simply being used as '*leverage*' on Telstra and PBL.

1368 When asked in cross-examination whether the outcome of the meeting was an agreement between all parties represented that the two proposed bids as outlined would proceed, Mr Philip answered as follows:

> *'It – the outcome of the meeting was a decision as to a level of support from Foxtel with Telstra's endorsement and from Telstra for a bid proposed by FoxSports. We did have a telephone conversation after this meeting where Mr Macourt, Mr Falloon and I checked with each other as to effectively what the outcome of the meeting was, whether it accorded with our expectations and whether it fitted with what FoxSports proposed. So the meeting – that conversation didn't happen during this meeting. It happened subsequent to that meeting'.*

1369 According to Mr Philip, at the end of the teleconference everything was '*more or less*' resolved, but it was necessary to hold a further discussion because there was '*a bit of*

confusion' about the outcome. He had a '*vague recollection*' that in the conversation with Mr Macourt and Mr Falloon they agreed that Mr Philip would tell Mr Marquard that Fox Sports could bid $30 million cash per annum and that he did tell Mr Marquard this.

9.23.6 Mr Akhurst's Evidence Relating to the Teleconference

1370 Mr Akhurst consulted Ms Kramer, an executive in Telstra's Retail Division, concerning the NRL sponsorship rights. She advised Mr Akhurst that sponsorship rights would be valuable for Telstra and they were worth about $5 million. However, she did not have provision for such an amount in the relevant budget. Mr Akhurst then asked whether, if he arranged for the payment out of the budget for which he was responsible, the rights could be used. She replied in the affirmative and it was on that basis that Telstra proceeded to acquire them.

1371 In addition, Mr Akhurst discussed the AFL proposal with Mr Rizzo and Mr Moriarty before the teleconference. Mr Rizzo was neutral to '*less than enthusiastic*' about the proposal, but was prepared to abide by whatever decision Dr Switkowski and Mr Akhurst made. Mr Moriarty was more positive.

1372 Mr Akhurst's reasons for supporting the NRL bid were these:

> *'I considered that the outcome of the discussions in relation to the NRL rights, whereby Telstra acquired the sponsorship and internet rights for $5 million as part of its commitment of $14 million per annum, was a satisfactory outcome for Telstra. Insofar as the total bid price of $45 million for the NRL rights was concerned, I accepted Mr Philip's advice that this price was necessary to ensure that FOXTEL continued to have access to NRL programming for its pay TV service. Although I do not recall discussing those matters with Dr Switkowski or any of the other Telstra representatives either during the telephone conference or prior to finalising the terms of the bid documents, it is likely that I discussed those matters with Dr Switkowski and that he supported by views in relation to the NRL rights'.*

1373 I accept this evidence. Insofar as there is a minor discrepancy with Dr Switkowski's evidence, I attribute that to Dr Switkowski's lack of familiarity with all the detail of the NRL bid.

9.24 NRL-Fox Sports Licence

9.24.1 Formalisation of Fox Sports' Offer

1374 The evidence is not entirely clear as to precisely how the board of Fox Sports came to approve the making of a revised offer for the NRL pay television rights. Mr Philip's evidence, uncertain as it is, suggests that the issue was resolved during the discussion between himself, Mr Macourt and Mr Falloon that followed the teleconference. Mr Marquard recalled that he and Mr Malone had recommended a bid by Fox Sports of $30 million per annum (exclusive of GST), but he could not remember how the offer was authorised. Mr Malone thought authority had been received in telephone discussions with Mr Falloon and Mr Macourt on the morning of 13 December 2000. Mr Macourt was uncertain on the point. The probabilities are that Mr Philip's account is accurate enough.

1375 In any event, at 4.07 pm on 13 December 2000, Mr Philip faxed to Mr Akhurst at Telstra and Mr Blomfield at Foxtel Management a term sheet relating to the NRL '*that need[s] to be signed today, to enable the bid to be lodged tonight*'. Mr Philip also faxed the term sheet to Mr Marquard at Fox Sports and Mr Falloon at PBL, but without the covering note referring to the urgency of signing the documents.

1376 At 7.08 pm the same evening, the term sheet was faxed to Mr Philip bearing Mr Akhurst's signature on behalf of Telstra. The document was signed by Mr Philip on behalf of Fox Sports and Foxtel. The term sheet is set out below. The words in bold were added in handwriting as the result of discussions between Mr Philip and Mr Akhurst and initialled by the signatories.

> *'In consideration of $10 paid by Fox Sports, Sports Investments Australia Pty Limited ... , Foxtel Management Pty Limited ... (Foxtel) agrees:*
>
> *(a) to Fox Sports supplying of NRL coverage to FOXTEL as part of Fox Sports 1 and 2 for no additional fees (other than as provided under (b) below) (with the right to take 1 match per week live on Fox 8), which Fox Sports agrees to do on the basis that (unless Optus acquires NRL pay TV rights direct from NRL), Foxtel has the sole and exclusive right to sublicence [sic] the NRL coverage to Optus and retain all proceeds of such sublicencing [sic] (Optus subscribers will not count in determining payments Foxtel makes for Fox Sports 1 and 2).*
>
> *(b) to paying Fox Sports $18 million per annum plus CPI on each of*

> *2002-2006 (this payment is exclusive of GST which must be paid by Foxtel on Fox Sports' invoice) by quarterly instalments in advance commencing 1 January 2001 for 6 consecutive years.*
>
> *If Fox Sports' per annum rights cash payments* ***to NRL*** *for NRL pay tv rights is reduced as a result of Optus acquiring pay tv rights direct from NRL, an amount equal to the reduction will be deducted from the per annum payment under (b).* ***If Fox Sports sublicenses the NRL coverage to any person during the term of [the] Fox Sports agreement with NRL (other than sublicensing to Foxtel, Austar and their successors) the proceeds of such sublicensing must be paid to Foxtel.***
>
> *In consideration of $10 paid by Fox Sports, Telstra … agrees if requested by Fox Sports, to offer to enter into agreements with NRL on a date nominated by Fox Sports (not after 31 January 2001) in accordance with the attached term sheets.*
>
> *Fox Sports', Telstra's and Foxtel's obligations are conditional on NRL selling NRL pay TV rights to Fox Sports for 6 years commencing 2001 on or before 31 December 2000.'*

1377 One of the term sheets (the '**NRL-Fox Sports Licence**') provided for the NRL Partnership, as Licensor, to grant Fox Sports, as Licensee, the right to telecast the '*Matches*' (defined to include at least five NRL regular season weekly matches and the finals games) on pay television during the six year term. Fox Sports retained the right to sub-license to '*Sublicensees*' (also a defined term). Clause 3.1 further provided as follows:

> *'[Fox Sports] acknowledges that [the NRL Partnership] has existing contractual obligations ("Obligations") owed to [Optus]. Licensor may not during the Term exercise any rights the same as or similar to any of the Rights or grant any rights the same as or similar to any of the Rights in [Australia] to any other party except in accordance with those Obligations and then only on terms that are the same (including as to price) as set out in this Agreement'.*

1378 Clause 4 of the NRL-Fox Sports Licence provided as follows:

> *'Notwithstanding anything contained in this agreement to the contrary, the Rights may be telecast on subscription television only on the basis that the pay television channel or channels that includes the Matches is completely branded with the primary brand of the Licensee or the Other Pay TV Licensee and no other brand, except in relation to one Match each week during the regular season of each NRL competition which Match may be compiled and integrated into a non-sports dedicated channel with alternative branding'.*

1379 The NRL-Fox Sports Licence provided (cl 7) that Fox Sports would pay a licence fee

of $30 million per annum, exclusive of GST, for the six year term (2001 to 2006). The fee was to be adjusted by the CPI in each year from 2002 to 2006. Fox Sports was also to pay '*kickers*' (extra fees) if its total average monthly subscribers exceeded 2 million or 2.5 million. If the '*Other Pay TV Licensee*' (that is, either of Optus or Optus Vision) entered into an agreement with Fox Sports under which the other Pay TV Licensee was granted the '*Rights*' for the '*Term*', the fee would be halved to $15 million per annum plus adjustments.

1380 Another term sheet (the '**NRL Naming Rights Sponsor Agreement**') set out the terms on which Telstra was to be the naming right sponsor, of the NRL Competition. The NRL Competition was to be known as the '*Telstra Cup*'. The arrangement was to be exclusive to Telstra, which was to pay a fee of $4 million per season, plus CPI, in each of the 2002 to 2006 seasons.

1381 At some time during the afternoon or early evening of 13 December 2000, the final Fox Sports offer was formalised in a letter addressed to Mr Moffett at the '*National Rugby League*'. The letter, which was signed by Mr Malone, stated that the offer was similar to the previous offer and draft contract that had been discussed:

> *'In other words, it enables the NRL to make an offer to Optus Television on the same terms'.*

1382 Mr Malone said that apart from a substantial financial increase, which was set out in the attached summary, the offer had a number of advantages. These were said to include the following:

> *'1. The FOX SPORTS offer has been developed to provide the NRL with an uncomplicated cash and contra package. This proposal can be easily analysed.*
>
> *2. The offer takes into account existing contractual obligations that we understand are owed by the NRL to other third parties. As a result, we believe the offer is capable of immediate acceptance by both parties.*
>
> *3. FOX SPORTS is currently distributed on the FOXTEL & AUSTAR platforms to more than 1,100,000 households. This represents a reach of 85% of all Australian pay television households.*
>
> *4. Both the existing FOX SPORTS channels appear in the basic package of channels offered by FOXTEL & AUSTAR.*

...

8. *Media reports have suggested that an alternative bid has been made to you which includes a reduction in licence fees of $1M per game if your FTA licensee broadcasts more than two games per week. If these reports are correct, this could seriously erode any fees receivable by the NRL and could negatively impact on your business plans. Our offer does not penalise the NRL in this way and there is no net reduction in revenue receivable by the NRL if the FTA network broadcasts an extra game or games'.*

The offer was expressed to be confidential.

1383 The offer provided for Fox Sports to pay the NRL Partnership a base fee of $33 million, inclusive of GST, for the NRL pay television rights, with annual increases of 3.5 per cent per annum, producing a fee of $39.194 million in 2006. The proposal included increases in the rights fees payable (described by Mr Malone as '*kickers*') if monthly subscriber numbers reached levels of two million or 2.5 million. (The '*kicker*' in the former case was $3.3 million in 2001, increasing by 3.5 per cent each year.) The proposal also included promotional spending of $4.4 million (inclusive of GST) in the first year, rising thereafter by 12 per cent per annum.

9.24.2 The Offer Is Accepted by the NRL PEC

1384 The NRL PEC met on the evening of 13 December 2000 at the premises of the NRL. Those present were:

Mr Macourt (Chairman, NRLI)

Mr Love (ARL)

Mr Politis (ARL)

Mr McDonald (ARL, by telephone)

Mr Philip (NRLI)

Mr Loosley (NRLI)

In addition Mr Moffett and Mr Gallop were in attendance. No representative of C7 was invited to attend.

1385 Fox Sports' written offer for the NRL pay television rights was presented to the meeting by Messrs Malone, Marquard and Parker, who then withdrew. The minutes of the meeting are laconic:

> ***'2. PAY TELEVISION***
>
> *David Malone and representatives of Fox Sports joined the meeting and spoke to a revised offer for Pay Television rights dated 13 December 2000.*
>
> *After lengthy discussion of the offers from Fox Sports and C7, it was resolved to accept the Fox Sports offer.*
>
> *It was also resolved to accept a separate naming rights sponsorship and an internet arrangement with Telstra'.*

The evidence allows some of the discussion to be recounted.

1386 In his presentation at the meeting, Mr Malone said that this was '*a one time only offer*' and that Fox Sports was ready to sign that night. Mr Malone accepted in evidence that he was putting the bid as '*a take-it-or-leave-it offer*'. He made that clear to the meeting by saying that he had been given instructions by the PBL directors not to leave the deal on the table if it could not be concluded that evening. Mr Malone agreed that he emphasised to the meeting the superiority of Fox Sports' offer in the event that a free-to-air broadcaster telecast more than two live matches per week.

1387 Mr Malone, despite what he told the meeting, expected to have another opportunity to bid if the NRL PEC did not regard the offer as the most favourable. He agreed that Fox Sports' offer, although he characterised it as '*strong*', was '*at the low end of the range*' and he also appeared to accept that Fox Sports would have gone higher if necessary. However, he had no instructions that evening that would have allowed him to go higher than $33 million (GST inclusive) per annum. He said that it did not occur to him that the NRL PEC might have called his bluff by requiring a better offer that evening. Mr Malone denied that he was certain when making his presentation that the Fox Sports bid would succeed. He thought that the bid might not be accepted.

1388 After Fox Sports' representatives left the meeting, Mr Moffet and Mr Gallop presented a financial analysis of the competing offers. The analysis had the same figures in

the summary as the earlier version of the document ([1349]), except that the NPV of the Fox Sports offer had increased from $123.8 million to $188.7 million. That figure made the NPV of the Fox Sports offer superior to the NPV of C7's offer in the '*probable*' and '*worst*' cases, but inferior on the best case (subscriptions over one million, Nine shows no additional games). However, if the '*probable*' case (subscriptions 500,000 to one million; Nine to take three games per week) was changed to provide for Nine to continue to take two NRL games per week, the NPV of C7's offer was substantially more favourable than Fox Sports' offer: that is, $240.1 million compared with the NPV of Fox Sports' offer of $188.7 million.

1389 On the best case scenario, C7's offer had an NPV of $303.6 million, compared with the NPV of Fox Sports' offer of $188.7 million. (In its Closing Submissions, Seven points out that if C7 had been carried on the Foxtel platform prior to December 2000, its offer would presumably have been assessed on the basis that C7 would have reached more than one million subscribers. As at December 2000, Foxtel had about 698,000 subscribers, Optus had 217,000 and Austar 399,000.)

1390 Mr Gallop said words to the following effect at the meeting after Fox Sports' representatives had left:

> *'Management recommends the Fox Sports bid. The amount that the NRL will receive under the Fox Sports bid is better in a number of circumstances and worse in others, but is more certain than the C7 offer in relation to the amount that the NRL will receive'.*

Mr Moffett said this:

> *'I think the Fox Sports offer is the better offer. It is more certain. They have been very good to us and I think the new rugby league programming that they are going to do will be very good for the game'.*

1391 After discussion, the NRL PEC unanimously resolved to the effect recorded in the minutes. According to Mr Macourt's evidence:

> He could recall no discussion of the likelihood that Nine would take more than two AFL games live per week in the future, although he understood that they had never done so in the past.
>
> He thought that there were circumstances in which C7's offer was worth more

than Fox Sports' offer and *vice versa.* He did not direct his attention to whether C7 then came within the 500,000 to 1 million bracket (identified in C7's offer), although he agreed that if C7 acquired the NRL pay television rights its subscriber numbers were not likely to fall.

He did not agree that if he thought C7's offer was worth less than Fox Sports he simply would have arranged for Fox Sports not to bid at all and would have relied on News' last right in relation to the NRL pay television rights. News would then have had to deal with PBL as to Fox Sports and Telstra as to Foxtel.

In any event, he did not think that C7's offer was capable of acceptance.

He disagreed that Fox Sports had made a lower bid which was forced through the NRL PEC.

9.24.3 Aftermath

1392 At about 2 pm on Thursday, 14 December 2000, Mr Love telephoned Mr Gammell and told him that the NRL PEC had met the previous evening, but that he was unable to discuss the outcome. Mr Love telephoned Mr Gammell in response to Mr Gammell's attempts to contact NRL '*in order to present an improved offer*'.

1393 Shortly after the telephone conversation, Mr Anderson faxed a revision to C7's bid to the NRL Partnership. The key paragraph in the letter is as follows:

> *'We wish to advise a further revision to our offer whereby the minimum fee payable will rise to $48.5 million for a number of subscribers 0 to 1 million. The higher level of $62.5 million will still apply for subscriber numbers in excess of 1 million'.*

The effect of this amendment was to remove the first tier of the bid pricing, so that the minimum fee payable would be $48.5 million.

1394 Mr Gammell denied that he knew by the time the fax was sent that Fox Sports' bid had already been accepted and that the amended offer was merely designed to secure publicity. There is no reason to doubt Mr Gammell's denial that he knew the outcome of the NRL PEC meeting by this time. After all, Mr Love had refused to tell him a few minutes earlier.

1395 Later on 14 December 2000, NRL issued a media release. The bolded words in the extract below are the subject of a claim by Seven that the NRL Partnership, or NRL, engaged in misleading or deceptive conduct in contravention of s 52 of the *TP Act.*

> *'The National Rugby League has announced the biggest Pay Television rights fee in Australian history, unveiling a six year contract with Fox Sports.*
>
> ***The total value of the deal is almost $400 million dollars** and promises Rugby League will reach the biggest subscription television audience in Australia as part of the "basic channel package".*
>
> *Optus will also be offered the same right to broadcast matches.*
>
> *"This is a tremendous boost for the game of Rugby League," NRL Chief Executive, Mr David Moffett said today.*
>
> *"Importantly, it guarantees that matches remain on the basic service for more than 1.1 million subscribers with a potential reach of four million viewers, by far the largest number in the country."*
>
> *...*
>
> *The NRL partnership approved the offer at a meeting last night, having also considered an offer from Pay Television operator C-7.*
>
> *"It says an enormous amount for the state of the game that we had such interest," Mr Moffett said.*
>
> ***"The bottom line is that the guaranteed figure from Fox Sports was higher than that of C-7.***
>
> *"The Fox Sports offer contained no penalty clauses, in the case of C-7's formal offer, penalty clauses would have been $1 million per match if Channel Nine elected to show another game.*
>
> *"It must also be said that the final offers compared were very different from those which were published in various newspapers."'*

1396 On 14 December 2000, Fox Sports also issued a press release, under the heading '*FOX SPORTS AND NRL SIGN HISTORIC PAY TV DEAL*'. The press release included the following paragraph:

> *'FOX SPORTS is currently distributed on the FOXTEL and AUSTAR platforms as part of their basic package to more than 1,100,000 households. This represents a reach of ... 85% of all Australian pay television households. FOX SPORTS is also distributed to pubs and clubs and commercial outlets throughout metropolitan and regional Australia. Through these distribution*

channels, FOX SPORTS reaches almost 4 million people, by far the widest distribution of any Australian sports TV broadcaster'.

1397 Mr Stokes learned that Fox Sports' offer had been accepted when he saw a copy of the NRL's media release in hard copy or electronic form. He knew before he attended the meeting with the AFL on 14 December 2000 that C7's bid for the NRL pay television rights had been unsuccessful.

9.25 Optus-NRL Licence

1398 On 15 December 2000, Mr Moffett wrote on behalf of the NRL Partnership to Optus' General Counsel, offering Optus a non-exclusive licence on the same terms as the NRL-Fox Sports Licence, as contemplated by cl 4 of the Optus Partners Funding Deed. The offer included a branding provision equivalent to cl 4 of the NRL-Fox Sports Licence. Mr Moffett's letter enclosed a licence agreement that had been signed by Mr Philip on behalf of NRLI and by Mr Love on behalf of ARL.

1399 As Mr Anderson of Optus well appreciated, Optus was in a difficult position. If it accepted the NRL Partnership's offer of non-exclusive rights, it would have to show the NRL matches on a channel branded either '*Fox Sports*' or '*Optus*'. The former was unlikely because Telstra had opposed the use of the Fox Sports brand on Optus; the latter was unattractive as Optus had no sports channel of its own. If Optus did not accept the NRL's offer, it would have to do without NRL or persuade Telstra to drop its opposition to the supply of Fox Sports to Optus. Discussions took place between the NRL and Optus in mid-January 2001.

1400 Mr Anderson spoke to Mr Chisholm of Telstra on 16 January 2001 concerning Optus' position. Mr Anderson recorded that he told Mr Chisholm that:

'either you sell us Fox Sports (which two of your shareholders – Packer/Murdoch tell me they want to do) – else we'll be forced to breathe life into C7 for the next six years'.

Mr Anderson said in evidence that he was using a '*piece of advocacy*' to achieve a result, knowing that Telstra had a record of blocking Optus at every opportunity. The following day, Mr Anderson saw the Minister for Communications and complained about Telstra's refusal to allow the supply of Fox Sports. Mr Anderson requested the Minister's support.

1401 Also on 16 January 2001, Mr George of Optus telephoned Mr Akhurst, indicating that Optus wanted to take a feed of Fox Sports channels from September 2001. Mr Akhurst sought advice from Mr Greg Willis. On 17 January, Mr Willis recommended against acceding to Optus' request, on the ground that Telstra would have no input into how such a channel would be structured and that, in any event, the arrangement would only strengthen Fox Sports' position in future negotiations with Foxtel.

1402 Mr Akhurst told Mr George on 18 January 2000 that Telstra was not inclined to co-operate while Optus was suing it in relation to the roll-out of the Telstra Cable. Mr Akhurst said that he would not stand in the way of Foxtel supplying NRL and AFL content (in the case of the AFL, presumably from 2002) to Optus if the litigation was abandoned. However, the supply of Fox Sports content was another matter. Optus declined Mr Akhurst's proposal (limited as it was to football content).

1403 Presumably as a consequence of his conversation with Mr George, Mr Anderson informed Optus' executives on 18 January 2001 that there was '*a strong possibility that we may lose NRL football this year*'. Mr Anderson remarked that:

> *'the vendors seem to be demanding that even if we did take [the NRL] - we can't play it via our sports service [C7]'.*

Mr Anderson's suggestion was a media strategy:

> *'centering on the relevance of Pay-TV to us; the value of NRL (with the main games on free-to-air); the Strategic Review discussions, the intransigence of Telstra in blocking us from buying Fox Sports (even through [sic] the owners Packer and Murdoch want to sell it to us) – and any other arguments you, or Mike – Sam – or anybody else – can develop.*
>
> *We need to avert the news that it's the "end of Optus Television" – and push the commercial relevance of such a decision'.*

1404 On 19 January 2001, Mr Lattin wrote to Mr Moffett seeking clarification of whether the NRL Partnership's offer of 15 December 2000 prevented Optus from placing NRL matches on '*our principal sports channel, C7, and C7 branding them as such*'. Mr Lattin asserted that if the offer had that effect, it might involve a breach of the *TP Act*.

1405 Mr Moffett replied the same day. He stated that the wording of the draft licence was

clear and that the requirements of the relevant clause could be satisfied by branding the channel that included the NRL '*Matches*' with Optus' primary brand. Mr Moffett also asserted that the restriction did not contravene the *TP Act*.

1406 Mr Philip was consulted by Mr Gallop in relation to the correspondence with Mr Lattin. Mr Philip's position at the time was that the NRL Partnership would have to insist that NRL programming could not be incorporated into C7's channels, since that outcome was dictated by the terms of the NRL-Fox Sports Licence. In his evidence, Mr Philip described the branding requirement as the '*working out of a strategy*' whereby '*Fox [S]ports would become the exclusive controller of production of all the NRL Pay TV matches*'.

1407 Mr Macourt also saw the correspondence. He approved the answer that Mr Gallop gave because (as he said):

> *'we had spent a lot of money buying the NRL for Fox Sports. We thought it was an important part of the Fox Sports brand and content, and we wanted to stay associated with Fox Sports'.*

1408 Mr Macourt accepted in evidence that if Optus had been permitted to use the NRL pay television rights in association with C7's channels, the channels would have been '*more attractive*'. However, he denied that this was what he wanted to stop. Rather, his concern was with Optus using '*our rights*' in competition with Fox Sports.

1409 At about this time, Mr Philip, in consultation with Mr Akhurst, came up with a proposal that he thought might be more appealing to Optus than the one Optus had previously rejected. Mr Akhurst described it in an email:

> *'Foxtel [not Fox Sports] would supply Foxsports [sic] 2, effectively a channel with the NRL, filler and non appealing sports content, for the NRL season over this calendar year and from Fridays to Mondays. Foxtel (including us) would control the content and ensure none of the valuable Foxtel sport was handed over. Foxtel would derive all the licence fees (say $15M, given Optus currently pays $13M for just the NRL). Foxtel could brand it Foxtel etc all over the viewing'.*

1410 Mr Philip, in conjunction with Mr Akhurst, prepared a number of draft term sheets giving effect to the proposal that had been discussed between them. In the course of discussion, Mr Akhurst raised the concept of a channel specifically designed for Optus, to be

known as '*Fox Sports 3*'. A term sheet incorporating this concept was sent to Mr George of Optus on the evening of Friday, 19 January 2001. The term sheet included a provision requiring Optus to use the channel only as part of its Australian cable subscription service and preventing Optus from sub-licensing, altering or re-branding the channel. The proposed price of the special purpose channel was $16 million for the 2001 NRL season.

1411 On the same day, Mr George reported to Mr Anderson and others at Optus that News and PBL were working on a proposal for a one year deal to supply *Fox Sports 2* (including NRL) to Optus at the same price Optus had negotiated with the NRL for the six year deal on NRL content alone. Mr George noted that this would give Optus no security over sporting content beyond 2001, but that Optus could assume that regulatory assistance would be available thereafter. He thought that:

> *'Probably the real concern would be us being held to ransom on price in the future especially if C7 disappears when it loses AFL'.*

1412 It appears that Mr Philip had sent the draft term sheet to Optus before securing Telstra's final agreement to it. On 22 January 2001, Telstra advised that it required Fox Sports to exclude from the channel a more extensive list of sports than had been identified in the draft term sheet. Negotiations then ensued. At Mr Akhurst's insistence, the name of the channel was to become either '*NRL on Optus*' or '*Optus Sports*'. Mr Akhurst's reason for insisting on the change was that he believed the exclusivity of the Fox Sports channels on Foxtel was an important point of differentiation between the Foxtel and Optus pay platforms.

1413 On 24 January 2001, Mr Akhurst rejected a proposal from Mr Philip that a Fox Sports channel be provided to Optus on an interim basis, until the NRL channel was ready.

1414 The term sheet in its final form was signed on behalf of Fox Sports, Optus Vision and Foxtel Management on 25 January 2001. The term sheet ('**Optus-NRL Licence**') set out:

> *'the basis on which Fox Sports, with FOXTEL's consent, is prepared to supply Optus with a weekend rugby league season channel during 2001 called NRL on Optus or Optus Sports or such other name as includes the principal brand of Optus from time to time'.*

1415 Since Telstra refused to agree to the inclusion of Fox Sports content other than NRL matches, the channel was to have the same coverage of NRL matches for the 2001 season

that Fox Sports supplied to Foxtel, together with replays of NRL matches from previous seasons, but no other Fox Sports content. The channel was to be transmitted between 9 am on Fridays and midnight on Mondays during each weekend of the NRL season (commencing on 16 February 2001 and ending on 1 October 2001). Optus was to pay Fox Sports a fee, exclusive of GST, of $16 million. Fox Sports directed Optus to pay $14 million of that amount to Foxtel.

1416 Clause 9 of the Optus-NRL Licence provided as follows:

> *'The Channel can only be used by Optus as part of its Australian cable and satellite subscription television services for residential premises outside the Austar territory ... and may not be sub-licensed, altered or re-branded by Optus'.*

In this form, the provision allowed Optus to transmit the channel by satellite, as well as cable. However, Optus could not rebrand or alter the channel. Seven's cause of action based on cl 9 of the Optus-NRL Licence is dealt with in Chapter 21.

10. RETAIL ACCESS DISPUTE

1417 Seven pleads a cause of action under s 45(2) of the *TP Act* based on the conduct of Foxtel and Telstra Multimedia in giving effect to cl 5.2 of the BCA (Broadband Cooperation Agreement). Clause 5.2 is reproduced later [2778]. Seven alleges, in substance, that the parties to the BCA gave effect to cl 5.2 by protecting Foxtel's exclusive contractual right to use the Telstra Cable and by taking measures to prevent C7 gaining access to the Telstra Cable for the purpose of supplying pay television services directly to its retail customers.

1418 In this Chapter, I set out the principal events relating to what the parties have described as the '*retail access dispute*'. The analysis of Seven's cause of action based on these events is in Chapter 17. I have described the '*Telecommunications Access Regime*' in Pt XIC of the *TP Act* in Chapter 4.

10.1 TARBS Request

1419 On 30 June 1997, the ACCC issued the Deeming Statement which purported to declare a broadcasting access service under s 39(5) of the *Telecommunications (Transitional Provision and Consequential Amendments) Act 1997* (Cth), for the purposes of Pt XIC of the *TP Act* ([531]).

1420 On 20 August 1998, TARBS requested Telstra Multimedia and Foxtel to provide access to the Telstra Cable under Pt XIC of the *TP Act* for the distribution of the Nightmoves Channel and several foreign language channels. Foxtel Management and Telstra responded by claiming that Foxtel had an '*exclusive contractual right*' of access to the Telstra Cable and asserting that the Deeming Statement was invalid.

10.2 ACCC's Inquiry and the Draft Decision

1421 On 22 December 1998, the ACCC announced two separate inquiries. One was into a proposed declaration under s 152AL(3) of the *TP Act* that the '*Analogue Subscription Television Broadcast Carriage Service*' (that is, the Telstra Cable) be a declared service for the purposes of Pt XIC of the *TP Act*. The effect of the declaration, if validly made, was to subject the Telstra Cable to the access regime set out in Pt XIC of the *TP Act*. The other inquiry concerned a proposed '*Declaration of Technology Neutral Subscription Broadcast*

Carriage Services'.

1422 Mr Mockridge's CEO's report for Foxtel Management's board meeting of 2 February 1999 noted that the declarations, if made, might allow parties other than Foxtel and Telstra to use the Telstra Cable and thus gain access to Foxtel's cable decoder boxes (that is, STUs or set top units). Mr Mockridge reported that, while the proposed declarations were a cause for concern, Foxtel had a defence in that its exclusive right of access under the BCA was a '*protected contractual right*' for the purposes of the statutory access regime. Nonetheless, his report indicated that Foxtel Management would be making a written submission to the ACCC in relation to its inquiry.

1423 On 18 March 1999, Mr Stokes met with Mr Chris North of Wattle Park Partners Pty Ltd. The following day, Mr North sent a letter to Mr Stokes, in the latter's capacity as Chairman of ACE, outlining the services that he (Mr North) could provide. Mr North indicated that his '*expertise span[ned] the technological, regulatory and commercial aspects of the broadcasting, telecommunications and information industries*'. He also said that he had advised TARBS in relation to its access request. Mr North made the following observation:

> *'Both ACE and Seven have a strong vested interest in securing access to the Foxtel, Optus Vision and Austar cable and satellite delivery infrastructure for pay TV. The [legislation] give[s] you that right of access'.*

1424 Mr North's services were duly engaged. On 25 March 1999 Seven sent a letter to the ACCC supporting the making of the proposed access declaration. The submission included the following:

> *'The need to promote competition is clear. Under the existing regime the Seven Network has experienced difficulties reaching mutually acceptable arrangements for carriage of its "C7" sport channels on analogue subscription television broadband services. For example, during discussion of such arrangements Foxtel informed the Seven Network that Foxtel has reservations about carrying the Seven Network's sport channels with "Seven" branding on Foxtel's basic tiers'.*

Mr Stokes said that he had not seen this submission at the time it was made.

1425 On 3 June 1999, the ACCC issued a draft decision to declare analogue services for

pay television. The ACCC's press release noted that a similar service had been declared in 1997, but doubts had been raised about the validity of the declaration. The ACCC also stated that it had not reached a decision as to whether to declare a technology neutral service, which would cover digital services.

1426 On 8 June 1999, Mr Mounter sent Mr Anderson and Mr Wood a copy of the ACCC's media release, with a comment:

> *'This strengthens our hand in our negotiations, though we should not play the card yet. To discuss at the next [Executive Management Committee meeting]. Please raise it and Shane [Wood] to attend'.*

On 2 July 1999, Mr Wood attended a meeting of the Executive Management Committee and apparently made a presentation on the ACCC's draft decision.

1427 Mr Mockridge's report for the Foxtel Management board meeting of 22 June 1999 (which was postponed until 8 July 1999) reported on the ACCC's draft decision. Mr Mockridge made the following comments:

> '• *It is unlikely that FOXTEL will challenge the draft decision. However, FOXTEL intends to lodge a further submission disagreeing with the draft report by the deadline of 30 June. Once a final decision is made (expected in August), FOXTEL would consider applying for administrative review of the determination in an attempt to overturn it.*
>
> *Even if the further declaration is made and not overturned, FOXTEL considers that it has a protected, pre-existing contractual right under the BCA for exclusive use of the Telstra cable network for Pay TV, and as such any final decision as to open cable access would not override that right'.*

10.3 Mr North's Strategy

10.3.1 Mr North's Long-Term Engagement

1428 On 27 July 1999, Mr North sent Mr Stokes an aide-memoire in preparation for a meeting Mr Stokes was scheduled to have with Professor Fels, the then Chairman of the ACCC, on 29 July 1999. The aide-memoire pointed out that the ACCC had been concerned for some time:

> *'at the concentration of ownership of program rights, particularly in the Pay*

> *TV industry, and the extent to which those rights can be used to limit competition'.*

Mr North suggested that:

> *'[the] core of your argument should be that Packer and Murdoch are using their market power in the various forms of media and communications at their disposal – free-to-air television, Pay TV, newspapers, magazines, the Internet and telephone services – to persuade the AFL not to renew your broadcasting rights'.*

Mr North said that such an outcome would not be acceptable as it would contravene the *TP Act*.

1429 Mr North also identified access to pay television infrastructure as a matter of interest to the ACCC. He noted that the ACCC was committed to fighting this issue on behalf of TARBS and to winning it. He considered that the ACCC was keen to secure Seven's support on this issue '*as C7 should also be permitted to offer its own channels on Foxtel's cable service*'. Mr Stokes read this aide-memoire and used it in determining what he should put to Professor Fels at their meeting.

1430 Shortly before 3 August 1999, Mr North and Mr Stokes had a meeting to discuss Mr North's engagement on a longer term basis. Mr North sent a fax to Mr Stokes on 3 August 1999, outlining a proposed course of action on a number of issues. Mr North said this in relation to the access issue:

> *'You agreed to provide "moral" and other support to [Professor] Fels in pursuit of access to the Foxtel cable network for C7 and the Olympics. I will draft a letter to [Professor] Fels for your signature that outlines the issues from our perspective ...*
>
> *We will need to ramp up activity on this issue to ensure its resolution in our favour over the next few months if you are to have sufficient time to negotiate advantageous arrangements for pay-per-view coverage of Olympic events'.*

1431 On about 5 August 1999, Mr North entered into Terms of Engagement between himself and Seven Network and ACE. That agreement was amended in December 1999. The agreement, as amended, provided an annual fee '*for provision of consulting and strategic advisory services*'. The agreement also provided for substantial success fees for Mr North if:

Foxtel agreed to carry C7 on the Telstra Cable on an ongoing basis; and

the ACCC intervened to prevent the acquisition by Foxtel of the AFL broadcasting rights when they fell due for renewal.

10.3.2 Mr North's Strategic Objectives

1432 On 13 August 1999, Mr North sent an email to Mr Stokes, Mr Gammell and others concerning a discussion he had had with Mr Cassells of the ACCC. Mr North reported in relation to the AFL pay television rights as follows:

> *'The ACCC expressed concern to PBL, News Corp and Telstra at the time of the PBL "equalisation" with News Corp in Foxtel at the risk of them using their combined market power to lock up all major program and sporting rights. They gave assurances (naturally) to the ACCC and said that there were good commercial reasons (?) why this would not happen. The ACCC advised in its decision not to oppose the move that [it] would "subsequently monitor the market behaviour" of News and PBL in relation to program rights.*
>
> *[The ACCC] would be concerned at the acquisition by Foxtel of the AFL rights. However the ACCC would need some HARD EVIDENCE (as discussed in my aide memoire for that meeting) that News, PBL, Telstra or other parties are colluding to take those rights from us. We need to put together a paper trail of any correspondence, affidavits of conversations etc'.*

Mr Stokes did not dispute that this advice had been given to him by Mr North at the time. Thus at least 16 months before the AFL finally awarded the AFL broadcasting rights to News, Mr Stokes had been advised of the need to gather evidence in support of a complaint to be made to the ACCC about anti-competitive conduct by News, PBL and Telstra.

1433 In August 1999, Mr North prepared a document entitled '*Seven Network Strategic Objectives*'. The document dealt, among other matters, with the AFL broadcasting rights, access issues, the anti-siphoning regime and the Olympics channels. In relation to access, Mr North prepared the following strategy:

> *'1. "Advocacy" letter to ACCC as undertaken at Stokes/Fels meeting to be sent in week beginning 16/8*
>
> - *expressing support for existing and proposed revised declaration and stance being taken by ACCC*
>
> - *offering ongoing legal and other assistance (affidavits, chronologies, correspondence etc) to pursue access*

- *outlining details of services proposed (C7, MGM, Australian Library, Disney etc)*

  ...

- *outlining history of attempts at access and obfuscation by Foxtel and promising further "hard" evidence and copies of correspondence when access sought again under the revised declaration.*

2. *Revised Declaration expected to be announced by ACCC in week beginning 23/8.*

3. *Formal requests by Seven Network to Telstra Multimedia and Foxtel for access for C7 and the Olympics as soon as declaration released by ACCC (week of 23/8) with deadline for response (30/8)*

   - *letter to be drafted by [solicitors] but signed by Seven to retain the semblance of a genuine attempt at reconciliation, not the forerunner to legal proceedings.*

4. *Develop chronology/history of negotiations with Foxtel for access for C7 ...*

5. *Following further advice from Cassells, ACCC, obtain supporting legal advices on key points of law to support the case for access ... e.g. validity of initial declaration and status of revision, legal status of purported 23/9/96 exclusivity contract.*

6. *Political campaign ...*

7. *Progressive press campaign ...*

8. *Prepare access requests to Foxtel, Austar and TARBS for access to their satellite and MDS Pay TV carriage services for C7 ...*

   - *timing of lodgement to be determined to maximise strategic advantage.*

9. *Further examine commercial and political implications of an equity stake by Telstra in C7 ...'*

1434 On 29 October 1999, Mr North updated Mr Stokes and Mr Gammell on the '*key issues in train and the current state of play*'. Mr North commented on the AFL broadcasting rights as follows:

'Working with Freehills [solicitors] to refine submission to ACCC arguing market definition, limits to plurality issues and "accretion of market power" issues ...

To meet with ACCC late November to present a first submission and influence their thinking in a non-adversarial environment

- *in preparation for the big event if and when News or PBL move on the rights'.*

10.4 Seven Formally Seeks Access to the Telstra Cable

1435 On 25 August 1999, Seven formally requested the Foxtel Partnership and Telstra Multimedia, pursuant to s 152AR(3) of the *TP Act*, to supply Seven with broadcasting access services declared by the ACCC. The letter stated that the request was made to enable Seven to provide three pay television broadcasting services. One service was to commence no later than 13 September 1999 and was to be supplied to subscribers on an ongoing basis. The two remaining services were to operate from 13 September 2000 to 2 October 2000, in order to provide coverage of the Sydney Olympic Games. The letter also sought billing information in connection with matters associated with the supply of broadcasting services, together with the use of '*conditional-access equipment*'.

1436 The letter sought a response from Foxtel by 8 September 1999. Although drafted by Seven's solicitors, the letter was signed by Mr Wood. This appears to have been pursuant to Mr North's strategy of having Seven sign the letter in order to '*retain the semblance of a genuine attempt at reconciliation*'.

1437 On 30 August 1999, Seven made further requests to Telstra Multimedia and to Foxtel for access to the Telstra Cable. The requests were said to be made for the purpose of providing three pay television services on the basis previously outlined. On the same day, TARBS made a further request for 16 additional channels, having originally requested eight channels in 1998.

1438 Seven made further requests for access on 3 and 8 September 1999. These were in substantially the same terms as the previous requests, but were made in the event that earlier requests had not been validly made.

10.5 A Declaration Is Made

1439 In the meantime, on 30 August 1999 the ACCC issued a media release stating that it had decided to declare pay television carriage services under Pt XIC of the *TP Act*. This was said to confirm the ACCC's earlier view, outlined in its June 1999 draft report, that it should declare such a service. The ACCC said the declaration would promote competition for retail pay television services and was in the long-term interests of consumers. The ACCC decided, however, not to declare a technology neutral pay television access service, which would also have applied to digital broadcasting over cable. This decision was said to reflect the fact that the deployment of digital technology and services was at an early stage.

1440 The ACCC published a detailed report relating to its decision to declare the analogue subscription television broadcast service. The declaration was gazetted on 8 September 1999.

10.6 Telstra's Response to Seven's Strategy

1441 Ms Lowes of Telstra was bemused by Seven's strategy. In an internal email of 25 August 1999, she commented as follows:

> *'This is fascinating. So are they proposing that we tell them where the customers are and they will sell a service that we will then bill??*
>
> *This is unlike any access declaration I have ever heard of'.*

Two days later Ms Lowes, in an internal email, expressed support for the idea of meeting with Seven, but added that she had been talking with Seven for some time and '*I can pretty much guarantee that this is about putting C7 on FOXTEL*'.

1442 On 31 August 1999, Ms Lowes informed colleagues within Telstra about a conversation she had had with Mr Gammell:

> *'1. Seven wants C7 to be carried as a channel on Foxtel.* ***They are not looking for separate access to the HFC network. They just see this as a way to push their way in****. They plan to send Telstra/Seven a separate term sheet on C7 which will offer Foxtel a price that is lower than Fox Sports price by a certain percentage, say 30%. This will make for an interesting discussion at the Foxtel Board meeting.*
>
> *2. Seven wants the Olympics to be carried as a special Pay per View on Tier channel on Foxtel. In my view, this should be very doable as Foxtel would not have to bear any short term cost burden. Query what PBL and News will say here.*

> *3. Peter [Gammell] says that they told [Minister] Alston that the issue was not Telstra's fault and they saw Telstra as cooperative here.*
>
> *4. Peter thinks that Fels got this one wrong, but … that it could still be helpful to them'.* (Emphasis added.)

1443 On 5 and 6 September 1999, an exchange of emails took place within Telstra concerning Seven's access request. Mr Moriarty recorded that Telstra had been pressing at Foxtel Management board meetings for Foxtel to seriously consider C7, but News and PBL '*are emphatically opposed*'. He considered that the legal position was '*very clear cut*'. The legislation had grandfathered the entitlement of network owners to enter exclusive content deals so that the rights of the Foxtel Partnership and its '*shareholders*' were protected.

1444 Ms Lowes, who had been in regular contact with Mr Gammell, assessed the position this way:

> *'The service that Seven wants is not Telstra's – it is Foxtel's. They want to be on the Foxtel service. In other words, they do not want to acquire their own customers, bill them, etc. They want Foxtel to do so. And … as Gerry [Moriarty] correctly says … News and PBL, and to a lesser extent, Foxtel management do not want to take C7.*
>
> *…*
>
> *Re Seven, I have told Peter Gammell (Kerry Stokes's 2IC) that we would like to have C7 on Foxtel, but that News and PBL are preventing this. He claims that he told Alston this.*
>
> *…*
>
> *C7 is harder – Tom [Mockridge] does not even want to contemplate a deal with Seven as he thinks that he might get the AFL directly. He therefore does not want to give C7 any leverage with the AFL to keep it. Seven knows this to [sic] so … it is likely to get difficult'.*

1445 On 7 September 1999, Mr Stokes wrote to Senator Alston, the Minister for Communications, Information Technology and the Arts, expressing concern at reported comments of Dr Switkowski to the effect that Telstra was not bound by the ACCC's declaration in relation to the Telstra Cable. Mr Stokes said it was his strong view that the Telstra Cable was a public asset and exclusivity of use was intended to be short-term. He urged the Government to pursue any avenues available to it to ensure that Telstra complied '*with the letter and the spirit of the telecommunications access regime*'.

1446 Mr Mockridge of Foxtel Management and Mr Rizzo of Telstra exchanged communications between 8 and 10 September 1999. Mr Mockridge complained of public comments by Telstra to the effect that it was open to commercial negotiations with parties concerning access to pay television. Mr Rizzo replied that the ACCC's declaration had placed Telstra in a difficult position. While Telstra did not wish to be seen as hostile to the ACCC:

> *'On the other hand, Telstra fully understands its legal obligations to FOXTEL and our joint venture partners vis-à-vis pay television exclusivity. In discussions regarding access, Telstra has consistently maintained that our agreement with FOXTEL constrains Telstra from unilaterally offering access to the network for the provision of pay TV services, and that any decision regarding new content on FOXTEL rests with the FOXTEL Board and management'.*

Mr Rizzo noted that as the interests of the three Foxtel partners might diverge on this issue, Foxtel Management should form its own independent position.

10.7 Foxtel and Telstra Respond to the Access Request

1447 On 9 September 1999, the solicitors for Foxtel Management rejected Seven's requests, on the following grounds:

> Foxtel Management was neither a carrier nor a carriage service provider for the purposes of Pt XIC of the *TP Act*;
>
> the ACCC's declaration was invalid; and
>
> Foxtel Management had a '*protected contractual right*' in relation to the Telstra Cable for the purposes of s 152AR(12) of the *TP Act* and any supply of the requested service would deprive Foxtel Management of its right.

Telstra Multimedia also responded to Seven's requests on 9 September 1999, asserting that it was neither a carrier nor a carrier service provider. However, Telstra Multimedia said that it would consider the issues further when it had the opportunity to do so.

1448 Seven responded to Foxtel Management's rejection on 10 September 1999. The letter stated that Seven did not accept Foxtel's protected contractual right contention and sought particulars of Foxtel's claim. Mr Mockridge replied on 13 September 1999, repeating the contention that Foxtel would be deprived of its protected contractual right if Telstra

Multimedia were to grant cable access to a third party. He also asserted that Telstra Multimedia was precluded by its contractual obligations to Foxtel from acceding to Seven's access request. Mr Wood responded to Mr Mockridge's letter on 15 September 1999, disagreeing with Foxtel's assertions.

1449 On 17 September 1999, the ACCC wrote to Telstra expressing the view that the Telstra Cable was a '*declared service*' and asking whether Telstra proposed to accede to the requests for access that had been made by Seven and TARBS. The letter recorded that the ACCC had received copies of correspondence directed to Telstra Multimedia.

1450 Telstra responded to the ACCC's letter of 17 September 1999 on 24 September 1999. Telstra aligned itself with Foxtel Management's contentions in the legal proceedings that, by then, had been instituted.

1451 The Foxtel Management board meeting of 21 September 1999 received a board paper which recommended as follows:

> *'The Board note that FOXTEL intends to apply to the Federal Court for a review of the recent decision of the ACCC to declare analogue cable subscription services. FOXTEL has been advised that the application would have reasonable prospects of success. The FOXTEL Partners, FOXTEL and Telstra Multimedia have received several access requests from Seven and TARBS. FOXTEL has responded to those requests on the basis that it is not an access provider and in any event any grant of access would deprive FOXTEL of its protected contractual right'.*

1452 The minutes of the board meeting recorded the following:

> *'The CEO advised FOXTEL's intention to apply to the Federal Court for a review of the recent decision of the ACCC to declare analogue cable subscription services and the fact that this presented an opportunity for FOXTEL's argument that it operates in a wider television market to be heard in the Federal Court. The CEO indicated that the application would be in the name of FOXTEL only as Telstra were unwilling to join the proceedings at this stage, although FOXTEL was receiving good co-operation from Telstra's legal team on the matter.*
>
> *The CEO referred to discussions with the Seven Network and advised that it was apparent from Seven's actions that they had decided to pursue access via the access regime rather than commercial negotiations with FOXTEL concerning FOXTEL's distribution of the channels.*

There was discussion of the AFL rights and Mr Falloon stressed the strategic importance of securing the rights'.

1453 On 22 September 1999, Foxtel Management commenced proceedings in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) challenging the validity of the ACCC's declaration of the Telstra Cable. In October 1999, Foxtel Management instituted separate proceedings under s 39B(1A) of the *Judiciary Act 1903* (Cth), challenging the validity of the ACCC Deeming Statement that had been made in June 1997. These proceedings, including cross-claims, were heard together by Wilcox J. His Honour also dealt with a claim by Foxtel Management and Foxtel Cable that neither was a carrier or carrier service provider within Pt XIC of the *TP Act*.

1454 On 23 September 1999, C7 commenced its own proceedings in the Federal Court, seeking a declaration that Foxtel Management did not have a protected contractual right for the purposes of Pt XIC of the *TP Act*. These proceedings were heard by Tamberlin J. On 27 March 2000, Tamberlin J delivered a judgment holding that there was no relevant protected contractual right: *Seven Cable Television Pty Ltd v Telstra Corporation Ltd* (2000) 171 ALR 89. On 31 March 2000, his Honour made declarations to give effect to his judgment: see *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* (2000) 173 ALR 362, at 369 [10], per Wilcox J, where the making of the declarations is noted.

1455 The '*public law*' aspects of the disputes were determined by Wilcox J in a judgment delivered on 8 May 2000. In substance, his Honour held that Foxtel Management failed in the proceedings, although he upheld some of its individual contentions. Wilcox J declared that the ACCC's declaration under s 152AL(3) of the *TP Act* was valid and effective in law: see *Foxtel Management v ACCC* 173 ALR, at 425.

10.8 TARBS Arbitration

1456 On 23 September 1999, TARBS lodged a notification with the ACCC of an access dispute between it and Telstra Multimedia. The notice formally invoked the ACCC's arbitral power under Pt XIC of the *TP Act.*

1457 On 15 October 1999, Foxtel Management was joined as a party to the arbitration. Between October and December 1999, Telstra Multimedia, Foxtel Management and TARBS

made submissions on a variety of issues. In August 2000, the arbitration was still continuing.

1458 Seven did not take any steps at this stage to initiate the arbitration process in relation to its access dispute with Telstra Multimedia or Foxtel. Seven in fact did not notify a dispute with the ACCC until late August 2000, after the Full Court had dismissed appeals from the judgments of Tamberlin and Wilcox JJ.

10.9 Responses to the Judgments

1459 On 29 March 2000, following Tamberlin J's decision at first instance, Seven wrote to Telstra requesting that negotiations commence with a view to C7 obtaining access to the Telstra Cable. The letter expressed the hope that the parties could work cooperatively '*rather than through the arbitration processes that are available to us*'. Seven sent a similar letter to Foxtel Management and the Foxtel partners on 30 March 2000.

1460 On 31 March 2000, Foxtel Management was granted leave to appeal against the judgment of Tamberlin J. Telstra Multimedia and was granted leave to appeal on 3 April 2000.

1461 On 3 April 2000, Mr Blomfield confirmed to Mr Wood that Foxtel remained interested in the Olympic channels. However, he advised that Foxtel's position in relation to the issue of carriage of C7 remained as he had previously outlined and, in particular, that the board had decided that Foxtel would pursue the AFL pay television rights directly from the AFL when they became available. Mr Blomfield sent a second letter on the same day to Mr Wood stating that, in view of the appeal, there was no point in discussing the terms and conditions on which Seven would be given access to the requested services.

1462 On 5 April 2000, Mr Blomfield (who had succeeded Mr Mockridge as CEO of Foxtel Management in February 2000) met with Mr Stokes and Mr Gammell. Mr Blomfield made it clear that Foxtel wished to acquire the Olympic channels, but not C7.

1463 On 6 April 2000, Mr de Jong of Telstra wrote to Mr Wood of Seven informing him that:

> *'Pending Justice Wilcox delivering his judgment on the validity of the 1997 Deeming Statement and 1999 Declaration, and the outcome of any appeals,*

> *Telstra's contractual commitments to FOXTEL preclude Telstra from negotiating the terms and conditions on which Telstra would supply broadcasting access services to Seven'.*

1464 On 12 May 2000, Mr Wood wrote to both Foxtel Management and Telstra stating that unless they indicated by 17 May 2000 that they were prepared to negotiate, Seven would:

> *'have no choice but to consider our options which obviously include notifying the ACCC that an access dispute exists and commencing the arbitration process under the* Trade Practices Act*'.*

1465 On the same day, Mr Stokes wrote a long letter to Mr Blomfield to which I have referred in Chapter 7 ([799]). Under the heading '*Access Requests*', Mr Stokes said this:

> *'Frankly, given Tamberlin J's decision, I am extremely surprised that Foxtel and Telstra continue to refuse to discuss access with us for Seven's sports services. Seven has written to you twice suggesting that it was imperative that negotiations between our organisations commence immediately and proceed expeditiously.*
>
> *We sought these access discussions so that, if and when the legal and commercial issues between our organisations are resolved, we have an agreement in place to provide for immediate access, rather than spending additional months negotiating the terms of access, and further delaying the supply of Seven's sports services on the Telstra/Foxtel platform. That seems to us to be a reasonable and sensible approach in the circumstances and we do not see how this can possibly disadvantage Foxtel. Foxtel's approach being one of a pattern of delay, is clearly designed to damage Seven. With the Olympics fast approaching it is imperative that the practical and commercial aspects of access by Seven, be resolved as soon as possible.*
>
> *...*
>
> *It is difficult to see how it is in the interests of either of our organisations to have terms and conditions imposed by a government bureaucracy rather than worked out between us. Lest there be any misunderstandings as to our position, let me make it clear that we would rather do a commercial deal than proceed down the road of forced access under the* Trade Practices Act, *but we will proceed down that road, and soon, if we are compelled to'.*

1466 Mr Stokes also complained of what he described as '*Continued Delay and Obstruction*' and invoked the threat of legal action based on Foxtel's allegedly anti-competitive conduct:

> *'Your refusal to discuss or allow access appears to be motivated, to paraphrase the words in your letter, by Foxtel's lack of interest in promoting*

a major competitor. Keeping Seven's pay services off the cable obviously enhances Foxtel's competitive position and damages Seven's competitive position. Foxtel does not have a problem carrying the FoxSport [sic] channel, presumably because there are common interests and associations between the owners of Foxtel and FoxSport, and FoxSport is not therefore regarded as a competitive threat. I would like to be confident that Foxtel's refusal to discuss access is not evidence of a conspiracy amongst "Foxtel friends and family" to deny access to people Foxtel regards as outsiders, when Foxtel appears more than happy to provide access to "insiders" like FoxSport.

...

The Way Forward

I, of course, assume a discounted sports channel, including the Olympics, would be of interest to Foxtel and its partners and their respective shareholders.

...

Any further delay will compromise our ability to prepare for and promote the Olympics channels, and will damage Seven.

...

The continuing delay is causing us ongoing loss of revenue and opportunity in relation to Seven's other services, including C7. Seven will of course seek to recover its losses through the Courts against Foxtel and Telstra. However, my preference is to resolve this amicably'.

1467 In his evidence, Mr Stokes initially claimed that he had thought that Seven could initiate an access arbitration only after the appeals had been determined by the Full Court. This evidence is plainly inconsistent with the terms of Mr Wood's letter of 12 May 2000 and is difficult to reconcile with Mr Stokes' own letter. Mr Stokes ultimately acknowledged that he knew in May 2000 that Seven could initiate an arbitration immediately if it chose to do so.

1468 The strong likelihood is that Mr Stokes knew that Seven could have taken that step after the ACCC had made its declaration in relation to the Telstra Cable, even though Telstra Multimedia and Foxtel made it clear at that time that they did not regard the declaration as valid. No doubt an issue might have arisen as to how far the arbitration could proceed while the litigation challenging the validity of the declaration was pending. However, insofar as Mr Stokes was suggesting that at an earlier stage that he thought that the arbitration had to await the outcome of the challenge to the validity of the ACCC's declaration or of the proceedings

addressing whether the Foxtel Partnership could rely on a '*protected contractual right*', I do not accept that evidence.

10.10 Further Discussions within Telstra

1469 In late May 2000, Mr de Jong and Mr Akhurst of Telstra exchanged emails. The correspondence raised issues concerning Foxtel and C7, the Olympics and the access dispute. The exchanges have been set out in Chapter 7 ([801]-[805]).

10.11 Full Court Decisions on the Access Appeals

10.11.1 The Decisions

1470 On 18 August 2000, the Full Court of the Federal Court gave three separate judgments on the appeals from the decisions of Tamberlin J and Wilcox J ([1455]). The Full Court:

> upheld in substance Tamberlin J's conclusion that Foxtel did not have a '*protected contractual right*': *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 464;
>
> held that the ACCC's statement of June 1997 was invalid, but that the ACCC's declaration, which took effect on 8 September 1999, was valid: *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 517; and
>
> upheld Wilcox J's dismissal of Foxtel's claim that it was not a '*carriage service provider*' for the purposes of the *TP Act*: *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 555.

10.11.2 Consequences of the Decisions

1471 In preparation for the Foxtel Management board meeting of 22 August 2000, the Telstra Media Division prepared a briefing note. The note referred to the Full Court judgments and pointed out that the management of Foxtel had been requested at the April 2000 board meeting to prepare a contingency plan in relation to C7's access claim to the Telstra Cable and Foxtel's STUs (set top units). The note recommended that the Telstra representatives:

> *'inquire whether in order to limit FOXTEL's potential damages and any future competition from C7 as a separate service provider, it would now prove beneficial for FOXTEL to negotiate for a licensing agreement for the carriage of C7 on FOXTEL'.*

The minutes of the Foxtel Management board meeting of 22 August 2000 do not record any discussion of this topic.

1472 On 23 August 2000, C7 wrote to Telstra Multimedia and the Foxtel partners asking for immediate discussions on the terms of C7's access to the Telstra Cable. The letters stated that, despite the history of delays in Telstra and Foxtel, C7 hoped for a cooperative approach rather than having to resort to the arbitral processes available to it.

1473 On 25 August 2000, Mr Blomfield replied to C7 as follows:

> *'In your letter you refer to Seven's pay television service being "carried by FOXTEL". As FOXTEL is under no obligation to include C7 as part of its channel line-up, we assume that you are referring to C7 commencing a competitive retail pay television service which is "carried" on Telstra's network, with access to FOXTEL's STUs. Subject to the possibility of FOXTEL making an application for special leave to appeal to the High Court in relation to any of the findings of the Full Federal Court, FOXTEL is willing to give C7 access to its STUs.*
>
> *We will send you a draft access agreement as soon as we can but it will take some time for FOXTEL to determine a price which it considers to be an appropriate price for access seekers to pay'.*

1474 Telstra wrote to C7 on 28 August 2000, advising that it was considering commencing commercial negotiations with all access seekers in relation to the terms of access.

1475 On 29 August 2000, C7 made further access requests, seeking six additional channels, taking the total requested to eight full-time channels and two Olympic channels. Foxtel Management replied on 7 September 2000, asserting that it did not have available capacity and thus was not obliged to supply C7 with the services it had requested.

10.11.3 Notification of the Access Arbitration

1476 On 29 August 2000, C7 formally notified the ACCC pursuant to s 152CM(1) of the *TP Act* that an access dispute existed between Seven and Telstra Multimedia, Foxtel Management and the Foxtel partners.

10.12 Access Arbitration

1477 Since Seven does not rely, in relation to the retail access dispute, on any events occurring after 18 August 2000, it is not necessary to trace the history of the access arbitration conducted by the ACCC. It is enough to note that:

> on 22 December 2000, the ACCC issued an draft interim determination in each of the C7 and TARBS arbitrations, concluding that nine channels were available to access seekers and proposing certain terms for access to C7 and TARBS;
>
> after the parties had made further submissions in relation to the draft, the ACCC made an interim determination in each arbitration, which came into effect on 5 April 2001; and
>
> the interim determination expired on 5 April 2002, but the arbitration continued thereafter.

10.13 Foxtel's Offer of Carriage to C7

1478 Following the ACCC's draft interim determination of 22 December 2000, a Foxtel board paper dealing with '*Access Strategy*' was circulated to directors on 16 January 2001. A revised version, circulated on 18 January 2001, recommended that Foxtel Management commence litigation in the Federal Court claiming declarations that the ACCC had exceeded its powers by including in its draft interim determination:

> an order that Foxtel make available its call centre services (operated on its behalf by Telstra); and
>
> an order purporting to compel Foxtel to give access to the STUs to Telstra.

1479 Mr Philip was in favour of the recommendation because he regarded the draft interim determination, if implemented, as likely to have a detrimental effect on the Foxtel business. Mr Philip discussed his concerns about the ACCC's draft with Mr Falloon and they agreed to seek a meeting with the ACCC. That meeting took place on 8 February 2001 and was attended by Professor Fels and other senior officers of the ACCC. It appears that during that meeting the ACCC suggested that one way forward was for Foxtel to make offers to C7 and TARBS for carriage of their channels in return for C7 dropping the access claim. Mr Philip and others then worked on drafting offers to C7 and TARBS.

1480 On 21 February 2001, Mr Blomfield wrote to Mr Stokes on a confidential basis attaching a proposal for his consideration. A copy of the proposal was, however, sent to the ACCC. The proposal included the following terms:

> C7 would supply two 24 hours, seven days a week channels;
>
> the channels would be limited to specific genres including sport, Australian drama and certain dedicated foreign language services;
>
> Foxtel would have non-exclusive rights to the channels for analogue cable only;
>
> the term would be 12 months commencing on 15 March 2001, but C7 would have an option to renew for a further 12 months;
>
> C7 would pay Foxtel $340,000 per channel on the signing of an agreement and $1.32 million per annum for each channel; and
>
> each channel would be carried as an a la carte channel (after basic) as part of the Foxtel line-up.

1481 On 7 March 2001, Mr Blomfield reported to Foxtel Management directors on his discussions with Mr Stokes concerning Foxtel's proposals:

> *'I met with Kerry Stokes last Tuesday and he said that he was interested in our offer but would not be able to get back to me until the end of the week after he has had the opportunity to run some numbers. His concerns related to the term of 2 years and the genre restrictions. I impressed upon him that I would work with him on the genre issue once he provided me with some parameters. Since then, I have spoken to Kerry almost daily and he is still working on the channel genres. In our call yesterday, Kerry said he would come back to me today on his timing'.*

1482 After discussions within Seven, Mr Stokes drafted two alternative replies to Mr Blomfield. The first was a bare rejection of Foxtel's offer. The second draft was longer and included the following:

> *'As you are aware, we have always maintained that the acquisition of the AFL rights was an abuse of market power by FOXTEL and its shareholders and their associated companies'.*

The longer draft prompted Mr North to observe on 8 March 2001 that:

> *'If our commercial objective is a damages claim then by all means reject. If access is our objective then Foxtel MUST be more amenable to a negotiated solution prior to a final ACCC determination in order to avoid the latter'.*

1483 Mr North's observation prompted an unusually formal response to him the next day from Mr Stokes. The form of the response may be explained by the fact that Seven's lawyers participated in the discussions within Seven. Mr Stokes' response was as follows:

> *'Our only criterion is whether the Foxtel offer is a reasonable commercial deal for Seven. There is no other driver in reaching our decision and especially not a damages claim.*
>
> *So far, the consensus amongst the opinions being given to me seem to indicate that the Foxtel offer is not a sound commercial deal for Seven'.*

1484 On 12 March 2001, Mr Stokes wrote to Mr Blomfield rejecting Foxtel's offer and stating that Seven would rely on its access claims before the ACCC. No reference was made to any alleged abuse of market power.

10.14 Seven's Response to the Interim Determination

1485 On 23 March 2001, apparently in anticipation of the ACCC's interim determination, Mr Wood reported that certain discussions with The Movie Network and the Disney Channel had '*borne fruit*', in that the suppliers had indicated a willingness to do licensing deals. However, on 26 March 2001, Mr Gammell commented that the price suggested by The Movie Network was too high. C7's discussions with The Movie Network and the Disney Channel did not produce any agreements.

1486 A '*Corporate Issues Review*' prepared within Seven on 10 April 2001 noted that the ACCC's interim determination had not provided access to Foxtel's call centre, subscriber management system or billing centre. Mr Gammell's evidence was that he did not believe that C7 could recoup sufficient revenue from subscribers to cover the variable and fixed costs of establishing and operating a pay television service by supplying two channels only at the prices specified by the ACCC. For that reason, together with uncertainty about access to Foxtel's STUs and the future allocation of sports broadcasting rights, he said that he did not recommend that C7 should seek retail access to Foxtel.

1487 On 27 March 2001, Mr North reported on discussions he had held with the ACCC.

Mr North conveyed to the ACCC Seven's:

> *'position that the access fee as a barrier to entry is likely to be too high and may render the service uneconomic'.*

1488 The ACCC's response, not surprisingly, was that in the absence of any details of business plans from Seven in relation to programming, demand expectations or pricing '*it was impossible for the ACCC to assess the commercial impact of the access numbers'*. According to Mr North, the ACCC said that:

> *'any detailed business plan put before the [ACCC] that demonstrated the non-viability of the service at sensible price points and that assumed a takeup consistent with industry norms would be VERY PERSUASIVE in convincing the ACCC to move on [the] access price in any final determination'.*

1489 In response to Mr North's '*helpful*' report, Mr Stokes said that Seven '*now need[s] to put together the business plans both for the ACCC and ourselves*'. It appears that the impetus for work within Seven on a business plan relating to retail access came from the ACCC's comments to Mr North.

1490 Mr Gammell wrote to Mr Wise and others on 28 March 2001, suggesting that Seven should develop a working model to test out the '*economic dynamics for a package of 4 channels: C7, ESPN and 2 MOVIE channels*'. Mr Wood's reply proposed that research should be commissioned on the pricing options. This led to Woolcott Research preparing a report in May 2001 designed to determine:

> Foxtel subscribers' level of interest in subscribing to C7; and
>
> the optimum pricing strategy for a C7 subscription.

The Woolcott report concluded that the interest levels were only moderate and that:

> *'revenue would be maximised at the lowest price points of $5 for C7 and ESPN, and $7 for C7 and The Movie Network'.*

1491 After considering this research, Mr Wise advised Mr Stokes and others on 20 May 2001 that:

> *'What is clear is that to move forward we have to abandon C7 Sport as a format. We are running out of time to get on Foxtel with C7 as a driver. While this may seem a problem I think we never had a product that could fly*

in the market. The product fundamentally changes at the end of September. To go to the market and drive a product we need much more than this. [Our] second channel for instance only has overflow product. [The] result would have been poor both in terms of financials and credibility'.

Mr Wise contemplated a channel which used library product to supplement Seven's pay television rights to cricket, soccer, tennis and the like.

1492 On 1 June 2001, Mr Wise informed the Seven Network board that the C7 business needed a base revenue stream to be viable. On the question of access, he advised as follows:

'• Publicly pushing hard.

Telstra cannot deliver for another 3 months.

Developing case to ACCC to revoke interim determination.

Behaviour of Foxtel/Telstra being used to strengthen anti-competitive case'.

1493 The budget presentation for the Seven Network board meeting of 29 June 2001 proposed as follows:

'• Revoke or vary interim determination now:

- *No access fees payable or significant delay – saves $5-7M*
- *Seek access to SMS/CAG and more channels – restart the clock*
- *May lose any action for hindering or delay against Telstra and Foxtel during interim.*
- *Focus on securing an Optus/Austar deal'.*

1494 Mr Gammell denied that the option of a variation to the ACCC's interim determination was attractive to Seven because it had no intention of exercising any right of access and because a variation would simply extend the process, thus deferring any obligation on Seven to pay fees to Foxtel. Be that as it may, Seven pursued the issue until February 2002, when the ACCC decided that no action should be taken on C7's request to vary the interim determination.

10.15 Seven Considers Withdrawing Its Access Claim

1495 On 3 February 2002, Mr Gammell sent a copy email to Mr Stokes as follows:

> *'As you know I am not wedded to "winning" the access case with the ACCC as I believe that we have been blown up commercially and the pricing that we will eventually gain will not be attractive commercially, but of course we will not know that until we have won!*
>
> *But, a win of our right to access is very important to use in our s 45 and s 46 cases'.*

1496 Mr Gammell confirmed in evidence that the reference to having been '*blown up commercially*' was to the conduct of the consortium in depriving Seven of the AFL broadcasting and NRL pay television rights. He denied that the email reflected his intention to continue the access case solely for forensic advantage, and not with a view to actually using the cable for retail access. Mr Stokes, however, understood the email as saying that there was no commercial advantage for C7's business in exploiting access if Seven succeeded in '*winning*' its case. Despite Mr Gammell's denial, that is clearly the message he intended to convey by the email.

1497 On about 9 February 2002, Seven's solicitors prepared a '*withdrawal options*' paper relating to C7's access claim to the Telstra Cable. In an email of 23 February 2002 to Mr Wise, Mr Jarman, an in-house lawyer, observed that '*[s]hort term it is clear that the cost of just maintaining the access case is prohibitive*'. Mr Jarman pointed out that Seven's long-term plans might be assisted by access to the cable, but the '*[p]roblem is that this long term ideal does not match the short term problems*'.

10.16 End of the Access Arbitration

1498 Following a prolonged period in which further submissions were made to the ACCC and various reports prepared, C7 withdrew its notifications of access disputes on 9 June 2004. This brought the access arbitration to an end.

11. EVENTS RELATING TO THE TERMINATION OF THE C7-OPTUS CSA AND ENTRY INTO THE FOXTEL-OPTUS CSA

1499 In this Chapter, I deal with two principal topics: first, the circumstances relating to the claims between Seven and Optus which revolve around the events leading to Optus' termination of the C7-Optus CSA; and, secondly, the circumstances leading to the entry into the Foxtel-Optus CSA of 5 March 2002.

1500 The Chapter recounts events occurring after the allocation of the AFL broadcasting rights and the NRL pay television rights in late 2000 and early 2001 although some transactions, such as the allocation of the AFL broadcasting rights in 2005, are explained elsewhere in the judgment. The Chapter also includes background material relating to the C7-Optus CSA and Optus' problems as a retail provider of pay television services.

11.1 Background: Licensing of C7 to Optus Vision

11.1.1 C7 Negotiates with Optus

1501 In June 1998, Mr Gammell formulated draft term sheets for the supply of C7 channels to Foxtel and Optus. In Optus' case, Seven proposed the supply of a single sports channel, branded as '*Seven's Super Sport*', operating 24 hours a day. Seven would telecast NRL matches on a separate channel, subject to the rights being made available by Optus, and from time to time would make available an overflow channel. The fee in the first year was to be $10.00 pspm (per subscriber per month), based on an MSG (minimum subscriber guarantee) of 160,000 subscribers. There was to be a reduction of $1.00 pspm for every Foxtel subscriber to whom the channel was sold. As Mr Gammell confirmed in evidence, this was designed to reduce the effective MSG to $9.00 pspm. As News points out in its submissions, the effect of the MSGs included in Seven's proposals to Foxtel and Optus (assuming both proposals were accepted) was to guarantee revenue of at least $46 million in the first year, against a projected cost base for C7 of $40 million for that year.

1502 Shortly after making these proposals, Seven prepared a business plan which contemplated supplying a sports channel to Austar on a tier at $4.00 pspm. The plan also assumed subscriber revenue from Optus of $30 million in the first year, adjusted for inflation thereafter. This reflected Mr Gammell's view that Seven could not proceed with the sports channel business unless it could secure an MSG covering the bulk of the business' projected

costs over a 10 year period. Mr Gammell agreed in evidence that the anticipated cost base of $40 million had been subsequently reduced '*to ensure that Seven's costs of producing the channel were substantially underwritten*'.

1503 On 10 June 1998, Seven's solicitors sent Optus an annotated version of a draft Channel and Production Supply Agreement. The draft contemplated that Optus would pay an annual fee of $30 million (subject to adjustments). It also contemplated that Optus could sub-license the channel to any party other than Foxtel, but for no more than $5.00 pspm (increased to $7.00 pspm in the final agreement). Optus was entitled to sub-license the channel on a tier without any MSG.

1504 At Seven Network's board meeting of 12 June 1998, Mr Gammell reported that Seven was still negotiating with the shareholders of SportsVision to remove the exclusivity of its sporting rights. He advised that the object was to develop and package Seven's own pay television sports service and to this end Optus was expected to provide an MSG of $30 million per annum. As Mr Gammell said in his evidence, he was confident that Optus would agree to the MSG because it had no access to Fox Sports or any other channel with Australian sports content.

11.1.2 C7-Optus CSA

1505 On 30 June 1998, the day after SportsVision went into liquidation, C7 (then known as Fanessa Nominees Pty Ltd), Seven Network and Optus Vision entered into the C7-Optus CSA. The C7-Optus CSA included the following terms:

> Seven granted Optus a licence to distribute on pay television the non-exclusive sports programming service to be provided by Seven comprising the '*Primary Channel*' (full-time) and the '*Overflow Channel*' (part-time) (cl 3.1);
>
> the agreement was to continue until 31 December 2008 (cl 3.3);
>
> Seven warranted that it would not license or make available the '*Seven Service*' (that is, the non-exclusive sports programming service provided by C7 to Optus) or any AFL pay television rights to Foxtel, News or Telstra before 1 October 1998, unless Optus consented (cl 3A.1);

Seven agreed to use its reasonable endeavours to procure that Optus would be offered Fox Sports on terms no less favourable than any other recipient of Fox Sports (cl 3A.2);

C7's service would include a replay of all AFL games in each round (cl 4.4(a)) and of the Ansett Cup (pre-season) competition (cl 4.4(b)(i));

Seven warranted that it would not sub-license the AFL pay television rights to any person other than that person taking C7's service in full (cl 4.4(c));

C7's service would include at least 16 exclusively live AFL games, referred to as '*Live Non-Conflicting Games*', in each AFL season (cl 4.4(d)(i));

C7's service would also include the maximum number of '*Live Games*' (that is, a live broadcast of games not shown as a live or delayed broadcast on a '*Commercial Channel*' produced by Seven) that Seven was able to include in each AFL season (cl 4.4(d)(ii));

the number of Live Non-Conflicting Games, delayed broadcasts of AFL games and Live Games was not to be less than 44 in any AFL season (cl 4.4(d));

C7's service was to include one '*classic*' or popular library AFL game per week in a regular time slot over the '*Term*' (that is, until 31 December 2008 or any earlier date of termination in accordance with the agreement (cl 4.4(e));

for so long as Optus had rights to NRL games, they would be included in the C7 Overflow Channel at no additional cost to Optus, unless Optus elected otherwise (cl 4.5);

C7's service had to provide at least 5,200 '*Original Hours*' of sports programming each financial year, being as near as practicable to 100 hours per week assessed on a two monthly average basis, while the full-time channel was to contain at least 3,600 hours of original sports programming (cl 4.7);

Optus would pay a minimum licence fee of $30 million per annum subject to annual CPI increases (cl 9.1(a));

subject to paying the minimum licence fee, the amount payable would be $6.50 pspm for the first 385,000 subscribers, declining by $0.50 pspm for each additional 50,000 subscribers, until the minimum charge of $4.50 pspm

was reached (cl 9.1(b));

Optus was free to sub-license C7's service to any person other than the Foxtel Partnership, News or Telstra and would pay an additional fee of $4.00 pspm under any such sub-licence (cl 9.2);

Optus was not to charge a fee of more than $7.00 pspm in respect of a sub-licence without Seven's consent (cl 9.2);

Optus acknowledged that Seven intended to negotiate with the '*Designated Licensee*' (that is Foxtel, News or Telstra) to license it to use the Seven Service and, if Seven did enter such a licence, the annual fees payable by Optus Vision would be reduced by the sum of $2 million and 25 per cent of the fees generated by the licensee (cl 9.3);

Optus could terminate the agreement earlier if, *inter alia,* C7:

> *'or a related body corporate does not have, or loses, the pay television rights to AFL games for any reason'* (cl 16.2(a));

Optus' rights under cl 16.2(a) were to be its:

> *'sole remedy in circumstances where Seven has lost the pay television rights to AFL games other than as a result of a breach by Seven or any of its related bodies corporate of the agreements with the AFL under which those rights were acquired. For the avoidance of any doubt, if Seven does not secure any new grant of the pay television rights to AFL games after the expiration of its then existing rights, Vision's sole remedy will be under clause 16.2(a)'* (cl 16.2(b));

termination of the agreement for any reason was to be without prejudice to any accrued right of the parties (cl 16.4);

each party agreed to:

> *'use reasonable efforts to do all things necessary or desirable to give full effect to this agreement [and to] refrain from doing anything that might hinder performance of this agreement'* (cl 21); and

Seven Network guaranteed the obligations of C7 under the agreement (cl 36).

11.1.3 CWO Deed Poll

1506 On the same date as the parties executed the C7-Optus CSA, SingTel Optus (then

known as Cable & Wireless Optus) executed the CWO Deed Poll, in the form of Schedule 1 to the C7-Optus CSA. The effect of the CWO Deed Poll was that SingTel Optus guaranteed the performance by Optus Vision of its obligations under the C7-Optus CSA and indemnified C7 and its related bodies against any loss in respect of a breach of those obligations by Optus Vision (cll 2, 3).

11.2 Background: Optus and Pay Television

11.2.1 CMM's Woes

1507 From its inception until August 1998, Optus Vision licensed its sports channel programming from SportsVision. The channels it obtained from SportsVision on an exclusive basis were '*Sports Australia 1*', '*Sports Australia 2*', '*ESPN*' and '*Sports AFL Channel*'. In June 1998, Optus Vision entered a direct contract with ESPN, the largest United States subscription television sports broadcaster. The contract provided for a payment on a pspm basis, but was not subject to an MSG. Shortly before SportsVision was wound up in July 1998, Optus executed the C7-Optus CSA, the terms of which have been summarised above.

1508 Optus also had the benefit of an exclusive licence of premium movie channels known as '*Movie One*' and '*Movie Extra*', both of which featured first run titles. These channels were supplied by Movie Vision, a wholly owned subsidiary of Optus Vision, which licensed the movies from Hollywood studios or distributors and packaged them into the channels. These arrangements were subject to MSGs. In August 1999, Movie Vision was replaced as a supplier of movie channels with effect from 1 April 1999 by a third party, acting as agent for several Hollywood studios or distributors.

1509 Optus obtained content from a variety of other sources. For example, it took '*The Disney Channel*' from Buena Vista International Inc; '*CNN*' and the '*Cartoon Network*' from Turner International; and the general entertainment channel '*Oh!*' from Warner Bros. In 2001 and in 2002 prior to the Foxtel-Optus CSA, Optus carried 37 channels.

1510 Mr Christopher Anderson was appointed the CEO of Optus in 1997, following the merger of SingTel Optus and Optus Vision. From that time, solving the problems flowing from the losses incurred by CMM (Consumer and Multimedia Division), including those

incurred by Optus' pay television business, was one of the main preoccupations of the merged company. From Mr Anderson's perspective, pay television was principally a means of attracting customers onto the Optus network in order to sell more profitable services such as telephony and internet connection.

1511 Management considered a number of options to address the losses incurred by CMM, including the sale of CMM's business operations; shutting down Optus' pay television network; merging CMM's business with Austar; and terminating the pay television business. Despite efforts over some years to sell CMM's business, no potential purchaser made offers that Optus considered to be acceptable.

1512 The extent of the problems besetting CMM is shown by its financial performance. It reported negative **EBITDA** (earnings before interest, tax, depreciation and amortisation) for the years ended 31 March 1999 (-$109 million), 2000 (-$125 million) and 2001 (-$47 million). According to Mr Anderson, whose evidence I accept, the cash drain during that period was some $300 to $350 million per annum. Of that figure, according to Mr Lee, whose evidence I also accept, some $200 million represented expenditure on capital items such as customer access units, although about $90 million was apparently spent on a project (iDTV) that was not pursued. The lack of profitability of the pay television business contributed materially to CMM's poor financial performance.

1513 As Mr Lee explained, one of CMM's biggest problems was the MSGs that applied to Optus' long-term contracts with the Hollywood studios for the provision of pay television content. Under those arrangements, Optus was required to pay very large sums (amounting to more than $100 million in each of the years 2002/2003, 2003/2004 and 2004/2005). As the long-term studio contracts expired, the minimum annual payments Optus was required to make decreased.

1514 The difficulties experienced by CMM are also illustrated by its relatively poor penetration of the potential customer base for pay television services. An Optus Vision business plan prepared in December 1994 projected that Optus would have approximately 273,000 subscribers by June 1997 and approximately 542,000 by June 1998. The actual numbers were approximately 179,000 in June 1997 and only 177,000 in June 1998. A graph prepared on the basis of subscriber numbers shows the relative performance of each of the

major retail pay television platforms from 1996 until October 2002. It will be seen from the graph that Optus never exceeded 266,000 subscribers (June 2002), compared with Foxtel's base of nearly 800,000 at the same time.

TABLE 11.1: Performance of Major Retail Pay Television Platforms 1996–2002

[Editor's Note: This graphic cannot be reproduced by electronic publishing.]

11.2.2 Optus Complains to the ACCC

1515 On 22 December 2000, Optus wrote to the ACCC expressing concern in relation to Fox Sports' acquisition of the NRL pay television rights and Foxtel's anticipated acquisition of the AFL pay television rights. The letter, signed by Mr Fletcher, expressed the view that the acquisitions by the Foxtel consortium might breach s 45 of the *TP Act*:

> *'as it will have the effect of substantially lessening competition in the delivery of Pay Television services to Australian consumers'.*

Optus requested the ACCC to seek enforceable undertakings from News and Foxtel requiring, among other things, that the supply by the holders of the AFL and NRL pay television rights to other pay television platforms be '*on terms no less favorable [sic] than supplied to Foxtel*'.

1516 On the same date, Mr Keely wrote to the Minister for Communications. The letter stated Optus' concern to be that:

> *'the current bidding process may lead to dangerous concentration of major sports codes in the hands of one group and consequent market control'.*

1517 A meeting took place between Mr Anderson and Mr Fletcher of Optus and the Minister for Communications, Information Technology and the Arts (Senator Alston) on 17 January 2001. Optus' presentation stated that:

> *'Foxtel's acquisition of AFL and ARL has created a sports content monopoly. They are unlikely to supply this key programming to other operators on fair terms'.*

Mr Anderson agreed in evidence that these were his views at the time, although Mr Keely said that the presentation was '*probably gilding the lily*'.

11.2.3 The SingTel Implementation Agreement

1518 On 25 March 2001, SingTel and Cable & Wireless Optus executed an '*Implementation Agreement*' providing for SingTel to make an offer for all shares in Cable & Wireless Optus. Mr Lee, the President and CEO of SingTel, was directly involved in the acquisition, which was finalised on 30 August 2001.

1519 At the time SingTel's intention to offer was made public on 26 March 2001, Mr Lee was well aware that CMM, in particular its pay television business, was making losses and consequently was a drain on Optus' cash-flow. Mr Lee's (and SingTel's) intention and preference at that time was to attempt to create a viable business model for CMM. However, SingTel's offer documentation indicated that SingTel would undertake a strategic review of CMM which would not preclude shutting down the business.

11.2.4 Optus' Marketing Campaign

1520 During the period Optus was encountering serious problems with CMM, it mounted an active campaign to attract subscribers, commencing in the latter part of 2000. When Mr Ebeid became closely involved in Optus' pay television activities in April 2001, Optus had been engaged in a significant marketing campaign for several months. Mr Ebeid said in evidence that in 2001 Optus:

> in his opinion, had a better movie package than Foxtel;
>
> Optus had AFL content (through C7), whereas Foxtel had no live AFL content; and
>
> could bundle its pay television services with telephony products, but Foxtel could not.

1521 Mr Ebeid agreed that Optus made progress during 2001 in increasing subscriber numbers, achieving a 23 per cent increase between September 2000 and September 2001. Some 80 per cent of the new subscribers took bundled telephony products. Mr Ebeid also agreed that, in his view, Optus had increased the perception in the first half of 2001 that it

was better value than Foxtel. He said that Optus had two objectives: one was to drive Optus' telephony subscribers (which was what Optus really cared about); the other was that Optus was to trial interactive television and to increase subscriber numbers for a possible sale of CMM.

1522 Mr Ebeid also said that he did not believe at the time that pay television would be profitable for Optus in the short term, although he agreed that increasing subscriber numbers would drive the sale of other products of CMM and thus improve its EBITDA position. The following exchange then took place:

> *'It would be fair to say, would it not, that, under your management and prior to the content sharing agreement with Foxtel, Optus pay TV had become a more vigorous competitor of Foxtel? --- I don't know if I would use the words "a more vigorous competitor", given that we were selling the product for considerably less in terms of the entry pricing. I think anybody could have increased the subscribers, if you were giving the product away a lot cheaper. So a vigorous competitor, to me, would be somebody who would be competing pretty close on some of those things'.*

1523 The reference to a low '*entry price*' is apparently to Optus' base price ('*Access Package*') of $22.95 pspm from 1 April 2001. The price had been $19.95 pspm from 8 October 2000 and was increased to $24.95 pspm on 1 October 2001. Foxtel's basic cable package was priced at $37.95 pspm from 1 July 2000 to 1 April 2003. The content of each package varied considerably. Optus' Access Package, for example, did not include comprehensive sports coverage, although it did include '*Sky Racing*' and certain other sporting content.

1524 In addition, the period of growth in Optus' subscribers occurred at a time when free telephone lines were incorporated into a package which included pay television. Free line rental was withdrawn on 1 April 2002 as part of the package because it was considered to be uneconomic. As Mr Ebeid explained:

> *'The free line rental offer was associated with a strategy in 2001 of attempting to grow subscriber numbers at the expense of margin. The strategy was adopted during a time when the company and the CMM division was sought to be sold and there was a focus on interactive Digital television.'*

11.2.5 Responses

1525 Optus' marketing program elicited responses from News, Foxtel and Telstra. On 1 June 2001, Mr Philip reported to Mr Lachlan Murdoch that Telstra was fearful that Optus might be able to match and pass Foxtel's subscriber numbers and end up getting a cheaper per subscriber average price. However, Mr Philip thought that this was unlikely:

> *'as Optus does not have a satellite service, Optus' offering is not as good as FOXTEL's (even if Fox Sports is non-exclusive), and because FOXTEL is prepared to consider letting Telstra bundle FOXTEL with Telstra's voice services so that Telstra can match the voice/pay tv packages offered by Optus'.*

1526 At a meeting of representatives of the Foxtel partners (including Mr Blomfield) held on 21 June 2001, Mr Blomfield acknowledged that Optus' campaign was making progress. All present agreed that '*if they [Optus] sustain it for another quarter we need to be able to react*'. Mr Macourt reported to Mr Murdoch on the representatives' meeting the following day. Mr Macourt observed that:

> *'Telstra and Jim [Blomfield] were concerned because the Optus subscribers have climbed to 247,000 from 206,000 in January. This growth is the first in several years and seem attributable to the bundled offer of telephony, internet and PayTV. We don't know how much of this is attributable to a $22 entry price package i.e. no movies or sport'.*

1527 At about this time, Mr Nichles of Foxtel advised Mr Fogarty of Telstra as follows:

> *'Of all the new subscribers to Pay TV in the last six months, my guess is that we have taken about 50% market share (in the markets where we compete with Optus). This is against our current share of 68%. Therefore, we are actually losing share in the markets where we compete. I think we have clearly outlined our proposed solution to a more competitive product.'*

11.2.6 Optus' Position in 2001

1528 Seven relies on Optus' performance during 2001 as indicating that the financial position of CMM's pay television business had improved. While there is no doubt that Optus' marketing campaign and pricing strategy were successful in increasing subscriber numbers, Seven's submissions, in my view, overstate the nature and extent of any improvement:

Seven says that CMM's EBITDA had '*improved*' from a loss of $131 million in 1999 to a loss of $47 million in 2001. This is true as far as it goes, but account must be taken of CMM's EBITDA of -$125 million in 2000.

Seven refers to a CMM document prepared in September 2001 which reported that CMM was '*trading strongly*' and that the underlying '*growth*' in EBITDA was 25 to 30 per cent (the latter presumably being a reference to diminishing losses). The same document qualifies the optimism by observing that:

> *'further improvements on existing strategic parameters will not bring medium term business viability'.*

Seven refers to a summary in a CMM document of 5 November 2001. The summary suggested that CMM would surpass $1 billion revenue and be EBITDA positive by 2001-2002. However, the document also stated that the '*structure of the industry must be resolved, or the business will remain unprofitable (EBIT)*'. It noted that at existing subscriber levels it was necessary to achieve an increase in **ARPU** (average revenue per unit) of $22.00 '*to be EBIT breakeven*'. Moreover, Mr Ebeid disagreed that the growth in revenue and improvement in EBITDA were driven substantially by increases in pay television subscribers. Mr Ebeid acknowledged that an increase in subscribers would lead to an increase in bundling and thus the take-up of other Optus products. He also accepted that there had been an increase in subscribers of some 70,000 in the eight months up to February 2002. But, as he said, the increase in numbers had only increased the share of revenue derived from pay television from about 11 to 12 per cent, to about 14 per cent.

11.3 Optus Attempts to Ascertain the Termination Date

11.3.1 Optus Obtains Legal Advice

1529 As I have recorded, the AFL announced in December 2000 that the AFL broadcasting rights for the 2002 to 2006 seasons had been awarded to News, subject to Seven's rights under the First and Last Deed. On 25 January 2001, Seven decided not to exercise its right to accept the last offer made by the AFL under the First and Last Deed.

1530 Early in 2001, Mr Ebeid, the Director of Commercial Operations of CMM, formed the view that, given C7's loss of the AFL pay television rights, Optus Vision should terminate the C7-Optus CSA pursuant to its contractual right to do so. Optus' concern was that the key attraction of the C7 channels was their AFL content and that the annual fee of $30 million, adjusted for inflation, was commercially insupportable if the C7 channels no longer had AFL content.

1531 On 25 January 2001, Mr Hutley SC (who ultimately appeared for News in these proceedings) gave advice in conference to Optus as to the termination date available to Optus Vision under the C7-Optus CSA. A summary of the advice was recorded as follows:

> '• *The right to terminate the C7 agreement accrues at the expiry of the period of the present grant of the AFL rights to C7 ie; at the end of the 2001 season in October;*
>
> *...*
>
> *Whilst the better view is that the right to terminate accrues at the time that the Foxtel rights are given, an issue of an election/waiver/estoppel arises if Optus does nothing once it has notice of the Foxtel rights;*
>
> *...*
>
> *To avoid the position [where] Optus finds itself locked in it should write a letter to C7 telling it of its view of the contract and inviting it to contradict that view if it takes a different position ...'*

1532 On 29 January 2001 Optus' solicitors, Baker & McKenzie, advised as follows:

> *'In our view, the proper interpretation of clauses 16.2(a) and (b) [of the C7-Optus CSA] is that the trigger for the termination right is the loss of the pay television rights or the failure to have those rights for the then current season rather than Seven failing to have secured those rights for some future season. On this interpretation, Optus Vision would cease to have the AFL pay television rights at the end of the 2001 season.*
>
> *Accordingly, in our view, Optus Vision's right to terminate arises at the end of the 2001 season, unless by that time Seven has managed to secure rights to the 2002 season.*
>
> ***Waiver/election***
>
> *Having said that, we confirm our earlier advice that the position is not*

entirely clear and that Seven may argue that the right of termination has already arisen and that unless Optus Vision acts expeditiously now, Optus Vision will have waived its rights to terminate and will have elected to affirm the contract because it became aware that Seven would not have the rights for the 2002 season and Optus Vision continued to perform the contract (eg by the payment of licence fees)'.

11.3.2 Optus and C7 Correspond

1533 By letter dated 30 January 2001, Mr Lattin informed C7 that Optus held the view that under cl 16.2 of the C7-Optus CSA, any right to terminate could only arise '*from the end of the 2001 AFL season*'. The letter asked whether C7 agreed with this view. The letter appears to have been framed in this way because of concern within Optus that the right to terminate might have arisen as early as December 2000 and that delay in terminating could amount to a waiver of the right. On 5 February 2001, C7 said that it was considering its position.

1534 Having received no substantive reply to Optus' letter of 30 January 2001, Mr Keely wrote to C7 on 24 April 2001 to confirm that:

'any discussions between us in relation to the proposed licensing of further channels from Seven after the termination of the C7 Agreement are without prejudice to our rights under the C7 Agreement and, in particular, our termination rights in accordance with clause 16.2'.

1535 On 30 April 2001, Mr Keely sent a follow-up letter to C7's letter of 5 February 2001, asking C7 to respond to Optus' original query. Mr Wood responded on behalf of C7 the following day (1 May 2001), as follows:

'C7 is keen to negotiate in good faith with Optus with a view to reaching agreement on commercial terms for an ongoing relationship in 2002.

In [the] interim however, I believe it is important that C7 put on record that it [does] not support your assumption with respect to Optus' right to terminate the C7 Agreement as detailed in the above facsimiles.

...

Under its present arrangements with the AFL, Seven has the right to broadcast on Pay and FTA the AFL Spectacles until at least the commencement of the 2002 Season (being approximately February 2002). For this reason until the first day of the 2002 AFL Season Seven will still have, and will not have lost, the AFL rights, and accordingly Optus' right of

termination under clause 16.2(a) will only arise on the first day of the 2002 AFL season'.

1536 The minutes of Seven Network's board meeting of 3 May 2001 recorded that Mr Wise reported as follows:

' ... an opportunity has arisen with Optus to secure an ongoing Sports deal for C7, which will be essential to this business post-AFL, as the guaranteed income can be withdrawn when AFL rights ***cease at the end of 2001****'.* (Emphasis added.)

11.3.3 Optus Obtains Further Advice

1537 On 4 May 2001, Baker & McKenzie provided advice to Optus in the light of C7's response. The summary included the following:

'• *In view of the terms of Seven's most recent correspondence, the risk of an election or waiver arising in favour of Seven as a result of Optus Vision continuing to perform the C7 Agreement now looks to be remote.*

On the information to hand, and in the absence of reviewing the terms of the arrangements between Seven and the AFL, the earliest likely date that Optus Vision may terminate the C7 Agreement under clause 16.2 is the date on which the new AFL broadcast rights holder first exercises its rights. We do not know this date but if Mr Wood's letter accurately reflects the position, it is a date in February 2002'.

1538 The body of the advice included the following passage:

'The position as between the AFL and Seven for the broadcast of the "AFL Spectacles" is presumably governed by a written agreement. Of course, Optus Vision not being privy to this agreement is not aware of its precise terms. For present purposes we assume that the rights that Seven has in relation to the AFL games, or "Spectacles" is as set out in Mr Wood's letter. Whilst the terms of any agreement between AFL and Seven in relation to the AFL television rights do not of themselves determine the position between Optus Vision and Seven under the C7 Agreement, they are critically important because the contractual trigger to Optus Vision's right of termination is Seven's loss of the pay television right for the AFL games. This event is obviously solely governed by the arrangements between Seven and the AFL'.

1539 Baker & McKenzie gave further advice on 24 May 2001, to the effect that there was uncertainty surrounding the termination date under the C7-Optus CSA. However, C7's position:

'looks to be credible but would depend upon verification by reviewing the terms of the AFL/Seven Agreement'.

11.3.4 Mr Fletcher's Pay TV End Game Memorandum

1540 On 21 May 2001, Mr Fletcher of Optus prepared a memorandum entitled '*Pay TV End Game*'. He summarised his position as follows:

'Presently, our message to Government is that we want Government intervention to neutralise Foxtel's content advantage over Optus. That message forms part of our underlying strategy – of maintaining an independent Optus TV and growing it through the introduction of digital TV.

I believe it is worth exploring a modified strategy, and hence a modified message to Government. Our strategy should be to achieve a BSkyB type restructure of the Australian pay TV industry, with Optus ending up with a share in a profitable pay TV operator delivered over a number of networks. Our message to Government should be that this will deliver consumer benefits, and Government should support it rather than blocking it as a substantial lessening of competition.

In this note, I argue that:

(a) We have only limited prospects of getting Government intervention on content exclusivity

(b) We should explore a BSkyB type restructure of the pay TV industry in Australia

(c) Potentially Foxtel, News and PBL could be persuaded to support this

(d) Potentially we could persuade Government to support it (and thus to require Telstra to participate)

(e) There are hurdles to be overcome before we could proceed with such an approach'.

1541 Mr Fletcher maintained that the existing structure of the pay television industry in Australia was not sustainable, since the three operators were splitting a market of fewer than 1.5 million subscribers and all were losing money. An '*end game*' was therefore inevitable:

'Optus approaches that endgame [sic] in a weak position. We are the smallest of the three operators. We have the weakest content.

However, the end game also offers opportunities. The experience of the

> *British pay TV industry is instructive. As separate operators, Sky and British Satellite Broadcasting each lost money. As a merged entity, they have made money'.*

1542 From Optus' point of view, sharing in the revenues and profits of one pay television operator was a lot more attractive than being one of three loss-making competitors. The benefits would include the monopsony purchasing power available to a single operator; a solution to Optus' '*MSG problem*'; and an improved margin on Optus' pay television customers. Mr Fletcher's view was that News and PBL might be persuaded to support the arrangement, but Telstra would only do so if its '*arm were twisted*'. This is where the Government came in.

1543 Mr Fletcher's memorandum was the first suggestion in 2001 of a content supply agreement of the kind ultimately entered into in March 2002. However, as has been seen in Chapter 6, there had been discussions as far back as 1997 about a '*Content Co*' which would have involved Foxtel and Optus sharing pay television content.

11.4 Seven Contemplates a Post-AFL Broadcasting Rights World

1544 On 13 March 2001, Mr Stokes approved a '*C7 Retention Scheme*'. The scheme was designed:

> *'to retain key personnel leading up to the possible closure of the C7 operations and to ensure the continued smooth operation of the Department until a decision is made'.*

The scheme provided for a 'commitment to continue payment' on 1 July 2001 and a 'conclusion payment' on 28 February 2002, or 'an earlier date if it is decided to cease operations of C7 prior [to that date]'.

1545 A document prepared by Mr Jarman of Seven on 10 April 2001 referred to '*the proposed litigation program against the Rights Consortium*'. At about this time, Seven was seeking or had obtained legal advice as to the possibilities of a claim against the consortium covering, among other things, the possible closure of C7. Mr Stokes said in evidence that his view at this time was that the continuation of C7 on a retail access basis, but without AFL pay television rights, was likely to be a loss-making exercise.

1546 Mr Wood prepared and Mr Wise submitted a '*C7-Recommended Strategy*' paper for the Seven Network board meeting of 1 June 2001. C7's '*broad objectives*' were said to include developing '*a viable business plan for C7 after losing the AFL as a driver*'. The paper acknowledged the difficulties facing C7 without the AFL pay television rights and noted that the C7-Optus CSA could be terminated, while the Austar contract was unlikely to be renewed. It suggested that '*Optus could provide the key for unlocking C7's potential*', through a comprehensive deal whereby C7 would provide its sports channel and take over production of the channels produced by Optus. Such a deal:

> *'would underwrite our exposure to pay television while providing a platform for us to define and launch our product mix for exploitation on the Foxtel platform. It would provide our greatest opportunity to develop a viable plan for Foxtel cable access, with the ability to get to purely incremental costs and revenues'.*

The paper recommended that C7 pursue a commercial deal with Optus involving the outsourcing of Optus' pay television content to Seven.

1547 In another report for Seven Network's board, prepared in June 2001, Mr Wise reported on negotiations with Optus as follows:

> *'We continue to negotiate with Optus for the provision of four channels. On a commercial basis I believe it is possible to secure this deal, although it would see us exposed in terms of costs until we had access on Foxtel. However, what impact our FIRB [Foreign Investment Review Board] actions have on the final outcome of this is unknown'.*

1548 Seven's board meeting of 29 June 2001 received a budget paper for 2001/2002 covering i7 and C7. The section dealing with subscription television addressed the question '*where is C7 with the loss of the AFL rights?*' The '*key assumptions*' included '*[c]lose at end of February at expiration of Optus agreement*'. The paper recorded that any decisions would be '*subject to viable business plans approved by the Board*'. The budget for 2001/2002 showed that a loss of $4.4 million (EBIT) was estimated if C7 closed at the end of February 2002. The identified risks included the following:

> *'Optus terminates the current agreement at end of AFL season ($8.2m)*
>
> *Endeavour to agree on-going commercial deal*
>
> *Prepare for action under anticipatory breach'.*

After referring to the unfavourable economics of the interim access determination, the paper recommended revoking or varying the determination and closing C7 at the end of the C7-Optus CSA.

1549 The Seven Network board meeting of 29 June 2001 discussed the budget paper. The minutes record the following:

> '• *The budget has provided for the closure of C7 at the end of February at the expiration of the Optus agreement.*
>
> *It was agreed that C7 go through the processes outlined in the presentation and then review and identify a real business.*
>
> *It was approved that the Company proceed with the pre-Action Discussion process, ... and lodge an Order 15A application with the Federal Court'.*

The reference to the '*Order 15A application*' is to the application for preliminary discovery, referred to in Chapter 1, which was ultimately determined in Seven's favour by Gyles J.

11.5 Optus Considers its Strategy

11.5.1 Options Are Canvassed

1550 According to Mr Ebeid, in about April 2001, Optus began to think about its sports programming for 2002 and whether it would terminate the C7-Optus CSA. In fact, some thought must have been given earlier to these issues within Optus, since advice had already been sought as to the date a right to terminate would arise. Be that as it may, in May 2001, at about the time Mr Fletcher prepared his '*end game*' memorandum, Optus commissioned an assessment from Dangar Research Group Pty Ltd of the impact of potential changes to Optus' sports programming. The key findings of the Dangar Report included the following:

> '• Sport is an important category for Pay TV – but it is not the most important category.
>
> *Having said this, more than two-thirds of the market regard sport as "very" or "reasonably" important. OTV subs and intenders are only slightly less interested than Foxtel subs and intenders.*
>
> *The AFL and the NRL have a very considerable franchise. Of those with any interest in sport, more than 85% consider either the AFL or the NRL as at least "reasonably" important, translating to 60% of the market overall.*

> *Losing ... the NRL is potentially more damaging than losing the AFL (mainly a function of market size). Lose one of these: 5% – 12% negative impact. Lose both: 10% – 21% negative impact.*
>
> *Gaining Fox Sports channels can be expected to bring extra customers – with particular appeal to the lapsed OTV group. A "Super Sports" package could be expected to bring a net increase of 8% – 17%'.*

1551 In June 2001, Mr Keely prepared a draft '*2002 Sports Options*' paper. He identified seven options:

> *'1. Optus licences [sic] Fox Sports 1 & 2*
>
> *2. Optus licences "NRL on Optus" from Fox Sports and adds Supplementary channel*
>
> *3. Optus exercises rights to produce NRL & licences Supplementary channel*
>
> *4. Optus licences 2 half year channels from C7*
>
> *5. Optus carries both an AFL and NRL*
>
> *6. Optus carries an AFL Channel only*
>
> *7. Optus carries no sports (apart from ESPN and Sky Racing)'.*

The '*worst case scenario*' was that Optus would exercise its current rights to produce the NRL channel.

1552 It is clear that Mr Anderson and Mr George of Optus each considered that a sports service was essential for Optus to remain viable as a pay television platform. As Mr George commented in an email of 23 July 2001 to Mr Anderson:

> *'without a broadly comparable [to Fox Sports] sports offering, Optus TV is dead in the water'.*

11.5.2 Optus Revives the Fox Sports Issue

1553 On 14 June 2001, Mr Anderson telephoned Dr Switkowski to propose a meeting to settle a wide range of current disputes between Optus and Telstra. He mentioned to Dr Switkowski that Optus would like to acquire Fox Sports. Mr Anderson emphasised that Optus had no interest in pay television as such and was pursuing '*only the bundling opportunity*'. However, Mr Anderson also said that Optus needed to enter long-term supply

contracts before the end of 2001 and wanted an arrangement with Fox Sports.

1554 Mr Akhurst's advice to Dr Switkowski on Optus' proposal was as follows:

> *'why give [Fox Sports] to them and let them bundle with telephony while we can't and before we sort out our [partnership] issues with News and PBL. And why create more value in [Fox Sports] when we are thinking of equity at a cheap price?*'

1555 Optus learned, no later than early July 2001, but probably some time earlier, that the arrangements between the AFL and Foxtel required Foxtel to sub-license the AFL pay television rights to Austar and Optus on reasonable commercial terms. On 4 July 2001, Mr Fletcher suggested to his colleagues that Mr Blomfield of Foxtel should be informed that Optus would have no hesitation in raising the issue with the AFL if Foxtel did not offer Optus reasonable commercial terms. Mr Fletcher made detailed comments in internal Optus memoranda on how the phrase '*reasonable commercial terms*' should be interpreted, pointing out that the ACCC's approach to the allocation of costs was '*instructive*'.

1556 On 20 July 2001, Dr Switkowski advised Mr Anderson that '*Telstra was still considering it [Optus' proposal] – but not at this stage*'. Mr Anderson suggested that Optus should make contact with Mr Chisholm in his new role as Chairman of Foxtel, particularly as litigation between Telstra and Optus (unrelated to the present case) had been settled.

1557 Accordingly, on 9 August 2001, Mr Anderson telephoned Mr Chisholm and reiterated Optus' interest in Fox Sports. Mr Chisholm told Mr Anderson that he thought that Telstra's reluctance to deal with Optus was '*wrong*' and that he would soon make his views known on this issue.

11.5.3 Fox Sports Provides Optus with an Indicative Term Sheet: August 2001

1558 At about this time, Optus negotiated with Fox Sports for the supply of the Fox Sports channels. In particular, Mr Ebeid and Mr Keely had discussions with Mr Malone of Fox Sports on the subject.

1559 On 20 August 2001, as a result of these discussions, Mr Malone prepared an unofficial draft term sheet, which was expressed to be subject to Telstra's approval. The term sheet provided for the supply of two full-time channels to Optus for a 10 year period

from 1 October 2001. The base price for residential subscribers was to be US$4.75 pspm. Volume discount prices of US$3.25 pspm were to apply for residential subscribers in excess of 250,000 and of US$3.00 pspm in excess of 800,000. For each year in which the channels included NRL coverage a '*Flagfall Price*' of $9.225 million per annum was payable. All prices were subject to CPI increases and GST. There was to be a monthly MSG of 100,000 subscribers.

1560 The draft term sheet was discussed on 21 August 2001 at a meeting between Mr Ebeid of Optus and Messrs Malone and Marquard of Fox Sports. At the meeting, Mr Marquard said words to the following effect:

> *'We know that you have an alternative supplier of sports channels. However, we would like to expand our supply arrangement with you beyond simply NRL programming. We are currently formulating a proposal for the supply of the Fox Sports channels to Optus, but we first have some internal matters to finalise'.*

1561 The '*internal matters*' to which he referred involved seeking Foxtel's consent to the supply of Fox Sports channels to Optus. Mr Ebeid indicated that Optus needed to know where it stood by the end of August 2001. Mr Malone informed Mr Ebeid in early September 2001 that approval from Telstra for such an arrangement was unlikely and that there was no prospect of a deal. At this time, Mr Ebeid was operating on the assumption that if Optus Vision intended to terminate the C7-Optus CSA, it would have to do so before 29 September 2001, the scheduled date of the 2001 AFL Grand Final.

11.6 Optus Engages McKinsey to Review CMM

1562 In June 2001, CMM's senior management team engaged McKinsey & Company ('**McKinsey**') to undertake a review of CMM to assess its future. On 21 June 2001, a representative of McKinsey outlined the '*proposed scope of the strategic review of CMM*' to SingTel Optus' Integration Committee. Mr Lee and Mr Anderson, among others, participated in this meeting.

1563 Mr Hope of SingTel provided a report on the progress of the review to the Integration Committee on 12 July 2001. He reported that the '*[p]reliminary findings indicated that the economics of pay TV were not favourable*'.

1564 On 30 July 2001, McKinsey made a presentation which identified a number of options for consideration, including '*consolidating industry structure and gaining cost savings ... through an Austar ... arrangement*' and falling back to a telephony-only business. The '*key message*' was this:

> *'Despite recent management efforts to improve short term performance, a weak strategic position ensures the underlying economics of the Optus analogue Pay TV business are unattractive now and likely to get worse, particularly given likely competitive moves'.*

The document reported that recent efforts had added 40,000 subscribers to Optus in the previous quarter, reduced '*churn*' from 50 per cent per annum to 35 per cent and increased '*bundling*' from 79 per cent to 86 per cent. Nonetheless Optus was said to be '*in a weak strategic position across a range of key dimensions of the Pay TV business*'. The document attributed the increase in subscribers primarily to '*new value bundles*', while '*improved marketing*' was the initiative that had reduced churn.

1565 On 22 August 2001, McKinsey completed a discussion paper entitled '*CMM's Strategic Options*'. The '*key messages*' included the view that CMM faced three fundamental problems: a relatively weak pay television position; a difficult industry structure (too many pay television players and excessive costs); and '*[u]nattractive off-network telephony economics*'. The two options that McKinsey thought should be considered were:

> *'Play to win, by acquiring Austar and launches [sic] a series of second front initiatives, or*
>
> *Fall back to "No TV"'.*

1566 McKinsey pointed out that Optus had a weak strategic position and that it had an unsustainable cost structure. Monthly revenue per subscriber was $47.00, while monthly costs were $109.00, leaving a gap of about $62.00 to break even on an EBIT basis or $52.00 on an EBITDA basis. Consequently running the business on an '*as is*' basis was unsustainable.

11.7 Negotiations between C7 and Optus: July–September 2001

11.7.1 A Three Year Supply Contract?

1567 The urgency of ascertaining the termination date of the C7-Optus CSA appears to

have faded for a time as Optus, through Messrs Keely and Ebeid, and C7, through Mr Wood, negotiated for an agreement to replace the C7-Optus CSA. The negotiations centred on C7 providing Optus with a '*low cost*' dedicated sports channel for three years from 1 March 2002.

1568 On 25 July 2001, a board meeting of i7 took place, attended by (among others) Messrs Gammell, Wise and Wood. The minutes recorded that:

> *'Steve Wise updated the Directors on his negotiations with Optus regarding the program supply contract* ***which lapses at the end of the 2001 AFL Season'.*** (Emphasis added.)

In his evidence, Mr Wise initially accepted that the minute was accurate, but later said that it was incorrect because Seven was asserting that the right to terminate did not arise until February 2002. I find that the minute accurately recorded what Mr Wise told the meeting.

1569 On 13 August 2001, Mr Ebeid sent an email to Mr Wood at C7, noting that Optus was '*nervous*' about a three year deal '*given current conditions*'. Mr Wood responded almost immediately, stating that although he was happy to '*entertain a shorter term, C7 would require comfort as to tenure through guaranteed option terms*'. Mr Wood reiterated that:

> *'unless a new arrangement is put in place on the basis of our ongoing discussions, the existing Channel Production & Supply Agreement will remain on foot and will not be terminable by Optus* ***until the beginning of the 2002 AFL season****.*
>
> *Accordingly C7 will not enter into any short term interim arrangement, and if we are going to enter into a new long term arrangement then we both know that the timing issues are becoming critical, and we need to move quickly'.* (Emphasis added.)

1570 On 23 August 2001, Mr Wood and Mr Crawley held a '*Contingency Planning Meeting*'. The subjects discussed included the steps to be taken by C7 if it was unable to reach agreement with Optus Vision. The notes recorded the following:

> *'If Optus give C7 notice not to renew:*
>
> *(a) Don't dispute ... what is the effective date – go back with legal response claiming reasonable notice – press legal button.*

(b) Go to Austar -> deal through to 28 February 2002 but not likely to last till then – put on [sic] Austar on notice.

(c) Negotiate a Grace Period e.g. three months with Optus and notify Austar.

Optus have a problem if they terminate C7 they need to have a substitution channel ready to go'.

1571 Mr Wood was asked in cross-examination about this meeting. He said that the plan at that stage was not to dispute any notice of termination given by Optus Vision, but to negotiate with a view to having the notice take effect on 28 February 2002. Mr Wood anticipated that in these circumstances C7 would continue to supply its channel to Optus Vision until 28 February 2002 pursuant to the C7-Optus CSA, in which case there would be no exclusivity clause.

11.7.2 Optus Requests a Copy of the AFL-Seven Licence

1572 Mr Wood's response to Mr Ebeid of 13 August 2001 prompted Optus to seek further advice from its solicitors. On 24 August 2001, Ms Bean, Optus' Corporate Counsel, sought urgent advice as to Optus' rights to terminate the C7-Optus CSA. She asked whether Optus could terminate on the last day of the AFL season or whether it would have to wait until February 2002, as Seven had asserted. She also asked whether Seven could be compelled to provide a copy of the AFL-Seven Licence. The solicitors tended to the view that C7 would not '*lose*' its rights until the new holder exercised its rights. This was likely to be at the beginning of the 2002 pre-season, in February 2002. However, the solicitors advised that the terms of the AFL-Seven Licence '*could be decisive*'.

1573 On 28 August 2001, Mr Keely wrote a '*without prejudice*' letter, on behalf of Optus, to Mr Wood, as follows:

'During our recent without prejudice discussions we have not resolved the question of when the C7 Agreement may be terminated as a result of Seven losing the pay television rights to AFL games for the 2002 season. On the basis of our previous communications, including your letter of 1 May 2001, it would seem that the position adopted by you relies on the terms of the current agreement between Seven Network Limited and the AFL. Of course, we have not seen this agreement and therefore we cannot comment on its terms. Accordingly, we consider that the resolution of this issue would be greatly assisted if you would provide us with a copy of the relevant agreement between Seven Network Limited and the AFL.

> *We understand that certain provisions of the agreement may be confidential and/or commercially sensitive and with this in mind we are willing to provide any reasonable confidentiality undertakings or agree that any particularly sensitive non-relevant provisions may be masked'.*

Optus' request was referred to C7's lawyers. There was no evidence as to the advice, but C7 did not provide a copy of the agreement as Optus had requested.

1574 Mr Keely gave evidence that he regarded C7's refusal to provide a copy of the agreement as having placed Optus in a difficult position. If C7 was right in its assertion as to the earliest termination date, Optus would be in breach if it sought to terminate in October 2001. Mr Keely felt that Optus had to proceed on the assumption that C7 might well have been right. Mr Ebeid gave similar evidence. I accept their evidence.

1575 In an update for Mr Anderson of Optus on 30 August 2001, Mr Ebeid noted that the AFL and NRL seasons ended in the last week of September 2001. He also noted:

> *'C7 cancellation option 29th September, 2001 (AFL Grand Final) - lapses after that date'.*

In a paper prepared by Mr Ebeid on 10 September 2001 updating Mr Anderson, Mr Ebeid repeated the statement '*C7 cancellation option 29 September*'.

11.7.3 C7 Sends a Term Sheet

1576 On 5 September 2001, Mr Wood sent Mr Ebeid a revised term sheet reflecting '*our recent discussions*'. The covering email stated that C7 reserved its rights under the C7-Optus CSA. The term sheet provided that C7 would supply a 24 hour, seven day a week sports channel on a non-exclusive basis for inclusion in Optus' pay television program package. The term of the agreement was to be three years from 1 October 2001. The minimum licence fee was to be $17 million (plus GST) in the first year; $18 million in the second; and $19 million in the third. If the number of subscribers to the Optus platform exceeded 400,000, Optus had to pay $5.00 pspm plus GST for the next 300,000 subscribers and $3.00 pspm plus GST for any subscribers over 700,000. Optus had to ensure that the C7 channel would be available to subscribers to the basic tier and that no other sports channel was available on that tier. Optus was to grant C7 an option to acquire the business and assets of the '*Oh!*', '*Ovation*' *and* '*MTV*' channels produced by Optus on or before 28 February 2002, on terms

to be determined. The term sheet recorded that the parties would seek to enter binding Heads of Agreement by Friday, 7 September 2001.

1577 The following day, 6 September 2001, Mr Ebeid reported to Mr Anderson on the status of negotiations with C7. Mr Ebeid said that '*we have achieved a good position*' and that the '*new deal essentially replaces and negates our current Supply agreement*'. He noted that C7's option to purchase the three channels compiled in-house, if exercised, would '*get us out of the production game*'. The email concluded as follows:

> *'we need to give C7 the go ahead asap. As you know we have extended the deadline to its limits.*
>
> *The alternative is to continue on the current agreement and pay $2.75m [versus] $1.4m per mth with the new deal. Doing this may also weaken our legal position of terminating the current agreement due to the loss of AFL.*
>
> *One sticking point is that I believe this is over your signing limit, which means we need Board approval. This is a real problem for C7 as the deal is effectively not binding until after board approval.*
>
> *What options do we have to get around this?*
>
> *Network 7 go to the market with their results next Tuesday, and this is a key issue for them. They have no where [sic] to go, but have requested we do everything possible to execute this deal beforehand'.*

1578 Optus' solicitors prepared a more formal version of the term sheet of 5 September 2001, which was sent to Mr Ebeid and others at Optus in the afternoon of 7 September 2001. The revised draft term sheet provided that additional fees above the minimum would be payable if Optus subscribers exceeded 450,000. In that event, $4.25 pspm (plus GST) was payable for the next 300,000 subscribers and $3.00 pspm for any subscribers over 750,000. Optus could place C7 on the basic tier, as a sports package, or on the premium tier, provided that no other sports channel received more favourable treatment. C7 was to ensure a minimum of 50 hours each week of '*original programming*'.

11.7.4 Optus Draws Back

1579 On 6 September 2001, Mr George, a former director of SingTel Optus, reported to Mr Anderson on the outcome of discussions with Mr Mansfield and Dr Switkowski of Telstra:

> *'Had a long chat with Bob Mansfield last night. I explained the Fox Sports*

position – that we had one last chance to begin the rationalisation of [pay television] – and that would be lost for at least another 3 years if we sign with C7.

As a result Ziggy rang me today. In a remarkably frank way he told me that the preponderance of opinion within Telstra (including the Telstra board) is that exclusive content is a competitive advantage for Telstra – the implication being that the relatively modest share of Foxtel losses is money well spent for Telstra in terms of the damage done to us under the industry structure.

He said that there is a view (presumably his) that the combination of Optus, SingTel and Stokes will be untenable and thus the long held Telstra objective of driving us into the sea is within sight'.

1580 Later that day, Mr Anderson replied to Mr Ebeid's email, stating that there was '*no chance that we can get this wrapped up quickly*'. He gave the following reasons:

'SingTel will take a lot of convincing that we should do a deal with Stokes – and this attitude has hardened since he began his campaign.

Also they have no understanding of the Sports issue – and it will take some time to get them up to speed.

Also it will run into the CMM review.

We will solve this – but it will need patience – and time'.

The reference to Mr Stokes' '*campaign*' was to his strong opposition to SingTel's acquisition of Optus, which had led him to make submissions to the Foreign Investment Review Board.

1581 On 7 September 2001, Mr Ebeid provided Mr Anderson with a draft '*Sports Update for SingTel*'. This identified three sports options for 2002 and estimated the costs of each. The three options and the evaluation of them were as follows:

'Option 1

C7 channel (1 channel)

ESPN

Potential NRL Channel (Feb-Sept) from Foxsports [sic]

Potential AFL Channel (Feb-Sept) from Foxtel

Option 2

Active Sports Channel

ESPN

Potential NRL Channel (Feb-Sept) from Foxsports

Potential AFL Channel (Feb-Sept) from Foxtel

Option 3

A new additional ESPN Channel

Current ESPN Channel (as an alternate)

Possible Golf Channel

Potential NRL Channel (Feb-Sept) from Foxsports

Potential AFL Channel (Feb-Sept) from Foxtel

…

Evaluating Each Option

Option 1 (C7)

Reasonable content, moderate price

Continues existing relationship

Releases Optus from current agreement, avoiding legal issue

Option to acquire our 3 Channels and associated staff

Option 2 (Active Sports)

Substandard content

Requires 2 months to start compiling

Additional costs to carry C7 ($6) for 2 more months

"AS" would still need to acquire sports rights

Unlikely to excite – won't drive acquisitions

Option 3 (Additional ESPN Channel)

All American content

No Australian sport is perceived negatively

$5m only an estimate at this stage

Little interest in Australia

ESPN has very low ratings'.

Mr Ebeid recommended selecting Option 1 (C7).

11.8 McKinsey Review Proceeds: Restructure CMM

1582 On 30 August 2001, SingTel's acquisition of SingTel Optus was finalised and SingTel Optus and Optus Vision became wholly owned subsidiaries of SingTel. On that day, Mr Anderson provided Mr O'Sullivan and Mr Lee with an assessment of the McKinsey review:

'It seems to me McKinsey are largely in two schools.

1. *Get out of Pay TV, pay-off the MSGs [minimum subscriber guarantees], perhaps disaggregate CMM, and concentrate on a telephony and internet offering; and*

2. *Invest in the business, perhaps acquire Austar, launch satellite, push iDTV and seek a part of the undeniable retail telephony/internet/video profit pool that is almost solely the province of Telstra's'.*

1583 McKinsey reported to the SingTel Management Committee of 10 September 2001 that CMM's business faced major structural challenges and competitive pressures which current plans did not address. The report suggested that:

'SingTel should pursue a different strategy for the CMM business:

- *Quickly determine if a "second front" (acquire Austar, launch satellite, fix off net telephony), (A$1.2 billion invested for $1.2 billion NPV) is doable and if not*

- *Fallback to the Resell TV option (A$930 million invested for $560 million NPV)'.*

The report proposed the launch of a '*60 day plan*' to explore these options.

1584 Ultimately, on 8 November 2001, the board of SingTel approved a proposal to appoint JP Morgan and McKinsey:

> *'to jointly develop a restructuring strategy for the [CMM] business and to provide support in its implementation'.*

11.9 First Variation Agreement

11.9.1 Optus Decides to Consider Project Alchemy and Project Emu

1585 On 10 September 2001, Mr Chamberlain, the Managing Director of CMM, requested information from Mr Keely for a briefing with SingTel on Wednesday, 12 September 2001. One particular point on which he sought advice was why Optus could not get a one year deal from C7. The answer provided by Mr Keely was that C7 simply was not prepared to offer anything less than a three year deal:

> *'Their concern is that we would continue negotiating with Fox Sports and drop them after 1 year'.*

1586 Shortly thereafter, Messrs Ebeid and Keely prepared a presentation entitled '*Sports Content Update to the Board*' recommending approval of the proposed deal with C7. The document included the following:

> ***'Issues – Right to cancel C7***
>
> *C7 is the premium local sports channel carried by Optus*
>
> *C7 will lose broadcast rights to the only major local football code it carries (AFL)*
>
> *Consequence that Optus can cancel deal*
>
> *Current deal pricing is too high for remaining content*
>
> *$16.8m unforecast impact on EBITDA of retaining current C7 deal*
>
> *C7 have offered a new deal at lower license [sic] fees*
>
> *...*
>
> ***Retention of Current C7 Deal***
>
> *There are two legal opinions of the end date for the current C7 deal*
>
> - *ends March 2002, or*
> - *ends 29 September 2001*
>
> *Retention means paying premium channel fees for a channel which*

has lost its key local football content – half its value

Retention will continue high license [sic] fee of $2.8m/mth versus the new C7 proposal of $1.4m/mth, effective 1st October 01

Retention creates unforecast EBITDA exposure of $16.8m 2001/02

...

Recommendation

From available options, C7 has best mix of content

...

CMM Management recommends C7 as best alternative for Board consideration.

- *Options to proceed with C7:*
  - *Continue on current contract: $2.8m p/m*
  - *Resign the new 3 year deal: $1.4m p/m*
  - *Sign a 3 year deal with a 1 year break clause with a penalty to exit'.*

1587 In a separate document prepared with Mr Keely's assistance for the Management Committee, Mr Ebeid noted that Telstra appeared to be blocking the supply of *Fox Sports 1* and *Fox Sports 2*. Optus had the right to produce an NRL channel over the next 22 years at a likely cost of $21 million per annum. News and Foxtel were obliged under the contract with the AFL to sub-license to Optus on reasonable terms, at a likely cost of $20–$30 million per annum. C7 had offered to provide an all year sports channel but the price, at $17 million per annum, was unacceptable to Optus. Nonetheless, Mr Ebeid's recommendation to the Management Committee on 17 September 2001 was that Optus should approve the C7 deal.

1588 The SingTel Optus Executive Group met on 17 September 2001. The attendees included Mr Lee, the President and CEO of SingTel, Mr Anderson and a representative of McKinsey. Discussion included options for CMM, consistent with the '*strategic objective*' identified by Mr Lee of:

> *'optimising the existing and future investment in the business whilst minimising the downside risk of this uncertain business'.*

1589 It was agreed that Mr Anderson would lead a '*hit team*' to develop options relating to

CMM, specifically merging with Austar or reselling Foxtel's content on the Optus pay television service. The proposal for a merger with Austar became known within Optus as '*Project Emu*', while the resale of Foxtel's content on the Optus Service became known as '*Project Alchemy*'. A third option, of shutting down the Optus pay television service, was regarded as a '*very difficult option to execute*'. The options were to be reviewed on about 15 December 2001. As a result of decisions reached in relation to CMM:

> *'it was agreed to see if it was possible to roll the existing C7 sports TV contract for a further 3 months and to seek to maintain our options on a more favourable future contract until after that time'.*

1590 Mr Ebeid did not attend the Executive Group meeting. However, he attended the Management Committee meeting shortly thereafter at which he made the recommendation already referred to. He was informed at the meeting of the Executive Group's decision. He was directed to continue paying the current licence fee of $2.8 million per month for three more months.

1591 In October 2001 Optus began discussions with Austar in relation to a possible merger. This development was consistent with the agreement reached at the Executive Group meeting of 17 September 2001 to explore Project Emu.

11.9.2 Optus Seeks a Short-Term Extension

1592 Mr Ebeid and Mr Wood then negotiated for a short-term extension of the C7-Optus CSA. On 19 September 2001, Mr Ebeid reported to Mr Anderson on the state of negotiations:

> '• *I have agreement in principle from C7 now that we will only pay $2m p/m for the next three months, and if we sign the new proposed deal in three months, then they will credit us the difference back to $1.4m p/m ($1.8m credit & thats [sic] a $4.2m saving) as if we had signed the new deal this week. On the flip side, if we don't sign with them in three months, then we will have to pay the difference between $2m and the $2.8m back to them. ($2.4m penalty which would have been paid anyway per Monday night's instructions) I think this is a great outcome for Optus.*
>
> *This was achieved by telling C7 that we had strong legal advise [sic] that the current agreement should terminate and [sic] the end of the current season. I advised that the alternative would be legal action and could potentially cost us more than it was worth, especially given*

> *we're trying to improve the SingTel/C7 relationship and that there was more at stake in the future.*
>
> *The above was agreed with a guarantee that we would not be negotiating with any other sports provider during this 3 months period. They are concerned that we're trying to get both Foxsports [sic] and C7 on OTV, or that we were buying time to get a better deal with Fox. I said this was not our intention, that it centred on the CMM review.*
>
> *Currently legal (Trudi Bean), is drawing up a standstill agreement to send to C7'.* (Emphasis added.)

Mr O'Sullivan received a copy of this email.

1593 On 20 September 2001, Mr Ebeid sent a without prejudice letter to Mr Wood confirming their discussions. The letter set out the terms upon which the C7-Optus CSA was to be varied:

> *'1. Subject to paragraphs 2 and 3 below, Seven will supply both C7 channels in October and the main C7 channel only in November and December for a reduced price of $2 million per month.*
>
> *2. If Optus signs a new agreement for C7 to supply one C7 channel for a 3 year term, Seven will charge Optus a reduced price of $1.4 million per month for the C7 Channel supply during October, November and December. Seven will refund to Optus the overpaid amount of $600,000 per month when the new agreement is signed.*
>
> *3. If a new agreement is not signed, Optus agrees that it will pay Seven $2.750 million per month for the C7 Channel supply during October, November and December. Optus will pay Seven the additional amount of $750,000 per month, for each of the 3 months.*
>
> *4. During October, November and December 2001, Optus agrees that it will not enter into an agreement with any other Sports Channel supplier for supply of a Sports Channel or Channels to be broadcast by Optus Television. This excludes any agreement for supply of broadcasts of AFL and NRL for the 2002 season'.*

The letter asked Mr Wood to sign a copy of the letter to confirm his agreement.

1594 Mr Wood responded to Mr Ebeid's letter on 24 September 2001, stating that Mr Ebeid's letter did not fully reflect their discussions and that, in any event, the proposals in the letter would not actually achieve their objectives. He proposed formal amendments to the C7-Optus CSA and the CWO Deed Poll. The proposed amendments included the insertion of

cl 8A, providing for an '*Exclusivity Period*'. The terms of the proposed cl 8A were broader than those of cl 4 set out in Mr Ebeid's letter of 20 September 2001. Clause 8A prohibited Optus Vision not only from entering into an agreement with any other sports channel provider, but from initiating or participating in discussions in relation to the supply of sports channels.

1595 Mr Ebeid and Mr Wood exchanged a number of emails on 27 September 2001. At 10.24 am, Mr Wood warned that, unless the variations were finalised by the end of the week, the existing terms of the C7-Optus CSA would continue throughout October 2001. Mr Ebeid observed at 12.13 pm that he had hoped to keep the agreement relatively simple, but given the '*formal legal reply from C7*' it was necessary to '*reply appropriately*'. Mr Wood responded at 4.19 pm with some impatience:

> *'Until such time as the variation is properly effected, C7 simply has no choice but to continue to comply with its obligations under the Channel Production & Supply Agreement. For this reason, unless the variation is executed by each party by close of business tomorrow, C7 will be submitting to Optus November programming for 2 channels and invoicing the requisite fee for October programming'.*

At 5.09 pm, Mr Ebeid warned that there would be many changes in the draft. However, he promised to send the fresh draft that evening. He also complained that it was '*a little unreasonable [to] get 24 hours notice, to sign or else*'.

1596 In the evening of 27 September 2001, Mr Ebeid faxed to Mr Wood a marked up copy of Mr Wood's letter showing the amendments required by Optus. The proposed amendments included limiting the Exclusivity Clause to merely prohibiting entry into an agreement with alternative sports channel suppliers, rather than merely prohibiting negotiations with such suppliers. Mr Ebeid explained this proposed amendment as follows:

> *'the terms of the proposed exclusivity period are unfair and not consistent with our discussions. It is sufficient to protect any of Seven's legitimate interests that Vision not enter into any relevant agreement during the exclusivity period. Your proposed terms go beyond this purpose'.*

1597 Mr Wood responded the following day, accepting some suggestions, but rejecting the proposed amendments to cl 8A:

> *'You have told me that Optus has ceased its negotiations with Fox Sports,*

that Optus wants to do the deal set out in the Term Sheet with C7 and the exclusivity period provision is stock standard. The provision you suggest means that Optus could negotiate and effectively conclude a deal with Fox Sports but not execute it until 1 January 2002. This is absolutely contrary to what we have discussed'.

Mr Wood added the following:

'Like you, I just want to get this finalised, but as I have said, until such time as the variation is finalised the simple fact is that the existing Channel Production & Supply Agreement remains on foot and C7 will continue to comply with its obligations under that Agreement. C7 expects Optus to do likewise'.

11.9.3 Execution of the First Variation Agreement: 28 September 2001

1598 It appears that the First Variation Agreement was finally signed in the evening of Friday, 28 September 2001. Earlier that day, Mr Ebeid sent a letter, on Cable & Wireless Optus Ltd letterhead, to Mr Wood in the following terms:

'I set out below the terms upon which C7 and Vision are prepared to vary the terms ("Variation Agreement") of the existing Channel Production and Supply Agreement (dated 30 June 1998 between C7 Pty Ltd ... and the ... Deed Poll executed in connection with this agreement (collectively, the "Agreement"): Vision acknowledges that the parties have expressed different views as to Vision's right to terminate the Agreement under clause 16.2 before the commencement of the 2002 AFL Season. Each party reserves its rights in relation to this issue'.

This letter sets out the terms of the proposed agreement, including cl 7 which stated that '[*a*] *new clause 8A to be inserted to read as follows*'. Clause 7 of the letter incorporated the text of the new cl 8A.

1599 At 10.10 pm on Friday, 28 September 2001, Optus sent to Seven's solicitors a copy of the First Variation Agreement signed by Mr Ebeid on behalf of Optus Vision and Mr O'Sullivan on behalf of SingTel Optus (then Cable & Wireless Optus Ltd). The covering note recorded that a further copy would be sent on Tuesday, 2 October 2001 (after the long weekend), with all Optus clauses signed by authorised officers. The note was a response to an email from Seven's solicitors, which had been sent at 10.03 pm on the Friday, confirming that a partially executed copy of the First Variation Agreement would be acceptable provided that a completely executed copy was received by noon on the Tuesday. If the completely

executed copy was duly received, Seven would treat the execution of the First Variation Agreement as having occurred on the Friday morning. In fact, Optus sent a formally executed version of the First Variation Agreement to Seven's solicitors on Tuesday, 2 October 2001. This version was executed by Mr Anderson on behalf of SingTel Optus and Optus Vision.

1600 In form, the First Variation Agreement consisted of the letter dated 28 September 2001 from Mr Ebeid to Mr Wood. The letter was signed by Mr Ebeid and was accompanied by pages which provided for the parties to execute the document as a deed. As has been noted, the letter recorded that the parties had expressed different views as to Optus Vision's right to terminate the C7-Optus CSA, pursuant to cl 16.2, before the commencement of the 2002 AFL Season. Each party reserved its rights in relation to that issue.

1601 The substance of the letter set out the agreed amendments to the C7-Optus CSA. The new cl 8A was as follows:

> *'EXCLUSIVITY PERIOD*
>
> *During the period from 27 September 2001 to 31 December 2001:*
>
> *(a) Vision must not, and must procure that its related bodies corporate do not, solicit, encourage, initiate or participate in discussions or negotiations with; or make any offers to any person other than C7 or its related bodies corporate; or enter into any contract, arrangement or understanding (including an option) with any person other than C7 and its related bodies corporate; and*
>
> *(b) Vision must, and must procure that its related bodies corporate, immediately cease any existing negotiations or discussions with; decline any offer made to it; and terminate any offers made by it to any person other than C7 or its related bodies corporate,*
>
> *in relation to the supply, sub-licensing or other incorporation into the Optus pay television platform of any sports channel, except that the restrictions in this clause 8A will not apply to the supply of AFL match and NRL match broadcasts for the 2002 season or any future season, provided that AFL match and/or NRL match broadcasts do not, in accordance with the Term Sheet, appear in a more favourable tier than the C7 Channel'.*

1602 Other amendments to the C7-Optus CSA effected by the First Variation Agreement included the following:

The quantity of '*Original Hours*' of sports programming on C7 was reduced from 100 hours to 50 hours per week (amended cl 4.7).

The licence fee was reduced from the minimum of $2.5 million per month (plus GST) to $2 million per month for October 2001 (when the Overflow Channel would be shown) and $1.5 million per month for each of November and December 2001 (in each case plus GST) (amended cl 9.1(a)(iii)).

Optus Vision was to retain the savings from the reduced licence fees if, on or before 24 December 2001, it entered into an agreement with C7 substantially in accordance with the term sheet of 7 September 2001. Otherwise the licence fees for October to December 2001 were to increase by a total of $3.25 million (plus GST) (amended cl 9.1(a)(iv)).

1603 The amendments were to take effect from the date of the First Variation Agreement (cl 9 of the First Variation Agreement). In addition, each of C7, Optus Vision and SingTel Optus ratified and confirmed the C7-Optus CSA as amended by the First Variation Agreement and the CWO Deed Poll (cl 10 of the First Variation Agreement).

11.9.4 Mr Wise's Advice

1604 On 2 October 2001, at 7.56 pm, Mr Wise advised Mr Stokes by email that C7 had negotiated a deal to provide C7 to Optus '*for the next three months as per their desire to undertake a review of the pay business*'. After summarising the terms of the arrangement, Mr Wise observed that:

> *'the sleeper in this is that by 31 December they will have to accept and go to print on January and February programming, so we have basically secured our minimum position of maintaining the contract until February*'.

1605 In a paper apparently prepared in early October 2001 for Seven, Mr Wise reported that an agreement had been executed with Optus for a three month extension of the C7-Optus CSA. Mr Wise offered this comment:

> *'I believe that under the deal we have structured we have virtually secured our minimum position of being paid our existing contract until February. However, I am equally sure that they will want to renegotiate the terms in December/January'.*

11.10 Discussions among Foxtel Partners: July–October 2001

1606 Between July and October 2001, discussions took place between the Foxtel partners on issues including the basis for the long-term supply of Fox Sports to Foxtel and the terms upon which Telstra would be permitted to bundle its telephony products with the Foxtel pay television service. Three main proposals were considered during this period.

1607 The first was the non-exclusive supply of Fox Sports to Foxtel on terms which would enable Fox Sports to supply its channels to Optus. A proposal to this effect was sent by Mr Philip to Mr Sutton of Telstra on 17 August 2001. It provided for a base price for residential subscribers of US$4.75 pspm. This was to be reduced to US$3.25 pspm for residential subscribers in excess of 250,000 and to US$3.00 pspm for subscribers in excess of 800,000. For each year in which the channels included NRL coverage, a '*Flagfall Price*' of $9.225 million applied.

1608 The second proposal was for the exclusive supply of Fox Sports to Foxtel. This proposal was analysed by Mr Sutton in an internal Telstra document of 18 September 2001. Mr Sutton understood the proposal to amount to US$5.44 pspm, increasing annually by the CPI. In addition, $18 million per annum was payable for NRL coverage. Mr Sutton pointed out that the current arrangements provided a flat licence fee of US$5.25 pspm with no CPI increases. The proposal was therefore more expensive than the current arrangements, with the disparity increasing over time.

1609 The third proposal, embodied in a term sheet prepared by Mr Philip on 24 October 2001, provided for the supply by Fox Sports to Optus of two channels: an '*NRL on Optus*' channel and an unbranded channel containing general sports programming, including some Fox Sports programs. Foxtel was to receive the Fox Sports channels at a fee of US$2.65 plus $5.00 pspm, with staged volume discounts cutting in at 250,000 and 1,000,000 subscribers. An annual fee of $9.225 million was payable for NRL coverage.

1610 The Foxtel partners were unable to reach agreement on any of these proposals. The proposal for the non-exclusive supply of Fox Sports to Foxtel was rejected because it provided insufficient benefits to Telstra and required further measures to prevent churn from Foxtel (and Telstra's telephony customers) to Optus. Telstra rejected the terms for the exclusive supply of Fox Sports to Foxtel because it involved a significant increase in the fee

payable by Foxtel under the then current arrangements. The supply of an unbranded channel to Optus was said by Telstra to be unsatisfactory in the absence of a bundling arrangement between Foxtel and Telstra.

11.11 Optus Agitates for an Offer from Foxtel

1611 As Mr Fletcher said in his evidence, by the end of September 2001, Optus executives were resigned to the fact that there was no prospect of sharing content with Foxtel because of Telstra's veto. Optus' attention therefore shifted to a campaign to secure changes in the regulatory regime that would provide for programming to be made available on a fair commercial basis to all pay television operators. To this end, as recorded in a report compiled by Mr Fletcher in October 2001, Optus contacted the ACCC, as well as the Minister for Communications and other politicians.

1612 In addition, Optus decided to press the AFL. Accordingly, on 25 September 2001, Mr Anderson wrote to Mr Jackson of the AFL pointing out that, despite promises from Foxtel, no proposal for a sub-licence of the AFL pay television rights had been forthcoming. He requested that the AFL '*urge Foxtel to commence and conclude negotiations with Optus as soon as* possible'. Mr Keely wrote another letter to Mr Jackson on 8 October 2001, seeking guidance as to the scope of News' obligations under its agreement with the AFL, to offer access to broadcasting of AFL games. Similar letters were dispatched by Optus to the ACCC and the Minister for Communications.

1613 On 4 October 2001, Mr Buckley of the AFL wrote to Mr Campbell encouraging Foxtel to commence negotiations with Optus as soon as possible and asking for regular updates on progress. On 12 October 2001, the ACCC informed Mr Blomfield of Foxtel that Optus had made a complaint about the failure of Foxtel to offer the AFL pay television rights on commercial terms.

1614 Optus' efforts apparently bore some fruit. In a letter of 2 November 2001, Foxtel set out the terms on which it was prepared to license an AFL channel to Optus. Foxtel offered to provide three live pay television games per week over a term of three years. The proposed licence fee was to be between $21.3 million and $27.8 million in the first year, depending on the costs of creating the channel and on whether Austar was prepared to take the channel. Optus was to have a non-exclusive licence, with no right to sub-license.

1615 Optus rejected Foxtel's offer on 19 November 2001, on the stated ground that it required Optus to bear a disproportionate share of the licence fee payable to the AFL. Accordingly, in Optus' view, the offer was not fair and reasonable.

1616 Further correspondence ensued between the parties. On 5 December 2001, Foxtel revised the proposed licence fee to $18.2 million (including capital expenditure) in the first year, decreasing to $15.5 million in the second and third years (subject to a CPI increase in the third year). Optus characterised the revised offer as also unfair and unreasonable. The parties were therefore unable to reach agreement.

11.12 Dinner at Tetsuya's and Movement towards Content Sharing: October 2001

1617 A dinner took place at '*Tetsuya's*' restaurant on 9 October 2001 between senior Optus and Telstra executives. Four Optus representatives were present, including Messrs O'Sullivan and Fletcher, and four from Telstra, including Mr Akhurst. A briefing note prepared for Mr O'Sullivan by Mr Fletcher in advance of the dinner dealt with a number of issues, including the question of Foxtel content. The note addressed this issue as follows:

> *'Optus would like to screen Foxtel premium sports and Hollywood movie content on the Optus Television service. At present, we are prevented by program exclusivity arrangements from screening such programming.*
>
> *The key content we would like to show are FoxSports [sic] channels 1 and 2, which will screen popular Australian Sports programming such as the ARL, AFL and Test Cricket. We seek fair terms for access to this content, where Optus Television would pay a price per subscriber that is no higher than the price per subscriber paid by Foxtel for the content. Such a deal is in all parties' interests because it enlarges the total subscriber base over which program content costs, that are largely fixed costs, can be spread.*
>
> ***Comment:***
>
> *Our understanding is that FoxSports (PBL and News) are enthusiastic about selling this content to Optus Television on fair terms, but Telstra is attempting to block the sale. We believe that the AFL contract with Foxtel requires it to onsell the programming to Optus and Austar on reasonable commercial terms.*
>
> *We would like Telstra to reconsider its position on this matter'.*

1618 The following day, 10 October 2001, Mr Fletcher prepared a file note of discussions at the dinner, including the following reference to the discussion on Foxtel content:

> *'Optus said we wanted to buy FoxSports [sic] and the AFL. Bruce Akhurst [sic] said Foxtel planned to sell us AFL and he would inquire into the hold up. He said he had asked the Foxtel JV partners for a proposition on FoxSports being sold to Optus. He was not opposed to it. The hold up was News Limited because Rupert [Murdoch] was in the country'.*

Mr Fletcher sent the file note by email to Mr Anderson and others who had attended the dinner.

1619 In a reply to Mr Fletcher's note, sent also to Mr Anderson, Mr Chamberlain, the Managing Director of CMM, said that the issue that '*consume[s]*' him was '*access to content on economic terms, specifically [Fox Sports]*'. He expressed disbelief in Mr Akhurst's assertion that it was not Telstra, but News which was blocking access. Mr Anderson informed Mr Chamberlain that he would raise the issue with Mr Rupert Murdoch the following evening. He added that '*we need to be sure of our facts*'. (By this time, Mr Chamberlain had informed Mr Anderson that he intended to return to Cable & Wireless in London and he apparently did so shortly after these events.)

1620 According to Mr Anderson, he spoke to Mr Murdoch the next evening at a function for a relatively brief period at a general level about the restructuring of pay television. On 16 October 2001, Mr Anderson reported to Mr Lee that he had raised the issue of a '*resell TV*' proposal with Mr Murdoch and suggested to him:

> *'that there could be a rationalisation of the Pay TV industry in Australia if only Telstra would accept a more realistic stance*'.

1621 On 25 October 2001, Mr McLachlan of PBL reported to Mr James Packer and Mr Yates on a conversation he had had with Mr Philip and Mr David Moffatt (Telstra's then Chief Financial Officer) concerning content sharing. Mr McLachlan expressed the view that there was a '*clear*' benefit to Foxtel in content sharing. He also considered that there was a '*commercial and strategic benefit*' to Telstra, as follows:

> *'if Foxtel as a pay-tv package is available universally to Telstra + Optus to bundle with their telephony, then "pay-tv" is "neutralised" as part of Optus' bundled services offering – eg no content differentiation, no low price entry points (Optus' basic basic package), no cost differentiation (except possibly favourable to Telstra for volume pricing) and Telstra gets to bundle whereas now they don't'.*

Seven relies on this memorandum as demonstrating that the Foxtel-Optus CSA was intended to neutralise pay television by removing product differentiation between Foxtel and Optus. That issue is addressed in Chapter 18.

1622 Mr Anderson reported to Mr Lee on 27 October 2001 on a number of matters, including an intimation he had received that a '*major breakthrough*' was looming on the pay television business of CMM:

> *'I've been pushing for years (I also raised it with Rupert personally a few weeks ago) that Foxtel sell us a Pay-TV feed and allow us the option (we may not take it with the Austar plan – but it's a good alternative strategy) to close our service and bundle the Foxtel service with our telephony/data/broadband, etc. Like BSkyB in the UK.*
>
> *It's something Telstra (as 50% owners of Foxtel) have always vigorously opposed: I'm now told that Telstra may be willing to drop its opposition.*
>
> *If so it would give us a great fall-back'.*

11.13 Seven's Deliberations: October–November 2001

1623 The minutes of i7's board meeting of 11 October 2001 recorded the following assessment of the position facing C7:

> *'C7 is awaiting the ACCC to convene a meeting to discuss a variation to the interim determination. A submission on an amendment to the final determination is being prepared.*
>
> *A Business Plan to support C7's ability to proceed has been requested, however, this is not needed because of the guarantee Seven will be giving.*
>
> *The three year deal with Optus for the C7 service has been negotiated, however, the Optus Board hasn't rejected the deal but has advised they can't enter into this while their entire Pay TV business is under review.*
>
> *The current Optus contract and the various termination provisions were discussed along with the effect on the budget of either the continuation or the closing down of the C7 business.*
>
> *The pursuit of the Access Claim is expensive and is exposing the Seven Group to a continuation of the action and a damages claim. It was agreed that the damages claim should continue, however, the continuation of the Access Claim is questionable and it will be costly to run the other channels, the content will be difficult to find and it will also be costly to market. The outlook for Pay TV is unsure and rationalisation worldwide must occur'.*

1624 A Seven board paper prepared by Mr Wise in early November 2001 reported on discussions between C7 and Optus. The Optus representatives had advised in confidence that SingTel had engaged McKinsey to review Optus' pay television operations. Optus' preferred option was to take over Austar at the right price which would give '*critical mass and access to a satellite platform to rival Foxtel*'. The executives of Optus, including Mr Anderson, were committed to the C7 deal, including the three-channel option, and wanted to do the deal before Christmas so that they could take '*the $3.4 million savings on offer*'. According to Mr Wise, Optus would require C7's programming in January and February 2002 '*regardless as it is stronger than Fox's*'.

1625 On 14 November 2001, in an email to Mr Gammell, Mr Stokes observed that Austar was '*seriously looking at keeping C7*'. He remarked that '*[t]hat would not necessarily work for our plan*'. In his cross-examination, Mr Stokes said he did not know to what '*plan*' he was referring. He acknowledged that the sentence would make sense if it was understood that the plan was to close C7 at the end of February 2002. However, Mr Stokes denied that such a plan had been put in place at that time.

11.14 Resolution of Foxtel Partnership Differences

11.14.1 PBL Puts a Proposal

1626 One of the issues creating disagreement between the Foxtel partners was Telstra's interest in bundling its telephony products with Foxtel's pay television service. An internal Telstra document of 16 August 2000 identified the benefits to each of the Foxtel partners (but particularly Telstra) of bundling arrangements. News and PBL did not share Telstra's enthusiasm, apparently being concerned that Foxtel might in effect become a wholesaler, dependent on Telstra as a retailer of pay television services.

1627 Following a meeting in late October 2001, Mr McLachlan of PBL circulated a proposal on 31 October 2001 to Messrs Philip, Akhurst and Moffatt. The main features of the proposal included the following:

> subject to an acceptable regulatory regime, Foxtel would commit to digital transmission;
>
> Telstra and Optus would both be licensed to bundle Foxtel packages with their

respective telephony services, but they would be resellers only and Foxtel would retain a direct relationship with customer;

Foxtel would receive, by transfer or sub-licence, Movie Network channels to which Optus had the rights; and

Foxtel would continue its retail business.

1628 On 2 November 2001, Mr Sutton set out Telstra's position in an email. He indicated that the Fox Sports pricing issue and the bundling arrangements '*while separate need to be settled together*'. Telstra wished to announce both at its Annual General Meeting to be held in late November 2001.

11.14.2 Meeting of 22 November 2001

1629 After further discussions, an important meeting took place on 22 November 2001 at the home of Mr Lachlan Murdoch between representatives of News (Mr Murdoch and Mr Philip); PBL (Mr James Packer and Mr McLachlan); and Telstra (Dr Switkowski, Mr Akhurst and Mr Sutton). Mr Chisholm, who was a director of Telstra and Chairman of Foxtel, also attended. The issues discussed at the meeting included the sharing of content between Foxtel and Optus; Telstra's proposal to bundle Foxtel with its telephony services; and the supply of Fox Sports to Foxtel. Dr Switkowski described the substance of the meeting in his cross-examination:

> *'This was, to me, in fact a defining meeting where Telstra approached this with a degree of reluctance, but if we could get bundling, then we were prepared to give ground on other matters. Then there was another theme introduced around, well, maybe this would then lead to including Optus in a broader arrangement, leading to the formation of this ContentCo structure.*
>
> *That was one of the subjects discussed on this occasion? --- I believe so.*
>
> *So you discussed Telstra bundling, number one? --- Yes.*
>
> *Content rationalisation in the pay television industry? --- Well, really, responding to the Optus approach that we merge our content agreements together and that Foxtel then takes responsibility for that'.*

1630 Dr Switkowski explained the position he took at the meeting in these terms (which I accept):

'At the time of the 22 November 2001 meeting, I was aware that if there was to be an agreement between Optus and FOXTEL, FOXTEL (and through it Telstra and the other FOXTEL partners) would be required to assume Optus' liabilities to its content suppliers, including onerous minimum subscriber guarantee ... commitments. I made the decision at the 22 November 2001 meeting that Telstra would support the proposed agreements with FOXTEL, News and PBL that were [ultimately] signed on 3 December 2001, because Telstra would obtain the opportunity to bundle FOXTEL with its telephony services, the terms of supply of Fox Sports to FOXTEL would be resolved, and I understood that FOXTEL would be able to expand its subscriber base and acquire a greater range of content and reduce churn. I also thought that Telstra would benefit from a better relationship with its FOXTEL partners in dealing with future issues such as digitisation. I considered that these benefits to Telstra outweighed the likely cost to Telstra of enabling Optus to bundle a more attractive pay television service with its telephony products while being freed of its burdensome content contracts and the cost to FOXTEL of funding Optus' MSG liabilities'.

1631 Mr Akhurst's explanation of his reasoning process at the time (which I also accept) was this:

'I weighed up the advantages and disadvantages of the proposals and formed the view that Telstra should support these proposals because the risks to Telstra of Fox Sports or FOXTEL supplying content to Optus were largely mitigated by Telstra itself being able to bundle FOXTEL, and the advantage which Optus had of being able to bundle would be largely mitigated by Telstra's ability to bundle. I considered that the proposals were the best compromise Telstra would be able to achieve and it also meant that we would be able to reach a resolution about the Fox Sports supply price to FOXTEL which had been a source of tension amongst the FOXTEL partners for several years. I also thought that the proposals would help improve the FOXTEL business, because FOXTEL would also be distributed by Telstra and Optus, and the FOXTEL partners could work more harmoniously to reach agreements in the future about issues such as digitisation of the FOXTEL service'.

11.14.3 Agreements of 3 December 2001

1632 On 3 December 2001, Foxtel and Fox Sports entered what appears to have been an agreement in principle for the supply of the Fox Sports channels on an exclusive basis. The agreement was conditional upon Foxtel securing a reseller agreement with Optus for the Foxtel Service. Subject to that, Fox Sports agreed to supply the Fox Sports channels to Foxtel on an exclusive basis:

at a base price for residential subscribers of US$2.65 plus $5.00 pspm, with a

volume discount of 15 per cent for subscribers in excess of 750,000;

in addition, at a flagfall price of $18.44 million per annum for each year of NRL coverage;

subject to an MSG of 750,000 subscribers; and

subject to CPI increases and GST.

1633 The agreement required the parties to use reasonable endeavours to implement the transactions as soon as possible and to execute long form agreements. On the same day, News, Foxtel, PBL and Fox Sports entered an agreement in principle for Foxtel to license Telstra as a reseller of all Foxtel services. Foxtel was to pay Telstra $125 for every '*new*' Foxtel customer secured by Telstra and $2.00 pspm for each Foxtel customer obtained through Telstra. Telstra committed to $2 million per annum for three years on the marketing and promotion of Foxtel. This agreement was subject to the same condition and the same obligations with respect to implementation. Long form agreements were ultimately executed on 20 February 2002.

11.15 December 2001 Meetings

11.15.1 News, PBL, Telstra and Optus Meet

1634 On 3 December 2001, Mr Anderson and Mr O'Sullivan of Optus met with Mr Lachlan Murdoch of News and Mr James Packer of PBL. The meeting took most of the morning. Messrs Anderson and O'Sullivan then flew with Mr Packer to Mr Chisholm's farm (Mr Chisholm then being on the Telstra board), where further discussions took place. At 7.02 pm that evening, Mr Anderson gave Mr Lee and others an update by email on the meetings. His report included notes on the meetings with Messrs Murdoch and Packer:

> *'Basically [Mr Murdoch and Mr Packer] said they had convinced Telstra that they should sell us the Foxtel service.*
>
> *I said that if so that would create a very valuable property for Foxtel – and we should share in some of the industry upside.*
>
> *We said I would be looking for the Foxtel partners to pay out some (or all) of our msgs [minimum subscriber guarantees]; and give us compensation for any network write-downs and planned redundancies.*
>
> *Surprisingly they said they would consider "helping" with our msg position.*

We put the point that unless we could reach accommodation with Foxtel – we would consider purchasing Austar – and then it would be difficult to rationalise the industry'.

1635 In cross-examination, Mr Anderson said that he recognised at the time that a '*valuable property*' might be created for Foxtel by:

> increasing the scale of Foxtel by the number of Optus pay television subscribers; and
>
> giving Foxtel greater negotiating power with content providers.

Mr Anderson also said that he wanted Optus to be '*rewarded for bringing a more rational structure in the purchase particularly of Hollywood product*'. He explained the reference to Austar in his report as a '*credible threat which was likely to give the Foxtel partners an incentive to deal with Optus on favourable terms*'.

1636 Mr Anderson reported to Mr Lee on the discussion at Mr Chisholm's farm as follows:

'Sam [Chisholm] (the chairman of Foxtel) said he now had "the numbers" on the Telstra Board to execute a Pay-TV deal.

He said both Optus – and Foxtel – were "wasting billions" on Pay-TV and believed an industry rationalisation would be good for competition – and the country.

We agreed to set up a small working party on both sides – to explore the Foxtel option.

Sam wanted to see if it was possible to come to a landing before the Telstra Board meets next Monday (Dec 10) – (he said the Telstra Board may change its mind on resale).

I said I would need to consult Singtel [sic] senior management and possibly the Singtel Board'.

1637 On 4 December 2001, a front page article in *The Australian's* business section reported that a meeting had been held between Mr Anderson and Messrs Murdoch and Packer. There was no evidence as to who vouchsafed this information to the News publication. The article said that Optus:

'looks to be flirting with several options for its pay-TV operation, including some sort of link-up with rival Foxtel in a move that could precipitate change

in the structure of the local pay TV industry.

...

Optus now is believed to be focusing on ways to share programming with Foxtel'.

Mr Stokes read the piece, but made no inquiries of Mr Anderson about the content of the article.

1638 On 6 December 2001, another meeting took place. The participants included Messrs O'Sullivan and Fletcher of Optus, Mr McLachlan of PBL, Mr Philip of News, and Messrs Akhurst and Sutton of Telstra. The subject matter for discussion was an arrangement for Foxtel to be resold on Optus (that is, content sharing). The briefing notes prepared in advance for the Optus representatives described the discussion as '*exploratory ... not negotiation*'. However, the notes also identified a number of '*required outcomes*'. A briefing paper prepared on 13 December 2001, apparently by McKinsey and Mr Hardy of Optus, incorporated a chronology which recorded that one of Optus' '*key messages*' at the meeting of 6 December 2001 was that '*industry rationalisation would create substantial future value*' of approximately $3 billion. Optus had sought a share of that value, in the order of $1 billion, and wanted compensation for MSGs, redundancies and other costs or liabilities. The briefing paper of 13 December 2001 incorporated an '*[e]stimated future value calculation for Foxtel*' on the assumption that it would acquire Austar. The calculation allowed for the following:

> *'Foxtel achieves $10/sub/month content cost across all subscribers to decrease content costs to around 35% of ARPU due to its monopoly negotiating position'.*

1639 A second meeting with the same attendees took place on 10 December 2001, except that Mr Macourt of News also attended. The chronology in the briefing paper of 13 December 2001 recorded that there had been a favourable response at the second meeting to Optus' requirement that it receive compensation for its MSGs. It was also suggested that content would be supplied to Optus '*at retail less cost savings from Optus provisioning*'.

11.15.2 Dr Switkowski and Mr Anderson Meet

1640 On 13 December 2001, Dr Switkowski telephoned Mr Anderson of Optus because he

wished to understand the '*possible Foxtel/Optus deal*'. Mr Anderson recorded the substance of the conversation in an email he distributed later that day. Mr Anderson told Dr Switkowski that the deal was good for Telstra (as a 50 per cent owner of Foxtel) because it created a $4 billion transfer of value to Foxtel. He also told Dr Switkowski that if Optus was to participate in the deal, it had four requirements, as follows:

> *'(i) For the FoxTel [sic] partners to assume our $500M MSG liabilities.*
>
> *(ii) For any FoxTel feed to be available for use on all of our delivery mechanisms – including satellite.*
>
> *(iii) For any FoxTel service to be supplied to us at a price that wasn't discriminatory to any service that was supplied to Telstra.*
>
> *(iv) Our idTV expenditure (of approximately $200M) to be written into the deal and accepted by the FoxTel partners'.*

1641 Dr Switkowski replied that it was hard for Telstra to accept these requests, but that he would consider the position. Mr Anderson warned Dr Switkowski that '*if we can't come to landing*', Optus would be likely to do a deal with Austar. Dr Switkowski's evidence was that he was aware of media speculation about a possible merger between Optus and Austar, but that he considered such a merger to be '*extremely unlikely*' because the combination of two loss-making businesses would not produce a good commercial outcome for either of them. The same email recorded that after his discussion with Dr Switkowski, Mr Anderson had had a conference call with Mr Lachlan Murdoch and Mr James Packer who wanted to know '*where we were in our deliberations*'. Mr Anderson repeated Optus' requirements '*for their benefit*'. Mr Murdoch and Mr Packer said that they would consider Optus' position and talk to Telstra.

11.15.3 Mr Blomfield is Removed

1642 In December 2001, Mr Blomfield was removed by News as the CEO of Foxtel. News acted on Mr Macourt's recommendation. Mr Blomfield was replaced by Mr Williams on 17 December 2001. Shortly after commencing duties, Mr Williams was informed by Messrs Philip, Akhurst and McLachlan (representing the Foxtel partners) that Foxtel was to pursue a long-term content supply agreement with Optus. Mr Williams was instructed to commence negotiations for such an agreement.

11.16 Mr Dalgleish Recommends the C7 Agreement

1643 On 4 December 2001, Mr Wood reported to Messrs Wise and Stokes that he had contacted Mr Ebeid the previous day. Mr Ebeid had said that he believed that he would shortly receive approval from Optus' Executive Committee to sign the term sheet. He pointed out that there were '*considerable financial penalties on Optus if they do not enter into the agreement by 24 December*'.

1644 On 7 December 2001, Mr Dalgleish, who had replaced Mr Chamberlain as Managing Director of CMM, recommended to Mr O'Sullivan that Optus '*proceed to urgent approval to execute the C7 agreement, but defer executing [it] until closer to the deadline of [24] December*'. Mr Dalgleish noted the following:

> *'If we revert to the existing agreement, our advice is the earliest we may terminate the agreement is at commencement of the AFL season, which is Feb 15th 2002 (the pre-season tournament). We would naturally only seek to do this if we have negotiated alternative content supply.*
>
> *The variation agreement entered into with C7 specifically precludes us from entering into any discussions on alternative supply before Dec 31'.*

1645 Later on 7 December 2001, Mr Dalgleish sent to Mr O'Sullivan a draft board paper to similar effect as his email. The draft contained the following summary of alternatives and a recommendation:

> *'**Alternatives***
>
> *On or before December 24, Optus can either:*
>
> *1. Confirm the revised 3 year agreement; or*
>
> *2. Pay original higher content costs, including reimbursement of lower costs provided in the last three months, and seek to terminate the original agreement on or after February 15th, 2002.*
>
> *If the agreement is not signed, Optus will need to seek alternative sports supply. The only other viable sports content partner is Fox Sports. Earlier negotiations with Fox Sports have faltered as a result of Telstra exercising rights of veto on such an arrangement. It is considered highly improbable that discussions could be re-opened on more favourable terms to this proposed arrangement with C7.*
>
> *By failing to execute this agreement, Optus risks C7 withdrawing its content from supply, and leaving our Pay television service without*

any suitable sports content. This would realise significant churn and loss of customer acquisition and resultant EBITDA, and place us in a competitively vulnerable position'.

Recommendation

Approve Optus to enter into a 3 year arrangement with C7 Pty Ltd on the terms proposed'.

1646 On 10 December 2001, Mr Dalgleish sent a further email to Mr Anderson and others reiterating points in the draft board paper and again pointing out that Optus was restrained from further negotiation until 31 December 2001. In response, Mr Anderson asked whether Optus should not '*use the present discussions to get a (better) Fox Sports deal?*' He also asked whether signing a long-term agreement with C7 would make '*the chance of any Foxtel deal dead*'. Mr George responded to Mr Anderson on the same day as follows:

'I agree with your thinking on this. It is far better to test the water with Foxtel by trying to get a Fox Sports deal prior to the wider negotiation than to be press ganged into a long term arrangement with C7.

...

I think Martin [Dalgleish] should tell 7 that under the SingTel approval process there is no way that such a contract can be signed by Dec 24. We can probably stall until the end of January – I don't think 7 has anywhere else to go. If this is wrong I would prefer that we cobble together our own sports channel for the summer rather than commit to 7'.

1647 In an email sent to Mr O'Sullivan on 12 December 2001, Mr Anderson commented on '*Channel 7 and Sports*':

'I want to wait – until we get a FoxSports [sic] answer from Foxtel – But can we afford to?'

11.17 Second Variation Agreement

11.17.1 An Extension is Agreed

1648 On 14 December 2001, Mr Ebeid sent to Mr Dalgleish a '*script for [Mr Anderson's] discussions with [Mr] Stokes*':

'Our teams have agreed a new 3 year arrangement in Sept, but were unable to sign it because of SingTel's strategic review of the CMM business. Therefore both parties agreed to a short term arrangement, based on the new terms, effectively agreeing to an extension to December 24th. ... We entered into this agreement in good faith ...

Despite our best intentions, we do not expect to finalise this review until February 2002.

We would seek that C7 extend the current arrangements until February 2002 (suggest say 10th). We will honour the same terms, if we fail to finalise extension then we retrospectively repay the deficit and revert to the current agreement (which we may terminate at any time once the AFL season commences). So C7 will not be out of pocket and is protected'.

1649 On about 18 December 2001, Mr Anderson sent a message to Mr Stokes, who was in Colorado, that he (Mr Anderson) wished to discuss a further interim agreement. Mr Stokes discussed the matter with Mr Wise who expressed the view that it would do no harm to accommodate Optus, given that Seven wanted Optus to agree to the three year deal. A conversation then took place between Mr Anderson and Mr Stokes to the following effect:

'[MR ANDERSON]: Kerry it would be useful for us to roll our arrangements on the same terms with you for another two months. We have two main options we are considering. We can get deeper into pay television with another player and put our business with another player and reach scale.

[MR STOKES]: If you do that we would want to be involved.

[MR ANDERSON]: The second option is we get out of pay TV content business. We don't know which way we will go as it is subject to discussions on the whole of the CMM business'.

1650 Mr Anderson also told Mr Stokes that he was pushing for Optus to stay in the pay television side of the business. Mr Stokes then agreed to Mr Anderson's request. (Mr Stokes and Mr Anderson disagreed in their recollections of some aspects of this conversation. For reasons I shall explain later, I prefer Mr Anderson's account. However, Mr Anderson acknowledged in his evidence that he understood that the extension of the interim arrangement would be on the same terms as the first arrangement, including the Exclusivity Clause.) Shortly after the conversation, both Mr Anderson and Mr Stokes sent internal emails recording their respective recollections of what had transpired.

1651 On 20 December 2001, Mr Wood sent Mr Ebeid a draft replacement Variation Agreement and requested its execution by Optus. It appears that Optus did not do so, apparently because discussions continued between the parties.

11.17.2 Execution of the Second Variation Agreement

1652 On 14 January 2002, Mr Wood wrote to Mr Ebeid reminding him that it was necessary to document any extension of '*the 24 December 2001 deadline*'. Accordingly, C7 requested a letter in the form of the attached Variation Agreement, duly executed by Optus. Like the First Variation Agreement, the Second Variation Agreement took the form of a letter from Mr Ebeid to Mr Wood. The opening paragraph recorded that the Second Variation Agreement '*replaces in its entirety*' the First Variation Agreement. The second paragraph, in the form ultimately executed by the parties, contained an acknowledgement as follows:

> *'Vision acknowledges that both parties have expressed different views as [to] Vision's right to terminate before the commencement of the 2002 AFL Season. Each party reserves it [sic] rights in relation to this issue. C7 acknowledges that Optus reserves its right to terminate the Agreement pursuant to Clause 16.2 and that any failure by Optus to do so will not waive or otherwise prejudice Optus' right to exercise such right of termination'.*

1653 The parties to the Second Variation Agreement were to be C7, Seven Network, Optus Vision and SingTel Optus. As with the First Variation Agreement, the Second Variation Agreement contained a number of clauses setting out the amendments to be made to the C7-Optus CSA. For present purposes it is necessary only to note the following:

> cl 5 provided for an increased licence fee to be payable if Optus Vision did not enter an agreement substantially in accordance with the term sheet of 7 September 2001;
>
> cl 8 provided for cl 16.2 of the C7-Optus CSA to be amended by inserting the following paragraph at the end:
>
> > *'Notwithstanding the foregoing, Vision will not terminate the Agreement under this clause 16.2 before the later of the date Seven or a related body corporate loses the pay television rights to AFL games and 1 March 2002';*
>
> cl 9 inserted a '*new*' cl 8A into the C7-Optus CSA, which was identical to the previous cl 8A except that the period of the restraint was expressed to be from 27 September 2001 to 28 February 2002;
>
> cl 11 provided that the amendments took effect from the date of the Second Variation Agreement; and

cl 12 provided that each of the parties ratified and confirmed the C7-Optus CSA as amended by the Second Variation Agreement.

1654 On 31 January 2002, Mr Wood forwarded the Second Variation Agreement for execution by Optus Vision and SingTel Optus. The agreement took the form of an undated letter corresponding to that sent by Mr Ebeid to Mr Wood on 14 January 2002, with provision for the parties to execute it as a deed. Although the evidence is incomplete, the agreement appears to have been executed as a deed on 31 January 2002 by the Optus parties. However, the agreement has been referred to in submissions as the '*25 January 2002 letter*', apparently because Mr Ebeid sent to Mr Wood the letter signed by him, but not yet executed as a deed by the parties, on that date.

11.18 '*NRL on Optus*' Is Extended

1655 On 17 December 2001, Mr Philip forwarded to Mr Akhurst of Telstra a copy of a letter from Optus to the NRL of 14 December 2001. In that letter, Optus requested the NRL to offer Optus the NRL pay television rights in accordance with the terms of the 1998 Optus Pay TV Programming Agreement. Mr Philip suggested to Mr Akhurst that it would be better to renew the '*NRL on Optus*' deal instead. After discussions, Telstra consented to that course.

1656 On 14 January 2002, Mr Ebeid prepared a paper for Optus' Management Committee, which was submitted to the Committee by Mr O'Sullivan. The purpose of the paper was to seek approval to renew a one year licence agreement with Fox Sports to license the *NRL on Optus* sports channel. Mr Ebeid recommended approval of the proposal. The paper recorded that there had been '*ongoing proposals canvassed with Fox Sports and [its] shareholders to license the premium Fox Sports Channels*'.

1657 A term sheet was signed on 15 January 2002. Under the arrangement, Optus was to receive the *NRL on Optus* channel for a further year, with an option to extend the arrangement for a further three years (2003 to 2005). The licence fee was to be $17.15 million (exclusive of GST). Of this sum, it appears that $800,000 would be retained by Fox Sports and the balance would flow to Foxtel.

11.19 Further Content Supply Discussions: January–February 2002

11.19.1 Telstra and Optus Negotiate

1658 On 8 January 2002, Optus and Telstra representatives met, at Optus' suggestion, to discuss the content supply proposals. At the meeting Optus threatened a '*break out*' strategy that involved a merger with Austar and extending national coverage via satellite. Mr Akhurst shared Dr Switkowski's view that this was a negotiating tactic by Optus, since a merger was not likely to be its preferred position.

1659 Over the succeeding week or so, further discussions took place in relation to content supply arrangements. Telstra also modelled the effects of Optus' proposals. On 17 January 2002, Mr Akhurst reported to Dr Switkowski that the modelling suggested that the benefits to Telstra of doing a deal with Optus were vastly less than Optus had estimated.

1660 An inconclusive meeting took place between Telstra and Optus representatives (including Dr Switkowski and Mr Anderson) on 21 January 2002. This was followed by a meeting on 28 January 2002 at Mr Lachlan Murdoch's house between representatives of News, PBL and Telstra. At the meeting, Dr Switkowski supported a further approach to Optus regarding the content proposals and agreed to Foxtel accepting Optus' MSG liabilities up to a capped amount. Mr Williams' note of the meeting valued the liabilities at $460 million, a figure apparently supplied by Mr Sutton on the basis of discussions with Mr Hardy of Optus.

1661 The negotiations continued to encounter difficulties. In particular, Optus' demand for an MSG indemnity from Foxtel and the pricing of satellite capacity to be sold to Foxtel generated disagreement. Discussions in early February 2002 failed to resolve the disagreements.

11.19.2 Optus and Fox Sports

1662 On 22 January 2002, Mr Anderson told Mr O'Sullivan that he was loath to sign up with Seven for another three years, but he did not think that he could get Mr Stokes to '*roll again*'. He concluded with the following question:

> *'Why don't we test Fox Sports willingness – although I suspect they'll attempt to use it as blackmail for a satellite deal – or another trade-off'.*

1663 Mr Anderson copied his email to Messrs Dalgleish and Ebeid. The latter gave evidence that he understood Mr Anderson to be suggesting that Optus should obtain the Fox Sports channels. Mr Ebeid appreciated at the time that what Mr Anderson was proposing would constitute a breach of the Exclusivity Clause. Although Mr Ebeid did not tell Mr Anderson directly of his views, he did remind Mr O'Sullivan of the Exclusivity Clause. Mr Ebeid had also previously reminded Optus executives via emails of the terms of the Exclusivity Clause.

1664 An internal Telstra email of 22 January 2002 recorded that Mr Philip had told Mr Sutton (of Telstra) that Fox Sports had received a call from Optus that morning indicating that Optus wished to discuss a supply deal. Mr Philip conveyed to Mr Sutton that Fox Sports would have to agree by 8 February 2002 or otherwise Optus would have to re-sign with C7. The call from Optus to Fox Sports was (so I find) probably made by Mr O'Sullivan.

1665 On 23 January 2002, Mr Gammell passed on to Mr Stokes information supplied by a former officer of Optus that Foxtel had suddenly become very active in trying to persuade Optus to take Foxtel's programming and that Mr Anderson was '*pushing hard for the Foxtel offering*'. Mr Gammell thought that the latest NRL deal was a '*precursor to a greater content deal*'. Mr Gammell identified a '*doomsday scenario*' in which:

> *'Foxtel provide all programming to Optus, they therefore block an Austar combination and gain access to the customers of their only competitor.*
>
> *If this occurred Foxtel would be the monopoly content provider to all Pay TV customers, Optus would merely be a carriage provider for Foxtel content'.*

1666 Late on 31 January 2002, Mr Gammell circulated an email saying that he had heard

> *'on the grapevine that Foxtel is making a determined push with Optus to do a content deal [and] that this has quite a deal of support inside Optus'.*

The next morning, Mr Wood confirmed that the discussions were occurring '*at a very high level*'.

1667 A handwritten note prepared by Mr Fletcher of Optus on about 11 February 2002 recorded that the aim was to agree on heads of agreement and to reach a binding Fox Sports

deal by early the following week. Mr Fletcher agreed in cross-examination that Optus wanted to reach a binding agreement ahead of finalisation of a long form Content Supply Agreement.

11.19.3 Foxtel and Optus Negotiate Concerning Fox Footy

1668 In early January 2002, Mr Williams of Foxtel met with Mr Ebeid of Optus in relation to the licensing of the *Fox Footy Channel*. Mr Ebeid indicated that Optus would like the channel but not at any price. He made it clear that Optus could live without the channel. Mr Williams was concerned by this response, as he thought that Foxtel needed to recoup part of the AFL pay television rights fee from Optus.

1669 On 17 January 2002, Mr Williams received an email from Mr Sutton attaching information he had provided to Telstra executives about the state of negotiations with Optus in relation to the AFL channel. Mr Sutton indicated that negotiations had stalled with an offer of $15 million per annum (plus CPI) for five years. Mr Williams then realised that there was a discrepancy between the expectations of the Foxtel partners as to the revenue to be obtained from Optus and Optus' views as to the value of the AFL channel. On 19 January 2002, Mr Williams expressed the view that the '*picture with both Austar and Optus is not as good as we would like*'.

1670 On 7 February 2002, Mr Ebeid sent Mr Williams a letter as follows:

> *'I note reports that you have now licensed AFL to 2002 to Austar on a per subscriber revenue share basis with, I assume, no Minimum Subscriber Guarantees.*
>
> *As you are aware, Optus would like to carry the Channels and allow our subscribers access to AFL match coverage on the Optus service. We are willing to consider an offer from you on no less favourable terms to those offered to Austar.*
>
> ...
>
> *If you are not prepared to make an offer on these terms, Optus will have to advise the AFL and the ACCC'.*

1671 On about 11 February 2002, Mr Williams prepared his CEO's report for the Foxtel Management board meeting scheduled for 19 February 2001 (which in fact was postponed).

Mr Williams commented that early results with the take-up of Foxtel were '*exceptionally encouraging ... [Fox Footy] is a clear subscription and upgrade driver and anti churn device*'. In that context, Mr Williams said it would be a mistake to slow the marketing. However, he presented a gloomy picture in relation to Optus:

> *'The picture with Optus is not at all as encouraging. Optus has flatly rejected the $15M offer. It has indicated that the channel is too expensive (notwithstanding the fact that it will deliver direct savings of $24M over and above that which Optus was paying previously)'.*

1672 On 12 February 2002, Mr Williams responded to Mr Ebeid's request as follows:

> *'I refer to your fax dated 7 Feb 2002 in relation to the above. As you are aware, FOXTEL's most recent proposal to Optus is for the supply of the FOX Footy channel, as that channel is made available to FOXTEL subscribers, for $10 million for one year. As discussed, this proposal is still subject to the approval of the FOXTEL partners.*
>
> *FOXTEL's obligation in relation to Austar was to offer the AFL rights to Austar "at cost". The agreement reached with Austar was reached in this context.*
>
> *FOXTEL's obligation in relation to Optus is to offer the rights on "reasonable commercial terms". FOXTEL is willing to do so and all offers to date have been in accordance with this requirement.*
>
> *FOXTEL's last proposal to Optus as set out in the letter dated 5 December 2001 from Jim Blomfield to you, was calculated by taking the costs of producing the core content of the AFL channel that would be made available to FOXTEL, Austar and Optus.*
>
> *...*
>
> *The revised proposal discussed on the telephone is even more reasonable. The costs of the FOX Footy Channel are higher than those of the core channel however, obviously Optus now avoids the capex costs associated with delivering three separate state based feeds to Optus. The revised licence fee essentially represents FOXTEL's costs allocated according to current subscriber numbers with an arguably uncommercial basis'.*

11.19.4 Foxtel Supplies Fox Footy Channel *to Austar*

1673 On 15 February 2002, a Foxtel board paper sought approval for Foxtel to enter a two year agreement with Austar for the supply of the *Fox Footy Channel*. Relevantly, the paper included the following information:

'The proposed agreement with Austar, which FOXTEL Management now wishes to enter into for the AFL, is forecast to contribute $1.5m to the 2001/02 financial year, and $3.5m for the 2002 calendar year. This compares with a budget of $10m in the 2001/02 Financial Year ($20m sub licence for the 2002 calendar year including both Austar and Optus).

FOXTEL's contractual obligation as set out in FOXTEL's agreement with News Limited for the acquisition of the AFL pay television rights, required FOXTEL to offer the AFL to Austar on terms no less favourable than those offered to FOXTEL. FOXTEL made an offer to Austar that complied with its contractual obligation and this offer remained open to Austar to accept. However, with a view to ensuring the AFL is available in regional Australia, FOXTEL has negotiated a separate commercial agreement with Austar on terms as follows:

1. ...

2. Non-exclusive residential and commercial cable (Darwin only), satellite and MDS rights to the FFC [Fox Footy Channel] for the Austar territory ... Austar has no right to sub-licence [sic] the FFC;

3. The FFC must be carried as an a la carte service as a buy through from the Austar basic tier of services available to residential subscribers;

4. Austar must pay to FOXTEL, licence fees based on the residential subscriber penetration of the Tier, such that:

0% - 9%	*100% of Revenue*
9.1% - 18%	*70% of Revenue*
18.1% plus	*50% of Revenue*

The amount payable per subscriber, will not be less than $10.80 pspm (not including GST) in season, and $5.40 pspm (not including GST) out of season'.

1674 Telstra, through Mr Akhurst, supported the recommendations. He was influenced by his understanding that Austar at the time was experiencing financial difficulties.

11.19.5 Foxtel-Optus Fox Footy Agreement

1675 On 19 February 2002, Foxtel Management and SingTel Optus executed the '**Foxtel-Optus Fox Footy Agreement**' by which Optus was appointed a non-exclusive selling agent for the *Fox Footy Channel* for three years. The *Fox Footy Channel* was to be available to Optus' residential subscribers as an a la carte channel and Foxtel was to determine the pricing and package options. Optus was to receive a small percentage of the gross

subscription revenue as commission. The Foxtel-Optus Fox Footy Agreement was therefore a revenue sharing arrangement. Either party could terminate the Foxtel-Optus Fox Footy Agreement if Optus entered an agreement to distribute the Foxtel Service.

1676 Mr Williams gave evidence that, despite his best efforts to negotiate satisfactory sub-licence arrangements with Austar and Optus for the *Fox Footy Channel*, the results were lower than had been assumed by Foxtel in its budgeting. As he explained:

> *'MR SHEAHAN: You were satisfied that you had done all that you could to achieve the best possible outcome? --- Well, it was a bit like negotiating with one's hands tied behind one's back.*
>
> *In what sense, Mr Williams? --- We had acquired the subscription television rights.*
>
> *Yes? --- And the others knew that therefore they were in an advantaged position relative to negotiating with us, and they did not in any way - they weren't shy about indicating that. They were quite harsh, in fact.*
>
> *So it was a tough negotiation? --- Very tough'.*

1677 Mr Williams' evidence was borne out by a document prepared on 1 March 2002 by Foxtel's Group Finance Manager. This compared the AFL business case approved by the board in December 2000 with the forecast which took account of the revenue-sharing arrangements actually concluded with Austar and Optus. The business case estimated the NPV over a five year period of the anticipated arrangements with Optus to be $25.9 million (including sign-on fees). The forecast NPV for the same period was $8.2 million.

11.20 Optus Considers Project Emu January 2002

1678 In January 2002, while negotiating with Telstra, Optus continued to consider Project Emu (the proposal for a merger with Austar). On 8 November 2001 the SingTel board had approved the appointment of McKinsey and JP Morgan jointly to develop a restructuring strategy for CMM. The brief included formulating plans for the implementation of Project Emu.

1679 JP Morgan prepared a report on the proposed merger on 9 January 2002. On 14 January 2002, Mr O'Sullivan reported unfavourably on the draft business plan for the merger. Mr O'Sullivan considered that a merger exposed Optus to the risk and '*Amber*

[Austar] comes along for the ride!' A simple buy-out of Austar presented problems because Optus would have to take over Austar's liabilities and Optus would be actually increasing its involvement in pay television, rather than diluting its interest.

1680 Mr Anderson explained in his evidence convincingly his reasons for concluding that the Project Emu business model was flawed:

> *'There were a number of factors identified from the ongoing analysis that made a merger with Austar unattractive. One aspect of the opportunity was the financial difficulties Austar faced at the end of 2001. However, by February 2002 Austar had managed to renegotiate with its creditors, and so was no longer pressed to enter into a deal with Optus. Secondly, it was important that Optus not become exposed to the substantial, pre-existing Austar debt. If a new corporate entity was created to operate the merged business, there was the likelihood that it would not be able to take advantage of Optus' substantial accumulated tax losses. Finally, the value of the synergies in the merged entity looked difficult to quantify. It was far from clear that the merger of two loss-making, financially distressed businesses would lead to valuable synergies'.*

11.21 Foxtel Optus Term Sheet and Termination of the C7-Optus CSA

11.21.1 Mr Wise Recommends an Interim Deal with Optus: 7 February 2002

1681 On 7 February 2002, Mr Wise prepared a memorandum for Mr Gammell and others concerning C7's negotiations with Optus. The memorandum recorded that Seven's original budget was prepared on the basis that the C7-Optus CSA would be terminated on 28 February 2002. The estimated loss if C7 closed on that date was $4.4 million. If Seven concluded a three year deal with Optus, the result would be a $7.6 million loss, even factoring in the $17 million per annum guarantee from Optus. The memorandum also recorded that Optus had said that it would not enter into any contractual obligations longer than one year. Mr Wise noted that Optus needed a sports channel and that '*[t]hey probably need us to put some tension in their content negotiations with Fox Sports, both on Fox Sports and AFL*'. Mr Wood observed that:

> *'There is debate about C7 being dead or alive (or being a zombie!). It is important to recognise the requirement that we must by law mitigate our loss, the Optus deal does that'.*

1682 Mr Wise recommended an agreement with Optus whereby Optus would pay the sum of $5.8 million due as at 28 February 2002; C7 would agree to provide *C7 Sports* until 30

June 2002 at $1.5 million per month; and Optus would be able to terminate on one month's notice (but not before 31 May 2002). If Optus did not accept the three year deal by 31 May 2002, the arrangements would end on 30 June 2002 and Optus would pay a four month '*penalty*', being four '*months on [the] original contract less amounts paid*'. Mr Wise recorded the features and benefits of this proposal as follows:

> '• *Gives C7 best financial outcome.*
>
> *Keeps C7 in the game at least until resolution of Austar.*
>
> *Optus doesn't have to enter 3 year contract.*
>
> *Optus gets savings against contract for March-June.*
>
> *Optus keeps C7 to negotiate with Fox Sports'.*

11.21.2 Optus Chooses Content Sharing

1683 On 11 February 2002, a SingTel Management Committee meeting, attended by Mr Lee, Mr Anderson and others, considered a paper prepared by Mr Ebeid and submitted by Mr O'Sullivan. The paper sought approval:

> *'for entering into a new agreement with a reduced three year term to replace the current ten year agreement with [C7] to license the C7 sports channel for broadcast on the Optus Pay TV service'.*

1684 The paper reported that following C7's loss of AFL pay television rights, Optus had negotiated a substantially lower licence fee for a single channel for a three year term, effective from the 2002 season, as follows:

Year 1:	$17 million
Year 2:	$18 million
Year 3:	$19 million.

The document included a comment on the Exclusivity Clause:

> *'A restriction limits Optus' discussions with suppliers other than C7 to provide sports content until 28 February 2002, although this restriction is unlikely to be enforceable by C7 as it is an illegal anticompetitive restraint. However a decision on all aspects of the C7 proposal must be advised to C7 by or on 28 February 2002'.*

1685 The minutes of the Management Committee of 11 February 2002 recorded the

following:

> *'Lim Toon suggested that Optus should try to prolong the period in which it was required to exercise its termination right as far as possible to allow it more time to make the proper decision, given that Projects EMU & Alchemy were still in progress.*
>
> *Given that there were other activities that might have an impact on the decision to enter into an arrangement with C7, [Mr Lee] requested [Mr Anderson] to update him on the progress before proceeding to sign with C7'.*

1686 On 14 February 2002, Mr Ebeid sent to Mr Fletcher, at the latter's request, copies of documents indicating the point that Optus had reached with Fox Sports in August/September 2001 '*when we thought we were close to a proposal*'. Mr Fletcher's evidence was that he had requested these documents in order to facilitate a deal with Foxtel regarding a sub-licence of *Fox Sports 1* and *Fox Sports 2*.

1687 On 18 February 2002, Optus' solicitors provided written advice concerning the enforceability of the Exclusivity Clause. The advice proceeded on the basis of two assumptions:

> *'It is accepted by C7 that Optus' right to terminate the agreement (as varied) arises from 1 March 2002 when C7 "loses" the AFL rights.*
>
> *Optus is in breach of clause 8A and intends to continue to conduct itself in breach of clause 8A'.*

The key paragraph in the advice was as follows:

> *'In our view, clause 8A is likely to be enforceable at the suit of C7. An argument may be raised that the exclusivity provided for in clause 8A contravenes certain provisions of Part IV of the [TP Act]. However, in our view, clause 8A is unlikely to be unenforceable by reason of any contravention of Part IV of the Act. There are numerous reasons for this conclusion, however the principal one is that the period of exclusivity runs from 27 September 2001 to 28 February 2002 and this is unlikely to substantially lessen competition within the meaning of the relevant provisions of the [TP Act]. Further, we do not see any application of unconscionability or other vitiating factor arising so as to render clause 8A void or voidable'.*

The advice analysed the consequences of breach and concluded that although C7 would have a claim for breach of contract, it was difficult to see how it could claim substantial damages.

11.21.3 Foxtel-Optus Term Sheet Is Signed

1688 On 20 February 2002, Foxtel Management, on behalf of the Foxtel Partnership, and Optus Vision executed the Foxtel-Optus Term Sheet. The parties acknowledged that they were working towards the execution and performance of a '*long form Content Supply Heads of Agreement*'.

1689 The Foxtel-Optus Term Sheet recited that Optus Vision had requested Foxtel to offer it a sports service and that Optus Vision had stated that it would only continue the negotiations for the content supply agreement ('*CSA*') if a sports service agreement was entered into. The provisions included the following:

> The parties agreed to continue to negotiate in good faith to enter into the CSA as soon as practicable, but the agreement would continue until the CSA became effective. If the CSA was not entered into the agreement would continue for a term of three years, from 1 March 2002 or, at Optus' election, 1 April 2002 (cll 1, 2).
>
> Foxtel sub-licensed to Optus Vision two full-time general sports channels with the same content as the Fox Sports channels, to be branded as '*Optus Sports 1*' and '*Optus Sports 2*'. It also sub-licensed any Fox Sports overflow channel. The sub-licence was for retail distribution to Optus' subscribers (cll 3, 4, 7).
>
> The base price, exclusive of GST, was US$2.65 plus $5.00 pspm. For each year in which the channels included NRL coverage, a '*Flagfall Price*' of $9.279 million applied. An MSG of 240,000 subscribers applied for the first nine months and 250,000 thereafter.

The effect of the MSG at a minimum of 250,000 subscribers was to require payment of at least $30.3 million per annum at the current exchange rates.

1690 Mr Anderson was cross-examined as to why Optus had been prepared to commit itself to a three year agreement with burdensome MSGs if, as Mr Anderson claimed, Optus was likely to close down CMM within about three years had the content sharing agreement with Foxtel not been finalised. Mr Anderson's response was that Optus was confident on 20 February 2002 that the content sharing agreement with Foxtel (effected by the Foxtel-Optus

CSA of 5 March 2002) would in fact proceed. He acknowledged that ACCC approval was required for the Foxtel-Optus CSA and that an Optus board paper for the meeting of 21 February 2002 had warned that there was a significant risk that the ACCC would not approve the transaction in its then current form. Mr Anderson said that his view at the time was that ACCC approval was likely although he thought that the ACCC might impose conditions on the parties to the agreement. This evidence is supported by the fact that the board paper noted that Optus' strategy was '*to negotiate the offending provisions with Foxtel once the ACCC has identified concerns*'. I accept Mr Anderson's evidence.

11.21.4 Optus Terminates the C7-Optus CSA

1691 Mr Anderson telephoned Mr Wise on 20 February 2002 to advise him that Optus would be exercising its right to terminate the C7-Optus CSA on 1 March 2002. Mr Wise told Mr Anderson that Seven had a different view on Optus' ability to terminate. Mr Wise's email to Mr Stokes and others conveying the conversation recorded Mr Wise's view that '*[a]ll the balls are now stacked in the one basket – TP action*'.

11.22 The Resolution of Other Disputes

1692 On 20 February 2002, the date the Foxtel-Optus Term Sheet was signed, agreements were signed making Telstra a reseller of the Foxtel pay television service and resolving the terms on which Fox Sports would be supplied to Foxtel on a long-term basis.

11.22.1 Telstra Becomes a Foxtel Reseller

1693 A board meeting of Telstra held on 19 and 20 February 2002 received a presentation from Dr Switkowski and others on the state of negotiations '*concerning supply of Pay TV content and bundling of Pay TV with telephony*'. The board expressed its appreciation to the team heading the negotiations, but did not specifically authorise the execution of any agreements. Dr Switkowski gave evidence that he authorised the execution of the Foxtel-Optus CSA on behalf of Telstra Media. I infer that he also authorised the execution on behalf of Telstra of agreements that preceded and accompanied the Foxtel-Optus CSA, including the agreements executed on 20 February 2002.

1694 On 20 February 2002, Telstra, Telstra Multimedia, Foxtel Management (as agent for the Foxtel Partnership), TNCL and PBL executed the '**Foxtel-Telstra Resale Term Sheet**',

by which the Foxtel Partnership licensed Telstra as a reseller of all existing and future Foxtel services on terms and conditions corresponding to those previously agreed in principle. The Foxtel-Telstra Resale Term Sheet was to continue until terminated by agreement or in consequence of a material breach.

11.22.2 Fox Sports-Foxtel Supply Agreement Is Signed

1695 On 20 February 2002, Fox Sports and Foxtel Management, on behalf of the Foxtel Partnership, signed the Fox Sports-Foxtel Supply Agreement, setting out the basis on which Fox Sports would supply *Fox Sports 1*, *Fox Sports 2* and a sports overflow channel to Foxtel. The agreement was for the exclusive supply of the channels, except for the Austar territory and was to continue until terminated for breach or by mutual agreement. As previously agreed, base price for residential subscribers was to be US$2.65 plus $5.00 pspm, subject to an MSG of 750,000. A volume discount of 15 per cent was to apply to subscribers in excess of 750,000. For each year in which the channels included NRL coverage, a flagfall price of $18.558 million was to apply. All prices were subject to GST and CPI increases. Foxtel was to be permitted to license Optus to resell the channels.

11.23 Foxtel Offers Carriage to C7

11.23.1 Foxtel's Offer

1696 According to Mr Philip, once the Foxtel-Optus Fox Footy Agreement and the Foxtel-Optus Term Sheet had been signed, he formed the view that it would be desirable for Foxtel to offer to carry C7. He said that he did so '*[i]n order to counter any complaint that C7 might make that those agreements had some anti-competitive effect*'. Mr Williams apparently formed a similar view.

1697 Whatever the precise motivation, on 27 February 2002, Mr Williams sent a letter of offer to Mr Stokes setting out the terms on which Foxtel would carry C7 as part of its pay television service. The terms included the following:

> *'1.* ***Channel:*** *A 24 hour 7 day a week sports channel known as C7 (the "Channel"). The channel will be a fulltime general sports channel;*
>
> *2.* ***Rights:*** *Non-exclusive pay television rights for cable and satellite with a right to sublicense ...*

3. ***Terms and Commencement Date:*** *3 years commencing 1 March 2002*

...

5. ***Carriage:*** *The Channel may be carried a la carte (ie after basic) or as part of a special sports tier at FOXTEL's election;*

6. ***Licence Fees:*** *If FOXTEL carries the Channel as an a la carte channel then C7 will be paid a per subscriber per month licence fee equal to the greater of an amount nominated by you and a 50/50 revenue split (after GST). If the Channel is carried as part of a special sports tier then the terms will need to be discussed;*

...

11. ***Content:*** *The Channel shall be the premier sports channel produced or developed by C7 or in which C7 is involved and C7 shall ensure that the Channel includes sports programming to which it holds the rights with the greatest viewer appeal. The quality of the Channel shall be at least equal to the quality of the Channel in the 6 month period prior to the date of the agreement and C7 shall use its best endeavours to broadcast the maximum number of sports events live'.*

11.23.2 Seven's Response

1698 After receiving the offer, Mr Stokes spoke to Mr Williams and told him that he (Mr Stokes) did not regard the offer as bona fide. On 8 March 2002 (although the letter is dated 5 March 2002), Mr Wise responded in writing on behalf of Seven to Foxtel's offer. Mr Wise questioned the motives behind the letter. He pointed out that the offer had coincided with the trade practices litigation to be commenced by C7 against the consortium following Seven's success in the preliminary discovery proceedings in the Federal Court. Nonetheless, Mr Wise indicated that Seven was open to genuine negotiations. He advised that Seven would require the following structure as a basis for discussions:

'• *a suite of channels on the Foxtel and Optus "basic" services, not merely a single channel. On a basis consistent to that negotiated with Optus prior to the announcement of your deal;*

pricing of channels on terms more consistent with industry practices, not a revenue share arrangement, again consistent with the negotiated position with Optus and reflective of the pricing regime offered to other sports channels such as Fox Sports;

a term to ensure Seven has the same competitive base as Fox Sports and others'.

1699 Mr Williams replied on 12 March 2002, asserting (among other things) that the offer

made by Foxtel had nothing to do with the allegations made by C7 in relation to the acquisition of the AFL or NRL pay television rights. The letter continued as follows:

> '• *FOXTEL is not willing to consider providing C7 with a suite of channels. For obvious reasons, FOXTEL is not willing to agree to carry channels when it has no information about the content of those channels. If C7 has specific channels to offer FOXTEL, it should explain precisely what these channels are and what price C7 is seeking for them ...*
>
> *The pricing offered by FOXTEL is consistent with industry practice for a la carte channels. A number of channels offered by FOXTEL on an a la carte tier are provided to it on a revenue share basis. As I mentioned in my letter, we will need to discuss pricing if the channel is to be provided on some other basis. I should make it clear, however, that in the context of price, FOXTEL does have some concerns about the quality of C7, both in terms of production and content ...*
>
> *The term of any agreement is a matter for negotiation'.*

1700 Mr Wise replied to Mr Williams' letter on 18 March 2002. He said that there would be little point in C7 providing information about its channels if Foxtel was subject to '*capacity/constraint issues*'. Mr Wise asked for an indicative price for a C7 channel carried on basic and noted that C7 had previously been offered at a discount to the cost of Fox Sports. He said that C7 '*would be willing to use a similar appropriate proportional relationship in the future*'. This was presumably a reference to the terms of C7's offer of 17 November 1999 which specified prices at a percentage of the price Fox Sports charged Foxtel for its channels.

11.23.3 Impasse

1701 Further correspondence ensued. On 20 March 2002, Mr Williams '*in a constructive spirit*' was prepared to formulate a proposal for the carriage of four channels to be supplied by C7 as part of Foxtel's planned digital service. Mr Wise then reiterated in a letter of 21 March 2002 that:

> *'a commercially viable outcome for Seven is a suite of channels in the Foxtel Optus "basic" package, competitively priced as against competing channels such as Fox Sports and Fox 8'.*

In a letter of 22 March 2002, Mr Williams rejected Seven's suggestion, but asserted his willingness to engage in '*meaningful discussion*'. Mr Williams and Mr Wise met on 27

March 2002, but nothing was resolved.

11.24 A Decision on Project Alchemy

11.24.1 Mr Anderson Identifies the Options

1702 On 7 February 2002, Mr Anderson and Mr O'Sullivan prepared a presentation dealing with the strategic options for CMM. The presentation was made to a meeting of the SingTel Executive Committee held on that day. Mr Anderson identified four options:

> wait and see;
>
> Project Emu;
>
> Project Alchemy; and
>
> exit the business.

1703 The presentation addressed the options. In relation to Project Emu, the presentation was as follows:

> '• *Objective:*
>
> - *Create a scale business with multiple distribution channels, allowing us to maintain super majority rights and an option to sell down in the future*
>
> *Rationale For:*
>
> - *Merged subscriber base will be ≈ 700,000 (Austar has ≈ 450,000)*
> - *Opportunity to re-negotiate content obligations*
> - *Bundle PayTV over Satellite, reaching more subscribers*
>
> *Rationale Against:*
>
> - *High level of implementation risk*
> - *Head-to-Head with PBL/News on PayTV*
> - *Proportional funding of debt ≈ $350M, up to $500M incremental funding'.*

1704 The minutes of the meeting recorded Mr O'Sullivan's oral presentation as including the following:

> *'On the merger with Austar, ... the objective would be to create a scale business providing an opportunity to re-negotiate content obligations but which would entail high implementation risk and still significant funding obligations on Optus. On Project Alchemy, management's objective would be to remove Optus's MSG obligations, obtain Foxtel content at a fair value while maintaining the option to distribute content over all channels. The advantages of the option would be to greatly reduce Optus funding requirement to CMM and reduce its operational risk. However, it would limit Optus's option as a fully integrated Tier 1 provider across all markets and products and the deal could potentially face blockage from the ACCC. The current offer from Foxtel and its partners was unsatisfactory and had been rejected. He explained the value transfer to Optus of the current Foxtel offer with the other options and informed that management would continue negotiations with Austar as well as the Foxtel partners'.*

1705 The SingTel board met on 8 February 2002. Mr Anderson and Mr O'Sullivan, in company with McKinsey, made much the same presentation as they had to the Executive Committee. The board noted that closing CMM would be undesirable as it would involve paying $750 million to content providers and dismissing 3000 employees. The board concurred with the view that Project Alchemy was preferable to Project Emu, but management was asked to negotiate actively on both. Mr Lee agreed in his evidence that, at this particular time, if it had not been possible to pursue Project Alchemy, Project Emu would have been the preferred option for CMM to pursue.

1706 JP Morgan wrote to Mr Anderson on 18 February 2002, summarising the material issues relating to Project Emu. The letter identified a number of concerns and material risks that had to be carefully considered in determining whether to undertake the transaction. One of the concerns was that Austar was carrying a debt of $400 million. Another was Optus' concern as to the ability of Austar's parent to provide appropriate levels of future funding. Mr Anderson said that he had interpreted JP Morgan's advice as indicating that Project Emu was '*extremely difficult*'.

11.24.2 SingTel's Board Meeting of 21 February 2002

1707 On 21 February 2002, the SingTel board met for the last time prior to Optus entering into the Foxtel-Optus CSA on 5 March 2002. A paper prepared for the board meeting provided an update on the status of Project Alchemy negotiations with Foxtel and Telstra. The risk assessment section of the paper dealt with the legal risks and included the following passage:

'By negotiating with Foxtel, C7 may allege that Optus has breached certain exclusivity provisions contained in the C7 variation agreements. C7 might immediately terminate those arrangements (therefore leaving Optus without sport content for up to 6 weeks) and/or seek damages.

In the interim a Fox sports [sic] deal has been agreed that will provide sports programming until such time as the larger deal is finalised.

Optus has also offered C7 to take its content as a buy through. Optus will defend vigorously any claims brought by C7. Our legal advice is that the risk of damages being awarded against Optus is low'.

1708 The board of SingTel discussed the future of CMM at the meeting of 21 February 2002. In addition to a management paper, the board considered a memorandum prepared by McKinsey which advised in relation to the options, particularly the '*evolving Alchemy deal terms*' and '*the emerging "Manage for Cash" plan*'. Of the four options, only Project Alchemy and Manage for Cash warranted serious consideration. Project Emu was flawed and Exit Now was '*suboptimal*'. Either Project Alchemy or Manage for Cash avoided or deferred several hundred million dollars in exit costs.

1709 The McKinsey paper described three '*fundamental changes*' to the then current operation of CMM that would be required if Manage for Cash were adopted. The changes were:

'• *Dramatically cutting capex (by $250M a year) by stopping new adds, cutting IT and eliminating ITV;*

Getting roughly $25-30M ... in non-content costs out in reduced sales and marketing, program production and provisioning expense;

Over time, getting a $14/sub/month lift in telephony ARPU (and therefore a $120M margin improvement) through a combination of line rental increases, less aggressive bundling discounts and selective price increases'.

1710 Mr Lee explained in his statement that '*stopping new adds*' referred to a component of the Manage for Cash option, to the effect that no new customers would be added to the Optus network. The reference to improved telephony margins assumed that Telstra would follow Optus' pricing moves.

1711 The McKinsey paper stated in relation to the Manage for Cash option:

> *'We believe you could get to roughly break-even steady state free cash flows in the next 3-4 years. You would have to get comfortable with the "can the team pull this off" – in our view; the cost and capex improvements are relatively straightforward, the pricing improvements are aggressive, yet achievable'.*

1712 McKinsey considered Project Alchemy to be '*intrinsically more attractive*' than the Manage for Cash option. It was the '*dominant strategic outcome*' and on a '*downside case*' produced a $50 million NPV against a -$160 million NPV for Manage for Cash. Moreover:

> *'You would continue to be in the consumer business and avoid/defer exit years down the track. In shifting to a "reseller" model for Pay-TV you would solve two problems – achieving sustainable economies in telephony AND preserving the customer base'.*

1713 A chart prepared by McKinsey incorporated the notation '*CMM becomes going concern*' under the heading '*Manage for cash*'. However, this statement was made in the context of comparing Project Alchemy with Manage for Cash on optimistic assumptions, the comparison being favourable to Project Alchemy. The McKinsey document as a whole does not suggest that it was likely that CMM would become a going concern under the Manage for Cash regime, although it apparently regarded this outcome as a possibility. Later, McKinsey recorded that if CMM could not achieve the proposed plan (including the aggressive pricing improvements), it would have to close by 2006.

1714 The management paper identified a key point that had been referred to at the previous board meeting:

> *'CMM division is currently sub scale, suffers onerous content obligations, is severely inhibited by network footprint and is exposed to rapid commoditisation of its telephony products.*
>
> *In the absence of industry rationalisation, all participants face a lack of scale and uneconomic content costs'.*

The management paper explained the '*network imprint*' issue as follows:

> *'Currently CMM's addressable market is limited to those serviceable homes which the HFC passes (2.2 Million of which 1.4 million is addressable). These [sic] leaves 4.4 million of 75% of the market unable to be addressed by the HFC network. This limitation is major barrier to achieving scale economics for CMM. It is also important to note that 80% of the CMM HFC network is overbuilt by Telstra, thereby cutting the theoretical maximum*

penetration levels for CMM in those area's [sic] in half due to competitive dynamics. For example, established overseas cable operators who have regional monopolies typically reach penetration levels of approximately 60%. In an overbuild situation with Telstra, that maximum penetration would be approximately 30% (assuming 50% market share for each operator).

All these footprint factors limit CMMs [sic] ability to achieve scale'.

1715 The management paper pointed out that Project Emu had significant execution and deal structure risks. It analysed the '*Stand-alone (Steady State manage for cash)*' option as follows:

'Historically the CMM division has had a cash burn rate of approximately A$300M per annum. This strategy contemplates that the cash burn could be reduced to between A$100M and A$150M by stopping growth, with a view to stalling any further decisions in relation to the CMM Division until such time that the PayTV and telephony industries have been rationalised (for example, if and when regulators remove barriers to Optus accessing the local loop) at economically viable prices.

There is no certainty that either industry will be rationalised and, even if they are, there is risk that competitive pricing pressures may erode any profit potentials within those markets. In the absence of any changes to content pricing this strategy, this model will likely see CMM trading on in a negative cash flow situation for the foreseeable future.

This option has a 5 yr NPV (no TV) $260M'.

As Mr Lee observed, Optus management took a '*slightly more pessimistic view of the potential outlook*' than had McKinsey.

1716 The '*Exit the Business*' option was described as follows:

'This option involves Optus closing its CMM business and stopping the cashburn [sic]. The shut down costs associated with exiting the CMM business include satisfying the minimum subscriber guarantees to content providers (current commitments have a $626M cash value), redundancies across the whole division and pulling down the HFC network. The estimated cost of a total shut down is in the range of A$900M-A$1Billion.

In addition to the high exit costs there is inevitable brand damage and loss of growth options (such as eventual access to the local loop and vulnerability for Optus Mobile if convergence eventuates) which are difficult to quantify.

This is the most extreme and least attractive of all the options due to the high cost, loss of future options and brand damage to other Optus business.

This option has an NPV of between [negative] A900M and [negative] $A1Billion'.

1717 The management paper identified a number of benefits for Project Alchemy, which involved streamlining Optus' pay television service by bundling Foxtel content with CMM pay television telephony products. Among the benefits were these:

'1. It relieves Optus of onerous content obligations to a maximum value of $550M.

2. It provides an immediate improvement in per subscriber economics by reducing the cost of content and increasing ARPU [average revenue per unit] (due to Foxtel retail prices being higher than Optus Pay TV). The net benefit of this change per customer would be a $15/mth increase margin and an annual benefit to cash flows and margin of $48M (on a subscriber base of 270,000).

...

4. It establishes a highly competitive source of Pay TV content for the CMM operations.

...

6. It keeps CMM's options open in the future by preserving involvement in consumer, telephony, internet and Pay TV and the ability to bundle under the Optus Brand whilst seeking regulatory relief for access on the local loop.

7. The ability to distribute over the HFC network.

...

This option has a 5yr NPV of $514M assuming same business test is satisfied and tax losses can be carried forward'.

1718 The management paper sought board approval:

'to re-sell the Foxtel Pay TV service and accept a 15 yr $900M offer from Foxtel for C1 satellite transponders'.

11.24.3 SingTel's Board Resolves in Favour of Project Alchemy

1719 The minutes of SingTel's board meeting held on 21 February 2002 recorded the following:

'The Board considered the four options available in relation to Optus' CMM business. It was noted that the Exit Now strategy was suboptimal in view of the significant exit costs of around A$1 billion, which would drop over time. Maintaining the status quo was not possible in the structurally flawed industry with CMM generating a negative cashflow of around A$300 million. The Manage for Cash plan would reduce the cash burn to around A$150 million. ***However, there was no certainty that the industry would have rationalised at economically viable prices down the road****. Project Emu was a complex deal which was asymmetric to Optus, requiring Optus to bear too much of the risk and peak funding exposure with little upside. The Board noted Optus Management's recommendation that Project Alchemy was the most attractive option which would add some A$60 million to the bottomline [sic] going forward'.* (Emphasis added.)

The board resolved:

'(a) that Optus execute and deliver the Project Alchemy transaction documents and progress submissions to the ACCC for approval;

(b) that Optus continue negotiations with Austar, as an alternative strategy in the event that ACCC approval is not forthcoming or other conditions precedent are not satisfied;

(c) that Optus continue refining (and if necessary, implementing) the stand alone "steady state" business plan as an interim measure to minimise cash burn; and

(d) to make a public announcement once the heads of agreement is signed'.

11.24.4 Motives: Mr Lee and Mr Anderson

1720 Mr Lee gave evidence as to his state of mind at the board meeting of 21 February 2002, as follows:

'I believed that the Manage for Cash option would continue to produce a negative cash flow. I did not think that there was a realistic likelihood of economically viable prices in the CMM division. I believed that the Manage for Cash option would result in continuing losses but at a lower level than simply maintaining the status quo.

I regarded the Manage for Cash strategy as inevitably leading to Optus withdrawing from the pay television industry in due course for the following reasons. The benefit of the strategy was that over time, the MSG exit costs reduced dramatically. The redundancy and close down costs also diminished

over time. By not seeking to attract any new pay television customers, Optus' connection with pay television would quickly diminish. Once the Manage for Cash strategy was adopted, I believed that it would have become apparent to subscribers and investors alike that Optus was not committed to further investment in pay television. In those circumstances, I did not believe that the Manage for Cash strategy was one which could or should be pursued indefinitely. Rather I believed that it was preferable to incur the exit losses relatively quickly and prevent a long and drawn out closure. It was preferable to minimise that brand damaging process and to permit the company to concentrate its management resources on the profitable areas of the business'.

1721 As at 21 February 2002, from Optus' point of view, there was a significant risk that Project Alchemy would not proceed or would have to be substantially modified. Mr Lee identified the two risks as follows:

the ACCC would not approve the Foxtel-Optus CSA; and

the Foxtel Partnership would pull out of the deal.

1722 The question of what Optus would have done if Project Alchemy did not proceed was therefore not entirely theoretical. Mr Lee's evidence as to SingTel's likely course of action if Project Alchemy had not been available to Optus was this:

'*If Project Alchemy at the end of February 2002 was not an option available to Optus/SingTel to pursue, I would have recommended and supported the Manage for Cash option. In my opinion, that is the course which SingTel would have adopted.*

If the Manage for Cash option had been adopted, I would not have agreed to or recommended Optus agreeing to a further 3 year agreement with Seven/C7 to take a C7 sports channel which did not contain the Australian Football League ... or the National Rugby League ... for a total committed consideration of $54 million. In my opinion, SingTel would not have approved entry into such an agreement under the Manage for Cash option. Such an agreement would involve committing Optus to a large additional MSG type payment whereas the Manage for Cash option was based on minimising expenditure. Although I appreciated that the view submitted by Paul O'Sullivan and Michael Ebeid in the paper considered at the Management Committee meeting on 11 February 2002 as to the importance of a local content sports channel, the Manage for Cash option did not involve attempting to attract any new subscribers. The proposed C7 sports channel would not carry any major local sport. Optus already had ESPN as a sports channel. Committing Optus to a substantial sum for a sports channel with no local major sport would have been contrary to the Manage for Cash option. Any loss of subscribers because of the absence of the C7 sports channel would not have concerned me in the Manage for Cash strategy'.

1723 Mr Lee was pressed in cross-examination as to whether Optus, in the event that Project Alchemy was unavailable, would not have continued to pursue Project Emu. His response was that, although the board had directed that negotiations with Austar should continue in case Project Alchemy did not go ahead, no decision had been made as to which of the two alternatives – Project Emu or Manage for Cash – was preferable. Mr Lee said that by February 2002, the Project Emu option was regarded as unattractive and in substance had been ruled out by McKinsey. He said that had Project Alchemy not been achievable, Optus would have continued to explore both Project Emu and Manage for Cash, but in his view Optus management would have recommended Manage for Cash.

1724 Mr Lee pointed to the formidable obstacles that needed to be overcome if any agreement was to be reached with Austar. They included:

> Austar's debt of $400 million, which was the subject of restructuring discussions;
>
> problems facing Optus in taking advantage of tax losses in the event of a merger; and
>
> the uncertainties linked to financial models which projected a positive NPV, but did so only on the basis of a high terminal value attributed to the merged entity.

1725 Mr Lee considered at the time that these difficulties were too great for Optus to overcome.

1726 Mr Anderson's evidence was to the same effect. He said that by 21 February 2002, he was of the view that a merger with Austar was not a viable option. In cross-examination, Mr Anderson reiterated (albeit somewhat defensively) his view:

> *'Obviously I can't persuade you, but I'm telling you that is my firm view. Emu – and I have not been back to it in depth, but Emu had all sorts of problems that were coming up at that date. Sock Koong, the financial controller of the whole group, had pointed out that we couldn't transfer tax losses, if I recall. There was a dispute, an arm wrestle, over whether or not it was going to be 80/20 or 50/50 or that sort of number anyway, but more equal between the Austar partners and Foxtel. There was the Austar debt that was a problem. So there was a whole range of things that made the Austar thing, when we*

started to really work into it, I would have had difficulty recommending it, but – and I'm sure you have probably quizzed them, I don't know if you have, but I don't think [Mr Lee] would have gone down that line at all'.

I think that Mr Anderson's evidence was consistent with the contemporary documentation and reflected accurately his views at the time.

1727 Mr Lee was also cross-examined on his evidence that the Manage for Cash strategy would have led to Optus withdrawing from the pay television industry within a short period. Mr Lee accepted that the Manage for Cash strategy was designed to see Optus through a period when the MSGs were at their highest. After that it was an '*open issue*' as to whether the business would be viable or not. He also accepted that if the Manage for Cash option had brought CMM close to cash flow neutral, it would have made sense for Optus to wait for the close-down costs to reduce further before finally closing the division.

1728 Nonetheless, Mr Lee insisted that as at 21 February 2002, when the decision was made to proceed with Project Alchemy, management's view was that Manage for Cash would lead to a shut down of the business over time. Mr Lee pointed out that the strategy involved minimising cash outgoings in '*every way possible*' and also involved cutting capital expenditure and taking no additional pay television subscribers. He also pointed out that, although the strategy included raising prices and reducing bundling discounts, Optus could not know precisely what the effect of these measures would be on the level of churn.

1729 Mr Lee reiterated that management had a more pessimistic view of what was achievable under Manage for Cash than McKinsey. In particular, management thought that a continuing cash deficit of $100 million to $150 million per annum was likely:

'You understood that, if the manage for cash option was successful, CMM would continue as a going concern? --- Successful to the degree that McKinsey modelled, which was not the same numbers which management put forth on the management paper, which envisaged continuing losses of $100 million to $150 million per annum in cash, even under the manage for cash option, and it was management's view of what was achievable and the financial implications of it. And you see that clearly put in the management paper to the board.

You understood from McKinsey's report that, if the manage for cash option was successful, CMM would continue as a going concern? --- If the manage for cash met the performance criteria and targets that McKinsey had in the

model, then it will become a going concern. If manage for cash met only what management thought was achievable, which was outlined in the paper put forward by Optus management to the Singtel board, the scenario was for continuing losses of between $100 million to $150 million in cash per annum, and that was what management thought at the time was our best guess of the future'.

1730 In Mr Lee's view '*it was only a matter of time*' before Optus would exit the pay television industry:

'Each of the papers [before the SingTel board] essentially considered the same options for CMM? --- That's correct.

Each of the papers rejected, I suggest to you, the exit option as an option? --- Yes, an immediate exit.

The papers did not speak of immediate or gradual, did they? They spoke of exit? --- Yes. But I ---

Would you agree with me ---? --- But I qualify that, because if you read carefully into the implications of the option which was titled "Manage for cash", management's view on it was that that would likely indefinitely have cash deficits, and therefore over time it would continue to be problematic, and my view at the time was that this would likely lead to a delayed exit of the business.

1731 Mr Lee was challenged on these and other aspects of his evidence. Seven contends that Mr Lee's evidence (and that of Mr Anderson) was hypothetical and should be given little weight because it was given with the benefit of hindsight by witnesses who knew where their interests lay. The hypothetical nature of evidence and the fact that witnesses are speaking with the benefit of hindsight are matters to be taken into account in determining whether their evidence should be accepted. As I have noted, however, the evidence given by Mr Lee and Mr Anderson was by no means entirely hypothetical. In any event, after giving due weight to the matters raised by Seven, I do not think its challenge to the evidence succeeds. Mr Lee's evidence seems to me both convincing and consistent with the contemporaneous records of deliberations within Optus. I therefore accept his evidence.

1732 Mr Anderson was adamant that Manage for Cash was a polite way of saying that Optus would run down the business and close it when the terms were better, for example MSG commitments to the Hollywood studios had reduced:

'Make no mistake, manage for cash was a way of closing the business, but

closing on our terms, not the disastrous terms that we were being faced with. That's what manage for cash was.

If you go to … the McKinsey report, you see in the box in the bottom half of the box:

> *CMM will achieve proposed business plan.*

That's manage for cash? --- Yes.

They say that, if CMM achieves the proposed business plan, CMM becomes going concern? --- Yes.

That's correct, isn't it? --- It's correct according to McKinsey. I don't know how many businesses McKinsey have ever run in their lives. But what you're talking about is slashing capital expenditure, and capital expenditure is not the way that you and I in a normal business reason would think of capital expenditure. In those days it meant growth. So you are talking about not having any capital expenditure, you are talking about putting no new ads on, you are talking about probably slashing programming costs as much as you can by running for bare bones and you are talking about losing 35 per cent or so of your customers each year. My view is that what manage for cash was always a polite way of saying that in the end you're going to run it down and close it.

…

[W]ould you agree with me that [Manage for Cash] was different from the next alternative, exit the business? --- It's different, but it really means the same thing. It's just a matter of where you take your snapshot. Manage for cash – let me say to you manage for cash is another way of exiting the business, only you're doing it in a phased withdrawal until your MSGs run out. If you look at $260 million with no terminal value, I think you'll see that manage for cash preserves your tax losses. When your tax losses run out, you end up losing money again. So it's a blind alley. You're going nowhere.

You think that manage for cash is existing the business over a period of time? --- Manage for cash?

Yes? --- Well, on this deal here it's managing probably, they say here, if they run it out, don't they, the tax losses run out and you're back in a worse state in four years. My view is – and I'm now thinking back four years ago, but my view is that in fact you couldn't have lasted that long because you would be losing 35 per cent of churn, you're putting no new customers on, you're essentially just waiting until it's better that you can do a deal, pay out as much of the MSGs as you can and exit the business'.

1733 Mr Anderson's view was that if Project Alchemy had not been open to Optus, there

was no future for its pay television business:

> *'I don't think CMM had any future at all without a content sharing agreement, without the rationalisation of the industry. It was too small. It was dysfunctional. It was subscale. It had too high fixed costs; all of the things. It had poor programming. So I think that after we had gone through this, and Alchemy also had been public knowledge, everyone had known about it, I think if we could not have pulled off Alchemy in that mid-2002 type period going forward, I genuinely think now in 2006, looking back, that there was no way that we could have got away without closing the business down.*
>
> *...*
>
> *Do you mean closing it down within a short time or adopting the manage for cash strategy? --- I meant manage for cash. But that, I think, would have meant closure. I suspect that it wouldn't have run out to the three or four years or whatever under the manage for cash scenario.* ***I think that the business would have become much less viable much earlier than that****'.* (Emphasis added.)

1734 Mr Anderson acknowledged that the ultimate decision in relation to CMM was up to Mr Lee and the SingTel board. However, I accept Mr Anderson's account as an accurate statement of his own thought processes at the time and of the likely outcome in the hypothetical situation he was asked to consider.

11.24.5 The End of Project Emu

1735 On 4 March 2002, Mr George advised Mr Anderson of the imminent announcement of the content supply agreement with Foxtel. Mr George recommended that:

> *'Regrettably this also means the end for Project Emu. The management team at [Optus] has put in an enormous amount of work on this project over the past 6 months but in the final analysis we were unable to persuade Singtel that the potential rewards from the alliance justified the financing and operational risks'.*

Mr George's comment does not suggest that, but for the Foxtel-Optus CSA, Project Emu would have been a viable option.

11.25 Seven and Optus Negotiate a Short-Term Arrangement

11.25.1 Negotiations

1736 On 25 February 2002, Mr Wise sent Mr Stokes and Mr Gammell his recommendations in view of Optus' decision to terminate the C7-Optus CSA. The key recommendations were:

> C7 should negotiate a package with Optus whereby C7 accepted termination on 31 March 2002 and Optus paid $2 million for the supply of C7 in March;
>
> Optus should take over certain of Seven's rights;
>
> C7 should negotiate with Austar for a termination date of 31 March 2002;
>
> C7 should pursue an alliance with ESPN; and
>
> Seven should continue its access claim '*but only after agreement with ACCC that C7 is terminated*'.

1737 Between 21 February 2002 and early March 2002, negotiations took place between Seven and Optus in relation to the supply of content to Optus during March 2002. On 28 February 2002, Mr Crawley of Seven sent an email to Mr Keely stating that Mr Wise was:

> *'adamant that you're getting off far too lightly considering the assurances I was given'.*

Optus submits that this email only makes sense if Mr Wise knew that Optus had breached the Exclusivity Clause.

11.25.2 Signing of the March Variation Agreement

1738 On 1 March 2002, Mr Wise confirmed to Mr Keely receipt of each of the agreements between Seven and Optus relating to supply of content for March 2002, in each case signed by Optus. Mr Wise confirmed that the documents were in the form agreed by Seven and C7. He said he would recommend the board execution of the documents in this form.

1739 On 4 March 2002, Seven and Optus apparently entered an agreement for the supply by C7 of a sports channel to Optus during March ('***March Variation Agreement***'). The fee was $2 million plus GST. The agreement, which appears to have been signed on behalf of C7 but not Seven Network, took the form of a variation to the C7-Optus CSA. It contained

no Exclusivity Clause. Clause 5.3(b) of the March Variation Agreement allowed Optus Vision to exercise its right of termination under cl 16.2(a) of the C7-Optus CSA at any time from 28 March 2002 to 15 April 2002. By separate agreements of 1 March 2002 and 4 March 2002, respectively, C7 agreed to provide Optus with certain residual programming and programming for an events channel.

11.26 Execution of the Foxtel-Optus CSA

1740 The Foxtel-Optus CSA was executed on 5 March 2002 by Optus Vision, Optus Vision Media, SingTel Optus, Telstra Media, Sky Cable and Foxtel Management. Mr Anderson and Optus' company secretary, Mr O'Brien, executed the agreement on behalf of the Optus parties; Mr Akhurst executed it on behalf of Telstra; Mr Philip and Mr McLachlan executed it for Sky Cable; and Mr Williams signed on behalf of Foxtel Management.

1741 The Foxtel-Optus CSA, which was subsequently amended by a Deed of Variation of 20 November 2002, was subject to conditions precedent, including notification by the ACCC that it did not intend to intervene (cl 2.1(a)). Pending satisfaction of the conditions precedent, the Foxtel-Optus Term Sheet remained in force. Other material provisions of the Foxtel-Optus CSA included the following:

> The CSA was to commence on 1 November 2002 and terminate on 31 December 2010 (cl 5.1).
>
> The Foxtel-Optus CSA was conditional upon the coming into force of the '*Satellite Services Agreement*' between Optus Networks Pty Ltd and Foxtel Management relating to the provision of satellite services to Foxtel via Optus' C1 satellite (cl 2.1(e)).
>
> Foxtel granted Optus a non-exclusive licence for the term to distribute the '*Foxtel Services*' over the Optus Cable and to certain subscribers by satellite (cl 3.1). Subject to limited exceptions, the '*Foxtel Services*' consisted of all pay television channels and all pay-per-view services provided by Foxtel to its subscribers as at 5 March 2002 or during the term of the CSA (cl 1.1).
>
> Optus was obliged to carry all the Foxtel Services once Optus commenced to provide its services in digital format (cl 15.2(b)). This obligation was imposed because in March 2002 Optus only had a capacity to carry 49

channels (cl 15.2(a)).

Each Foxtel channel broadcast by Optus had to be broadcast in conformity with the '*Channel Queue*' set out in Schedule 6 to the Foxtel-Optus CSA (cl 15.2(b)). The Channel Queue identified four channels, including the Fox Footy Channel, that Optus had to carry from the outset and another 20 channels that it was permitted to carry. For each channel, the Channel Queue specified whether, if broadcast by Optus, it was to be in basic, on a tier or available a la carte.

Subject to certain MSGs, Optus agreed to pay Foxtel monthly fees equivalent to a nominated percentage of the retail price payable by Foxtel's subscribers (excluding installation charges) for the corresponding service tier, multiplied by the monthly average of Optus' subscribers (cll 4.2, 4.4).

Foxtel agreed to meet certain of Optus' liabilities and commitments up to an '*Aggregate Cap*' which could not exceed $550 million (cll 6.2, 6.5).

Optus agreed to make available to Foxtel all channels compiled or produced by it, subject to obtaining any necessary consents (cl 10.2(a)).

If Optus acquired a programming service after 30 January 2002 from a supplier other than Foxtel, Optus could elect the tier on which the service was to be provided, unless '*the new programming is of the same or a similar genre of programming as a Foxtel Service*', in which case Optus had to place the programming on a higher tier than that of the Foxtel Service (cl 15.7).

If Optus acquired any new rights comprising either movies or sports, it was required to ensure that the rights were made available to Foxtel (cl 10.1).

1742 On 5 March 2002, News, PBL, Foxtel and Fox Sports executed an '*Amending Agreement*'. This amended a number of agreements including the Fox Sports-Foxtel Supply Agreement. The effect of the amendment was to increase the volume discount available to Foxtel (by lowering the threshold for the application of the discount) and to reduce substantially the flagfall fee payable in respect of the NRL content.

11.27 Ending the C7-Optus Relationship

1743 Mr Anderson advised Mr Stokes in a telephone call on 5 March 2002 that Optus

would be buying the Foxtel Service for distribution on the Optus platform. Mr Stokes thanked Mr Anderson for the information and said that '*you have really helped me in my Trade Practices case against Foxtel*'.

1744 On 12 March 2002, Mr Wise sent an email to Mr Stokes expressing the view that C7 should do a deal with Optus for one month '*to progress the orderly close down of the channel*'. Mr Wise observed that:

> *'Optus was restricted in talking to Fox [Sports] about a Sports [channel] until 28th February. While they are in [breach] of this the issue for us is what damages we have suffered*'.

In cross-examination, Mr Wise accepted that the view he was expressing in this email was that he could not think of any damages suffered by C7 or Seven Network by reason of Optus' alleged breach of the Exclusivity Clause.

1745 On 20 March 2002, Optus deposited $6.325 million into C7's account. This amount represented the top up payment (inclusive of GST), being Optus' liability to pay increased licence fees for the period October 2001 to February 2002 in accordance with the Variation Agreements. On 21 March 2002, Mr Wise wrote to Optus Vision reserving all Seven's rights.

1746 On 28 March 2002, Mr Anderson, on behalf of SingTel Optus, wrote to Mr Wise, as CEO of C7, in the following terms:

> *'We refer to our recent communications regarding the Channel Production & Supply Agreement dated 30 June 1998 amongst C7 Pty Limited, Seven Network Limited, Optus Vision Pty Limited and SingTel Optus Limited ("The Agreement"). The purpose of this letter is to terminate the Agreement in accordance with clause 16.2(a) of the Agreement. Consistent with clause 16.2(a), such termination takes effect immediately upon your receipt of this notice and, in accordance with clause 16.4, such termination is without prejudice to our accrued rights'.*

Mr Wise replied the same day, stating that C7 did not accept the validity of Optus' notice and that C7 reserved its rights.

11.28 C7 Closes Down

1747 On 3 April 2002, Mr Wise received a paper from Mr Wood recommending that if no

commercial deal was done by 10 April 2002, C7 should be closed on that day. Mr Wise's account of the closure of C7 was as follows:

> *'No such deal with Foxtel was concluded and in mid to late April 2002 I decided, after discussing the matter with Mr Gammell, that the C7 business should be closed. My decision was based on my belief that although the business would continue to incur the costs associated with purchasing rights to programming, personnel and production, it was unlikely to return any profit because in the absence of any attractive programming I believed it had little prospect of being accepted for broadcast on any pay television platform. In early May 2002 I instructed Mr Wood to close the C7 business. This involved negotiating an "exit" from remaining rights contracts to which C7 was a party, attending to redundancy of C7's staff or their relocation to other positions in the Seven Network Group, and attending to the sale of equipment or its transfer to other companies in the Seven Network Group'.*

1748 On 6 May 2002, Mr Wise sent a further letter to Mr Anderson of Optus, as follows:

> *'C7 contends that Optus Vision's dealings, in contravention of clause 8A of the Channel Supply Agreement, constitutes a serious breach of the Channel Supply Agreement. C7 also contends that your letter dated 28 March 2002, purporting to terminate the Channel Supply Agreement, amounts to a repudiation by Optus Vision of its contractual obligations under the Channel Supply Agreement.*
>
> *...*
>
> *C7 accepts Optus Vision's repudiation and terminates the Channel Supply Agreement, effective immediately. As the Channel Supply Agreement is now at end C7 will cease to supply Optus Vision with the Seven Service'.*

11.29 ACCC Approves the Foxtel-Optus CSA

11.29.1 Approval Is Sought

1749 After the Foxtel-Optus CSA had been executed, the parties entered into discussions with the ACCC to secure its approval to the agreement. On 29 May 2002, the ACCC informed Foxtel and Optus that it considered that the Foxtel-Optus CSA was likely to have an anti-competitive effect in the market for the acquisition of broadcasting rights for pay television and the market for the wholesale supply of programming for pay television. This letter led to meetings between the ACCC and representatives of Foxtel and Optus. On 21 June 2002, the ACCC confirmed its view that the proposed arrangements were likely to substantially lessen competition in the markets it had identified. In addition, the ACCC had formed the view that the arrangements were likely to have the effect of substantially

lessening competition in the market for retail provision of retail television services and in the telecommunications fixed customer access market. This provoked further discussions with the ACCC, concerning the nature and scope of undertakings that might be proffered by the parties to the ACCC.

11.29.2 Enforceable Undertakings Are Given

1750 On 20 November 2002, the Deed of Variation amending the Foxtel-Optus CSA was executed. On the following day, Telstra, Foxtel, Optus and Austar provided to the ACCC enforceable undertakings pursuant to s 87B of the *TP Act*.

1751 The enforceable undertakings given by the parties included the following:

> Foxtel and Telstra agreed to analogue and digital access undertakings, including an undertaking that Telstra would supply up to ten additional analogue channels available for retail access by parties other than Foxtel;
>
> Austar undertook to enter into agreements to enable infrastructure operators to supply the Austar pay television service over their networks;
>
> Foxtel and Telstra agreed, subject to certain conditions, to digitise their pay television services and to supply the services to third parties;
>
> for the period of the Foxtel-Optus CSA, Foxtel and Optus agreed not to acquire the pay television rights to specified channels or movie packages on an exclusive basis;
>
> Foxtel agreed that at least 30 per cent of the channels offered in its basic package would be supplied by non-affiliated channels;
>
> Optus agreed to compile and provide two channels predominantly comprising programming created by Optus or acquired by Optus from third parties;
>
> Optus agreed to provide at least seven channels not shown on Foxtel or supplied by a particular movie channel;
>
> Optus and Foxtel agreed to commitments relating to spending on Australian drama programs; and
>
> Foxtel undertook that the price of its basic package on Foxtel's cable and satellite pay television services would not exceed the then current retail price

of its satellite services, adjusted for CPI, for a period of three years.

11.29.3 ACCC Approval Is Given

1752 On 13 November 2002, in advance of the undertakings being executed, the ACCC announced that the proposed undertakings would address its concerns about the potential anti-competitive effect of the planned television arrangements between Foxtel and Optus. The Chairman of the ACCC, Professor Fels, was quoted as saying:

> *'The majority of submissions considered rationalisation was necessary in the industry, which was suffering from high content costs and difficulty accessing quality content ...*
>
> *Pay TV operators will now have access to a more comprehensive range of programming, enabling [them] to offer pay TV consumers a broader range of programs, including popular movies and sports'.*

1753 In a formal letter to the parties of 21 November 2002 the ACCC stated that:

> *'the undertakings, if implemented in accordance with their terms, would overcome the competition concerns that [the ACCC] has expressed in respect of the CSA. In those circumstances, the Commission has no current intention to take action against the CSA'.*

The ACCC noted that third parties might have standing to bring proceedings against the CSA or other agreements entered into by the parties. In view of the ACCC's notification, the Foxtel-Optus CSA came into effect on 1 December 2002.

1754 By reason of giving the undertakings to the ACCC, it became necessary for News, PBL and Telstra to amend the Umbrella Agreement and other agreements. This was effected by the '*Implementation Deed*' of 21 November 2002 which, among other things, removed the Foxtel Partnership's exclusive right to use the Telstra Cable.

11.29.4 Optus' Non-Foxtel Channels

1755 The seven non-Foxtel channels which Optus chose to maintain were:

LBC (a Lebanese and Middle Eastern content channel);

ART (an Arabic language channel);

Al Jazeera;

The Australian Christian channel;

ABC Kids;

Expo (an '*infomercial*' channel); and

CNNfn (a financial news channel).

11.29.5 The Position after the Foxtel-Optus CSA

1756 Mr Williams, Foxtel Management's CEO during the period following the implementation of the Foxtel-Optus CSA, gave evidence of the effects of the content sharing agreement. His evidence shows that after the Foxtel-Optus CSA:

> Foxtel had an interest in persuading Optus to improve the quality of its channels so as to maximise the uptake of tiers by Optus' subscribers and thus maximise Foxtel's revenue (since Optus' revenue was passed on to Foxtel, less a discount retained by Optus);
>
> Foxtel monitored Optus to ensure that it was vigorously promoting its subscription packages whereas, before the Foxtel-Optus CSA, Foxtel monitored Optus so as to better equip Foxtel to compete;
>
> Foxtel preferred Optus customers not to transfer to Foxtel, since the transfer would have involved additional costs without generating additional revenue;
>
> Foxtel preferred Optus to increase its subscriber numbers, whereas before the Foxtel-Optus CSA Foxtel preferred its own subscriber numbers to grow relative to Optus;
>
> new pay television subscribers were more valuable to Foxtel if they subscribed to Optus rather than Foxtel, because of the revenue sharing arrangements between the two;
>
> Mr Williams did not expect there to be vigorous competitive bidding between Foxtel and Optus for either programming or channels and thus he expected both to be available more cheaply;
>
> Mr Williams did not regard Optus as a business rival (but he also said that he regarded it as an '*extraordinarily ineffective*' business rival before the Foxtel-Optus CSA came into force);

in general whenever Foxtel raised its subscription prices, Optus also did so, although sometimes Optus increased its prices more than Foxtel; and

Foxtel did not monitor Optus' pricing closely, partly because its pricing structure was linked to the bundling of telephony services.

12. MARKETS

12.1 Introduction: Expert Evidence

1757 In this Chapter I address the questions of market definition raised by Seven's pleadings and submissions. These questions are of central importance to the case, since Seven's claims under s 45(2) of the *TP Act* depend on demonstrating that particular provisions or conduct had the purpose or likely effect of substantially lessening competition. Market definition is also central to Seven's case under s 46(1) of the *TP Act*, that Foxtel took advantage of its substantial degree of market power for a proscribed purpose.

1758 I have already commented on the fact that the parties adduced a great deal of expert evidence on the market questions, much of it repetitive in character. Seven tendered reports from:

> Professor Roger G Noll, Professor of Economics at Stanford University and Director of the Stanford Center for International Development; and
>
> Dr Rhonda L Smith, Senior Lecturer in the Economics Department of the University of Melbourne and formerly a Commissioner of the ACCC.

1759 The Respondents tendered reports from:

> Professor Franklin M Fisher, Jane Berkowitz Carlton and Dennis William Carlton Professor of Microeconomics Emeritus at the Massachusetts Institute of Technology (tendered by News);
>
> Professor Philip Williams, Executive Chairman, Frontier Economics Pty Ltd and Honorary Professorial Fellow, Department of Economics and Melbourne Business School (tendered by News); and
>
> Professor George A Hay, Edward Cornell Professor of Law and Professor of Economics, Cornell University (tendered by PBL).

1760 There is no dispute that each of the '*competition experts*' (as the parties described them) has considerable economics expertise and, in particular, is well qualified to express opinions on issues of market definition. Nor has there been any suggestion that the experts were presenting other than their honestly held opinions on the questions on which each was

asked to comment. Of course, this has not prevented the parties from criticising trenchantly the reasoning process of the '*opposing*' experts or from endeavouring to demonstrate that the key assumptions underlying their respective opinions were flawed or unsupported by the evidence.

1761 To a greater or lesser degree each of the experts made useful contributions to the debate, although I found Professor Williams' evidence not to be of particular assistance. Nonetheless, the expert evidence, although useful, cannot determine the market definition questions I must address. I explain later in this Chapter why there are limits to the utility of the expert evidence in this case.

1762 I do not think it would be useful to summarise the evidence of each of the competition experts. The better course is to refer to their evidence in the course of addressing the arguments made by the parties.

12.2 Identification of Markets: Principles

12.2.1 Market Definition Is a Tool

1763 Seven's Closing Submissions sometimes give the impression of approaching the definition of the relevant markets as a separate issue, largely distinct from the other issues in the case. Yet the parties are agreed that markets are not defined in the abstract, but for the purpose of analysing the processes of competition relevant to the allegations of anti-competitive conduct made in the particular case. In *Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd* [2006] ATPR 42-123, Allsop J made the point, supported by copious citation of authority, that (at 45,243 [429]):

> *'Market definition is not an exact physical exercise to identify a physical feature of the world; nor is it the enquiry after the nature of some form of essential existence. Rather, it is the recognition and use of an economic tool or instrumental concept related to market power, constraints on power and the competitive process which is best adapted to analyse the asserted anti-competitive conduct'.*

1764 Similarly, in a well-known passage, cited (among many others) by the Full Federal Court in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, at 399 [293], Professor Maureen Brunt said this:

> *'It must be constantly borne in mind that market definition is but a tool to facilitate a proper orientation for the analysis of market power and competitive processes – and should be taken only a sufficient distance to achieve the legal decision. The elaborateness of the exercise should be tailored to the conduct at issue and the statutory terms governing breach (or authorisation ...*
>
> *There can be more than one "relevant market" for a particular case, in the sense of markets that will attract liability'.*

M Brunt, '"Market Definition" Issues in Australian and New Zealand Trade Practices Litigation' (1990) 18 ABLR 86, at 126-127 (hereafter '*Market Definition Issues*').

1765 The same point was emphasised by Mason CJ and Wilson J in *Queensland Wire Industries Pty Ltd v The Broken Hill Pty Co Ltd* (1989) 167 CLR 177. In that case, the issue was whether BHP had misused its substantial degree of power in the steel and steel product market, in contravention of s 46 of the *TP Act.* Their Honours observed (at 187-188) that the:

> *'analysis of a s 46 claim necessarily begins with a description of the market in which the defendant is thought to have a substantial degree of power. In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated. Accordingly, if the defendant is vertically integrated, the relevant market for determining degree of market power will be at the product level which is the source of that power ... After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes: too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is'.*

Similarly, Deane J (with whom Dawson J agreed) said (167 CLR, at 195) that in:

> *'the case of an alleged contravention of ... s 46(1), there will ordinarily be little point in attempting to define relevant markets without first identifying precisely what it is that is said to have been done in contravention of the section'.*

12.2.2 Substitutability

1766 Section 4E of the *TP Act* (reproduced in Ch 13) defines a market in terms that direct attention not merely to the goods or services of the alleged infringer, but to goods or services

which are '*substitutable for, or otherwise competitive with*' them: *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236, at 268-269 [111], per *curiam.*

1767 The concept of a market for the purposes of competition analysis was explained by the Trade Practices Tribunal (of which Professor Brunt was a member) in *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 ('*QCMA*'), at 190:

> *'We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from this geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.*
>
> *It is the possibilities of such substitution which set the limits upon a firm's ability to "give less and charge more". Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to "give less and charge more" would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, i.e. a relatively high cross-elasticity of demand or cross-elasticity of supply?'*

1768 While this passage predated the enactment of s 4E of the *TP Act* in 1977, it is regarded as a classic explanation of the concept of a market and has been approved by the High Court: *Queensland Wire* 167 CLR, at 188, per Mason CJ and Wilson J; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 ('*Boral Besser*'), at 413-414 [99], 422-423 [133], per Gleeson CJ and Callinan J (with whom Gaudron, Gummow and Hayne JJ appeared to agree on this issue: at 427 [155]). It follows, as Dawson J pointed out in *Queensland Wire* 167 CLR, at 199, that:

> *'[the] basic test involves the ascertainment of the cross-elasticities of both supply and demand, that is to say, the extent to which the supply of or demand for a product responds to a change in the price of another product. Cross-elasticities of supply and demand reveal the degree to which one product may be substituted for another, an important consideration in any definition of a market'.*

1769 In the present case, Dr Smith explained the basic concept from an economic perspective in non-contentious terms:

> *'In defining the relevant market for the purpose of analysing possible competition issues, the aim is to identify those buyers and/or sellers who constrain the pricing and production decisions of the firm (or supplier) whose conduct is alleged to raise competition concerns. The firm's decision-making will be constrained to the extent that buyers are willing to switch to other products and/or other producers are willing to offer an alternative product, if the original supplier increases prices by a relatively small amount:*
>
> > *"... discretionary power rests upon an absence of close substitutes for the firm's output, either actually or potentially. This means that market power ultimately rests upon two factors that act as constraints upon a firm's business behaviour: the numbers of (independent) firms and patterns of substitution for their products within an industry, and the extent to which there are barriers to entry of new firms, which would produce close substitute products, from 'outside' an industry (including the limbo of unborn firms). ... Thus, substitutability becomes the basic concept – in the economist's sense"'.*
> > (Footnotes omitted.)

(The quotation in this passage is from *Market Definition Issues*, at 93.)

1770 As Dawson J recognised in *Queensland Wire*, a question of degree is involved in determining the point at which different goods or services became closely enough linked in supply or demand to be included in the one market. In the same case, Deane J accepted (167 CLR, at 195-196) that the identification of relevant markets and the definition of market structures and boundaries:

> *'involves value judgments about which there is some room for legitimate differences of opinion. The economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can be neatly fitted. One overall market may overlap other markets and contain more narrowly defined markets which may, in their turn, overlap, the one with one or more others. The outer limits (including geographic confines) of a particular market are likely to be blurred: their definition will commonly involve assessment of the relative weight to be given to competing*

considerations in relation to questions such as the extent of product substitutability and the significance of competition between traders at different stages of distribution'.

12.2.3 In the Long Run

1771 The passage cited from *QCMA* refers to strong substitution '*at least in the long run*'. The temporal dimension of market definition was explained by the Trade Practices Tribunal (presided over by Deane J and including Professor Brunt) in *Re Tooth & Co Ltd and Tooheys Ltd* (1979) 39 FLR 1, at 38-39:

> *'It is plain that the longer the period allowed for likely customer and supplier adjustments to economic incentives, the wider the market delineated. In our judgment, given the policy objectives of the legislation, it serves no useful purpose to focus attention upon a short-run, transitory situation. We consider we should be basically concerned with substitution possibilities in the longer run. This does not mean we seek to prophesy the shape of the future – to speculate upon how community tastes, or institutions, or technology might change. Rather, we ask of the evidence what is likely to happen to patterns of consumption and production were existing suppliers to raise price or, more generally, offer a poorer deal. For the market is the field of actual or potential rivalry between firms'.*

1772 In *Re AGL Cooper Basin Natural Gas Supply Arrangements* [1997] ATPR 41-593, the Australian Competition Tribunal (Lockhart J, Dr Brunt and Dr Aldrich) pointed out (at 44,210) that the phrase '*long run*':

> *'is to be read in a special technical sense as referring not to a span of years but to "operational time" as explained in Telecom Corporation of NZ Ltd v Commerce Commission (1991) 3 NZBLC ¶99-239 at 102, 363:*
>
> > *"We include within the market those sources of supply that come about from redeploying existing production and distribution capacity but stop short of including supplies arising from entirely new entry.* ***Thus 'the long run' in market definition does not refer to any particular length of calendar time but to the operational time required for organising and implementing a redeployment of existing capacity in response to profit incentives****"'.* (Emphasis added.)

12.2.4 Close Competition

1773 In undertaking the evaluative process identified in *Queensland Wire*, the Court is concerned, as the passage from *QCMA* shows, with **close** competition in the form of strong substitution, given price incentives. This is not the same thing as conduct that might have

some effect on the behaviour of a particular firm:

> *'A vast number of firms might have some actual or potential effect on a defendant's behaviour. Many of them, however, will not have a significant effect and we attempt to exclude them from the relevant market in which we appraise a defendant's power. We try to include in the relevant market only those suppliers – of the same or related product in the same or related geographic area – whose existence significantly restrains the defendant's power. This process of inclusion and exclusion is spoken of as market definition'.*

P Areeda and L Kaplow, *Antitrust Analysis* (4th ed, Little Brown & Co, 1988), at 572, cited in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* (1991) 33 FCR 158, at 178, per French J (with whom Spender and O'Loughlin JJ agreed).

1774 The same point was made by Dr Smith when she observed in her evidence that:

> *'just knowing that someone [in an industry] takes account of something else doesn't actually mean it's a close constraint on them.*
>
> *... Because you could benchmark against a totally different activity in a totally different market and you would be taking account of what is going on there, but that doesn't mean to say you are in the same market'.*

1775 The distinction between competition and close competition is crucial. So, too, is the evaluative judgment required as to the degree of closeness of competition relevant to the assessment of the particular conduct in issue: *ACCC v Liquorland* [2006] ATPR, at [441], per Allsop J. Thus, in *Australian Competition and Consumer Commission v Boral Ltd* (2000) 106 FCR 328, the Full Court overturned the trial Judge's finding, in a s 46 case, that there was a single market for the acquisition of materials for use in the construction of walls and paving. The Court held that the relevant market was narrower and was limited to the supply of concrete masonry products. This was so notwithstanding that, to a degree, alternative products were available and that, on occasions, some substitution occurred. Having regard to the conduct of players in the industry, the area of **close** competition was limited to the supply of concrete masonry products: at 377-378 [179], per Beaumont J; at 384-385 [202]-[203], per Merkel J; at 410 [320], per Finkelstein J. This holding was affirmed by the High Court: *Boral Besser* 215 CLR, at 423 [134], per Gleeson CJ and Callinan J; at 427 [155], per Gaudron, Gummow and Hayne JJ; at 456-457 [256]-[258], per McHugh J.

12.3 Common Ground

1776 There was no real dispute among the experts as to the principles relevant to the delineation of markets. While they used different language and, to some extent, different sources, they all accepted the principles that have already been summarised. It is useful to record some additional common ground.

1777 **First**, the experts generally agree that the hypothetical monopolist test is the '*standard analytical tool*' in economic analysis for defining markets. Professor Hay explained the test this way:

> *'Put simply, we assume that all current producers of electric toothbrushes merge into one (or otherwise act as one) and ask whether the "hypothetical monopolist" could profitably increase or maintain prices above the competitive level by a "small but significant" amount for a sustained period of time. If so, then electric toothbrushes are a proper product market.*
>
> *Both demand and supply side considerations can come into play when defining a market. We can ask not only how many consumers of electric toothbrushes would over time switch to manual toothbrushes (cross-elasticity of demand) but also the extent to which producers of related products (such as electric drills) could and would (in response to the assumed higher prices for electric toothbrushes) convert some or all of their facilities to the manufacture of electric toothbrushes and would succeed in making sales (cross-elasticity of supply)'.* (Footnotes omitted.)

1778 **Secondly**, as Professor Hay pointed out, the standard analytical tool is often referred to as the '*SSNIP test*'. On this test, as explained by Professor Noll a relevant market contains the producer of the benchmark product (a specific product that is produced by a particular firm), plus the smallest number of producers of other products such that, if all these products were offered by a single firm, the single seller could impose a '*small but significant non-transitory increase in price*' ('**SSNIP**') above the competitive level. To put the matter another way, two products will be in the same relevant market if all producers of one of those products, acting together, could not profitably impose a SSNIP above the competitive level without losing sales to the producers of the other product. A SSNIP is generally taken to be an increase of 5 to 10 per cent above the competitive level.

1779 **Thirdly**, as the previous paragraph implies, the relevant price in applying the SSNIP test is the **competitive** price. This is important because applying the test to the monopoly price results in an over-broad market definition. This mistake is known among economists as

the '*cellophane fallacy*' because the United States Supreme Court is usually said to have made the error in the *Cellophane Case* (*United States v E I du Pont de Nemours & Co* 351 US 377 (1956)). Professor Noll explained the correct position this way:

> *'The role of competition in market definition is illustrated in the following example. Suppose a firm is the sole producer of product A. If this firm sets a monopoly price for A, no further profit-increasing prices are feasible. Consequently, at the monopoly price consumers must be willing to switch their purchases to another product B if there is a further increase in A's price. At any lower price for A consumers prefer A to B, and the producer of A can impose a profit-enhancing price increase. Thus, B is not in the relevant market for A because it does not prevent the producer of A from setting its price above the competitive level, even though B is regarded as a substitute when A is sold at the monopoly price.*
>
> *In competition analysis, regarding A and B as in the same market is called the "cellophane fallacy", which refers to a U.S. court decision that found cellophane, waxed paper and aluminium foil in a relevant market for flexible wrapping materials because at the prices prevailing in the market buyers would switch purchases among them if any one attempted to raise its price. But one product (cellophane) was supplied by one company and was priced substantially above average cost. Hence, waxed paper and aluminium foil should not have been regarded as in the relevant market for cellophane because they did not force the price of cellophane to the competitive level'.* (Footnotes omitted.)

1780 **Fourthly**, in a case involving buyers of products or of services, the hypothetical monopolist test requires reference to the exercise of market power by a firm acting as a buyer, not as a seller. In this context, it is necessary to consider the effect of a SSNRP: '*a small but significant non-transitory reduction in price*' by a hypothetical monopsonist. (While this was not necessarily common ground among the economists at the outset, it was ultimately not in dispute.) Professor Noll explained that:

> *'Monopsony is the mirror-image of monopoly, and a firm that has the power to reduce price below the competitive level or to exclude other buyers from the market is a monopsonist'.*

1781 **Fifthly**, there are four dimensions to a market: product, geographic, functional and temporal. Dr Smith quoted observations of Professor Brunt (*Market Definition Issues*, at 102), as follows:

> *'A market has product, space, function and time dimensions. Between what set of **products** can customers and suppliers switch? Within what geographic **space**? Is the focus to be on the selling **function** or the buying **function**, and*

how many levels or stages of production and distribution is it appropriate to distinguish in order to assess the scope for substitution through trade or potential trade? Finally, how much ***time*** *is needed for customers and suppliers to make their adjustments in response to economic incentives?*

An important practical consideration is that these dimensions may not be independent. Thus, for example, geographic substitution may be alternative to, or complementary with, product substitution. And the interdependence may be enhanced the longer the time period'. (Emphasis in original.)

1782 These dimensions were described by Dr Smith, again in non-controversial terms. In summary, her views were as follows:

> A product market consists of those goods or services which are readily substitutable either in demand or supply, within an appropriate time frame, for the product or products of the firm whose conduct is in issue.
>
> The geographic dimensions of a market relate to the geographic area or areas in which sellers of the particular product operate and to which buyers can, as a matter of practicality, turn for such goods and services. The geographic dimensions of the market are defined by reference to substitutability.
>
> A supply chain defines the different functions involved in creating and supplying a product or service, for example, manufacturing and wholesaling. It is necessary to identify the appropriate levels in the supply chain in order to understand the competition implications of the conduct at issue. In particular, it is necessary to determine whether each level forms a separate market or whether two or more levels together form a single market (as where manufacturing and wholesaling form a single market because all manufacturers undertake wholesaling and there are no independent wholesalers).
>
> The temporal dimension of a market makes the SSNIP test operational because it identifies the period over which responses of sellers and buyers are to be measured. In general, economists tend to regard a year or so as sufficient for assessing substitutability, but when a new product is introduced a longer period may be needed to allow the market to adjust. (However, this assessment of the relevant period may have to be modified in the light of the principles stated in the authorities: ([1771]-[1772].)

1783 **Sixthly**, the experts and the parties agree that there are separate markets for AFL broadcasting rights and NRL broadcasting rights in Australia. However, they disagree as to whether there are separate markets for AFL **pay** television rights and NRL **pay** television rights, distinct from markets for AFL **free-to-air** television rights and NRL **free-to-air** television rights.

12.4 Application of the SSNIP Test

1784 The reliable application of the SSNIP test requires sufficient quantitative data to permit the calculation or assessment, in particular, of the competitive price for the product in question. As has been seen, it is the competitive price that provides the starting point for determining whether a hypothetical monopolist could profitably impose a SSNIP. Whether or not it is ever possible to apply the test on the basis of purely quantitative data, the experts agree that such an approach is not available in the present case.

1785 Dr Smith explained her approach as follows:

> *'Pay TV has a relatively short history in Australia. Further, during the relevant period it is difficult to identify a competitive price for the purpose of applying a SSNIP. The industry employs pricing arrangements that make it difficult to identify consistent pricing data in relation to a product of constant quality. These data deficiencies mean that I will use a qualitative rather than a quantitative approach to assess the extent of substitutability at each level in the industry supplying channels to Pay TV service providers'.* (Footnotes omitted.)

Professor Noll acknowledged in his oral evidence that he had not attempted to ascertain a competitive price in any of the markets he said existed.

1786 In the absence of adequate pricing information, the economists were thrown back on so-called '*qualitative assessments*'. Dr Smith agreed that without quantitative data, the SSNIP test '*really in effect is an intellectual aid to focus the exercise*'. In economics, this apparently can be described, without Orwellian overtones, as '*a thought experiment*'.

1787 One consequence of the limitations of the SSNIP test (in the absence of quantitative data) is that in certain respects the economic evidence may not be as helpful as its volume (and the time spent on it in cross-examination) might suggest. This is not to deny the value of economic evidence for certain purposes. Plainly, it can be very helpful in identifying and

explaining the economic concepts embodied in the *TP Act*. It can also be very helpful in explaining how economists go about the task of applying the economic concepts to particular situations. The evidence is, however, apt to be less cogent when the experts are asked to apply economic principles to the particular circumstances of a case. There are at least two reasons for this.

1788 The first is that a '*qualitative assessment*' necessarily involves the exercise of judgment upon which reasonable minds can differ. The sharp differences of opinion in this case among well-qualified experts demonstrate that this is so. Moreover, the exercise of judgment, if the present case is any guide, requires economists who may not have specialist expertise or experience in a particular industry to express their opinions about the application of economic principles to that industry. Even if the witness has expertise or experience in the industry, the lack of quantitative data may require what comes very close to speculation about the likely behaviour of industry participants, although it may perhaps be described as informed speculation.

1789 The second reason is that the qualitative assessments by the expert economists must proceed on the basis of assumed facts since, in the ordinary course, the facts have not yet been established by the Court. Like many competition cases, the present case is extremely complex. In order to deal with the complexities, the parties deemed it appropriate to provide their respective experts with extraordinarily elaborate sets of assumptions upon which to base their evidence.

1790 Seven, for example, prepared '*Assumptions A*', a document of some 350 pages, of which no less than five separate versions were supplied to various experts at various times. Some, but by no means all of the assumptions in Assumptions A were agreed between the parties, as recorded in a sixth version of the document. News prepared an additional set of assumptions, designated '*Assumptions B*', comprising about 80 pages. Two different versions of Assumptions B were supplied to the economic experts at different times. Mercifully the two quite distinct versions of News' '*Assumptions C*' were short, while '*Assumptions D*', largely agreed between the parties, deals with confidential material relating to the award of the AFL and NRL television rights in 2005.

1791 The result is that the economists were asked to express their opinions on a range of

questions on the basis of a mountain of material (the various assumptions incorporated references to a multitude of contemporaneous documents). Each of the experts did so with impressive diligence and, for the most part, demonstrated an equally impressive ability to recall during oral evidence the details of many transactions and events.

1792 In the end, however, they were required to express opinions concerning the application of economic principles to an Australian industry with which none of them had detailed practical knowledge or experience. As Dr Smith said in her evidence, this process required them not only to take into account different assumptions, but to interpret the common assumptions. In addition, the experts had to analyse and construe documents such as board papers, emails and formal agreements, some of which were the subject of extensive oral evidence. It is therefore perhaps not entirely surprising that they came to such divergent conclusions on market definition and other issues.

1793 Professor Hay (whose reports were relatively brief) made some rather blunt comments that assist in placing the economic evidence in perspective. He referred in his oral evidence to the fact that the experts had managed to produce over 700 pages of analysis on certain issues. This observation led to the following exchange:

> *'HIS HONOUR: Do I detect, Professor Hay, from your answers that you are not altogether sure that the 700 pages to which you refer are necessarily very helpful in resolving the issue [concerning the scope of the retail television market] that you have identified?*
>
> *...*
>
> *[PROFESSOR HAY:] You may find much of the material informative or entertaining or educational. I did not find that it led me, again having only perused it, to be able to draw a firm conclusion on that issue. And, by the way, that is exactly what I anticipated was the case when I started; that even if I did that work, I don't think I would be able to resolve the problem'.*

1794 Conclusions on market definition cannot simply be reached by choosing between the expert opinions. The task requires the application of the statutory criteria, informed (as the authorities require) by economic principles. Ultimately, the conclusions must rest on an assessment of the evidence as a whole including, where they are helpful, the opinions and reasoning of the experts. But the fact that ss 45 and 46 of the *TP Act* incorporate economic principles and concepts does not mean that the application of those principles to the facts is,

in effect, to be delegated to the economists who are called to give their expert opinions.

12.5 Evidence of Market Behaviour

1795 Both parties invoke the principle that the best evidence of the dimensions of a market, in the absence of a quantitative SSNIP test, will often be from those who work in the relevant industries, rather than from economic theory. Not surprisingly, however, they dispute the inferences that should be drawn from contemporary decisions or expressions of opinion by industry participants.

1796 The general point has been made by Justice Heydon writing extra-judicially (J D Heydon, *Trade Practices Law* (Lawbook Co, Subscription Service), at [3.245]):

> *'The dimensions of a market are real, not theoretical. To define those dimensions the best evidence will come from the people who work in the market: the marketing managers and salesmen, the market analysts and researchers, the advertising account executives, the buyers or purchasing officers, the product designers and evaluators. Their records will establish the dimensions of the market; they will show the figures being kept of competitors' and customers' behaviour and the particular products being followed. They will show the potential customers whom salesmen are visiting, the suppliers whom purchasing officers regularly contact, products against which advertising is directed, the price movements of other suppliers which give rise to intra-corporate memoranda, the process by which products are bought, what buyers must seek in terms of quantities, delivery schedules, price flexibility, why accounts are won and lost'.*

1797 In the same paragraph, Justice Heydon quotes from Sir Alan Neale, *The Antitrust Laws of the United States of America* (2nd ed, Cambridge University Press, 1970), at 121, a passage also quoted with approval by Allsop J in *ACCC v Liquorland* [2006] ATPR, at [443]:

> *'The court will take as the market, for the purposes of deciding cases, just that market which the concern itself takes for its field of activity: if a firm shows an intent to exclude competition from that field it will be assumed that the field sufficiently describes a market – for otherwise what would be the point of the effort to exclude?'*

1798 These general propositions are not in dispute. It is, however, important to observe that contemporaneous conduct or expressions of opinion by market participants are often ambiguous on questions of market definition. For example, in a letter of 10 March 1999, referred to by Mr Sumption in his opening submissions, Mr Macourt referred to C7 and

ESPN as '*direct competitors of News*'. Seven equates News in this context with Fox Sports (of which News was the parent corporation at the time) and suggests that Mr Macourt's comments show that he regarded C7 as a competitor of Fox Sports. However, it is not clear from the letter in what market Mr Macourt thought Fox Sports and C7 were competitors. In his evidence, Mr Macourt said that he regarded the free-to-air broadcasters as significant competitors, suggesting that he may have been thinking of some kind of sporting rights market.

1799 Seven also relies on a passage in Mr Macourt's cross-examination, as follows:

> *'[MR SUMPTION:] Did you in June 1998 have any particular entity in mind as being likely to offer competition to Fox Sports in the sports channel business? --- I can only assume I would have thought SportsVision was a competitor at the time.*
>
> *But you knew by June, didn't you, that there was at least a question as to whether SportsVision would survive? --- Yes.*
>
> *Did you have in mind any potential competitor who might succeed SportsVision as a competitor to Fox Sports? --- I don't have a specific recollection, but Mr Mockridge's letter you referred to earlier identified Mr Weston as saying Seven was offering a service.*
>
> *Yes. Well, I think what you are referring to is ... the paragraph which says:*
>
> > *"The apparent 'threat' that Weston used to extract the deal was that his alternative was to formulate a long term sports supply deal with Channel 7 which would lock-out Fox Sports from becoming the dominant supplier?"*
>
> *--- Yes.*
>
> *Now, do you agree that from the very beginning of June it was apparent that the most likely source of competition to Fox Sports in the sports channel business was Seven or part of the Seven group? --- Yes'.*

1800 I think it is correct, as Seven submits, that Mr Macourt was being asked in this particular passage for his view about competition to Fox Sports as a channel supplier rather than as an acquirer of sporting content. However, I do not think that the questions were free from ambiguity, especially as the passage follows a question in which Mr Macourt was asked to agree that '*rights will cost more if there is competition*'. In any event, Mr Macourt's attention was not directed to the issue of **close** competition, which is central to market analysis. In particular, his attention was not directed to the significance, as he saw it, of the

different subscription driving content available or likely to be available on Fox Sports and on C7 as a successor to SportsVision. Mr Macourt's evidence certainly has to be taken into account in determining whether Seven has established the existence of its pleaded wholesale sports channel market. But the evidence is far from decisive and must be evaluated in its proper context.

12.6 Purpose

1801 In assessing market behaviour, it is also very important to appreciate that Seven puts the alleged anti-competitive purpose of Foxtel and News at the forefront of its submissions on market definition. Seven states, correctly, that the point of considering the existence or otherwise of particular markets is to assess the competitive implications of the acquisition by Foxtel of the AFL pay television rights for 2002 to 2006. Seven then says that, since its case is that the Consortium Respondents engaged in a series of actions designed to eliminate C7, it is necessary to deal with the market issues having regard to the purpose it attributes to those parties.

1802 Seven's submissions reflect the close links between market definition questions and other issues in the case. Having placed such emphasis on the anti-competitive purpose of '*killing C7*', Seven's market submissions have to be assessed in the light of my findings on the purpose of the Consortium Respondents. Contrary to Seven's contentions, I find in Chapter 15 that none of the Consortium Respondents had the substantial purpose of killing C7. While Mr Macourt and Mr Philip, and perhaps others, would have been content – even very pleased – to see the end of C7, that was not the objective or end they sought to achieve in arranging Foxtel's successful bid for the AFL pay television rights. To use Seven's own language, the actions of the Consortium Respondents, while aggressive and perhaps ruthless, did not go beyond the '*ordinary workings of vigorous competition*'.

1803 Seven's market definition submissions, particularly those relating to the wholesale sports channel market, are permeated by the assumption that the Consortium Respondents engaged in the conduct in question for the purpose of destroying C7 as a competitor of Fox Sports or Foxtel. My findings of fact elsewhere in this judgment mean that the assumption is not soundly based. That must be kept steadily in mind when considering Seven's submissions in relation to the particular markets it propounds.

12.7 AFL and NRL Pay Rights Markets

1804 Seven pleads that there is and has been since at least November 1998 an AFL sports rights pay television market ('**AFL Pay Rights Market**'), being a market in Australia for the acquisition and supply of pay television rights to broadcast AFL matches (par 153). Seven says that the broadcasting rights to AFL matches are purchased by companies which either on-sell the rights to other companies or use the rights themselves in the course of making television broadcasts of AFL matches. The Statement of Claim pleads an NRL sports rights pay television market ('**NRL Pay Rights Market**') in comparable terms (par 154).

1805 As has been noted, the parties are in agreement that, from the perspective of a buyer of sports rights, there are markets at least as narrow as an AFL broadcasting rights market and an NRL broadcasting rights market. The question is whether each of these markets should be further subdivided into AFL pay rights and NRL pay rights markets, separate from AFL free-to-air rights and NRL free-to-air rights markets.

12.7.1 Seven's Submissions

1806 Seven contends that there are separate free-to-air and pay rights markets for each of the AFL and NRL. It identifies the critical test as whether, if all buyers of AFL or NRL pay rights acted as a single firm, they could depress prices for the rights below the competitive level:

> *'The test is focused on the level of constraint which is likely to operate on a potential single purchaser of pay TV rights for either the AFL or NRL. More specifically, would the demand by FTA broadcasters for the FTA rights for the relevant code constrain the hypothetical single purchaser of the pay TV rights to a competitive price?'*

1807 Seven submits that the demand for free-to-air AFL and NRL broadcasting rights does not closely constrain the demand for the rights to broadcast on pay television, for two reasons. First, the anti-siphoning regime gives free-to-air broadcasters an effective right of first refusal in respect of sporting events on the anti-siphoning list, including AFL and NRL matches. The free-to-air operators' first right of refusal in relation to AFL and NRL broadcasting rights thus shields them from competition from pay television operators for those rights. Seven relies on Professor Noll's observation that '*[t]he anti-siphoning rules prevent pay-TV from bidding on the first-choice live television rights in any time slot'.*

Secondly, the free-to-air networks have limited capacity to televise live sport, no matter how popular the particular sport may be.

1808 Seven rejects the Respondents' contention that the measures used in practice to '*circumvent*' the anti-siphoning regime (my word, not the Respondents') mean that free-to-air operators act as a constraint on any attempt by pay television operators to impose a SSNRP for the AFL or NRL pay television rights. Seven's Reply Submissions expressly disavow any reliance on breaches of the anti-siphoning provisions of the *BS Act* for the purposes of market definition. Rather, Seven contends that the effect of the regime **as understood and applied by market participants**, gave free-to-air operators a first right of refusal in respect of the AFL and NRL broadcasting rights. According to Seven, the whole point of the anti-siphoning regime is to ensure that classic sporting events remain on free-to-air television and are not transferred to pay television '*simply because of a higher bid*'. Moreover, the AFL and the NRL Partnership would find the prospect of too many matches, or the best matches, being reserved for pay television most unattractive.

1809 So far as capacity constraints are concerned, Seven argues that each free-to-air broadcaster must have regard to opportunity costs when evaluating new programming. The practical consequence is that each additional match will be less valuable to the free-to-air broadcaster than the previous one because it will attract less advertising revenue and displace a more valuable programme. As Professor Noll explained:

> *'The opportunity cost of the first televised AFL game on any channel is the profitability of the worst program that otherwise would be shown on the weekend. As more games are broadcast, the opportunity cost of that game increases because the program that must be dropped is a better program than the previous programs that were dropped'.*

1810 Seven says that in the absence of major regulatory or structural changes, such as permitting free-to-air multi-channelling, there would be little prospect of free-to-air operators using all broadcasting rights either to the AFL or NRL, notwithstanding that they have the benefit of the anti-siphoning regime. Thus there will continue to be a set of '*exclusive*' rights available for acquisition by pay television operators, being the residue matches not wanted by free-to-air operators.

1811 Seven submits that:

pay television will always obtain games having a low value to free-to-air operators;

there will always be live matches available for broadcast on pay television; and

the alternative open to sports rights owners of awarding more rights to free-to-air operators does not constitute a '*binding constraint*' on the price of pay television rights.

1812 The final point is reinforced, so Seven argues, by the experience in 2000, when Foxtel bought the pay television rights, in effect, to the last three AFL matches in each round for $30 million per annum. This was substantially more than the price of $23 million per annum paid by Nine for the first three picks. If Foxtel had offered less than $30 million per annum for the pay television rights (that is, less than the assumed competitive price), the AFL could not have improved its position by offering more rights to free-to-air operators.

1813 In summary, Seven argues that:

> *'pay TV cannot compete with FTA for those matches which FTA seeks. In respect of the balance, FTA has little or no interest in the matches and thus pay TV is largely unconstrained in acquiring the rights to those matches. As a consequence, the acquisition of each set of broadcasting rights ought to be characterised as in separate markets, as a pay TV monopsony will not be constrained by FTA to pay a competitive price for pay TV rights'.*

12.7.2 News' Submissions

1814 News submits that Seven's submissions (and expert evidence) frequently overlook the fact that the scope of the pay rights markets is in issue because of an alleged exercise of market power by **buyers** of sports rights, not sellers. The exercise of market power by a buyer (by imposing a SSNRP) can be defeated in two ways:

the seller might turn to alternative buyers; or

the seller might switch production to an alternative product.

1815 News does not suggest that the latter is a feasible option for the AFL or the NRL pay television rights. However, News submits that the practical content of pay television rights, in view of the anti-siphoning regime, depends on which free-to-air operator acquires the

rights and on the approach taken to the rights. The free-to-air and pay rights are '*intertwined*'. Thus, the AFL and NRL pay television rights have no constant existence or scope.

1816 According to News, the correct market analysis, for the purpose of addressing alleged anti-competitive conduct by a buyer of sports rights, requires an assessment of what would occur if all of the free-to-air and pay television operators combined (the hypothetical monopsonist) and sought to reduce the price paid to the AFL or NRL for their respective broadcasting rights. In that event, the AFL or NRL would not be able to defeat a price reduction either by selling the rights to an alternative purchaser or by switching its production to something else. It is for this reason, News contends, that the AFL and NRL broadcasting rights are properly to be considered in separate markets.

1817 News then addresses the appropriate analysis to determine whether there are separate pay rights markets for each of the AFL and NRL. It argues that the test is not (as Seven submits) whether demand by **free-to-air broadcasters** for the **free-to-air rights** for the relevant code constrains the hypothetical single purchaser of the **pay television rights** to a competitive price. The test is rather whether demand by **free-to-air broadcasters** for **broadcasting rights** to the relevant code constrains the hypothetical **single pay television** purchaser of **broadcasting rights** to a competitive price.

1818 News accepts that the anti-siphoning regime distinguishes between free-to-air operators and pay operators and gives the former a competitive advantage. Nonetheless, it is open to Foxtel and Fox Sports to do what they can, within the law, to obtain the most attractive programming. News says that the reality is that, despite the anti-siphoning regime, dealings with the AFL and NRL pay television rights have resulted in some matches being televised exclusively live on pay television. The impact of the anti-siphoning regime, in practice, is limited and does not prevent pay operators obtaining quality matches on an exclusively live basis.

1819 News also acknowledges that each free-to-air operator has capacity constraints. However, News says that Seven's experts wrongly assumed that the first pick of an AFL or NRL match by a free-to-air operator who has the right of first choice is necessarily the most valuable match. News also says that the experts wrongly assumed that there is a '*linear*'

relationship between the first and last games for valuation purposes. The flaw in the assumption is that neither AFL nor NRL matches are sold one by one. Rather, buyers seek to obtain a package of rights and a range of considerations determine how much the buyer is prepared to pay. Moreover, according to News, Seven fails to come to grips with the practice of the free-to-air rights being split between two free-to-air operators.

1820 News further submits that Seven is mistaken in contending that pay television simply gets what free-to-air cannot use. News says the evidence supports the following assumption (Assumptions B [18.15]) provided to its experts:

> *'What constitutes the free-to-air broadcasting rights and what constitutes the subscription television broadcasting rights to particular sporting events depends on how the rights to televise sporting events are divided up between free-to-air operators on the one hand and providers of subscription television sports channels on the other. How those rights are divided up is the subject of negotiation between the person seeking to acquire those rights and the sporting bodies (or other owners) seeking to sell them'.*

1821 Finally, News submits that Professor Hay gave a convincing rebuttal of Seven's contention that a hypothetical pay television monopsonist attempting to impose a SSNRP on the competitive price for pay rights would not be constrained by free-to-air operators. The AFL, for example, could avoid the problem of a single buyer of pay rights by declining to pre-define separate free-to-air and pay television rights and electing to allow competitive tensions to arise within and between consortiums of buyers.

12.7.3 PBL's Submissions

1822 PBL's submissions traverse much of the ground covered by News' submissions, although making some additional points. PBL conveniently summarises its contentions on other issues as follows:

> *'(a) first, there is no clearly defined boundary between "free to air" and "pay television" matches;*
>
> *(b) second, the practical and legal operation of the anti-siphoning provisions is that pay television can acquire a de-facto exclusivity for live broadcasts. Professor Noll accepts that if his understanding of anti-siphoning is incorrect, Professors Hay and Fisher are correct that there is no separate market. Dr Smith's conclusions to the contrary are based upon a misunderstanding of the assumptions she was asked to make and upon unsupportable assumptions;*

(c) third, faced with an attempt by a hypothetical monopsonist of AFL/NRL pay television rights to exercise market power, the relevant league could shift the description of the rights being offered;

(d) fourth, a joint bid of a free to air operator and a pay television operator competing with a bid from one or more free to air operators for all broadcast rights is inconsistent with [Seven's] theory of separate pay television rights markets;

(e) fifth, the AFL and the NRL are able to sell all of their broadcast rights in a bundle to competing consortia. In an open auction, the bidder with the highest willingness to pay will succeed. This involves a fluidity in the allocation of rights, based on competition between these consortia which is inconsistent with the successful application of an SSNRP;

(f) sixth, FOXTEL's participation in the PBL AFL rights bid in 2005 is inconsistent with there being separate AFL free to air and pay television rights markets'.

12.7.4 Reasoning

1823 The question of whether there are distinct AFL and NRL pay television rights markets must be assessed bearing in mind that, as the authorities establish, market definition is but a tool to facilitate orientation for the analyses of market power and competitive processes. In this instance, as News points out, the contravening conduct is said to have occurred on the buying side, in that the loss of the AFL pay television rights is alleged to have caused C7's demise and led to an increase in the market power of Foxtel and Fox Sports as buyers or potential buyers of both AFL and NRL pay television rights. It is for this reason that the parties have focussed upon whether Foxtel and Fox Sports can exert market power by forcing prices for AFL and NRL pay television rights below the competitive price for a sustained period.

12.7.4.1 SEVEN'S EXPERTS

1824 Despite the limitations I have identified as to the utility of '*qualitative*' expert evidence in defining markets, both Seven and the Respondents rely heavily on the evidence of their respective experts. It is quite clear from the evidence of Dr Smith and Professor Noll that the differences of opinion among the experts rest, to a considerable extent, on different assumptions about the operation of the anti-siphoning regime. Both Dr Smith and Professor

Noll assumed that the regime operates in a manner that eliminates, or at least severely limits, the opportunity for pay television operators to acquire exclusive rights to AFL or NRL matches of relatively high quality. Both accepted that in the absence of the anti-siphoning regime, AFL and NRL broadcasting rights would be sold into a single Australia-wide retail television market: that is, they accepted that in the absence of an anti-siphoning regime, free-to-air rights buyers would act as a close constraint on a pay television monopsonist seeking to impose an SSNRP on the AFL or NRL as sellers of pay television rights.

1825 Neither Dr Smith nor Professor Noll, naturally enough, offered a view as to the legality of what Seven described as the devices used to '*circumvent*' the anti-siphoning regime. In any event, as I have explained, Seven does not rely on what it says is the illegality of the arrangements employed by some of the Respondents (and, for that matter, by Seven) to circumvent the anti-siphoning regime (an issue that is addressed in Chapter 21). Instead Seven looks to the practices actually adopted in relation to the bidding for broadcasting rights in support of its market definition case.

1826 In these circumstances, an important difficulty facing Seven becomes apparent from Professor Noll's evidence. In his reply report, Professor Noll stated that under the anti-siphoning regime, once free-to-air networks have acquired broadcasting rights, pay television operators can acquire '*subsidiary rights*'. He expressed the view, on the basis of the award of the AFL broadcasting rights in 2000, that the AFL received a higher price for its pay television rights (quality and quantity adjusted) than it received for its free-to-air television rights. Professor Noll continued:

> *'Because the willingness to pay for additional FTA rights is declining in the number and quality of games that are made available, the incremental price that FTA television networks would have been willing to pay for the rights that were acquired for pay TV must have been lower than the prices they paid for the FTA rights that they did obtain. This price in turn was lower than the amounts paid by Foxtel. Hence, the willingness to pay of FTA for the rights that were acquired by Foxtel was not a binding constraint in determining the pay-TV prices, so that competition by FTA can not prevent a small but significant, non-transitory reduction in price for pay-TV rights. Consequently, a pay-TV service, by avoiding the competition for rights that ensued in 2000, has something to gain from becoming the only buyer in the future sale of pay-TV rights'.*

1827 Professor Noll, after referring to the 2005 bidding for the AFL broadcasting rights by

Nine and Foxtel, said in his cross-examination that the critical question is whether parties could '*contract around*' the anti-siphoning regime in a fashion that caused a free-to-air broadcaster to be '*simply a broker for a pay television service in procuring the rest of the rights*'. The following interchange then took place:

> *'[HIS HONOUR:] May I take it, then, from what you have said, that underpinning your conclusion that there is a separate free-to-air rights market and a separate pay television sports rights market is the proposition that under the anti-siphoning regime, as enforced in Australia, pay television can get only what is left over after free-to-air has first choice in its own interests? --- That's right. That is the crucial fact separating the experts in this case about market definition and also about substantial lessening of competition. It is whether the anti-siphoning regime is sufficiently binding a constraint on pay television that they don't really get what they want despite their willingness to pay.*
>
> *That is something you agree that neither you nor the other economists have any particular expertise? --- Exactly. That is a legal conclusion, and I'm afraid that's your job, not mine'.*

Later in his evidence, Professor Noll explicitly accepted that if he was wrong about the anti-siphoning rules affecting the allocation of broadcasting rights and their price, he was also wrong about market definition.

1828 The Respondents interpret Professor Noll's evidence as conceding that if the contractual arrangements utilised in 2000 and 2005 to give the pay television operators greater certainty in relation to content were lawful (the so-called '*circumvention measures*'), this would also cause the market for pay and free-to-air television rights to be integrated. I agree with Seven's protest, in its Reply Submissions, that this interpretation misconstrues Professor Noll's evidence. Any concession made by him did not go that far. He insisted that there would be an integration of the pay and free-to-air television rights markets only if Foxtel, or any other pay operator, were to be placed on an equal footing with the free-to-air broadcasters in relation to the selection of games to be broadcast on an exclusive basis.

1829 Nonetheless, it is clear enough that Professor Noll's analysis proceeded on the assumption that the existing regime in practice prevents a pay television operator from bidding on first-choice live television rights in any timeslot. It is for this reason that he referred to pay television as acquiring only '*subsidiary rights*'. He did not address in any detail the opportunity for pay television operators to negotiate not merely with the AFL or the

NRL Partnership, but with free-to-air broadcasters with a view to forming a bidding coalition. As the evidence shows, negotiations between free-to-air and pay broadcasters can open the way to an agreement concerning the ultimate award of pay television rights and, more importantly, the precise content of those rights. The bargaining chip available to a pay television operator, as Professor Hay pointed out, is the pay television operator's contribution to the consortium's bid.

1830 In Dr Smith's first report, she expressed the view that there are separate markets for free-to-air and pay AFL and NRL television rights. Dr Smith reasoned that the rights available for pay television under the anti-siphoning regime are those not required by the free-to-air networks. In effect, therefore, the regime creates two categories of rights for sports on the anti-siphoning list: one for free-to-air rights and the other for pay television rights. Hence, '*demand is likely to be unresponsive to a SSNIP*'.

1831 News, in my view, justifiably criticised Dr Smith's approach in her first report on the ground that she determined the boundaries of the sports rights markets as if the relevant issue was the power of the **sellers** of rights to raise prices above the competitive level. Presumably for this reason, she spent some time considering whether a SSNIP charged for the rights to a particular type of event would cause much supply side substitution between different types of events, for example by creating a new Australian Rules competition. The answer to that question does not assist in identifying the boundaries of the sports rights markets for the purpose of assessing the power of **buyers** of sports rights to depress prices below the competitive level.

1832 In her reply report, Dr Smith accepted that in a market where the allocation of rights results from competition between potential buyers, the question is whether a seller of AFL or NRL broadcasting rights could defeat a negative SSNIP (SSNRP) on the part of a hypothetical pay television monopsonist, by offering more rights to the free-to-air networks. Rather confusingly, she then said that it was inappropriate to apply a negative SSNIP test to determine the relevant market because the focus was on buying power. Dr Smith said that the reason a negative SSNIP test could not be applied was because of the operation of the anti-siphoning rules, which (as she understood it) meant that only rights not exercised by the free-to-air networks could become available for pay television. In Dr Smith's view, the anti-siphoning regime operated in a manner similar to a government regulation partitioning a

geographic area that might otherwise comprise a single geographic market:

> *'the anti-siphoning rules (if effective) mean that the FTA networks can obtain the rights they require with no effective competition from Pay TV. In my opinion, this results in separate markets for the AFL/NRL broadcast rights for FTA and for Pay TV'.*

1833 In cross-examination, Dr Smith conceded, perhaps a little reluctantly, that her analysis was dependent on a '*linear approach*' – that is, she acted on the assumption that the effect of the anti-siphoning regime was that the most attractive matches would go to free-to-air operators and pay television operators would be left with the residue of the least attractive matches. She also conceded that it would be possible for a pay television operator to seek a coalition with a free-to-air operator in order to acquire more attractive games and that a free-to-air operator might have legitimate business objectives in forming or joining such a coalition.

12.7.4.2 DOES PAY TELEVISION RECEIVE THE WORST MATCHES?

1834 The assumption that pay television operators invariably receive the worst matches is reflected in Seven's submissions. The evidence does not support the validity of this assumption. It is true that the successful News bid in 2000 for the AFL broadcasting rights, supported by the Foxtel Put, resulted, broadly speaking, in Foxtel obtaining the three least attractive AFL games, although the form of the bid appears to have been influenced by the existence of Seven's last right. But other arrangements involving coalitions of rights buyers have contemplated pay television operators securing more attractive games, effectively on an exclusively live basis.

1835 Under the arrangements in place for the NRL broadcasting rights between 2001 and 2006, Nine in fact had the first two choices from seven NRL matches each week, while Fox Sports had the balance available for broadcast on pay television. Although Nine had the first two picks (subject to the practical constraints imposed by the scheduling of NRL matches), it could not meaningfully be said that Fox Sports was simply left with an unattractive and unwanted residue. After all, it had five NRL matches available for broadcast live each week, while Nine effectively could occupy only two time slots over a weekend of matches.

1836 More importantly, the bidding for and award of the NRL and AFL broadcasting rights

in 2005 demonstrates that coalitions can be formed between one or more free-to-air operators and a pay television operator under which a bid, if successful, will result in the pay television operator acquiring rights to some attractive matches, effectively on an exclusively live basis. Some of the details of the arrangements entered into form part of the confidential evidence and it is not necessary to outline them in this section of the judgment. They support the proposition that genuine bids were made that, if successful, involved a pay television operator being able, in effect, to make a selection of matches that could not reasonably be regarded as the unattractive residue of the free-to-air rights.

1837 The point can be illustrated by the arrangements made in 2005 between Nine and Fox Sports in relation to the NRL broadcasting rights for 2007 to 2012. Under these arrangements, Nine had the first, second and fifth pick of the eight matches in each round. Fox Sports had the third and fourth picks and all matches not required by Nine. In addition, Nine nominated its time slots as 7.30 pm on Fridays, 3 pm on Sundays and either a second Friday night game or a Monday night game. However, if Nine chose the Monday night game, it had to pay substantial compensation to Fox Sports.

1838 Seven's Reply Submissions seem to accept that under the 2005 arrangements, Nine did not obtain exclusive rights to the '*best matches*'. In particular, Nine did not obtain the third selection; Fox Sports retained its position as the exclusive live NRL broadcaster on Saturdays; and Fox Sports retained the Monday night slot unless Nine elected to pay Fox Sports substantial compensation.

1839 Seven attributes the particular outcome to PBL's common ownership of Nine and half of Fox Sports and News' half interest in each of Fox Sports and the NRL Partnership:

> *'In these circumstances, it cannot be assumed that Nine is acting as a profit maximising entity to take advantage of its position as a free to air broadcaster acquiring an event on the anti-siphoning list. Nor can the NRL be assumed to be acting in the best interests of a league to ensure that the best matches get the widest possible coverage'.*

1840 There is, however, no evidence that supports Seven's submission that Nine was not acting as a profit maximising entity and that the NRL Partnership was not acting in the best interests of the NRL Competition. Accordingly, I do not accept the submission. Whether or not Nine got *'what it wanted*' (whatever that means), as Seven suggests, does not detract

from the outcome. Negotiations between a free-to-air operator and a pay television operator might result in the latter obtaining exclusive rights to '*better*' matches than some of those taken by the free-to-air operator.

1841 The point is further illustrated by the 2005 Nine-Foxtel bid for the AFL broadcasting rights for 2007 to 2011. Seven seems to accept that, had the bid succeeded, Foxtel would have obtained an improved selection of AFL matches for broadcast on its pay television platform. However, Seven attributes the outcome to the fact that Foxtel was participating in a consortium with only one free-to-air broadcaster which had particular capacity constraints because of its ongoing commitment to NRL content. But this explanation helps make out the Respondents' contention. The precise terms of any arrangement between members of a bidding consortium will depend on a variety of circumstances, including the free-to-air operator's pre-existing commitments, perceived viewer preferences, likely advertising revenues, the pay television operator's assessment of the value of premium sporting events and many other factors.

1842 Even where a bid for broadcasting rights was made in 2005 by a coalition of free-to-air operators (without the participation of an existing pay television operator), it was structured in a way that allowed rights to be sub-licensed to a pay television operator. Depending on the outcome of negotiations between the successful free-to-air bidders and the pay television operator, the latter might well be able, in effect, to select at least some of the more attractive AFL matches for broadcast exclusively live on pay television.

1843 In my opinion, the evidence supports PBL's submission that:

> *'in 2000 and 2005 there was competition between and within bidding groups over: the number of matches to be shown on free to air and pay television; the rights to "pick" matches for broadcast; time slots for broadcast (both over popular times and over "clean air"); exclusive or non-exclusive coverage of finals matches; and the price to be paid for the bundle of rights'.*

Indeed, during negotiations in 2005 relating to the AFL broadcasting rights, Seven itself proposed that Foxtel could enjoy '*increased exclusivity*' in return for an increased rights fee.

1844 The experience in Australia demonstrates that in practice it is impossible at the outset of the bidding process for the AFL or NRL broadcasting rights to ascertain with certainty the

content of the '*pay rights*'. The precise content of the bundle of rights ultimately obtained by the pay television operator depends on negotiations between the rights holders and the various bidders, as well as negotiations among bidding coalitions and within individual bidding coalitions. Consequently, the matches taken by a pay television operator are not necessarily the least attractive and, indeed, might even be the first choice for a particular time slot.

12.7.4.3 PROFESSOR HAY'S ANALYSIS

1845 These conclusions lend support to Professor Hay's analysis. He argued in his first report that there is no externally imposed boundary between the number of matches shown exclusively on free-to-air television and the number shown exclusively on pay television. The NRL and AFL can therefore set the boundaries in a manner that maximises the overall value of the rights to them. According to Professor Hay, if a hypothetical pay television monopsonist attempted to restrict the quantity of pay television rights purchased from the NRL or AFL, in order to drive down the price paid, the NRL or AFL could shift the boundaries so that more matches are available to free-to-air. More generally, the NRL and AFL could establish contractual terms that provided an allocation of matches between free-to-air and pay television that maximised their revenues from the sale of television rights, subject only to the anti-siphoning regime:

> *'since the ability of the NRL to engage in supply-side substitution (to FTA television operators) would constrain the ability of a hypothetical monopsonist of NRL [and AFL] pay TV rights to depress the price paid for those rights below the competitive level, a market limited to the NRL [or AFL] pay TV rights is not justified'.*

1846 In cross-examination, Professor Hay illustrated what he had in mind by reference to the 2005 bidding. He said that it was open to the AFL or NRL not to pre-define the rights, but to encourage various consortiums to be formed and to engage in competitive bidding. If one consortium elected not to pay what the rights were worth, another consortium would win with a different balance of free-to-air and pay television rights. In other words, the AFL and NRL could facilitate the shifting of rights between free-to-air and pay, thereby allowing '*fluidity to work itself out*'.

1847 Professor Hay rejected a suggestion put to him by Mr Sheahan that a monopsonist pay television operator would be able to insist on offering a less than a competitive price, even

after a competing consortium had acquired the broadcasting rights. Professor Hay explained that the consortium would be able to offer a variety of packages and could threaten to divert all the rights to free-to-air, if necessary enlisting a third free-to-air network or, as News added, even one of the public broadcasters. As News submits, there will be differences among free-to-air operators, and between free-to-air operators and pay operators, as to the value they place upon particular rights. The different attributions of value may well be influenced by the strategic objectives of each operator.

1848 Seven submits that it is fanciful to suggest that one of the National Broadcasters (ABC and SBS) might form part of a bidding coalition or might acquire AFL or NRL broadcasting rights. There is no evidence to support this submission. On the contrary, Mr Frykberg gave evidence that SBS (which he regarded as a commercial channel) had shared the rights to significant sporting events, such as the English Premier League, World Cup soccer and Test cricket and that the ABC had on occasions shared sporting rights with other free-to-air channels. The evidence supports Professor Hay's view that in certain circumstances the National Broadcasters might be prepared to participate in a bidding coalition for AFL or NRL broadcasting rights or to acquire such rights in other ways, for example by a sub-licence from the rights holder.

12.7.4.4 SEVEN'S ADDITIONAL ARGUMENTS

1849 Seven invokes (as does Professor Noll) the award of the AFL broadcasting rights in 2000 to answer Professor Hay's analysis. It argues that Nine and Ten actually paid less for the free-to-air rights than Foxtel paid for the inferior pay television rights (bearing in mind the content of those rights). It is said to follow from this experience that competition from free-to-air operators for rights cannot prevent a SSNRP by a pay television operator. The free-to-air operators will simply not be prepared to pay enough.

1850 There are difficulties in drawing general conclusions from the arrangements in place for one set of rights for a closed period. Those particular arrangements are likely to have been influenced by considerations that will not be present on other occasions. In any event, as PBL points out, there was no evidence as to the comparative prices on a quality adjusted basis. Such an analysis would require consideration of such matters as the potential of the final series to drive advertising growth and the strategic importance of a network being identified with one of the premier Australian sports. Moreover, the experience in 2005

relating to the AFL broadcasting rights indicates that the position at that time may have been quite different. In particular, the bid by Nine with Foxtel's support, so far as the raw (confidential) figures are concerned, suggests that, if anything, the free-to-air television rights were valued more highly than the pay television rights on a simple per match basis.

1851 For much the same reasons, in my view, Seven's reliance on the *law of one price* (the principle under which buyers in the same market will end up paying the same price) does not take matters very far. As Professor Fisher explained in his evidence, that law is of little assistance where rights are not sold game by game, but in packages designed to serve, among other objectives, the strategic purposes of the acquirer.

1852 In the end, the answer to the question posed by Seven depends on what Dr Smith described as a qualitative assessment based on the available evidence. For the reasons I have given, I think that the arguments advanced by Professor Noll and Dr Smith are flawed. In particular, they assumed that the anti-siphoning regime worked in a way that does not correspond to the realities of industry practice. I prefer the analysis of Professor Hay who demonstrated a better grasp of the practical workings of the anti-siphoning regime.

1853 Seven appears to argue that even if the reasoning of Professor Noll and Dr Smith is flawed, the objective circumstances support the contention that free-to-air broadcasters could not constrain a pay television operator seeking to impose a SSNRP on a seller of AFL or NRL pay television rights. Although not explicitly conceding flaws in the reasoning advanced by Professor Noll and Dr Smith, Seven's Reply Submissions seem to put an argument that assumes that their reasoning was indeed flawed.

1854 It is true, as Seven submits, that the anti-siphoning regime, as a practical matter, gives a free-to-air broadcaster certain advantages in negotiating with a pay television operator or in dealing with the AFL or NRL in relation to the selection of matches. However, whether the advantages are important in determining the allocation of rights depends on the value the respective operators place on the particular matches or combination of matches. Price cannot be eliminated from the equation. Similarly, it is true, as Professor Noll suggested, that a free-to-air broadcaster's incremental willingness to pay for the right to broadcast additional matches each week will tend to decrease, **at least to some extent**, as a consequence of the opportunity costs which arise from capacity constraints. But that does not mean that the price

the free-to-air broadcaster is prepared to pay for any particular set of rights will be significantly less than the price a pay operator should be prepared to pay for the same rights in a competitive market.

1855 Seven's case that a free-to-air broadcaster will not constrain a monopsonist purchaser of NRL or AFL pay television rights seeking to impose a SSNRP rests, in my opinion, too heavily on the experience with the allocation of the AFL broadcasting rights in 2000. The experience of the rights bidding in 2005 suggests that general conclusions cannot be drawn from the earlier transaction or series of transactions. On the contrary, the more recent experience suggests that, despite the concentrated nature of the buyers' market (however defined), broadcasting rights can be re-allocated among coalitions so as to constrain a pay television operator seeking to impose a SSNRP in respect of the rights it is prepared to acquire.

12.7.4.5 CONCLUSION

1856 I conclude that Seven has not established, for the purpose of assessing the anti-competitive conduct alleged against the Consortium Respondents, that the pleaded AFL and NRL pay rights markets existed as separate and distinct markets from AFL and NRL free-to-air rights markets. The evidence may well be consistent with the existence of AFL and NRL broadcasting rights markets, but Seven has not relied on these markets to make out its case under s 45(2) or s 46(1) of the *TP Act.*

12.8 Wholesale Sports Channel Market

12.8.1 The Issues

1857 Seven pleads that there is and has been at least since November 1998 a wholesale sports channel market, being a market for the wholesale acquisition and supply of channels consisting of sports programming for the providers of pay television services (par 145). According to the Statement of Claim:

> the channels are supplied by channel providers to the operators of pay television services in the retail pay television market who incorporate sports channels into the package of channels constituting the pay television services provided to subscribers (par 145(a));

the suppliers in this market have been Foxtel (which until recently produced the *Fox Footy Channel*), Fox Sports, ESPN, TAB Ltd ('**TAB**') and C7 (par 145(b)); and

the acquirers of the channels are the pay television service providers, chiefly Foxtel, Optus and Austar (par 145(cc)).

1858 The existence of the pleaded wholesale sports channel market is central to Seven's case, since it alleges that the acquisition of the AFL pay television rights in 2000 by News and, consequently, Foxtel led to a substantial lessening of competition in that market. In particular, Seven claims that by reason of Foxtel's acquisition of the AFL pay television rights, C7 was unable to compete with Foxtel and Fox Sports in the supply of pay television channels, leaving Foxtel and Fox Sports as the only suppliers of channels which include '*sports programming of a premium or marquee nature*'.

1859 The Respondents strenuously dispute the existence of the wholesale sports channel market as pleaded by Seven and, at least in the case of News, support their contention with elaborate and detailed arguments. (PBL's submissions, although adopting News' arguments, were refreshingly succinct.) In essence, their main contention is that the substitution possibilities between Fox Sports and C7, on both the demand and supply side were limited. Moreover, any attempt to impose a supra-competitive price by a hypothetical monopolist of sports channels would be defeated by vertical integration backwards by the pay television platforms or forwards by the NRL Partnership or the AFL. Naturally enough, the Respondents' contentions provoked equally elaborate and detailed arguments in reply by Seven.

1860 The analysis in this section as to the existence or otherwise of the wholesale sports channel market takes account of the arguments that have been put but does not explicitly address every contention advanced.

12.8.2 Seven's Submissions

1861 Seven submits that there can be no doubt that C7 and Fox Sports were competitors at the material times. It argues that the question of market definition should be informed by findings made in relation to Seven's purpose case, since this sheds light on the perception of News, PBL and the other parties as to the likely consequences of their actions. Those

actions, so it is alleged, were designed to bring about the demise of C7. As I have recorded, I have rejected Seven's purpose case.

1862 According to Seven, a hypothetical merger of Fox Sports and C7 would create a firm with significant market power, having the capacity to raise the price of its services beyond the competitive level or to reduce the price of its inputs (sports rights) below the competitive level. It says that there is an abundance of such evidence:

> Both Fox Sports and Foxtel assessed C7 as being Fox Sports' major competitor. For example, Fox Sports in 1998 projected a significant increase in rights fees in 1998 and developed a strategy to acquire rights to combat C7's entry into the market place.
>
> Fox Sports expected to generate increased revenue in the absence of C7, a proposition illustrated by its perception of C7 as a threat to its revenue via supply agreements to the pay television platforms.
>
> Telstra played off C7 against Fox Sports in negotiations for the supply of the Fox Sports channels to Foxtel. In particular, Telstra '*benchmark[ed]*' Fox Sports against C7 and put pressure on Foxtel to consider taking C7 instead of Fox Sports, thereby demonstrating that C7 was a real constraint on Fox Sports. Internal Telstra documentation demonstrates that its officers regarded C7 as Fox Sports' key competitor and that C7 was an alternative to the Fox Sports channels on the Foxtel platform.
>
> Optus played C7 off against Fox Sports in supply negotiations after C7 had lost the AFL pay television rights. Optus sought to obtain the Fox Sports channels by threatening to '*breathe life*' into C7.
>
> Austar played off C7 against Fox Sports in supply negotiations in 1998.
>
> Fox Sports and its shareholders considered C7 to be by far the most substantial competitor to Fox Sports. For example, Mr Macourt agreed in evidence that in mid-1998, it was apparent that the most likely source of competition to Fox Sports in the sports channel business, following the collapse of SportsVision, was part of the Seven group. Similarly, in November 2000 an internal Telstra document recorded a view of Telstra management that the effect of the proposed AFL pay television rights acquisition would be to enable Fox Sports

to extract monopoly profits.

1863 Seven answers the Respondents' '*backwards integration*' argument by contending that the possibility of a pay television broadcaster moving into the production of an input (sports channels) does not establish that two functional levels (a retail platform and channel supply) should be treated as a single market, unless the efficiencies of integration are overwhelming. The fact that Foxtel was the only retail platform to be vertically integrated in this sense (through the Fox Footy Channel) shows that the efficiencies were not overwhelming. In any event, the suggestion that the response to a hypothetical monopolist imposing a SSNIP would be backwards integration lacks an empirical basis. The conduct of Foxtel in creating the Fox Footy Channel should be understood as the product of overlapping proprietorial interests in Foxtel and Fox Sports and, more colourfully, as '*the stunted misbegotten progeny of parents with conflicting commercial interests*'.

1864 Seven submits that Professor Hay's suggestion that an attempted monopolisation could be defeated by the AFL and NRL integrating forwards is pure supposition, unsupported by any empirical evidence in Australia. In any event, such a move would be difficult and risky and involve significant sunk costs. Any potential new entrant to the wholesale sports channel market, for example a free-to-air operator, would perceive and encounter many difficulties. These include the fact that sports rights are available only every five years or so and are on the anti-siphoning list. The hypothetical entrant may have to join a bidding coalition and, in any event, would face the prospect, if successful, of having to deal with a dominant Foxtel in order to exploit the pay rights.

1865 These arguments and others were developed by Mr Sumption in his final oral submissions. Mr Sumption argued that although premium subscription driving content is commercially necessary for a sports channel supplier, such content is not sufficient to establish a viable business. A channel requires a broader range of programming, in particular to fill the off-season schedule (in this case, summer). He pointed out that the AFL-only channel, the Fox Footy Channel, was not a success, in part at least because it had no fresh summer sports programming.

1866 Mr Sumption contended that the mere existence of Fox Sports, C7 and other sports channels such as ESPN shows that there was a market for the supply of such channels.

Furthermore, so he argued, pay television broadcasters in practice bought channels from suppliers instead of compiling the channels themselves. Even if pay television broadcasters could move into channel-making, it would merely demonstrate that there were lower barriers to entry to the wholesale sports channel market, not that there was no market.

1867 Mr Sumption contended that, in any event, an entrant into the market would have to reckon with the close association between Fox Sports and Foxtel. An entrant would know that '*half the retail market would probably be closed to him, irrespective of the merits of his product*'. At best, a new entrant could expect to sell to Foxtel only '*at a prodigiously loss-making price*'. Mr Sumption referred to the modelling conducted within News suggesting that a higher price could be charged by a channel supplier with a practical monopoly, by selling to all three pay platforms. He contended that the models did not take into account the possibility that Optus and Austar would circumvent the monopoly supplier by producing their own channels. Mr Sumption also relied on Optus' decision in January 2001 to take NRL programming from Fox Sports, rather than exercise its entitlement to obtain the rights directly from the NRL Partnership. At no point, so he argued, had Optus contemplated setting up its own channel.

12.8.3 News' Submissions

1868 News submits that the question posed by Seven's allegations is whether the exit of C7 led to an increase in the market power of Fox Sports and Foxtel as suppliers of sports channels. The primary focus must therefore be on the close constraints on Fox Sports as a supplier of sports channels. The answer to that question, according to News, is that '*there is no meaningful sports channel market*', for these reasons (among others):

> On the demand side, the substitution possibilities between Fox Sports and C7 were limited. C7, which depended primarily on AFL content, was not substitutable for Fox Sports, which included NRL content and a variety of other sports such as Rugby Union, English Premier League soccer and international tennis.
>
> The fact that Telstra, Austar and Optus used the availability of C7 as a bargaining chip in negotiations with Fox Sports does not establish that C7 constrained Fox Sports so as to prevent it imposing a SSNIP above the competitive level. To draw such a conclusion, without first identifying the

competitive price, has the potential to fall foul of the Cellophane fallacy.

On the supply side, Fox Sports and C7 did not constrain each other. The only opportunity for Fox Sports to become a substitute for C7 was by acquiring the AFL pay television rights when they became available in 2000. Likewise, in order for C7 to become a substitute in supply for Fox Sports, it would have had to acquire the NRL pay television rights when they became available.

The source of the power to charge a high price for Fox Sports and C7 lay in holding the NRL or AFL pay television rights. The opportunity for sports channel providers to derive monopoly rents was likely to be lost to the entities that sell the premium sports rights that in turn constitute the source of the power to charge high prices. Monopoly rents are likely to end up in the hands of the AFL and NRL. Channel suppliers may charge a high price, but it is not a monopoly price. The price merely reflects the cost of an essential input.

The pay television platforms could integrate backwards to acquire the premium sports rights directly and thus prevent sports channel supplier exacting monopoly rents.

The anti-siphoning regime means, in practice, that sports channel suppliers seeking to acquire rights must reach an accommodation with free-to-air operators who can use their position of advantage to skim any monopoly rents that otherwise would accrue to the channel suppliers.

12.8.4 PBL's Submissions

1869 PBL submits that the alleged wholesale sports channel market is not relevant to resolving the competition issues raised by Seven's case. PBL says the following:

> If the existence of a wholesale sports channel market is to be judged by reference to Seven's '*purpose*' allegations, the competitive concerns identified by Seven relate either to a sports rights market or a retail pay television market, not the market alleged by Seven.
>
> Seven in any event poses the wrong test, namely whether a hypothetical monopolist of premium or marquee sports channels would have the capacity to reduce the price of sporting rights. That question, according to PBL, is relevant to the existence of a sports rights market, not a wholesale sports

channel market.

If the correct question is posed, either in terms of the hypothetical monopolist test or the views of market participants about the constraints on Fox Sports as a channel supplier, the evidence does not support the existence of a separate wholesale sports channel supply market. This is because:

- an attempt to impose a supra-competitive price by a hypothetical monopolist of sports channels would be defeated by vertical integration by pay television platforms or by the AFL or the NRL Partnership;
- sports channel suppliers are merely '*middle men*' selling a collection of broadcasting rights and the competition relevant to the issues raised in the proceedings takes place in relation to the acquisition of sports rights;
- it is necessary to identify an appropriate '*time horizon*' in order to evaluate competitive responses to an attempt by a hypothetical monopolist of sports channels to impose a supra-competitive price; and
- the logic of Seven's case is that two sports channels built around the broadcasting of AFL and NRL matches respectively are not substitutes in demand or supply and are therefore not in the same market.

12.8.5 Correct Question

1870 The existence of the wholesale sports channel market pleaded by Seven is an issue in the proceedings primarily because Seven contends that Foxtel's acquisition of the AFL pay television rights and Fox Sports' acquisition of the NRL pay television rights increased the market power of Fox Sports and Foxtel as the suppliers of sports channels and substantially lessened competition in the market. As I have noted, market definition is a tool to facilitate analysis of the processes of competition and of market power. That being the case, the focus, as Dr Smith agreed, must be on the **close** constraints on Fox Sports as a supplier of sports channels to pay television platforms during the period 1998 to 2000.

1871 This basic proposition, while uncontentious, is important because Seven's submissions often depart from it. At various points in its argument (and in various ways) Seven contends that C7 acted as a constraint on Fox Sports in relation to the acquisition of

sports rights, particularly the AFL and NRL pay television rights. In a key paragraph of its Closing Submissions, Seven asserts that the market definition question is:

> *'whether a merger of C7 and Fox Sports would create a firm with significant market power. That would not be so if, as the Respondents' experts suggest, the merged firm would be so closely constrained by the pay TV retailers, rights owners and FTA networks that it would have no capacity* ***to reduce the price of inputs (rights)*** *or raise its prices. On the other hand, evidence suggesting that a merged firm could* ***either reduce the price of rights****, or could raise the price of its services to pay TV retailers, in each case even if only to a small extent, would indicate that sports channels like C7 and Fox Sports were a separate market'.* (Emphasis added.)

1872 Seven's submissions proceed to address this question. Consequently, its submissions contain many references to evidence that is said to show that C7 constrained Fox Sports as an acquirer of sports rights, rather than a supplier or acquirer of channels. For example, as I have noted, Seven relies on evidence suggesting that Fox Sports projected significant increases in rights fees as a result of the entry of C7 as a channel supplier in 1998. Similarly, Seven points to a Fox Sports budget prepared in mid-2000 which recorded that C7's and ESPN's competition for Australian pay television rights had served to inflate costs at a rate far in excess of the CPI.

1873 Whether C7 and Fox Sports (or, for that matter, ESPN) competed for sports rights may be significant in determining whether there is a market for the sale and acquisition of particular sports rights or sports rights in general. But it has little or no bearing on whether there is a wholesale sports channel market in which the sellers are compilers of sports channels and the buyers are pay television platforms with retail subscribers. The correct question, as PBL submits and Seven's experts confirmed, is whether a hypothetical monopolist of the supply of sporting channels could sustain a price to pay television platforms above the competitive level for a non-transitory period.

1874 Some of Seven's submissions are directed to the correct question. However, its submissions are adversely affected by Seven's identification of questions that are, at best, irrelevant and, at worst, misleading.

12.8.6 Seven's Dilemma

12.8.6.1 PLEADINGS: MARQUEE SPORTS

1875 Seven's pleaded case puts two alternative propositions in relation to the significance of sports programming for pay television platforms. The first, which is pleaded in the context of the wholesale sports channel market, is that:

> *'sports channels are distinct from and not substitutable with channels which contain other types of programming. In order to operate a viable television service in Australia, it is necessary to have attractive Australian sports programming as a subscription driver. It is not possible to substitute other types of channels for sports channels, because the pay television service will fail to attract sufficient subscribers to render it a viable service'* (par 145(d)).

The barriers to entry in the wholesale sports channel market are said to include long-term contractual entitlements to the pay television rights to attractive sports programming (par 146(c)). According to the particulars provided by Seven, the long-term contractual commitments include those relating to the AFL, the NRL, elite Rugby Union, the English FA Premier League soccer and the World Swimming Championships.

1876 The second alternative appears in the section of the Statement of Claim dealing with the effect of lessening competition in the various markets. Seven alleges (par 161A) that:

> *'since at least November 1998, in order to reach sufficient critical mass to be economically viable, it is important that a retail pay television operator in Australia, seeking to obtain material market share, has access to a sports channel that incorporates a "must have" or "major" sport known as a "marquee sport", as:*
>
> *(a) marquee sports are distinguished, in part, by the depth and spread of their appeal to consumers, viewers and subscribers, in part, by social and cultural factors and, in part, by the greater utility they provide to retail pay television operators;*
>
> *(b) the most important single factor driving pay television subscriptions is live and exclusive coverage of marquee sports;*
>
> *(c) marquee sports overcome consumer inertia and are frequently the catalyst for a consumer to make a decision to subscribe to pay television;*
>
> *(d) the value of marquee sports in building a network and a subscriber base means that their value to retail pay television operators extends beyond directly attributable cash flows;*

(e) the only premium sports in Australia which provide consumers, viewers and subscribers with sufficient depth, intensity, and strength of live coverage at recurrent, predictable, concise and regular times convenient to both the broadcaster and the audience that can be characterised as marquee sports are the AFL and the NRL'.

1877 Seven pleads that the effect or likely effect of the acquisition by Foxtel of the AFL pay television rights was, among other things, a substantially lessening of competition in the wholesale sports channel market. The pleading is as follows:

'176 ... [P]rior to the acquisition by Foxtel of AFL pay rights, C7 provided significant competition to Fox Sports and Foxtel in the wholesale sports channel market ...

177 Following the acquisition by Foxtel of the AFL pay rights, and the failure by C7 to secure the NRL pay rights, C7 is unable to compete with Foxtel and Fox Sports in the supply of pay television sports channels.

178 There is no other competition or significant competition to Foxtel and Fox Sports in the supply of pay television sports programming. The only other suppliers of sports channels in Australia are ESPN Inc (ESPN) and TAB Limited (Sky Racing). ESPN provides international sports and is not a substantial subscription driver [while] Sky Racing is a channel which provides specialised horse and greyhound racing coverage, and is not competitive with the Fox Sports channels.

179 Further or in the alternative, Fox Sports and Foxtel are the only suppliers of channels including attractive Australian sports programming, and the only suppliers of channels including marquee sports and premium sports.

...

181 By reason of the matters pleaded in paragraphs 176 to 180, the effect or likely effect of the acquisition of AFL pay rights by Foxtel is a substantial lessening of competition in the wholesale sports channel market ...'

12.8.6.2 WHICH ALTERNATIVE?

1878 Seven's pleading creates a dilemma on the question of whether there is a wholesale sports channel market in the terms it advances. The dilemma is that the more Seven stresses the unique character of each of exclusive AFL and NRL content as subscription drivers, the more difficult it is to see a channel containing exclusive AFL live content as a **close** substitute

for a channel containing exclusive NRL content. No doubt it is in theory possible to have two forms of subscription driving content that appeal largely to the same audiences (and indeed Mr Sumption submitted that this was the position in fact). But if each channel containing separate subscription driving content appeals to a largely discrete audience or potential audience, it may be very difficult to conclude that one channel supplier can closely constrain the other if it attempts to impose a SSNIP.

1879 Early in its Closing Submissions, Seven reiterates its pleading that a pay television operator must have access to material that includes a marquee sport and that the **only** marquee sports in Australia are the AFL and NRL. The primary forensic reason for Seven's emphasis on the unique attractions of AFL and NRL content is clear enough. Its case is that once C7 was locked out of the AFL and NRL pay television rights in 2000, the channel was doomed.

1880 It would be very difficult, if not impossible, for Seven's case to succeed if neither live AFL nor live NRL content was indispensable to C7's survival. Similarly, Seven's case that the acquisition by the consortium of the AFL pay television rights in 2000 substantially reduced competition in the wholesale sports channel market rests on the proposition that other suppliers of sports channels in Australia (ESPN, TAB and others) '*do not provide significant competition to Foxtel or Fox Sports in the supply of pay TV sports channels*'. Hence Seven relies on Mr Frykberg's evidence (among others) to submit that:

> *'AFL and NRL are the most important content for the purpose of driving subscriptions to a pay TV platform. Further … the AFL and NRL were the* ***only sporting contests*** *potentially available to C7 which were capable of rendering C7 (or any new entrant) sufficiently attractive to platforms to be potentially viable as a premium sports channel'.* (Emphasis added.)

1881 Seven does not merely submit that the only marquee sports in Australia are the AFL and NRL. In support of its claim that there are separate AFL and NRL pay rights markets, Seven emphasises the '*substantial complementarity of the two sporting codes*':

> *'The AFL and the NRL appeal to predominantly different groups of supporters (with some overlap). Therefore they* ***are not close substitutes in demand by pay TV operators****, because the pay TV operators are seeking to attract both groups of supporters as subscribers and therefore would prefer to have both the AFL and NRL. (If, by way of contrast, the AFL and NRL had substantially overlapping supporters, they would probably be substitutes and therefore in the same market.)'* (Emphasis added.)

It is particularly this emphasis on the substantial complementarity of the two sporting codes (in the sense used by Seven) that creates in my opinion the dilemma for Seven in relation to the existence of the wholesale sports channel market.

12.8.6.3 AFL AND NRL AS MARQUEE SPORTS

1882 Seven puts at the forefront of its submissions the proposition that there are only two marquee sports in Australia, in the sense of major pay television subscription drivers: the AFL and the NRL. While Seven's enthusiasm for this proposition seems to waver occasionally, it is at the heart of Seven's case. For that reason, and also because the proposition is significant for Seven's contention that there is a wholesale sports channel market, it is necessary to consider whether the AFL and the NRL are indeed marquee sports broadly in the sense propounded by Seven. In my opinion they are.

1883 On one view, the proposition is self-evident. The prices paid for the AFL pay television rights for 2002 to 2006 and for the NRL pay television rights for 2001 to 2006 greatly exceeded the price paid for any other sports rights in respect of those periods (other than the special, one-off case of the Olympics). The price paid for each set of rights is obviously a direct reflection of the perception by the successful bidders that the rights had subscription-driving attributes for pay television that no other sporting rights could match.

1884 Table 12.1 sets out in summary form the annual pay television rights fees (and in some cases, free-to-air rights fees) in respect of the 2002 year. Table 12.1, which is derived from Seven's Closing Submissions, may not be precisely correct in every particular, but it is generally accurate.

TABLE 12.1 RIGHTS FEES: 2002

Description of rights	Annual pay rights fee for 2002
AFL pay television rights	$30 million
NRL pay television rights	$30 million

UK cricket (pay television rights to matches involving Australia in 2005 and the free to air and pay television rights to other cricket matches played in the UK)	$4.25 million for term of agreement (2002-2005), that is $1.42 million per year
Pakistan cricket (matches played in Pakistan by international touring sides including Australia) – free to air and pay television rights	US$1.05 million
Rugby Union (live Super 12s and delayed Tri-Nations series and other internationals involving the Australian team) – pay television rights	US$10 million
English Premier League soccer - free to air and pay rights	£1.25 million
Wimbledon Championships (tennis) – pay television rights	US$2.6 million

1885 The reasons for the peculiar attraction of the AFL and NRL content to pay television subscribers were explained by Mr Frykberg, who has very considerable experience in pay television sports programming. Mr Frykberg, whose evidence I generally accept, said that the utility of sports rights for pay television is affected by a number of factors. These include:

> the popularity of the sport, both in terms of the numbers interested and the intensity of their interest;
>
> the '*tribal culture*' associated with some sports, of which the following attracted by individual AFL and NRL teams is a prime example;
>
> the extent to which the participation of popular teams or competitors is assured;
>
> the number of matches or events and the duration over which they are played;
>
> the regularity and frequency of the matches or events, with particular value attaching to '*appointment viewing*' on a weekly basis at popular viewing times; and

the broadcasting of the matches or events by pay television on an exclusively live or live and exclusive basis.

1886 In his statement, Mr Frykberg identified '*category 1*' sports or sporting events by which he meant:

> *'sports and sports events [that] are highly sought after by free-to-air networks, pay television channel suppliers and sports brokers because of their popularity among the Australian population'.*

1887 Category 1 sports (Mr Frykberg's own construct) comprise the following:

NRL Competition;

Rugby League '*State of Origin*' matches

Rugby League Test matches played in Australia;

AFL Competition;

matches involving the Australian cricket team played in or outside Australia (test matches and one day internationals);

Rugby Union Internationals played in Australia involving the Australian national team;

Tri-Nations Rugby Union competition;

Rugby Union Super 12 competition;

soccer matches involving the Australian national team;

Australian Swimming Championships;

World Swimming Championships;

Olympic Games and the Winter Olympics;

Commonwealth Games;

Cricket World Cup;

World Cup soccer;

Rugby Union World Cup;

tennis: the Australian Open; Wimbledon; the US Open, the French Open;

golf: US Masters, US Open, British Open and Australian Open;

horse racing: Melbourne Cup and Caulfield Cup; and

motor racing: Bathurst 1000; V8 Supercars competition; Formula One Grand Prix.

This list consists of 10 discrete sports, apart from the Olympic or Commonwealth Games. The only sports in category 1 that involve a regular, wholly Australian domestic season are the AFL and the NRL Competition.

1888 Mr Frykberg agreed that the AFL and NRL Competitions stand out as the most attractive for the purposes of driving pay television subscriptions. As Mr Frykberg said (and as appears from other evidence), each Competition:

organises matches that are played week in and week out from March until September;

has a very large following in Australia, subject to regional variations;

has built up strong, sometimes fanatical, club and regional loyalties;

provides sufficient numbers of matches each week to ensure that, generally speaking, the free-to-air broadcasters cannot utilise all the rights;

enables pay television, notwithstanding the anti-siphoning regime, to broadcast some of the matches on an exclusively live basis; and

allows for appointment viewing in regular, convenient timeslots.

1889 No other sport has this combination of characteristics. For example, cricket matches in Australia involving the Australian team are almost always broadcast live or nearly live on free-to-air television. Similarly, Rugby Union Internationals or Tri-Nations matches played in Australia (involving the Australian team) are generally shown live on free-to-air television, while overseas matches are often played at times inconvenient for Australian audiences.

1890 The Rugby Union Super 12 competition (now Super 14) includes teams from Australia, South Africa and New Zealand. The Super 12 competition, which is not on the anti-siphoning list, was essentially a creation of News, and the rights have been made available only to News-related pay television platforms. In any event, as measured by the

proportion of people who report that they watch premium sports on television, Rugby Union does not enjoy the popularity of the AFL or NRL Competitions, although there are regional variations.

1891 Some events, like swimming championships or World Cup soccer are, in effect, one-off competitions that do little to encourage long-term subscriptions to pay television. International events included in category 1 are usually held at inconvenient times for Australian audiences. Examples are the major tennis tournaments (other than the Australian Open, the most attractive parts of which, in any event, are broadcast on free-to-air television) and the major international golf tournaments.

1892 Mr Harold Anderson, Seven's Director of Sport, gave evidence that he regarded AFL content as a major subscription driver for pay television operators. He offered essentially the same reasons as Mr Frykberg, although he added that matches shown in full exclusively on pay television were attractive to viewers, even when broadcast on a delayed basis. Mr Anderson said that other '*attractive sports*' were needed to enhance the overall attractiveness of the channel but none was sufficient to enable C7 to operate a viable sports channel independently of what he described as a '*must have*' sport such as AFL or NRL. It is not necessary for me to decide whether C7 could have survived without AFL content, but Mr Anderson's evidence supports the proposition that the AFL and NRL have unique subscription driving qualities for pay television platforms in Australia.

1893 Mr Keely and Mr Ebeid of Optus both agreed that the exclusive NRL and AFL content were key audience-driving programs for Optus. Their evidence was consistent with the terms of a letter written by Optus to the ACCC on 22 December 2000. The letter identified the key subscription-driving pay television content as movies and sports programming and pointed to the AFL and the NRL as '*the most popular sports on Pay Television*'.

1894 Mr Marquard of Fox Sports was taken to a Fox Sports board paper of February or April 2000. That paper identified the NRL pay television rights as '*key strategic programming ... central to our business*'. Mr Marquard agreed that the NRL constituted a central part of Fox Sports' programming for a substantial part of the year and was also central to building up consumer loyalty to Fox Sports. He pointed out that Fox Sports used the

expression '*tier 1*' for marketing purposes and that the Super 12 competition, Australian cricket tours and English Premier League soccer were also in tier 1. However, it is clear that NRL content occupied a position of special importance to Fox Sports.

1895 The evidence to which I have referred is consistent with the contemporaneous documentation which is replete with references to the centrality of AFL or NRL content to the pay television platforms. This includes documentation from Austar which shows that it regarded the NRL as vital to its business.

1896 In my view, AFL and NRL content, if available on an exclusively live or live and exclusive basis, are clearly the most important sports subscription drivers for pay television in Australia. They each have characteristics that no other sporting content can match. The closest is perhaps Rugby Union coverage, but at the relevant times Rugby Union content fell a considerable distance behind AFL and NRL content in its subscription-driving power.

1897 This finding does not necessarily mean that without AFL or NRL content, C7 could not have survived beyond May 2002. Nor does it mean that sports content other than the AFL or NRL lacks any appreciable subscription-driving potential. It does mean that the AFL and NRL can be described as '*marquee sports*' in that they are clearly the two major sports subscription-drivers in the Australian pay television industry.

12.8.7 A Premium Sports Channel Market?

1898 The logic of Seven's insistence on the existence of only two marquee sports would seem to be that there is a premium sports channel market in Australia, comprising only channels that offer exclusive live AFL or NRL content. Seven instead opts for a wholesale sports channel market which is said to have included at the material times not only Foxtel, Fox Sports and C7, but ESPN and TAB. It is not clear how ESPN and TAB, neither of which produce channels carrying marquee sports (as defined by Seven), can be regarded as ever having been part of the same channel supply market as Fox Sports, Foxtel and C7. Indeed, as I have noted, Seven expressly pleads that there is now no significant competition to Foxtel and Fox Sports in the supply of pay television sports programming because:

> *'ESPN provides international sports and is not a substantial subscription driver [while] Sky Racing is a channel which provides specialised horse and greyhound racing coverage, and is not competitive with the Fox Sports*

channels' (par 178).

If this pleading is correct as a matter of fact, ESPN and TAB cannot closely constrain the market behaviour of Foxtel or Fox Sports as channel suppliers. Seven's position is not advanced by its description of ESPN and TAB as '*niche participants*'.

1899 Professor Noll concluded that sports channels were in a separate market from **non-sports** channels that are also subscription drivers, a conclusion that seems to be common ground. However, Professor Noll also concluded that the relevant market is for premium sports channels. He regarded a channel as a '*premium sports channel*' if a substantial number of potential subscribers would acquire a pay television service only if it contained access to that channel or another like it. Seven's Closing Submissions acknowledge that Professor Noll described the relevant market '*slightly differently*' from Seven's pleaded market. Seven submits that the difference is immaterial because Professor Noll in his reply report included within his premium sports channel market *ESPN* and *Sky Racing*, just as Seven does in its pleaded wholesale sports channel market.

1900 This submission is not entirely convincing. Professor Noll included within the category of premium sports in Australia not merely the AFL and NRL (Seven's '*marquee sports*') but other sports such as cricket, Rugby Union and English Premier League soccer. Professor Noll put forward three criteria for determining whether other channels compete with '*benchmark premium sports channels*':

> *'first, whether other sports channels are substitutes for it in attracting subscribers to the pay-television service; second, whether other types of premium channels are substitutes for premium sports channels; and, third, whether other channels can add major sports events to offer a competitive substitute for an established premium sports channel'.*

He did not, however, explain why *ESPN* and *Sky Racing* satisfy these criteria, being content to assume '*conservatively*' that both are premium sports channels. It may be that Professor Noll regarded their offerings as premium sports or, alternatively, that he was prepared to assume that the channels could add premium sports content and thus compete with an established premium sports channel (there was evidence that ESPN might have been considering acquiring Australian sporting content in about 1998). If Professor Noll intended the latter, an issue would arise as to why other channels, including those with predominantly

non-sporting content, could not also satisfy the criteria.

1901 In the end, there may be little conceptual difference between Seven's wholesale sports channel market, which in substance includes channels offering '*attractive Australian sports programming*', and Professor Noll's premium sports channel market, which includes channels carrying an apparently wider range of so-called premium sports, specifically *ESPN* and *Sky Racing*. But there is clearly a substantial difference between Seven's category of '*marquee sports*' in Australia and Professor Noll's category of '*premium sports*'. Indeed, his understanding of the scope of premium sports is at odds with the concept of marquee sports which underlies the way Seven has presented its case.

12.8.8 Seven's Experts

1902 Professor Noll's concept of premium sports may be difficult to reconcile with Seven's emphasis on the peculiar if not unique attributes of AFL and NRL content as subscription drivers for Australian pay television. But his concept of premium sports does not necessarily affect Seven's contention that C7 acted as a close constraint on Fox Sports (and Foxtel) as a supplier of sports channels. However, another aspect of Professor Noll's reasoning sharpens the dilemma confronting Seven.

1903 Like the other experts, Professor Noll concluded that the AFL and NRL pay television rights are sold in separate markets. In his view:

> *'[the] most popular team sports sell their television rights in separate relevant markets* ***because the audiences for these games are substantially non-overlapping****'.* (Emphasis added.)

Professor Noll pointed to evidence that the AFL and NRL appeal primarily to audiences in different regions, the AFL being much more popular in the southern States and Western Australia, while the NRL is much more popular in New South Wales and Queensland. According to Professor Noll, the regional nature of the interest was supported by differential advertising revenue from AFL free-to-air matches shown in different areas of Australia. Professor Noll said that the justification for concluding that the AFL and the NRL Partnership sell their rights in different markets is:

> *'the evidence that each* ***separately*** *is a subscription driver, and that the effect of each on subscriptions is* ***additive****'.* (Emphasis added.)

1904 As News correctly submits, Professor Noll did not explain why, if the AFL and the NRL Partnership sell their rights into different markets **for the reason he gave**, pay television channels containing AFL and NRL live programming are not supplied to pay television operators in separate markets. To put the point another way, Professor Noll did not explain why, on the assumptions underlying Seven's case as to marquee sports, C7 would constrain Fox Sports from imposing a SSNIP or could otherwise be regarded as a close competitor of Fox Sports. If the AFL and NRL are separately subscription drivers and have a cumulative effect on the revenue of pay television broadcasters because they appeal to different audiences (the position Seven itself adopts), it would seem to follow that an AFL sports channel supplier would be unlikely to constrain a SSNIP by an NRL sports channel supplier.

1905 Dr Smith's evidence seems to present even more substantial difficulties for Seven. In her first report, she expressed the view, on the basis of market research and other material, that a relatively small number of sports, but particularly the AFL and NRL Competitions, are sufficiently differentiated from other sports with respect to popularity '*and hence subscriber appeal*' that buyers of rights are unlikely to respond to a SSNIP:

> *'Although economists are concerned with responses at the margin, preferences as between particular sports (especially football codes) are likely to be so strong, given the strong attachment to the particular sport and especially to the particular team, that any marginal change will be small – such a change would be unlikely to cause many soccer fans to watch less soccer and more AFL live broadcasts and so retail Pay TV suppliers and channel suppliers are unlikely to alter their demand for rights'.*

1906 Yet, when addressing the product dimensions of the market, Dr Smith also expressed the view that if a particular sports channel imposes a SSNIP on a retail pay television platform:

> *'there is likely to be sufficient potential response from other suppliers of sports channels to make [the] SSNIP unprofitable'.*

1907 Dr Smith acknowledged that substitutability is less certain on the demand side because sports channels tend to be complementary, in the sense that they are differentiated in content. Even so, she thought it commercially realistic:

'to identify sports channel supply rather than supply of programming relating to a particular sport, because even though retailers may seek a sports channel with a primary focus on a particular sport, the content will need to be broader than just that sport'.

1908 This analysis does not explain why, in view of Dr Smith's conclusions as to the differentiation between the appeal of AFL and NRL (geographically and on the basis of supporter allegiance), a SSNIP charged to pay platforms by, say, Fox Sports (with NRL content) would be rendered unprofitable by competition from C7 (with AFL content). In her oral evidence, Dr Smith appeared to accept that C7 would not closely constrain Fox Sports in that situation because the channels appeal to largely different groups of subscribers:

'[HIS HONOUR]: As I understand what you were saying, it was that if a channel supplier such as Fox Sport [sic] had a subscription driver like NRL, it would be very unlikely that if the channel supplier increased prices – SSNIP – that there would be substitutability from another channel supplier that had, say, the AFL? --- That's correct.

Also a premium subscription driver? --- That's correct.

Why or why not? --- Because while – well, first of all, they are tied up with contracts, so you can't substitute within the period of the contract.

The channel supplier can't ---? --- They have rights, contractual rights, which they can use for NRL and they have contractual rights they can use for AFL.

...

Yes, the channel supplier would be supplying a pay TV platform?
--- Supplying a pay TV platform, yes, that's correct.

If the channel supplier increased the price to the pay TV platform? --- Yes.

That's different of course from the period of time during which the channel supplier holds the rights? --- Yes.

The contractual arrangements between the channel supplier and the pay TV platform could be quite short-term, could they not? --- They could be.

They could be terminable in a variety of circumstances, could they not?
--- Yes, that's absolutely correct.

If that is the case, why couldn't the pay TV platform, faced with a hypothetical increase in price by Fox Sports with the NRL say, "Sorry, we're going to substitute C7 with AFL, because they haven't increased their prices. So we will get rid of you pursuant to our contractual arrangements" – assuming they exist – "and substitute C7"? Why not? --- I can understand that if the

> *price was* ***more than a SSNIP*** *they might be persuaded to do that.* ***Given that NRL appeals to one particular group of subscribers and AFL appeals to a different group of subscribers, just for a very small change in price I don't believe that they would switch between the two****.*
>
> *So that in turn depends upon an evaluative judgment as to how loyal AFL fans are and NRL fans are to the particular codes that they follow? --- Yes, it does'.* (Emphasis added.)

1909 Dr Smith addressed supply side substitutability separately. In her first report, she expressed the view that there was supply side substitutability in the wholesale sports channel market, on the ground that:

> *'Other firms that provide sports channels would be likely to constrain a SSNIP by a particular sports channel supplier, even though the composition of the bundle of sports programs offered differs from one channel supplier to another, and so they would be included in the same market, although the extent of the constraint imposed may vary from firm to firm depending on the content offered'.*

1910 Dr Smith returned to this topic in her third report, acknowledging that her reasoning in the first report had not been entirely clear. She reiterated her view, but on the basis of several assumptions. In particular, Dr Smith assumed that access to an '*essential input*', in this case the AFL and NRL pay television rights, would not be restricted by exclusive supply contracts. She also assumed that each of the AFL and the NRL Partnership would offer several bundles of pay television rights for a period of three to five years, with the expiry dates aligned. On this basis:

> *'a SSNIP by one general sports channel supplier could occur at the time when new contracts are being negotiated with its retail Pay TV customers (such as Foxtel). The SSNIP would be constrained to the extent that the Pay TV retailers can threaten to acquire their sports channels from an alternative sports channel supplier. Thus, if the AFL Pay TV rights are split between several sports channel suppliers then an attempt by one of these to impose a SSNIP on its retail PAY TV customer/s will be constrained by the risk that that/those customers will switch demand to an alternative sports channel supplier'.*

1911 Dr Smith justified these assumptions on the ground that to achieve a competitive market it is necessary to exclude '*anti-competitive agreements*' between the AFL and the NRL Partnership and buyers of the rights. But, as she acknowledged, the general (although not invariable) practice has been for the AFL broadcasting rights and the NRL pay television

rights to be awarded on an exclusive basis. Moreover, they have been awarded for a lengthy period, typically five years or thereabouts. Contracts for the supply of channels with premium content to pay television platforms tend to be negotiated shortly after the rights auctions or, alternatively, the contracts are terminable if the channel supplier loses the premium rights.

1912 It seems to me that Dr Smith's contention that a sports channel with exclusive NRL content can be substituted for a sports channel with exclusive AFL content rests on an unrealistic set of assumptions. Mr Hutley put to Dr Smith that if there were sports channel markets at all, they consisted of distinct product markets – that is, an AFL sports channel market and an NRL sports channel market. When asked to comment on this hypothesis, Dr Smith said that there is competition among sports channel suppliers **at the point when rights become available**. However, during the period in which the AFL and NRL broadcasting rights are held by different parties, Dr Smith accepted that there would not be much constraint by one channel supplier on the other:

> *'it may be true that there is no competition between a channel with the AFL rights and a channel supplier with the NRL rights within the period of the contract, [but] I disagree that ... there is not a constraint involved at the point of competing for those rights'.*

1913 When Dr Smith was asked how one can work out the competitive price for a channel incorporating NRL content, she replied that the constraint applies at the point when parties '*compete for the market*'. The following exchanges then took place:

> *'[HIS HONOUR]: Yes, but that's competition in the market for the acquisition of rights? --- That's competition for rights that are an essential input to enable you to compete in the channel supply market and produce in the channel supply market.*
>
> *...*
>
> *How does this address the difficulty of assessing what the competitive price might be within the market that you hypothesise, that is, the channel supply product market, how can it assist in that process to say, "Well, there was a competitive process to acquire the rights as an essential input"? --- Well, I think you are right; if you define the market as being a monopoly, you don't have a competitive price by definition unless ---*
>
> *I'm just trying to ascertain what your position is. As I understand it, that inexorably flows into your position, because you are regarding the NRL rights*

as a unique product in the sense that there is no close substitute? --- Mm-hm.

I'm trying to follow the argument. That seems to lead to the proposition that although one can – I don't mean this offensively – mouth the words "competitive price", it is just a concept devoid of content in this context. If that is right, if you agree with that, I would then like you to address what that means to your hypothesis about separate functional markets from acquisition of rights and supply of rights to channel supply and acquisition of channels to retail TV provider [sic] and acquisition of retail TV. They are the three levels of the market? --- I don't think it has anything to do with the functional aspect of it at all. I think that's quite separate from it. I think it has to do with the question of what is the character of the product. ***Does the functional market supply a series of separate products in separate markets? Or does it provide sports channels which are in a single market?*** *And you are right that, if in fact there is no competition, if they are so different, then for the period of the contract you set up a monopoly and you don't have a competitive price, you have a monopoly price.*

...

On the analysis that you are accepting, I think, what consequence, if any, does that have for your proposition that there is a separate channel supply product market consisting of the rights? --- Okay, what it would say is I have a separate channel supply market, ***the nature of the product market is that, if there is no competition within a relevant time frame, then I will have a series of different product markets within that functional channel market, and they will be NRL, AFL****.*

Separate product markets? --- Separate*, mm-hmm.*

MR HUTLEY: What flows from that is, is it not, that the market would be, of its character, only ever involve one participant, assuming exclusivity is the structure, correct? --- Assuming exclusivity, yes.

The only significant question from the point of view of competition is whether there were any significant constraints existing in respect of the next auction; that's correct, isn't it?--- ***Well, essentially you are asking me would there be competition for the market the next time around. Yes, that would be the relevant question****'.* (Emphasis added.)

1914 It seems to me that, as News submits, Professor Noll's argument that AFL pay television rights are supplied in a separate market to the NRL pay television rights, leads to the conclusion that channels containing exclusive AFL programming are supplied in a separate market to that in which channels containing exclusive NRL programming are supplied. Dr Smith's concessions in cross-examination lead to much the same result. Although she insisted that there was a functionally separate channel supply market, she

accepted in substance that there were separate AFL and NRL product markets within the channel supply market. That is, an NRL sports channel would not be a **close** competitor of an AFL sports channel, even though each had other non-premium sporting content. Contrary to Seven's Reply Submissions, I do not understand Dr Smith's evidence to be based on the assumption that the two channels *exclusively* showed AFL and NRL content respectively.

1915 For these reasons, Seven's expert evidence provides scant support for the wholesale sports channel market for which Seven contends.

12.8.9 Cumulative Appeal of AFL and NRL

12.8.9.1 EVIDENCE

1916 Neither Professor Noll nor Dr Smith is an expert in the sporting preferences of Australian television audiences. The fact that their reports proceed on the basis that the AFL and NRL appeal to largely different audiences does not establish that this is the fact. As I have noted, Seven's position, at least for the purposes of its submissions on the rights markets, is that the AFL and NRL are substantially complementary. The evidence supports Seven's position and, consequently, the assumptions on which Professor Noll and Dr Smith proceed.

1917 Because there was no dispute that AFL and NRL have different levels of popularity in different parts of the country, the point perhaps received less detailed attention in evidence and submissions than otherwise might have been the case. Nonetheless, a number of witnesses gave evidence to this effect. Mr Harold Anderson (of Seven), for example, said that in mid-2000 the possibility of obtaining the NRL rights was appealing:

> *'Given the popularity of rugby league in New South Wales and Queensland I believed that the pay television rights to NRL matches could be characterised as the northern Australian States "equivalent" of Rugby Union matches in New Zealand … I believed that the NRL pay rights would be a significant subscription driver for C7 in New South Wales and Queensland'.*

Mr Anderson also said that the AFL had a large and passionate following, but that there was less interest in the AFL in Queensland and New South Wales, reflected in the fact that fewer matches were broadcast on free-to-air channels in those states. Mr Frykberg agreed that each sport had built strong ties of loyalty for its supporters, but that there were significant regional

differences in the enthusiasm for each sport.

1918 Mr Mockridge's memorandum to Mr Lachlan Murdoch of 17 March 1999 recommended that Foxtel take C7 on reasonable terms. Among the advantages Mr Mockridge identified was that Foxtel would achieve greater penetration in Melbourne, which lagged behind Sydney (14.5 per cent compared with 19.5 per cent). Mr Mockridge pointed out that, given that C7 would be on a tier, C7 would derive a benefit only to the extent that Foxtel subscribers upgraded to take C7 on a tier. However, Mr Mockridge expected Foxtel's '*existing subscriber base [to be] light on AFL " nuts"*'.

1919 A draft Foxtel board paper prepared in about June 1999 referred to the AFL being a subscription driver in the southern states of Australia. The paper pointed out that not having access to the AFL had hurt Foxtel's penetration in Victoria and, to a lesser extent in South Australia and Western Australia. Mr Macourt said in evidence that he agreed with this assessment at the time. The position had not changed by January 2002, because a Foxtel Sports Marketing Update at that time expressed no doubt that AFL would be '*a huge acquisition driver in southern states*'.

1920 Another draft Foxtel paper prepared in October 2000 expressed caution about some of the main assumptions underlying the AFL Business Plan. The paper assumed that if Foxtel carried the AFL it would attract eight per cent more subscribers in the southern states over a 10 year period than it would without the AFL. By contrast, the AFL would attract only a two per cent increase in subscribers in the northern states. The paper noted that this projection was consistent with the 5.6 per cent difference in the then current levels of penetration in Sydney and Melbourne.

1921 The modelling conducted within Foxtel during 2000 repeatedly predicted substantial increases in subscriber penetration in the southern States if Foxtel were to carry AFL programming. While Seven contends that some of the figures were deliberately exaggerated, the fact is that the models proceeded on the basis that AFL programming was the key to achieving greater penetration in the southern States, but that AFL content would have relatively little effect on penetration in the northern States.

1922 A number of documents in evidence prepared for or published by the AFL identify

challenges facing the AFL in various parts of Australia, especially New South Wales, Queensland and the Australian Capital Territory. For example, in the AFL's *104th Annual Report* (2000), the Chairman of the AFL Commission, Mr Evans made the following observations:

> *'the establishment of Australian Football as a truly national code played at all levels in communities throughout Australia is one of our key strategic objectives.*
>
> *Success in some states of Australia and not others will not satisfy our national aspirations. That is why we have increased significantly our investment in game development in New South Wales and the Australian Capital Territory during the past two years.*
>
> *We also accepted recommendations last year from an AFL-appointed review group to boost development of our game throughout Queensland.* ***Our vision for the northern states requires long-term investment if we are to bring about generational change in the way the broad community accepts and supports Australian Football****.*
>
> *At the same time, we are not overlooking the* ***traditional football [AFL] states*** *of South Australia, Victoria, Western Australia and Tasmania, which are the foundation upon which the game is built'.* (Emphasis added.)

1923 An earlier report entitled '*Broadcast Background Documents for AFL Commission*', prepared in February 1999, summarised data showing trends in the number of viewers attracted to AFL matches. In 1997, for example, the average ratings for major '*groups*' of matches varied from 3.6 and 4.6 in Brisbane and Sydney respectively, to 16.6 (Melbourne), 18.8 (Adelaide) and 17.3 (Perth).

1924 Professor Noll cited in his report a survey known as *The Sweeney Sports Report*. This is an annual national survey of Australians' sporting interests and is conducted throughout the year on the basis of interviews in the capital cities. The survey includes questions on the sports watched by interviewees. Professor Noll cited figures from the 1999/2000 and the 2003/2004 surveys. Oddly enough, the later survey was in evidence, but the former was not. The later survey showed very significant regional variations in viewer preferences. For example, 30 per cent of respondents in Sydney in 2000 watched AFL, while 54 per cent watched NRL. The comparable figures for Melbourne in 2004 were 58 per cent (AFL) and 27 per cent (NRL). The AFL in Brisbane attracted a viewer group of 54 per cent, while the NRL interested 61 per cent. Of course these figures do not distinguish between pay and free-

to-air viewing and do not reflect intensity or extent of viewing commitment or relatively transient factors such as the success in the 2003 AFL competition of the Brisbane Lions. Nonetheless, they point to very substantial regional differences.

1925 A paper prepared by Mr Keely of Optus in June 2001 referred to market research which showed that more than 85 per cent of Optus' current or future subscribers considered either AFL or NRL programming to be at least '*reasonably important*'. Mr Keely considered that losing the NRL was potentially more damaging than losing the AFL. He estimated that losing one of these sports might have a five to 12 per cent negative impact, while losing both could have a 10 to 21 per cent negative impact. Mr Keely noted that AFL was most important in Melbourne but NRL was most important in Sydney and Brisbane, a factor that accounts for his assessment of the differential impact of the loss of AFL and NRL rights.

1926 The evidence therefore supports the assumption on which both Professor Noll and Dr Smith proceeded, namely that channels with exclusive AFL and NRL content appeal to largely different audiences. This reflects regional differences in Australia and the strong '*tribal*' allegiance of supporters to particular clubs.

12.8.9.2 A QUESTION OF OVERLAP

1927 In his oral closing submissions, Mr Sumption submitted that it does not follow that, because some people are committed to one or other of the football codes, there is not a larger group of people who are prepared to watch either code. According to Mr Sumption, the evidence suggested that C7 and Fox Sports were substitutable, not for all consumers, but for a sufficiently large proportion of consumers, to warrant the conclusion that they were in the same market. This was said to be supported by the fact that Mr Philip and Mr Macourt both gave evidence that they regarded C7 and Fox Sports as competitors.

1928 In his closing submissions in chief, Mr Sumption did not refer to any evidence in support of this contention. In his oral reply he returned to the topic and repeated the contention that:

> *'there is clearly a substantial overlap between the AFL-watching and the NRL channel-watching public'.*

Again, however, he cited no evidence in support of the proposition.

1929 Mr Sumption attempted to remedy this deficiency by handing up, on the very last day of the trial, an aide-memoire identifying four documents said to provide evidentiary support for the submission. One of the documents is not in evidence. In my view, none of the others, at least without further explanation from witnesses, supports the proposition advanced by Mr Sumption.

1930 One of the documents, for example, is an internal Telstra paper addressing the possible supply of NRL content to Optus. The paper observed that Optus' loss of NRL programming should make Optus more willing to acquire AFL content from Foxtel because '*Optus TV **must** have a major Australian winter sport*' (emphasis in original). It is difficult to see how this statement demonstrates a substantial overlap between pay television subscribers who are particularly attracted by coverage of the AFL or the NRL Competition. Another of the documents relied on by Mr Sumption, a '*Pay TV Market Tracking Study'* prepared for Foxtel in June 2001, suggests that only a small proportion of people *'very interested*' in watching AFL or NRL on television are very interested in both. If anything, this document is inconsistent with the contention advanced by Seven.

12.8.10 General Sports Channel

1931 Despite urging in one context that AFL and NRL channels containing exclusive content are not close substitutes in demand, Seven argues in the present context that C7 and Fox Sports should be regarded as '*general sports channels*'. This is said to follow from the fact that their content was not limited to AFL and NRL programming, but included many other sports, particularly in the off-season. Seven further submits that a pay television platform can substitute a general sports channel which carries key subscription driving content with another sports channel with different subscription driving content.

1932 There are a number of obstacles in the path of this submission. It is difficult to understand how it can be reconciled with Seven's insistence, first, that C7 could not survive as a channel supplier without either the AFL or the NRL pay television rights and, secondly, that the two sporting codes are substantially complementary. Moreover, some of the evidence on which Seven relies to support the submission relates to possible **competition between general sports channels for the acquisition of rights**. For reasons I have given, this evidence has little relevance for present purposes.

1933 It is true that, as Seven contends, even sports channels with premium content ordinarily require additional sporting content. Mr Marquard, for example, gave evidence that diversity of sporting programs was important to Fox Sports for a number of reasons, particularly in the summer months:

> *'Major properties such as the NRL and rugby union are generally only played between mid-February and September. Between November and March, the Nine Network broadcasts extensive coverage of cricket played in Australia and the Seven Network broadcasts golf, tennis tournaments held in Australia and rugby union played overseas by the Australian team. Fox Sports has in the past employed, and continues to employ, strategies in those months to attract and retain subscribers. Examples are the acquisition of the broadcast rights to:*
>
> *(i) the English Premier League;*
>
> *(ii) the Australian National Basketball League … ;*
>
> *(iii) the Hopman Cup and more recently, the Australian Open Tennis tournament (pay television rights only);*
>
> *(iv) cricket matches featuring international test and one day teams;*
>
> *(v) various golf tournaments; and*
>
> *(vi) the play-off season to Major League Baseball and the National Football League [in the United States]'.*

The problems encountered by the Fox Footy Channel, which showed only AFL content and ultimately closed in September 2006, reinforce the importance of including additional sporting content in a channel containing marquee sports.

1934 It is, however, one thing to accept that even a sports channel containing subscription driving content must have additional sporting content. It is another to conclude that one sports channel with subscription driving content is a **close** substitute for another channel with different subscription driving content. As I have explained, the evidence strongly supports the view that Seven relies on elsewhere in its submissions, namely that channels with exclusive AFL and NRL content are the two key subscription drivers in Australia, but appeal to largely non-overlapping audiences. In those circumstances, it is difficult to see how C7 and Fox Sports could have been **close** competitors notwithstanding that each had general sporting content in addition to their respective premium sports. As I have explained, Seven's contention is in substance at odds with the opinions expressed by its own experts.

1935 Seven's Reply Submissions contend that even if C7 and Fox Sports should be classified, respectively, as an AFL and NRL channel, they would still be in the same market. This is said to follow primarily because a merged entity would not compete in price for the non-AFL or non-NRL content and would be able to extract additional fees from supporters of both codes. However, the submission rests on assertion only and is not supported by an empirical analysis of whether the merged entity would raise prices above the competitive level for each channel. Such an analysis would require examination of the extent to which non-premium sports shown on the channels were important to viewers (having regard to other sources of such content) and the extent to which the AFL and NRL Competitions have a common supporter base.

1936 Seven relies on Mr Stokes' evidence that if C7 had acquired both the AFL and NRL pay television rights in 2000, Fox Sports nonetheless would not have been administered a '*fatal blow*'. Mr Stokes justified this view on the ground that Fox Sports:

> *'still had rugby union and cricket, so they still had 12 months of good sporting product. We would have been the premier channel for the winter codes without question, but they would have been still a strong competitor'.*

1937 This evidence was given by Mr Stokes when he was asked to explain, in effect, why C7 needed either AFL content or NRL content to survive, yet was prepared to seek both sets of pay television rights to the exclusion of Fox Sports. In giving his answer, Mr Stokes seemed to me to be conscious of the potential difficulties for C7's case if he acknowledged that Seven's conduct in seeking to obtain both the AFL and NRL pay television rights inevitably would have led to the destruction of Fox Sports. I do not regard his evidence as providing support for the proposition that C7 and Fox Sports were close competitors in 2000 even though each carried different '*marquee*' sporting content.

1938 I do not think that the other evidence upon which Seven relies on this issue substantially advances its case. The evidence of the Optus witnesses, for example, supports the view that it needed both AFL and NRL content and additional sporting content. But the evidence does not suggest that one '*general sports channel*' with live and exclusive AFL content would be a close substitute for a second such channel with live and exclusive NRL content. Professor Fisher's evidence is of marginal significance on this issue because he rejected the concept of a separate sports channel market.

12.8.11 Conduct as Evidence of the Market

1939 Seven's submissions, not surprisingly, tread somewhat cautiously around the expert evidence, particularly that of its own experts, Professor Noll and Dr Smith. No doubt in recognition of the difficulties presented by that evidence, Seven analyses in some detail negotiations and contemporary observations that are said to demonstrate that C7 was a constraint on Fox Sports in the supply of sports channels to pay platforms. These negotiations and observations, according to Seven, strongly suggest that there is a separate market for wholesale sports channel suppliers in which C7 and Fox Sports competed.

1940 I shall deal in turn with Seven's contention that C7 constrained Fox Sports:

in the supply of channels to Foxtel;

in its pricing of channels to Austar; and

in its dealings with Optus.

12.8.11.1 SUPPLY OF FOX SPORTS TO FOXTEL

1941 Seven particularly emphasises Telstra's conduct in benchmarking Fox Sports against C7 and in putting pressure upon Foxtel to consider taking C7 instead of the Fox Sports channels. Seven acknowledges that the impact of Telstra's conduct was '*blunted*' by reason of the influence of News and PBL at the board and management level of Foxtel. Nonetheless, Seven says that Telstra played off C7 against Fox Sports and that both Mr Macourt and Mr Philip were concerned about the possible impact of C7 on Fox Sports as a supplier to Foxtel. Moreover, Seven submits that Telstra' records make it clear that C7 was seen by Telstra as direct competition for Fox Sports and that Telstra used C7 in negotiations relating to the pricing of the Fox Sports channels.

1942 There is no doubt that during 1998 and 1999 Telstra attempted to play off Fox Sports against C7 with a view to achieving a better price for the supply of the Fox Sports channels to Foxtel. Mr Philip recognised as much in his evidence. During this period, there were many examples of Telstra acting on the basis that Foxtel could achieve a better long-term deal with Fox Sports by invoking the threat of competition from C7. An illustration can be found in a meeting that took place on 17 December 1998 between Mr Blount and Ms Lowes of Telstra and Mr Lachlan Murdoch and Mr Macourt of News. Ms Lowes' notes record that

Mr Blount complained about the proposal that Foxtel pay Fox Sports US$5.25 pspm on a long-term basis, having regard to the Austar pricing of US$3.70 pspm for the Fox Sports channels. Ms Lowes asked at the meeting why Foxtel could not '*leverage a deal between C7 and Fox Sports*'. The answer given by Mr Macourt was that Foxtel would be hurt if it did not have the Fox Sports channels.

1943 Similarly, a Telstra board paper of 28 July 1999 recorded that:

> *'News has consistently indicated they would block Foxtel dealing with C7, thereby denying Foxtel the benefit of a competitive negotiation and a market price. Meantime, they are extracting and seeking permanently to extract the highest sports prices in the industry from Foxtel, knowing that Telstra is funding 50% of this, and News only 25%'.*

1944 Another example is a presentation made by Telstra to News and PBL representatives on 22 October 1999, in an effort to settle the ongoing dispute over the proposed programming deal between Fox Sports and Foxtel. The presentation included the following claims:

> '• *C7 offer to FOXTEL would have resulted in sports programming costs significantly less than those which would be incurred if the current FOX Sports offer is accepted*
>
> • *Contrary to News's assertions, research indicates the C7 programming line-up is as attractive to consumers as the FOX Sports line-up'.*

1945 Dr Switkowski became aware of the contents of the presentation at the time. He accepted in his evidence that Telstra's executives had reported to him that research had suggested that C7's '*line-up*' was as attractive as that of Fox Sports. On the basis of this material, Dr Switkowski formed the view that it was in Foxtel's interest to carry C7 and that it was '*possibly*' in Foxtel's interest to carry C7 instead of carrying Fox Sports.

1946 The significance of this evidence **for the purposes of market definition** must be assessed in context. The context includes the '*interim*' arrangements for the supply of the Fox Sports channels to Foxtel that had been entered into on 13 May 1998, by way of a sub-licence from Austar. In practice, these arrangements could not be altered without the agreement of all Foxtel partners (that is, News, PBL and Telstra). Thus Telstra, in its capacity as a Foxtel partner, was locked into the '*interim*' licence fee of US$5.25 pspm unless it could persuade both its partners to accept the merits of a different set of

arrangements. Telstra found itself locked into this unhappy position notwithstanding the view of Telstra executives, virtually from the outset of the interim arrangements, that the price of US$5.25 pspm for the Fox Sports channels was much too high and reflected an attempt by News and perhaps PBL to divert profits from Foxtel (in which they each effectively held a quarter share) to Fox Sports (in which they held a 100 per cent interest between them).

1947 The legal dimensions of the dispute between Telstra and News revolved around the Umbrella Agreement, which governed News' obligation in relation to the '*Alliance*' in the form of the Foxtel Partnership. News was obliged, under cl 7 of the Umbrella Agreement, to procure for the Alliance sports programming to which it or '*Related Bodies Corporate*' held rights:

> *'at a price and on other terms no less favourable to the Alliance than the price and terms available from other relevant sources for comparable program rights, or if not available then on reasonable commercial terms'.*

1948 As News contends, Telstra had to negotiate with News on the basis that the C7 channels were comparable in quality to the Fox Sports channels, if Telstra was to gain any comfort from cl 7 of the Umbrella Agreement. Internal Telstra documentation makes it clear that Telstra executives understood that a central issue was the reasonableness of the terms on which Fox Sports was being offered and that Telstra's interests were served by asserting that C7 was a sports provider comparable to Fox Sports.

1949 An example is a Telstra briefing document prepared on 1 September 1999 for a meeting that was to be held between Telstra and News to discuss the ongoing dispute. By this time, Telstra was contemplating legal action against News. The 60 page document pointed out that the objective of the Foxtel joint venture arrangement with News was to maximise the profitability of Foxtel. It was not to allow:

> *'partners to extract value via related party transactions at the expense of the other partners'.*

The document recorded management's view that the terms on which News had offered the supply of Fox Sports channels violated the Umbrella Agreement because they were *'essentially* ***not comparable*** *to similar sports packages'* and '***not commercially reasonable***' (emphasis in original). The document said News was attempting to extract profit from Foxtel

and transfer it to Fox Sports by persisting with a price of US$5.25 pspm. It also recorded that Telstra had utilised a number of analytical approaches to estimate the value of Fox Sports. These included international comparisons, an assessment of '*fair value*' and a comparison of Fox Sports to the '*only other comparable Australian pay-TV sports provider, C7*'. The analysis suggested that News' offer violated the terms of the Umbrella Agreement and was both unreasonable and unacceptable.

1950 Telstra was attempting to reduce the cost of sports programming to Foxtel because its executives thought that the price of the Fox Sports channels was excessive. Naturally enough, it developed arguments to support its contention. C7 was invoked as a useful point of comparison. But Telstra did not address (and had no occasion to address) issues relevant to whether C7 could constrain a SSNIP by Fox Sports. On Telstra's view, Fox Sports was charging Foxtel very much more than a reasonable or competitive price. Telstra's assessment in the document of 1 September 1999 of C7's attributes did not take account of the fact that AFL and NRL appeal to largely different audiences, but appears to have been based on a comparison of content between Fox Sports and C7 prepared by AT Kearney in August 1999. However, AT Kearney's comparison, which Ms Lowes herself thought was disappointing because it did not answer the real questions, hinted at the issue but did not explore it.

1951 In my view, once the evidence relating to Telstra's conduct in benchmarking Fox Sports against C7 is placed in context, it does not support Seven's contention that there was a separate market for wholesale sports channel suppliers in which C7 and Fox Sports competed.

12.8.11.2 SUPPLY OF FOX SPORTS TO AUSTAR

1952 Seven points to the fact that Fox Sports reduced its price to Austar in September 1998 from US$5.25 pspm (as negotiated in May 1998) to US$4.75 pspm, reducing to US$3.25 pspm for subscribers in excess of the first 250,000 subscribers. Seven relies on evidence which it says shows that the reduction in the price offered to Austar was the result of threatened competition from C7. That evidence includes:

> a News briefing note of October 1998, which acknowledged that it was imperative for Fox Sports that Austar retain the Fox Sports channels rather than move to C7, as it was threatening to do;

the records of the meeting of 17 December 1998 between Telstra and News, in which Mr Lachlan Murdoch said that News had to do the deal with Austar at the reduced price because Austar was negotiating with Seven and News risked losing Austar to C7; and

Mr Macourt's agreement in evidence that one of the reasons Austar gave for seeking a lower price was that it was exploring an '*attractive alternative*', namely a deal with Seven.

1953 Seven implicitly acknowledges in its submissions that C7 may not have constrained Fox Sports to a competitive price. PBL argues that it is possible to test the proposition advanced by Seven that, in the absence of competition from C7, Fox Sports would have been able to charge a monopoly price to Austar. PBL says that if Seven is correct, after Foxtel acquired the AFL pay television rights in 2000, the Foxtel-Fox Sports monopoly should have been able to increase the amount extracted from Austar for the supply of the *Fox Footy Channel* from that previously charged for the supply of C7. In fact, Austar negotiated terms of $2.00 pspm on a tier with Foxtel (for DTH and cable subscribers), precisely the amount it had previously paid for C7 (with its AFL coverage).

1954 PBL's submission may not be a complete answer to Seven's argument because the *Fox Footy Channel* was an AFL-only service, while C7 offered additional sporting content. In other words, while charging the same price, Foxtel may have been giving less. However, there are other difficulties in the path of giving too much weight to the Foxtel-Austar experience.

1955 The contemporaneous documentation shows that Austar, whatever its negotiating stance, decided that, because most of its customer base was north of Wagga Wagga, it could not afford to be without NRL coverage. This emerges most clearly from Mr Mann's letters of 27 July and 25 August 1998 ([640]-[641]). If anything, the correspondence reinforces the conclusion that C7, a sports channel carrying exclusive AFL matches as its primary subscription driving content, could not act as a close constraint on Fox Sports, carrying exclusive NRL matches as its primary subscription driving content. This conclusion is further reinforced by the fact that Austar was willing to pay very much more for Fox Sports than for C7. In July 1998, it offered to acquire C7, if carried on basic, for $4.50 pspm for the first 200,000 subscribers, reducing to $3.00 pspm for over 300,000 subscribers. By contrast,

in September 1998, Austar was willing to pay US$4.75 pspm for the first 250,000 satellite and MDS subscribers to Fox Sports and US$3.25 for each additional subscriber. (At the time $1.00 was equivalent to about US$0.59.)

1956 For these reasons, while the availability of C7 as a sports channel played a part in the negotiations between Fox Sports and Austar, the evidence does not support the contention that C7 constituted a close constraint on Fox Sports. Thus, in my view, the evidence does not support the wholesale sports channel market pleaded by Seven.

12.8.11.3 SUPPLY OF FOX SPORTS TO OPTUS

1957 Seven relies on attempts by Optus in 2001 to obtain the general Fox Sports channels to support the existence of the pleaded wholesale sports channel market. In the course of these attempts, warnings were given to Foxtel that if the channels were not supplied, Optus might be forced to keep C7 alive. (By 2001, it was known that Seven had lost the AFL pay television rights for 2002 to 2006.)

1958 An example is the warning given by Mr Anderson of Optus to Mr Chisholm on about 16 January 2001. The warning was recorded by Mr Anderson in an internal Optus email:

> *'either you sell us Fox Sports (which two of your shareholders – Packer/Murdoch tell me they want to do) – else we'll be forced to breathe life into C7 for the next six years'.*

According to Mr Anderson, Mr Chisholm '*understood*'. Conversations to similar effect took place later in 2001, including one between Mr Anderson and Dr Switkowski on 14 June 2001.

1959 These discussions must also be understood in context. Optus had been seeking to acquire the Fox Sports channels for a considerable period. (Optus already was entitled to NRL content in consequence of the Super League settlement and had been offering the C7 channels on its pay platform.) Optus had been thwarted in its attempts by the exercise of Telstra's veto on the supply of the Fox Sports channels to Optus. In 2001, Optus was aware that it was entitled to terminate the C7-Optus CSA, although the timing of that entitlement was a matter of dispute with Seven. During this period, Optus was considering a number of options for the future, including closing its pay television service.

1960 As Mr Anderson explained in his evidence, the references to breathing life into C7 were part of '*normal commercial negotiation[s]*' designed ultimately to secure the removal of Telstra's veto. Mr Anderson was using advocacy to see if Optus could get the non-exclusive content it had long wanted in the interests of its pay television platform. C7 was an obvious alternative if Telstra persisted in the exercise of its right of veto over the supply of the Fox Sports channels to its telephony competitor.

1961 In my opinion, the evidence relied on by Seven concerning the negotiations between Fox Sports and Optus does not provide substantial support to the proposition that C7 was a close competitor of Fox Sports in any wholesale sports channel market.

12.8.12 Views of Market Participants

1962 Seven submits that the evidence supports the proposition that industry participants regarded C7 as a close competitor of Fox Sports in the wholesale sports channel market. The evidence relied on, however, is for the most part to the same effect as that already discussed. Furthermore, to the extent that contemporaneous comments of market participants might suggest that C7 and Fox Sports were competitors, the comments often indicate that the participants were perceived as competitors in relation to the acquisition of sports rights, rather than in relation to the supply of sports channels.

1963 Several of the Telstra documents cited by Seven, for example, explicitly referred to Fox Sports' ability to negotiate content supply at lower rates or to negotiate pay rights for '*weak*' sports. A draft PBL business plan for 2002 to 2007, to which Seven refers, is equivocal on the question of C7 and Fox Sports as competitors in a wholesale sports channel market. Among other things, the draft plan describes free-to-air sports as a '*direct substitute*' for Fox Sports (a view contrary to Seven's case on the retail television market) and classifies C7 and ESPN together merely as the '*only other pure sports channel providers*'.

1964 Seven also points to Mr Philip's agreement in cross-examination that he regarded C7 as the most significant competitive threat to Fox Sports in the sports channel supply business between 1998 and 2000. However, Mr Philip's perception was also that ESPN represented a significant competitive threat, suggesting that he was not necessarily thinking in terms of close competition. Moreover, his attention was not directed to what seems to me the critical issue, namely the fact that C7 and Fox Sports, by reason of their different marquee sports

content, appealed to largely discrete groups of viewers. I do not think that his evidence overcomes the difficulties facing Seven in establishing that there was at the material times a wholesale sports channel market in which C7 and Fox Sports were close competitors.

1965 As I have noted earlier in this Chapter ([1798]), conduct or expressions of opinion by market participants may be ambiguous on questions of market definition. The fact that a person may have described C7 as a competitor of Fox Sports is not necessarily an indicator that the person regarded C7 as a competitor of Fox Sports in the particular wholesale sports channel market pleaded by Seven. I do not mean to suggest that evidence of this kind is only probative of the existence of a particular market if an industry participant specifically directs attention to the precise dimensions of that market. But a comment to the effect that C7 was a competitor of Fox Sports may carry relatively little weight if it does not imply that C7 was a close constraint on Fox Sports as a wholesale sports channel supplier.

12.8.13 No Wholesale Sports Channel Market as Pleaded

1966 In my opinion, the weight of evidence does not support Seven's contention that during the period 1998 to 2000 there was a wholesale sports channel market in which C7 and Fox Sports were close competitors. Whether or not there is or was any market which could be described as a wholesale sports channel market, I agree with PBL's submission that C7 (built around long-term AFL pay television rights) and Fox Sports (built around long-term NRL pay television rights) were not substitutes in demand or supply. Seven has therefore not established the existence of the wholesale sports channel market with the characteristics pleaded by it.

12.9 Wholesale Sports Channel Market: A Separate Functional Market?

12.9.1 The Respondents' Contention

1967 In view of the conclusion I have reached, it is not necessary to consider the merits of the Respondents' contention that at the material times there was no separate functional wholesale sports channel market. The Respondents' contention was succinctly articulated by Professor Hay:

> *'to the extent [the] Applicants are claiming the existence of a separate relevant market for the production of wholesale premium sports channels, where a premium sports channel is defined as one that includes one of the*

marquee sports in Australia (at a minimum, NRL and AFL), I do not believe that the economic analysis that underlies issues of market definition supports the claim. If a hypothetical single producer of wholesale premium sports channels set out to acquire the NRL and/or AFL rights with the notion of attempting to impose supra-competitive prices on the customers for those channels (the suppliers of pay TV services), there would be nothing to prevent one or more of the providers of pay TV services from integrating backwards, acquiring the rights directly from the leagues, and either including the matches on existing channels or creating speciality channels. Nor would a hypothetical single producer of premium sports channels be able to depress the price paid for the rights to the marquee sports below competitive levels, given the ability of the leagues to integrate forward into the production of sports channels or to sell the rights directly to the providers of pay TV services'.

1968 Professor Hay elaborated on this analysis in the cross-examination:

'[MR SHEAHAN]: I gather from your report that you consider any attempt by a single premium sports channel to raise its wholesale price, that is to networks, above competitive levels would be unsustainable; is that right? --- It would be unprofitable.

Would be unprofitable? Unprofitable because? --- Because I think the networks have alternatives.

What do you see those alternatives as being? --- Putting together their own channel. Buying a channel directly from the league. Buying a channel from someone else who is not currently in the channel business. Perhaps, for example, a free-to-air broadcaster might decide to go into the channel supply business. My only point is: looking at any one point in time at who is now producing channels, premium sports channels, simply doesn't tell you anything about the competitive landscape. For one thing, normally there's only going to be two of them, one of them producing an NRL channel and one of them producing an AFL channel. That's almost – I wouldn't say it's certain, but that's simply the fact. So you look at it and say, "What have I learned about the competitive analysis?" Not much. You need to look over the longer run and look at the alternatives available to leagues on the one hand and to platforms on the other hand.

HIS HONOUR: When you talk about a channel supplier in this context, are you just referring to the services of putting together a program or are you including a service that involves rights, the acquisition of rights having been acquired as an essential input? --- Again, at that point, once someone has the rights to, let's say, the AFL games, obviously if I want the AFL I have to deal with them. If you take a longer run perspective and you say, "I think this person may be trying to extract too much," then your longer run strategy is to bid for the rights yourselves or to go to the league and suggest that the league put together a channel. So there are a variety of options you have.

But, when you were talking about a channel supplier, you were assuming that the channel supplier was somebody who had the relevant rights was supplying not only the technical services of putting a program together but the rights as well? --- A channel supplier is someone who is currently actively engaged in the process of maintaining and selling a channel with the rights obviously that are needed for that to occur'.

1969 It is inherent in Professor Hay's reasoning that the mere fact that there are several channel suppliers in business at a given time (a fact relied on by Seven to demonstrate that there is a separate wholesale sports channel market) does not reveal a great deal about the competitive landscape. Moreover, according to Professor Hay, a pay television platform integrating backwards is not merely a theoretical possibility, since it is precisely what Foxtel did when it acquired the AFL pay television rights for 2002 to 2006 through News, rather than through a channel supplier.

1970 Professor Fisher's analysis was to the same effect as that of Professor Hay:

'I find that the pleaded channel markets are too narrowly defined because they fail to take into account all the constraints faced by the channel providers as sellers. A channel provider can be thought of as yet another seller of rights. It essentially assembles a bundle of pay television programming rights (among other things) to on-sell. Pay television operators can, and do, "go around" channel providers and purchase rights directly (and/or produce the programming themselves). Pay television operators have in the past effectively bypassed channel suppliers (as intermediaries) and themselves compiled channels after acquiring broadcast rights. The most obvious example is Foxtel's production of the Fox Footy channel. I find that the ability of pay television operators to purchase rights directly serves as an immediate constraint on any wholesale sports channel provider.

If a wholesale sports channel provider, such as Fox Sports, were attempting to exercise monopoly power in its sale of the collection of rights to pay television operators, the rights holders and/or the pay television operators are effectively able to constrain that power by "going around" the channel provider and dealing with each other directly. Thereby, the channel providers compete with – and are constrained by – these other sellers of rights. Accordingly, channel providers do not themselves constitute a relevant market. For these reasons, there is no relevant wholesale sports channel market nor is there a relevant wholesale channel market'.

1971 In cross-examination it was put to Professor Fisher that what he was describing was a sports channel market in which there were potential entrants, namely pay television networks integrating up the supply chain and the sports leagues integrating down the chain. The

discussion continued:

> *' --- You can, if you wish, describe it that way, but I think it ends up being quite misleading to talk about a separate market and then take entry separately, because entry seems to me to be so easy that one would be better off describing those other players as already in the market. If you don't do that, it's okay, so long as you realise there can be no market power in the so-called sports channel market because entry is so easy.*
>
> *HIS HONOUR: But is there any difference in assessing whether market power exists or the extent of it as to whether (a) there is a separate sports channel market with relative ease of entry in the way that Mr Sheahan has described or (b) a sports channel market that incorporates as players, if you like, the sports organisations like the AFL and the NRL and also incorporates the pay platforms? Is there any practical difference between those two concepts? --- Your Honour, I don't think there is, and I think it is a matter of serious principle that the conclusions at any time to be reached anywhere about market power should not simply depend on the way you choose to define markets. You can do it either way so long as you remember how you are doing it.*
>
> *But, in any event, your view from the perspective of assessing market power within the market, however defined, is that it is not going to make a great deal of difference how one describes the market? --- Yes.*
>
> *As between the two alternatives that we have discussed? --- Yes, your Honour'.*

12.9.2 The Contention Should Be Accepted

1972 If it were necessary to do so, I would accept the analysis put forward by Professors Hay and Fisher. As I have noted, the characteristics of the pay television industry at the relevant times included the award of exclusive premium sports rights on a long-term basis, ordinarily followed by the negotiation of similarly long-term contracts for the supply of sporting content (terminable in the event of loss of rights). The existence of relatively long term licensing agreements for the AFL and NRL pay television rights prevents supply side substitution except when the rights become available.

1973 As Dr Smith appeared to accept, the constraint on a supplier or potential supplier of sporting content, in these circumstances, comes at the point at which the rights become available. The point emerges in the following extract:

> *'MR HUTLEY: Dr Smith, turning to the competitive environment at the time of the auctions for the rights, of course another constraint in that competitive*

environment is the capacity of platforms to acquire rights; correct? --- Platforms could directly acquire rights, yes.

And in effect vertically integrate them; correct? --- Once they acquire the rights, they have to do something with them. If they choose to produce them themselves, then that would be vertical integration.

And that's a direct and immediate constraint upon channels' capacity to seek to SSNIP; correct? --- Independent channels, yes.

Quite. By "independent channels" what do you mean? --- I mean parties that are not related by ownership.

...

Dr Smith, on the assumptions that you have been asked to make for the purposes of analysing whether there is a channel market in which Fox Sports is constrained, having regard to your view as to the centrality of the rights auctions, ***it is obvious that a constraint upon Fox Sports on seeking to impose a SSNIP, that is monopolising the market, would be the capacity of Foxtel, if confronted by such an attempt, to vertically integrate: correct? --- If they expected that the rights would be used by Foxtel rather than placed with Fox Sports, then, yes, I would agree with that****'*. (Emphasis added.)

1974 On the approach taken by Professors Hay and Fisher, the ability of any premium sports channel supplier to extract sustained returns above the competitive level would be constrained by the ability of the pay television platform to '*integrate backwards*' by securing the rights for a competitive price at the first opportunity. The channel supplier would also be constrained because others, particularly free-to-air operators, could acquire the rights with a view to creating channels with premium sports content (specifically, exclusively live or live and exclusive AFL or NRL content).

12.9.3 A Real World Foundation?

1975 Seven's principal objection to the Respondents' analysis is that the opportunities for vertical integration do not signify that two functional levels should be treated as a single market unless the efficiencies of integration are overwhelming. The efficiencies are said to be negatived by the survival of non-vertically integrated firms. According to Seven, only Foxtel is vertically integrated into sports channel production. The evidence, however, suggests that, contrary to Seven's submissions, there is a '*real world foundation*' for the Respondents' contentions.

1976 In brief, the examples of actual or contemplated vertical integration by pay television platforms or others include the following:

> By cl 6 of the 1997 First and Last Deed, Seven made an '*irrevocable offer*' to create a joint venture with the AFL to exploit the AFL pay television rights. While the offer was never accepted, cl 6 shows that the potential was present for the AFL in effect to become a channel supplier and thus integrate '*forwards*'.
>
> In September 1998, Ms Lowes of Telstra proposed a list of special events to Mr Philip of News. Telstra's view was that these events, such as the AFL, Rugby World Cup and cricket, should not be included in any deal with Fox Sports, but '*should be purchased separately through special purpose joint ventures*'. As News submits, this indicates a potential constraint on Fox Sports, in that Telstra was proposing to acquire rights directly, although the implementation of the proposal encountered obstacles because of the arrangements among the Foxtel partners.
>
> In October 1999, the board of Foxtel Management approved in principle a strategy known as '*Network AFL*' for acquiring the AFL pay television rights. Network AFL contemplated the establishment of a joint venture between the Foxtel Partnership and the AFL. Under the strategy, the joint venture would acquire the AFL pay television rights and be the exclusive distributor, with the non-exclusive rights to be offered to each of the three major pay platforms. Foxtel was to bear the early losses and share the profits with the AFL once they were derived.
>
> From 1998 until 2000, Optus held the right to broadcast NRL matches on pay television by way of a sub-licence from News. During this period, both Optus and Foxtel were involved in a co-operative arrangement for the production of NRL matches for broadcast on the pay television platforms. In the event, Optus retained All Media Sports Pty Ltd to produce the NRL matches allocated to it, while Foxtel engaged Fox Sports for the purpose. In January 2001, Optus and Fox Sports agreed that Fox Sports would supply NRL content to Optus. However, this followed Optus' rejection, on financial grounds, of an offer by the NRL to grant Optus directly the non-exclusive NRL pay television

rights.

In late 2000, Austar proposed a joint venture with C7 to take effect if Seven won the NRL pay television rights. The joint venture was to involve the creation of a new NRL-based channel, with additional content to be agreed. Mr Wood remarked in an email to Mr Gammell on 29 October 2000 that:

> *'Austar have a strong incentive to back us in a bid for NRL rights ... as they have a very onerous $US contract with Fox Sports which falls over if Fox cannot deliver the NRL'.*

In addition, Austar was a 50 per cent shareholder (with Foxtel) in XYZnetworks Pty Ltd ('**XYZ**') which supplied a variety of (non-sports) channels to pay television platforms.

(Seven attempts to discount the significance of Austar's interest in a joint venture on the grounds that Austar did not propose creating a sports channel itself and because Austar stated in a letter to the ACCC, written some twelve months later, that it did not create content but merely licensed channels. In my view, the significance of the discussions between Austar and Seven, for present purposes, is that Austar was considering supporting a bid by C7 for the NRL pay television rights. This suggests that, notwithstanding what was said a year later, Austar might well have given serious consideration to acquiring sporting rights and producing a sports channel by means of a joint venture, if a premium sports channel supplier attempted to increase prices to a supra-competitive level.)

The Fox Footy Channel was placed on air by Foxtel in time for the 2002 AFL season, about a year after News exercised the Foxtel Put in January 2001. While it is not easy to disentangle the interests of the individual Foxtel partners, the evidence shows that Foxtel had genuine commercial reasons for producing its own AFL channel, rather than accepting a Fox Sports proposal for a similar channel. In particular, as shown by a Foxtel document analysing the competing proposals, the Fox Footy option was considerably cheaper than the Fox Sports alternative.

(Mr Sumption emphasised that Fox Footy had not been a commercial success.

However, that of itself does not detract from the significance of the venture as an illustration of the alternatives open to a pay television platform seeking to counter an attempt by a hypothetical monopolist sports channel supplier to raise prices above a competitive level. Mr Sumption himself attributed the failure primarily to the absence of any fresh off-season content. The evidence establishes that it would have been open to Foxtel, had it wished to do so, to supplement the AFL content on the channel with other sporting content. The decision to proceed with an AFL-only channel, rather than to incorporate additional sporting content, was a commercial one.)

12.9.4 Additional Obstacles?

1977 Seven relies on a number of obstacles that it says any potential sports channel supplier would encounter. Most of these are mentioned in the context of Seven's contention that there are high barriers to entry in the wholesale sports channel market. Of course, this particular contention assumes the existence of such a market, the very point in issue here. However, Seven relies on some of these barriers as demonstrating the unlikelihood of a pay television platform or sporting league (or anyone else) integrating backwards or forwards in response to a channel supplier's attempt to impose a supra-competitive price for its premium sports channel.

1978 Seven identifies many potential obstacles, some of which are of little import. The major matters on which it places most reliance appear to be the following:

the costs and difficulty of establishing a new sports channel;

the timing and duration of sports rights contracts, making it difficult to obtain not only premium content but the secondary sports content required for a sports channel;

the close connections between Foxtel and Fox Sports, making it highly unlikely that Foxtel would act adversely to the interests of Fox Sports; and

the dominance of Foxtel as a retail platform, coupled with the uncertainty of whether Foxtel would be prepared to negotiate on commercial terms with a new channel supplier, especially one that might threaten the interests of Fox Sports.

1979 In support of the last point, Seven says that it is necessary to take account of:

> *'Foxtel's clear signalling to the industry that it will not accept carriage of any channel which competes with Fox Sports'.*

Seven also relies on Dr Smith's observation that:

> *'Conduct by an oligopolist may result in a change in market structure, for example by raising barriers to entry, or the conduct itself may deter entry, for example by signalling the likelihood of an aggressive response to entry which would be likely to result in substantial and ongoing losses for the entrant, or by restricting access to the customer base in some way (for example via long term contracts). Such conduct may significantly raise the expected cost of entry and so may confer market power on the firm concerned, that is, the strategic conduct is the source of the firm's market power'.*

1980 To some extent, Seven's arguments are undercut by the examples of actual or contemplated vertical integration to which I have already referred. They are further undercut by evidence from Seven's witnesses or its own actions.

1981 Mr Stokes was asked by Mr Meagher about his perceptions as to the alternatives available to the AFL and the NRL Partnership when disposing of their sports rights in 2000. Mr Stokes agreed that they could have dealt with the rights in various ways, including selling to:

> entities such as C7 and Fox Sports for supply to pay television operators;
>
> production houses such as Artists Services Pty Ltd (which had offered to produce AFL content and supply it to Seven and free-to-air broadcasters);
>
> other parties, such as ESPN, which might be interested in producing a sporting channel (ESPN at one stage having expressed an interest in acquiring the AFL pay television rights on its own account); or
>
> pay television operators such as Foxtel, Optus or Austar.

1982 The reference to ESPN is of some importance in the present context. Mr Gammell accepted in his evidence that at all material times he believed that ESPN was in a position to develop substantial Australian sports content on its channel. He said that he understood in mid-1998 that ESPN was looking to develop its Australian sports content.

1983 Mr Stokes also agreed that the options available to a sports rights holder included participating in joint ventures with free-to-air operators such as Seven, with a view to onselling channels to pay television operators. Mr Stokes acknowledged that the First and Last Deed negotiated in 1997 involved a possible joint venture between Seven and the AFL. Mr Stokes also agreed that consideration had been given within Seven in July 2000 to a proposal whereby Optus would acquire the NRL pay television rights and Seven would produce the content for Optus and other pay television operators.

1984 Elsewhere in his evidence, Mr Stokes agreed that it was '*pretty easy*' for an organisation such as Seven to set up a new pay television channel. He reiterated that point in the context of explaining C7's bid for the NRL pay television rights. Mr Stokes commented that Seven already had the resources to produce most of the NRL games, in part because Seven's existing resources had been under-utilised. He said that he was satisfied that Seven had the skills, expertise and personnel necessary to produce the NRL content.

1985 In a similar vein, Mr Wood, when questioned about the discussions that Seven had held with Optus in July 2000, said that he saw no impediment at the time to a free-to-air station such as Ten taking over the production and supply of channels to Optus as a pay television operator. The views expressed by Mr Stokes and Mr Wood reflect the fact that free-to-air broadcasters usually have the facilities and expertise required to produce such channels and can do so quite easily. They also tell against Seven's contention that the editorial and compilation functions involved in the creation of a sports channel mean that the supply of the channel cannot be regarded as a close substitute for the pay television rights themselves. The evidence suggests that once the rights have been acquired the rest is relatively easy. The rights are the critical component.

1986 Mr Stokes readily agreed that when Seven was considering acquiring the NRL pay television rights, one possibility was that it would create a new channel built around the rights. In this context, Mr Stokes accepted that if Seven had to create a new channel, it would have had no difficulty in acquiring additional sporting content within about three or four months. Indeed, his evidence was that there would have been no difficulty in acquiring additional sporting content required for two full-time channels, one built around the AFL content and the other around NRL content. As Mr Stokes said:

'There was lots of programming available … There isn't a shortage'.

1987 Mr Stokes evidence on this point is not surprising. News' written submissions set out in detail rights to various sporting events or competitions that became available during the period 1998 to 2000. News' submissions also set out in some detail the opportunities available to Seven to acquire sporting rights during 2001 and 2002. It is not necessary to recount this material. It is enough to observe that the material amply supports Mr Stokes' own assessment.

12.9.5 Seven's Role in 2000 and 2005-2006

1988 Mr Sumption acknowledged in his oral submissions that Seven's '*strategic barrier*' argument must confront the fact that:

> in late 2000, Seven was prepared to bid for the AFL broadcasting rights and belatedly (through Mr Stokes) to offer $30 million per annum, for certain AFL pay television rights; and
>
> in 2005, Seven (in combination with Ten) was prepared to acquire, through the exercise of its last right, the AFL broadcasting rights for the period 2007 to 2011.

In each case, Seven was prepared to bid for or acquire rights notwithstanding Foxtel's so-called '*signalling*' conduct and Seven's awareness of the relationship between Foxtel and Fox Sports. Indeed, on Seven's case, Foxtel's conduct in refusing to take C7 in 1999 and 2000 was aimed specifically at Seven and its pay television channel supplier. Yet Seven was prepared to participate in the bidding process on each occasion, albeit by the exercise of its last right in 2005.

12.9.5.1 SEVEN'S OFFER IN 2000

1989 Seven seeks to explain its involvement in the 2000 AFL broadcasting rights process primarily on the basis that it wished to take advantage of the MSGs provided for in the C7-Optus CSA. No doubt this was a factor in Seven's decision-making. But as PBL submits, Mr Stokes' willingness to offer $30 million per annum for the AFL pay television rights in December 2000 or January 2001 is explicable only on the basis that he believed, notwithstanding the '*signals*' conveyed by Foxtel, that Seven would obtain carriage on Foxtel if it (Seven) acquired the AFL pay television rights.

1990 Mr Sumption appeared to concede as much in his oral closing submissions. That concession is not surprising (even if it is refreshing), given the evidence. Mr Gammell told the AFL on two separate occasions in August 2000 that C7 would get on Foxtel because Foxtel could not afford to keep C7 off its pay television platform. Mr Wise confirmed the conversations and agreed that Mr Gammell's position reflected his own view at the time.

1991 I am prepared to accept readily that any potential acquirer of premium sporting rights would need to pay careful attention to the likelihood of any sports channel built around those rights being licensed on commercial terms to Foxtel, the principal pay television platform. In theory, it may be possible for such a potential acquirer to discount entirely the prospect of a sale to Foxtel, relying instead on selling the entirety of, say, the AFL broadcasting rights to a combination of free-to-air broadcasters. However, in practice, a prospective new entrant is less likely to be able to meet a hypothetical single channel supplier's attempt to impose a SSNIP for an AFL-based channel by directly acquiring the AFL pay television rights, if the entrant assesses that it is unlikely to gain access to the principal pay television platform.

1992 The experience in 2000 suggests that a potential new sports channel supplier would proceed on the basis that Foxtel would act rationally in its own commercial interests and would negotiate in a reasonably predictable way with a new supplier of an AFL-content or NRL-based channel. If Seven, said to be the target of Foxtel's conduct in 1999 and 2000, was prepared to bid for the AFL pay television rights on the basis that it would be able to sell its AFL channel to Foxtel, it is difficult to see why any other potential premium sports channel supplier would take a different view. The AFL seems to have reached that conclusion, since Seven's solicitors told the ACCC in December 2000 that the AFL was confident that there would be additional bidders the next time around.

1993 It is also material that in December 2000 Seven was prepared to bid $60 million per annum for the NRL pay television rights. Mr Stokes gave evidence to the following effect:

> he told the Seven Network board that, although he could not guarantee anything, he expected that if C7 acquired the NRL pay television rights, it would succeed in getting on the Foxtel platform;
>
> his advice to the board reflected his reasonable belief at the time;
>
> the fact that Seven had no contract with any pay television operator for the

carriage of an NRL-content channel did not prevent C7 from '*bidding a full price*' for the NRL pay television rights; and

he regarded Seven in late 2000 as a new entrant in the market for NRL pay television rights.

1994 I agree with Mr Meagher's submission that this evidence is inconsistent with the existence of a strategic barrier of the kind relied on by Seven. On Mr Stokes' evidence, Seven was prepared to bid a full price for the NRL pay television rights in the expectation that C7, with NRL content, could be sold to Foxtel, notwithstanding Foxtel's refusal in 1999 and 2000 to take the C7 channel. Moreover, according to Mr Stokes, Seven was prepared to bid for the NRL pay television rights knowing that it might also succeed in its bid for the AFL pay television rights. This evidence is difficult to reconcile with Seven's contention that any potential sports channel supplier would be deterred from bidding to a competitive level for premium sports rights by any '*signals*' given by Foxtel as to its willingness to negotiate on commercial terms.

12.9.5.2 SEVEN'S SUCCESS IN 2005

1995 Seven succeeded in 2005 in acquiring the AFL broadcasting rights for 2007 to 2011. This success provides further evidence that Seven did not see Foxtel's '*signals*', nor its apparently dominant place in the retail pay television industry, as a barrier to paying what seems to have been a full price for a package of AFL broadcasting rights, including the right to sub-license to pay television operators.

1996 It is true, as Seven points out, that Seven and Ten acquired the AFL broadcasting rights pursuant to the exercise of the last right under the First and Last Deed. It is also true that the form of the final agreement was dictated by the structure of PBL's offer to the AFL and that the initial offer by Seven and Ten sought live and exclusive rights only to five free-to-air AFL matches per round (although later offers extended to all AFL matches). Nonetheless, the simple fact is that Seven and Ten agreed to accept an offer reflecting the terms of PBL's offer. Moreover, Seven made its decision on the explicit basis, set out in its internal communications, that Foxtel would be likely to negotiate on commercial terms for a sub-licence of the AFL pay television rights (that is, the rights to broadcast exclusively on pay television those AFL matches not required by the free-to-air operators).

1997 In making this assessment, Seven doubtless took into account the fact that Foxtel's position in 2005 and 2006, in relation to AFL content, was somewhat different from its position in 2000. By late 2005, Foxtel had been offering AFL content to subscribers for four seasons, whereas in 2000 it had yet to provide such content. Foxtel had a particular incentive in 2005 and 2006 to secure AFL content for the succeeding seasons, in order to avoid '*churn*' (loss of subscribers) if it ceased to provide content highly prized by some subscribers. On the other hand, Seven's assessment in 2000 took into account Foxtel's need to obtain the AFL in order to improve its penetration into the southern States.

1998 In 2005-2006 Seven also contemplated as a serious commercial possibility that the AFL pay television rights, if necessary, could be sub-licensed to other channel suppliers. Contrary to Seven's Reply Submissions, it is not entirely '*fanciful*' to include ESPN in the category of potential sub-licensees, since the evidence suggests that Seven at one time took seriously the possibility of negotiating with ESPN with a view to ESPN taking a sub-licence of the AFL pay television rights. (I should record that Seven made a belated suggestion, apparently based on the AFL's submissions, that the terms of the offer accepted by Seven pursuant to the First and Last Deed permitted it to sub-license the pay rights only to Foxtel or Austar. The point was not developed and, in my view, lacks substance.)

1999 There was no evidence as to the outcome of negotiations between Seven and Ten (on the one hand) and Foxtel (on the other) concerning the sub-licensing of the AFL pay television rights for 2007 to 2011, following the exercise by Seven and Ten of the last right. It is clear that, by the time the evidence closed in this case, the negotiations had not borne fruit and, indeed, the parties were then a considerable distance apart. However, I do not draw the inference that it was unlikely that the negotiations would ultimately result in a sub-licensing agreement on commercial terms between the rights holders and the major pay television platform. The hearing concluded some months before the commencement of the 2007 AFL season and at that stage the negotiations had a long way to go.

2000 Seven submits that PBL went to some lengths to construct its offer for the AFL broadcasting rights in 2005 in a restrictive manner. According to Seven, PBL wished to ensure that the terms of the last offer by the AFL (which had to mirror PBL's offer) would force Seven and Ten to recognise that they needed Foxtel's co-operation to make the acquisition of the AFL broadcasting rights commercially worthwhile. If anything, Seven's

submissions highlight the nature of the calculations underlying Seven's decision. Even if PBL had the motives Seven attributes to it, Seven was quite prepared to commit itself to acquiring the AFL broadcasting rights **without any agreement with Foxtel being in place.** Seven no doubt had fall-back positions available, such as sub-licensing '*surplus*' AFL broadcasting rights to other free-to-air operators. But sub-licensing to Foxtel was always likely to be the most direct avenue for Seven (and Ten) to recoup from a third party a significant portion of the outlay for the AFL broadcasting rights.

2001 Seven submits that I should find that Seven had decided in late 2005 or early 2006 that it would not set up its own sports channel. While there is no evidence that Seven gave active consideration to the option of setting up its own sports channel, there is also no evidence that Seven had ruled it out. Given Mr Stokes' evidence as to the ease with which a free-to-air operator could create a new sports channel incorporating AFL content, it seems to me that the creation of such a channel was a realistic commercial option available to Seven, even though it may not have been the preferred option. Whether as events turned out there would be any particular advantage to Seven in taking this course is not a matter that I need to address.

12.9.6 Conclusion

2002 In view of the conclusion I have reached that C7 and Fox Sports were not competitors in a wholesale sports channel market as pleaded by Seven, it is not necessary to consider whether, at the material time, there was a separate functional wholesale sports channel market. Nonetheless I have addressed that issue.

2003 In my view, Seven has not established that there was such a market. The fundamental reason for so concluding is that an attempt by a sports channel supplier holding the AFL or NRL pay television rights to impose a SSNIP could be met by a pay television platform or a third party acquiring the AFL or NRL pay television rights at a competitive price when they became available. The evidence establishes that it is relatively easy, once the rights have been acquired, to join with an existing channel supplier or free-to-air operator or to set up a new channel. It is not helpful, in the setting in which AFL and NRL pay television rights are acquired and exploited through sports channels, to assess market power by reference to sports channel suppliers.

12.10 Retail Pay Television Market

12.10.1 Pleadings

2004 Seven pleads that there is and has been since at least November 1998 a market in Australia for retail supply of pay television services to subscribers ('*the retail pay television market*') as follows:

> *'(a) The market is an Australia-wide market for the retail supply of pay television services.*
>
> *(b) The principal suppliers of pay television services in the market are Foxtel, Optus and Austar.*
>
> *(c) The service is distinct from, and not substitutable with, the free-to-air television services provided by the free-to-air television networks. A free-to-air television service provides only one channel with programming of general appeal, which is free, whereas a pay television service provides, amongst other things:*
>
> *(i) a package of multiple television channels;*
>
> *(ii) channels which conform to a particular genre or subject, such as a news channel, a movie channel, a documentary channel;*
>
> *(iii) programming that is not available, and of a type which is not available, on free-to-air services;*
>
> *(iv) cable/satellite quality transmission;*
>
> *(v) programming of narrow appeal or niche programming;*
>
> *(vi) fewer advertisements, in particular during movies; and*
>
> *(vii) repeats of some programming at different times and dates,*
>
> *for which the subscribers pay a fee.*
>
> *(d) The conduct of providers of retail pay television services, and the price at which providers of retail pay television services provide services, is not constrained, or alternatively not constrained to any significant extent, by the activities of free-to-air broadcasters'.*

2005 The existence or otherwise of the retail pay television market as pleaded by Seven is important for several purposes. In particular, Seven says that:

> the Master Agreement Provision and the other provisions on which it relies

relating to the acquisition of the AFL pay television rights, had the purpose or effect or likely effect of substantially lessening competition in (among others) the retail pay television market;

the Foxtel-Optus CSA of 5 March 2002, by which Foxtel and Optus formalised their content sharing arrangements, also had the purpose or effect or likely effect of substantially lessening competition in the retail pay television market; and

Foxtel took advantage of its substantial power in the retail pay television market for a proscribed purpose by refusing to accept offers made by C7 to supply its channels to Foxtel, thus contravening s 46(1) of the *TP Act.*

12.10.2 Seven's Submissions

2006 Seven submits that the relevant question is whether a hypothetical pay television retailer monopolist could profitably impose a SSNIP. If not, the products or services which constrain the hypothetical monopolist are in the same market as those provided by the monopolist. Seven accepts that a quantitative analysis is not feasible and it is therefore necessary to '*undertake a qualitative approach, drawing inferences from available evidence'*.

2007 Seven contends that the retail market for pay television does not include free-to-air television because pay television caters to consumer preferences that are not met by free-to-air television. Pay television does this because:

the demand for television entertainment exceeds the output of the free-to-air operators, which are constrained by restrictions on the number of free-to-air licences and by prohibitions on multi-channelling;

it is not '*output constrained*' in the same way as free-to-air television, in that it offers multiple channels of programming that cater to many different consumer preferences at the one time; and

it aims to increase the numbers of subscribers, not viewers.

2008 Pay television is therefore highly differentiated from free-to-air television and, for that matter, other entertainment products such as first run movies or DVDs. Seven submits that the strong differentiation of pay television content indicates that the demand for it is highly

price inelastic. A SSNIP would not cause movement along the demand curve that would render the increase in price unprofitable.

2009 From a supply perspective, the free-to-air networks have no capacity to respond competitively to a SSNIP by retail pay television platforms, since they do not charge viewers a fee and the quality of their service is already maximised by reason of competition between the free-to-air operators. Furthermore, Foxtel's pricing policies, in particular its ability to charge more for satellite than for cable and more for digital than analogue, show that free-to-air operators are not a close constraint on the competitive price for pay television.

2010 Seven emphasises the different business models of pay television and free-to-air operators. The latter seek to attract mass audiences and to sell audiences to advertisers. Pay television retailers, by contrast, attempt to satisfy the breadth of demand for television viewing, arising from '*the heterogeneity of consumers' preferences*'. Their business model aims to maximise subscription revenue. Pay television operators therefore, seek to induce consumers to subscribe rather than to maximise subscribers' viewing of pay television channels.

2011 According to Seven, the critical points of differentiation are these:

> for free-to-air operators the product is essentially the audiences which are '*sold*' to advertisers, while for pay television operators the products are the programs which are sold to viewers;
>
> free-to-air operators can and do ignore minority tastes, while pay television caters to the tastes of small, niche groups who are willing to pay to see their programs of choice; and
>
> the pay television operators do not attempt to maximise audiences for individual programs, but concentrate on providing a wide selection of programs broadcast simultaneously in order to satisfy existing subscribers and attract new ones.

2012 It follows, so Seven submits, that pay television is in a different product market than free-to-air television. Seven notes that the expert economists generally agreed that the greater the degree of differentiation between products, the less strongly substitutable they are (a point

Seven was not quite so keen to emphasise in relation to the debate about the wholesale sports channel market). Seven argues that the effect of product differentiation in the present context was to enable Foxtel to increase its prices while also increasing subscriber numbers. In short, Foxtel's product differentiation was designed to develop a strong consumer preference for pay television, such that consumers would be willing to pay a substantial price, including installation fees and minimum term commitments.

2013 Seven also contends that, because free-to-air operators are capacity-constrained, they cannot expand output in response to a SSNIP by a pay television platform. While in theory the free-to-air operators could improve quality, for example by decreasing the volume of advertisements or acquiring highly attractive content, they are unlikely to do so in response to a SSNIP. Among other things, by reason of competition among themselves they would already be likely to be implementing an optimal mix of content and advertising.

12.10.3 News' Submissions

2014 News counters Seven's written submissions with 50 closely typed pages of responses. News' starting point is that the experts agree that free-to-air television constrains pay television to some extent. Thus the critical question for the purposes of definition of the relevant market is whether the constraint is close. According to News, the '*qualitative evidence*' shows that Foxtel was in fact closely constrained by free-to-air television.

2015 News accepts that the pay television platforms have a different business model than that of free-to-air operators. However, it argues that this does not mean that free-to-air television does not constrain pay television platforms. Contrary to Seven's submissions, News says that in truth the aim of any retail television operator, whether pay or free-to-air, is to attract as many viewers as possible. The evidence shows that both media consider that they compete for the same audience. Indeed, according to News, Foxtel has conducted its business on the basis of attempting to attract the maximum number of viewers.

2016 News relies on Foxtel's programming practices to demonstrate that Foxtel attempted to '*counter-schedule*' against the free-to-air broadcasters. Mr Crowley, the Head of Programming at Foxtel, gave evidence that he would examine the free-to-air schedules with a view to providing different programming for persons who were unlikely to be interested in the free-to-air programs or similar programming so as to attract the same or similar kinds of

viewers.

2017 News also relies on churn data to support its claim that pay television competed with free-to-air television for viewers. The evidence shows that in 2000 Foxtel was experiencing high rates of churn (that is, subscribers who disconnect from Foxtel in any given month as a percentage of total subscribers at the end of the period), even though Mr Mockridge had succeeded in reducing the rate from 50 per cent to 25 per cent. Since most of the churn was away from pay television altogether (rather than to Optus), News submits that the evidence shows that many subscribers did not consider that pay television represented value for money. News invites me to find that:

> *'there are a significantly large number of marginal customers, that is, pay television customers, who would switch if either the price of FOXTEL increased or the quality of its programming decreased relative to free to air television. High churn suggests that consumers are sensitive about the price to be paid for the product, and it is reasonable to suppose that churn would increase if the price of the product increased'.*

2018 Seven points to the differences between pay television and free-to-air programming as indicative of the fact that pay television and free-to-air operators are not in the same market. News, by contrast, contends that firms often seek to differentiate their products from competitors which provide a close constraint on their pricing. According to News, the evidence shows that Foxtel from at least 1998 sought to differentiate itself from the free-to-air networks, principally by acquiring exclusive content, not only in sports, but in other areas. This conduct was economically rational only if Foxtel had been closely constrained by the free-to-air networks.

12.10.4 Reasoning

12.10.4.1 THE ISSUE

2019 The debate about the existence or otherwise of a separate retail pay television market throws up an unusual feature of the relationship between free-to-air television and pay television services. As Dr Smith explained, free-to-air television is a '*public good*':

> *'[it] lacks excludability (once it is available anyone can use it whether or not they are prepared to pay for it) and is non-rivalrous (consumption by one person does not reduce availability for others)'.*

As Dr Smith also explained, retail pay television platforms charge subscribers for the right to view the channels they offer, restricting access through encryption devices. Thus pay television is not a public good.

2020 Dr Smith pointed out that there is nothing unique in the notion that a public good can closely constrain the pricing of a product for which people have to pay. She gave as an example free newspapers, which may constrain (or be said to constrain) the pricing behaviour of subscription newspapers. The question that has to be answered is whether the public good sufficiently constrains the pricing and production decisions of the subscription products as to be a **close economic substitute**. That question, as Dr Smith acknowledged, requires an evaluative judgment (a '*thought experiment*') as to whether, in this case, free-to-air television constrains a pay television platform from profitably raising its prices by about five to ten per cent over a period of time that is appropriate to the market definition issue.

2021 Dr Smith accepted that pay television operators were '*ultimately constrained*' by the free-to-air operators, but maintained that the constraint was insufficient to place them both in the same market. By '*ultimately constrained*', Dr Smith meant that the demand for retail pay television services was influenced by the offering of the free-to-air networks and that there was some competition for programming. But she regarded the constraint as insufficient to place both within the same market, for four reasons:

> the free-to-air operators and the pay television platforms offered products with very different characteristics from the perspective of consumers;
>
> the businesses operated differently, in that free-to-air operators derived revenue from advertising, while pay television platforms earned revenue mainly from subscriptions, thus limiting the ability of each to respond competitively to the other;
>
> the volume and depth of programming demanded by each business was different; and
>
> regulatory restrictions, such as the anti-siphoning regime and restrictions on free-to-air multi-channelling, limited competition between the two forms of television broadcasting.

12.10.4.2 COMPETING FOR THE SAME VIEWERS

2022 One of the reasons News gives for contending that free-to-air television, at the relevant times, constrained the pricing of pay television was that both competed for the same pool of viewers. News relies on evidence that suggests, perhaps not surprisingly, that pay television, like free-to-air television, seeks to maximise its viewing audience. Mr Mockridge's objective at Foxtel, for example, was:

> *'to try to get as many people as possible to spend their time watching FOXTEL rather than watching free-to-air television, other pay TV or videos/DVDs'.*

Mr Mockridge also said that Foxtel scheduled *Fox 8* '*with a view to very direct competitive activity with free TV*'.

2023 Similarly, Mr Delaney, the Executive Director for Content, Product Development and Delivery at Foxtel, gave evidence of his approach while CEO of XYZ from May 2000 until May 2002. (XYZ is jointly owned by Austar and Foxtel and produces and distributes a range of pay television channels, although none is apparently a sports channel.) Mr Delaney said that during his time at XYZ he strove to increase and retain the number of viewers who subscribed to and watched the Foxtel and Austar platforms. He considered it to be in the interests of XYZ and its shareholders to maximise the viewing of Foxtel and Austar as a whole and that his underlying goal was to:

> *'draw viewers away from free-to-air television and to FOXTEL and Austar'.*

2024 Mr Delaney explained his goal in his evidence:

> *'[HIS HONOUR:] Did you mean by that draw pay TV viewers, that is those who are already subscribers, away from choosing to watch free-to-air and diverting them, as it were, to pay TV, or were you referring to drawing viewers away from free-to-air in the sense of subscribing to Foxtel and Austar, or were you referring to both? --- Both, your Honour.*
>
> *Was the strategy the same in each case? --- Yes, your Honour. Roughly aligned'.*

2025 Mr Delaney accepted that his strategy to achieve this outcome was to '*provide attractive programming that was worth paying for*'. He also accepted that there were two aspects to this endeavour:

attracting subscribers in the first place; and

retaining those subscribers once they have signed up to a pay television platform.

However, Mr Delaney maintained that, while potential and actual subscribers had to believe that they were getting programming worth paying for, they made that decision '*[b]y reference to what they can otherwise get for free*'.

2026 In assessing the significance of this evidence, the views of Professor Hay are relevant. He said nothing in his reports about the retail pay television market, but he was asked in cross-examination about reports he had prepared in 1995 and 1997 in relation to a proposed merger of Foxtel and Austar. As Professor Hay correctly said in evidence, he did not express the view on either occasion that free-to-air television and pay television were necessarily in separate markets. He did opine, however, that the '*prudent position*' for the ACCC to adopt was a '*conservative one*'. Professor Hay's view at the time was that the ACCC should act on the basis that there was a separate retail pay television market:

> *'at least until the real competitive forces have evolved in such a way as to prove conclusively the existence of a single broad market'.*

2027 Professor Hay recognised in his 1995 report (a position in effect reiterated by him in 1997) that the competitive forces that had operated in the United States and other countries possibly would:

> *'turn out to function differently in Australia, either because of fundamental differences in consumer tastes or because of technological developments that will render the distinction between free TV and pay TV obsolete (although most of the technical developments on the horizon seem likely to further separate the markets rather than bring them together). Thus, several years down the track, it may turn out that free TV and pay TV are best seen as comprising a single market.* ***But at most, that is only a possibility (and, in my opinion, an unlikely one)****'.* (Emphasis added.)

Professor Hay described his opinion on the issue at the time he gave evidence in these proceedings as '*more agnostic than I may have appeared to be in 1995 on that issue*'.

2028 What is significant about Professor Hay's reasoning in 1995, for present purposes, is his view on the competition between free-to-air television and pay television operators for

audiences. He did not think that this form of competition suggested a single retail pay television market:

> *'Viewers who watch many hours of sports on pay TV will almost certainly reduce the number of hours spent watching free TV with consequent implications for the total amount of advertising revenues that will be generated by a given program. Thus, it is hardly surprising that free TV networks lobbied for the anti-siphoning legislation. (A second motive for supporting the legislation would be the concern that competition from pay TV would bid up the cost of sporting events.) However, even though more meals eaten at home mean less eating in restaurants, this does not mean that supermarkets and restaurants are in the same market.* ***By the same token, the availability of some sporting events on free TV says little about the ability of a monopoly pay TV provider to extract supra-normal prices for the broad cluster of programs being provided*** *(including the considerable number of major sporting events that apparently will be available on pay TV despite the legislation).'* (Emphasis added.)

2029 Professor Hay's reasoning in 1995, in my opinion, is equally applicable to the period from 1998 to 2002. The fact that pay television seeks to attract viewers from the general body of free-to-air television viewers (virtually everyone) does not necessarily mean that free-to-air operators are in the same retail market as pay television platforms. In particular, it does not mean that free-to-air television operators constrain pay television platforms from profitably imposing price increases of from five to 10 per cent over a period of time. Nor is the position changed by the fact that pay television operators may choose to schedule certain programs with an eye to free-to-air programming. That is a manifestation of the fact that pay television operators must both attract and retain subscribers from the general body of television viewers. The operators must also offer programming that is sufficiently attractive to justify subscribers paying the required fees, notwithstanding the availability of a free television viewing alternative. It is how the product is made attractive that is particularly important.

2030 Mr Williams of Foxtel gave evidence consistent with this analysis. He said that he regarded a greater than 50 per cent share of television viewing by Foxtel's subscribers (that is, where existing subscribers watch pay television more than 50 per cent of the time they devote to television viewing) as a measure of subscribers' satisfaction with Foxtel's programming. But the need for Foxtel to ensure that its subscribers were sufficiently satisfied with Foxtel's programming to maintain their subscriptions, having regard to a free-to-air '*alternative*', does not mean that free-to-air television operators constitute a constraint,

in the relevant economic sense, on the pricing of Foxtel.

2031 Furthermore, it is not correct to say that pay and free-to-air television simply compete for viewers. The objective from the perspective of pay television platforms is to provide subscribers and potential subscribers with offerings they are prepared to pay for. Hence the emphasis, not so much on mass audiences, but on offering channels and programs that appeal to strong minority preferences that are not catered for, or are catered for insufficiently, on free-to-air television.

2032 As Professor Fisher agreed, it is not correct to say that the aim of pay television is to attract as many viewers as possible. Rather it is to attract as many paying subscribers as possible. Hence the comment in a Fox Sports marketing plan for 2000/2001:

> *'We must therefore wherever possible provide consumers with what they want to watch, how and when they want to watch it. The question must always be asked what are consumers prepared to pay for? Not just what are they prepared to watch. This is the fundamental point of difference between pay television and free to air television'.*

2033 The differences between free-to-air television and pay television models are well illustrated by the extent to which operators in each sector depend on advertising revenue. As has been seen in Chapter 4, the *BS Act* requires that subscription fees, not advertising revenue, be the predominant source of revenue for subscription television licensees. In fact, pay television operators derive only a very small proportion of their revenue from advertising. In the four financial years from 1 July 1998 to 30 June 2002, advertising revenue constituted between 1.7 per cent and 4.1 per cent of C7's total revenue from operations. Mr Williams estimated that in the 2001/2002 year, Foxtel derived between five and 10 per cent of its revenue from advertising, but '*probably closer to 5 per cent*'.

12.10.4.3 PRODUCT DIFFERENTIATION

2034 Seven and the Respondents appear to be in furious agreement that pay television operators go to considerable lengths to differentiate their product from free-to-air offerings. News refers, for example, to Mr Mockridge's evidence that pay television pursued exclusivity wherever it could, just as free-to-air television did. By way of example, pay television broadcasts first-run movies that cannot be broadcast on free-to-air television because pay television has an '*earlier window for release of a movie*'. Mr Williams said that

Foxtel needs original content to differentiate its service from the Commercial and National Broadcasters. He gave as illustrations content commissioned by Foxtel in areas not well provided for in free-to-air television, such as music, comedy, documentary and children's programming. Mr Williams pointed out that, in order to defray costs, Foxtel sometimes worked with the free-to-air broadcasters, particularly in commissioning Australian drama, although in more recent times there had been less emphasis on joint ventures.

2035 While this evidence is not in dispute, the parties disagree as to the significance of pay television's differentiation of its product from free-to-air television. News contends that a firm acts rationally in differentiating its product from another product only if it is closely constrained by the firm producing the second product. It follows, so News argues, that the evidence of product differentiation actually indicates that free-to-air television and pay television are in the same market.

2036 News submits that Dr Smith's evidence supports its argument. It is true that Dr Smith agreed with the theoretical proposition that it is not rational for a firm to continue to modify its product so as to further differentiate it from another product unless the second product is in the same market. However, Dr Smith qualified her answer. She pointed out that a firm may engage in product differentiation in order to create a demand where none has previously existed. In that situation, the pay television platform (if it is the product differentiator) is developing its product in order to increase its subscriber base and profitability. As Dr Smith explained:

> *'Differentiation from free-to-air, if you are already outside the market, may not be something that you are concerned with. You want to maintain that differentiation, you want to make your product more appealing, but you also want to grow your market. So what you are looking to do is to develop your product, perhaps that's a better terminology, in different ways to attract consumers not just from free-to-air but who have done all sorts of other things perhaps in the past or who know what they have been doing. So it is in fact development of the product which may mean doing things differently, so loosely described as differentiation'.*

2037 Moreover, as Professor Fisher accepted, a firm might rationally seek to differentiate its product from those that constrain it to some extent, **but not closely**. He agreed, for example, that a manufacturer of cellophane might stress the differences between its product and grease-proof baking paper, even though the products are not in the same market. The

reason:

> *'might have been either to ensure that people kept on believing that there was something special about cellophane, or indeed so special about cellophane that they were willing to pay even higher prices for it before they turned to others'.*

12.10.4.4 THE CRITICAL POINT: CHOICE

2038 It seems to me that News' submissions attempt to compartmentalise issues in a way that does not correspond to the facts. The attraction of pay television – an attraction that requires consumers to pay for the service – does not rest merely on '*product differentiation*', although that is part of it. The critical point is that pay television offers subscribers something that free-to-air television (and other forms of entertainment) cannot: a very wide choice among a range of programs in the subscriber's own home. The choice includes access to subscription driving content that is exclusive to pay television.

2039 The point was recognised by Mr Mockridge and Mr Williams in their evidence. Perhaps curiously, the cross-examination focussed on Foxtel's efforts to differentiate its content from free-to-air television, rather than on more general strategies for expanding its subscriber base. Nonetheless, both Mr Mockridge and Mr Williams gave broader answers than particular questions required. Each answer identified choice of programming as the fundamental differentiator between pay television and free-to-air television.

2040 Mr Mockridge, when invited to agree that Foxtel's business model was to differentiate its product from free-to-air by various techniques, answered as follows:

> *'Fundamentally, multichannel television, the differentiator is that there's more of it. It's television, it's often the same thing,* ***but there's a much greater choice. That's the differentiator'****.* (Emphasis added.)

Similarly, Mr Williams, when asked about sports as a subscription driver, replied that:

> *'my personal view is that the proposition of* ***choice in subscription television is the primary driver****, and that is informed from sport, from movies and from other genres, particularly documentary and areas that we can own, such as music and children's programming'.* (Emphasis added.)

2041 In my opinion, it is the capacity of pay television to satisfy intense, but diverse consumer preferences, together with its ability to offer exclusive programming in the key

subscription-driving area of premium sports and movies, that sets it apart from free-to-air pay television and other forms of home entertainment. The subscriber is prepared to pay for the choice and opportunity to access exclusive content within that field of choice. He or she has the added benefit that pay television, which derives only a small proportion of its revenue from advertising, has fewer advertisements than free-to-air television.

2042 A similar point was made in a submission made to the ACCC on Foxtel's behalf in about June 1999. Although the submission argued that consumers see pay television and free-to-air television as competitive services, it summarised the reasons for subscribers being willing to pay fees as follows:

> *'[Consumers] are swayed in their decision to subscribe to Pay TV by a number of factors including a greater number and variety of channels, newer release movies, more sport, niche viewing, fewer advertisements and better children's programs. The decision to subscribe to Pay TV is thus based on a perception of the quality and quantity of Pay TV which justifies the cost of paying for a service which can be received for free'.*

2043 As all parties agree, in the absence of quantitative information relating to the constraints imposed by free-to-air television on a SSNIP imposed by pay television platforms, an evaluative judgment is required. It seems to me that Dr Smith is well justified in arguing that the willingness of subscribers to pay substantial fees for pay television when free-to-air networks are available without charge suggests that the demand for pay television is relatively price inelastic. However, I do not think it is simply a matter of inferring from the willingness of subscribers to pay $40 to $50 pspm that a small but significant price increase will not lead to a loss of subscribers in favour of free-to-air television.

2044 The evidence in this case has focussed on the subscription-driving potential of premium sports, particularly AFL and NRL content, rather than other subscription-driving programming, such as movies. The evidence suggests that subscribers or potential subscribers have very strong preferences for the exclusive AFL or NRL content that is available on pay television. It is these preferences that fuel the high prices paid for the AFL and NRL pay television rights, compared with the prices paid for other sporting content. The willingness of subscribers to pay substantial monthly fees in order to satisfy their preferences from the wide range of choices available on pay television (including subscription-driving content exclusive to pay television) suggests that small but significant increases in fees would

not cause them to '*switch*' to free-to-air television. Under the current regime, free-to-air television cannot offer the same range of choices. Nor can it satisfy the preferences of consumers in the way pay television does.

12.10.4.5 CHURN

2045 News relies on rates of churn to support its contention that pay and free-to-air television are in the same market. It argues that the high rates of churn experienced by Foxtel justify an inference that:

> *'there are a significantly large number of marginal customers, that is, pay television customers who would switch if either the price of FOXTEL increased or the quality of its programming decreased relative to free to air television. High churn suggests that consumers are sensitive about the price to be paid for the product, and it is reasonable to suppose that churn would increase if the price of the product increased'.*

2046 It is not entirely obvious why high rates of churn, of themselves, suggest that subscribers would terminate their subscriptions if the pay television operators sought to impose a SSNIP. The point might be more persuasive if News linked increases in churn rates directly to increases in Foxtel's prices or to improvements in the quality of free-to-air television. But News does not attempt to make either link. Mr Mockridge, for example, accepted in evidence that Australian free-to-air television offered the same general quality of programming over the period he was CEO of Foxtel.

2047 Similarly, if it was clear that the prices charged by Foxtel during the relevant period were at competitive levels, the point made by News might carry more weight. But News does not suggest that it can demonstrate the proposition to be true. High rates of churn are consistent with subscribers forming the view that discretionary expenditure on entertainment is better directed to forms of entertainment other than pay television, or perhaps is better redirected to other household priorities altogether.

2048 In any event, I think that Dr Smith was correct when she suggested that the high rates of churn experienced by the industry were in part the result of pay television being a relatively new product in 1999 and 2000. News criticises Dr Smith's suggestion on the ground that it was mere speculation and was not grounded in economic concepts. However, Mr Mockridge gave evidence that the annual churn rate had decreased from 50 per cent to 25

per cent while he was CEO of Foxtel and that he had expected that decline to take place:

> *'the longer someone had the additional channels, the more likely they would keep them'.*

Mr Mockridge's expectations seem to have been borne out beyond his period as CEO of Foxtel, as Foxtel's annual churn rate reduced to an average of about 12 per cent in 2004.

2049 This evidence seems to me to be consistent with pay television being a relatively new phenomenon throughout the period 1998 to 2002 (but particularly in the first half of that period). During its transitional phase, the behaviour of both the pay television platforms and subscribers had not yet fallen into a predictable pattern. Professor Hay, in his 1995 report to Optus, seems to have anticipated that there would be a transitional period. He proposed that the ACCC should adopt the prudent course of assuming the existence of a separate retail pay television market:

> *'until the real competitive forces **have evolved** in such a way as to prove conclusively the existence of a single broad market'.* (Emphasis added.)

2050 Furthermore, I agree with Seven's submission that the evidence, such as it is, does not suggest that pay television subscribers relinquished their subscriptions during the relevant period because of the availability of free-to-air television, except in the sense that virtually everyone has access to the free-to-air networks. A report prepared by consultants for Foxtel in October 2003, which analysed the reasons for churn, recorded that:

> *'There were no differences between churners and non-churners in their ratings of [free-to-air television]'.*

News challenges the relevance of this statement, but does so by reference to other statements in the report which were in fact concerned with different issues.

2051 The report to Foxtel, along with much other evidence, shows that an important reason for subscribers giving up Foxtel was their perception that it did not represent '*value for money*'. But this reason does not demonstrate that free-to-air television acted as a close constraint on pay television in the relevant sense. For example, call centre staff at Foxtel were directed to ascertain from those subscribers who gave '*value for money*' as the reason for disconnecting, the value comparison they had in mind. Mr Mockridge agreed that very

few subscribers gave free-to-air television as the reason for concluding that pay television did not give value for money. This evidence, in my opinion, tends to suggest that free-to-air television did not act as a close constraint on pay television operators.

12.10.4.6 FOXTEL'S PRICING : SATELLITE VERSUS CABLE

2052 Seven relies on Foxtel's pricing practices in relation to its satellite and cable services to support its contention that Foxtel was not closely constrained by free-to-air television. Seven points out that ever since Foxtel's satellite service was launched on 1 March 1999, the price charged pspm for its basic satellite service has always been substantially higher than the price of its basic analogue cable service. In the third quarter of 1999, for example, the price of Foxtel's basic satellite service was $46.95 pspm (exclusive of GST), while the price of the analogue cable service was $34.95 pspm. By the last quarter of 2002, when the Foxtel-Optus CSA came into force, the differential had been reduced from $12.00 pspm to $10.00 pspm. ($47.95 pspm for satellite, compared with $37.95 pspm for cable). Nonetheless the differential (20.9 per cent of the satellite pspm price) was still substantial.

2053 Seven argues that the substantial differential is indicative of price discrimination practised by Foxtel and therefore of the exercise of market power by it. Moreover, so Seven contends, the differential suggests that free-to-air television was not a close constraint on the price charged by Foxtel for its satellite service. This is said to follow from the fact that only a minority of Foxtel's satellite subscribers from 1998 to 2002 could choose Optus as an alternative platform, while the great majority of Foxtel's cable subscribers could choose Optus if they wished (because the Telstra and Optus Cables largely serviced the same geographic areas). Seven submits that if free-to-air television had been a close constraint on Foxtel, it would not have been able to charge its satellite subscribers substantially more than its cable subscribers.

2054 I do not understand News to dispute the logic of Seven's argument. News essentially seeks to explain the price differential as resting on differences in the cost structure of satellite and cable services. News says that:

> part of the differential between the '*cable variable margin*' and the '*satellite variable margin*' was attributable to a fee payable under the BCA to Telstra in respect of each cable subscriber;

the differential had narrowed over time;

the cost of installation for each new satellite subscriber was higher than for each cable subscriber; and

Foxtel did not differentiate among cable subscribers on a geographic basis, even in regions (like Perth and Adelaide) where Optus' cable service was not available.

2055 It is not easy on the material available to me to ascertain whether the matters raised by News fully explain the substantial differential in the pricing for Foxtel's cable and satellite subscribers. My impression is that they do not. For example, the fact that Foxtel adopted uniform national pricing for cable subscribers seems to me readily explicable by the attention a differential pricing policy based on regions would have invited from regulators, if not consumers. The narrowing of the differential over time does not alter the fact that the gap remained substantial. The payment to Telstra cannot fully explain the extent of the differential. Ascertaining the true costs of installation of cable and satellite subscriptions seems to me a complex exercise which the evidence does not allow me to undertake with any confidence.

2056 In my view, the differential pricing policy adopted by Foxtel tends to support, although perhaps not very strongly, Seven's contention that free-to-air television did not closely constrain Foxtel's pricing during the period 1998 to 2002. At the very least, the evidence is consistent with Seven's position.

12.10.4.7 FOXTEL'S PROFITABILITY

2057 Foxtel's accounts show that it experienced substantial negative cash flows in each year from 1995/1996 until 2003/2004. Elements of the calculations, in the later years at least, were said to be confidential. There is no need in this judgment to reproduce the precise figures showing the extent of the negative cash flows.

2058 News relies on Foxtel's lack of profitability to show that Foxtel had been constrained by the free-to-air operators during the relevant periods. One of the reasons Professor Hay gave for being more '*agnostic*' about the existence of a separate retail pay television market than in 1995 and 1997 was his understanding that Foxtel had been unprofitable during the

intervening period. Professor Hay explained that:

> *'the significant question is this one: is Foxtel currently charging supernormal prices and earning supernormal profits? If the answer is no* ***and there is no likelihood they will be able to do so in the future****, that ought to lead you to the conclusion that the constraint is an effective one from free-to-air, which in turn ought to lead to the conclusion that they are all in one market'.* (Emphasis added.)

2059 Professor Hay agreed in cross-examination that there were a number of possible explanations for Foxtel's lack of profitability. These included transfer pricing (by which revenue could be diverted to a related entity), inefficiency and the pursuit of strategic objectives rather than profitability. Professor Hay readily accepted that the material he had perused did not enable him to draw a firm conclusion on the significance of Foxtel's lack of profitability. He doubted whether, as an economist, even if he had undertaken more intensive work, he would have been able to resolve the problem.

2060 Professor Noll rejected a suggestion put to him in cross-examination that it was extraordinary that a firm such as Foxtel, if it had monopoly and monopsony powers in the retail pay television market, should have suffered substantial losses over a long period. Professor Noll answered as follows:

> *'No, it wouldn't be, given – the crucial phrase in your question was "a firm such as Foxtel". Foxtel isn't a normal firm. It has three owners with whom it has transfer prices. So the decision about the profitability of Foxtel is in part a decision about the profitability of its owners, and the transfer prices are set accordingly'.*

2061 Professor Noll argued that the correct way to account for the profitability of Foxtel was to examine not only its own cash performance, but the effect it had on the cash performance of its owners (the Foxtel partners). He suggested, for example, that the accounts for 2002/2003 indicated that the sum of Fox Sports profits and the revenue derived by Telstra from Foxtel's use of the Telstra Cable exceeded the EBITDA loss. Professor Noll also suggested that, in assessing the value of Foxtel to Telstra, it is necessary to consider the value of Telstra's retained telephony business attributable to its interest in Foxtel.

2062 News criticises Professor Noll's analysis and similar comments by Dr Smith as '*mere assertions*'. It is true, as they both recognised, that they were not in a position to test the

hypothesis that Foxtel was the vehicle for boosting the separately recorded profits of its owners. It is equally true that News has not demonstrated that the hypothesis is without empirical support. Telstra's determination to retain its interest in Foxtel (one of the matters which News says shows that there was no transfer pricing) may well be explained, in large measure, by Foxtel's value to Telstra's telephony and telecommunications business. Moreover, the evidence concerning the price paid by Foxtel for Fox Sports until the disputes among the Foxtel partners were resolved is consistent with News (and, later, PBL) favouring Fox Sports' interests over Foxtel's, even if it is not conclusive on that question.

2063 News relies on the evidence of Professor Williams to demonstrate that Foxtel lacked market power over the period 1995 to 2004. In essence, Dr Williams examined Foxtel's cash flows, after eliminating interest payments, and concluded that the negative returns over a period of nine years were inconsistent with the exercise of market power. He also opined that Foxtel's projected cash flows in its 2002 business plan did not anticipate that Foxtel would earn monopoly profits over the succeeding decade.

2064 Professor Williams' analysis did not take account of the issues raised by Professor Noll. The analysis also suffers from the difficulty that, as he acknowledged, caution must be exercised in using accounting data to draw inferences about a firm's ability to derive monopoly profits. In this respect, Professor Williams implicitly accepted the validity of the work done by Professor Fisher, News' competition expert.

2065 Professor Fisher is the co-author of an influential paper entitled '*On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*'. As Professor Fisher explained in evidence, the basic point made in that article is that the critical concept in determining whether a firm is making monopoly profits is the firm's '*economic rate of return*', not its '*accounting rate of return*'. The two concepts are different and are not necessarily related. The economic rate of return is very difficult to assess because:

> *'in principle … if you want to look at the economic rate of return, one should look at the cash flows that the firm receives and one would have to look at them over a long period of time* ***In principle, you have to look at them over the entire life of the firm****, which typically hasn't happened yet'.* (Emphasis added.)

Indeed, Professor Fisher said that the economic rate of return may be impossible to compute

in particular cases because of the need to project the long-term future of the firm.

2066 Professor Fisher applied his approach to the current case in the following exchange:

> *'[MR SHEAHAN:] Your opinion, I take it, Professor, was that you could not, by taking a particular profit and loss statement of a company or even a set of them, deconstruct it ordinarily in order to come up with an economic rate of return? --- Well, that's true, but that is not to say that one cannot under some circumstances actually reach some inferences. For example, in the present case there is, as you know, a series of accounting statements which show negative cash flows for Foxtel over a long period of time, and that's before depreciation.* ***Now, it may perfectly well be true – one cannot know – that off there in the future is a great balloon of profit which is going to be made****. But there is no evidence, so to speak, that that is likely to happen, and it certainly hasn't happened for a very long time, and one has to have, you know, a serious amount of faith to suppose that this is going to be consistent with earning monopoly returns. You can't prove it won't happen'.* (Emphasis added.)

2067 Professor Williams attempted to project Foxtel's likely future returns on the basis of its 2002 business plan and to relate these to the present value of Foxtel's investment at the end of the 2003/2004 year. This exercise involved a good deal of uncertainty and was sensitive, among other things, to the discount rate chosen. The value of Professor Williams' analysis for present purposes is also affected by the fact that he did not (and indeed could not) take into account more recent accounting information produced by Foxtel. That information, in my view, does not rule out the realistic chance of, in Professor Fisher's phrase, a '*great balloon of profit*' in the future.

2068 The result is that I do not regard Foxtel's history, until recently, of negative cash flows as inconsistent with it operating within the retail pay television market identified by Seven, nor with Foxtel having a substantial degree of power within that market.

12.10.4.8 FOXTEL'S PERCEPTIONS

2069 Seven accepts that Foxtel's contemporaneous documents contain many references, in one form or another, to free-to-air television being a competitor of Foxtel. This concession has prompted the parties to swap sides on the significance of such references for the purposes of market definition. Seven, having enthusiastically cited contemporaneous comments implying that Fox Sports and C7 may have competed in a single wholesale sports channel market, now seeks to discount contemporaneous comments implying that Seven and Foxtel

may have competed in a single retail television market. News, having discounted contemporaneous documentation implying that Fox Sports and C7 may have been competitors in a single wholesale sports channel market, now enthusiastically cites contemporaneous material implying that Seven and Foxtel may have competed in a single retail television market.

2070 I repeat the note of caution I have sounded about reliance on contemporaneous records for the purposes of market definition. They may be very important, but the context of the records must be taken into account. As Dr Smith accepted, free-to-air television was a constraint on pay television platforms such as Foxtel and was seen as such by officers of Foxtel and News. But the question is whether the free-to-air operators acted as a sufficiently close constraint on pay television platforms to justify regarding them as in the same market.

2071 News accepts the proposition that business people tend to talk of '*markets*' in a different sense from that used by economists. Mr Mockridge made the same point in his evidence when a draft Foxtel document was drawn to his attention which asserted that '*Foxtel has a commanding lead in a growing market*'. He observed, without prompting, that

> *'often the word "market" is used in a non-precise term [sic] by people working in businesses'.*

2072 This perfectly understandable tendency among business people may produce ambiguities in documentation relied on for the purposes of market definition. A Foxtel planning document prepared in November 2002, for example, referred to a possible competitive threat from free-to-air operators if they are permitted to '*multichannel*'. The document noted a correlation between increases in the number of free-to-air broadcasters and lower rates of take-up of pay television. The same document, however, argued that Foxtel competes in the '*entertainment market*', which was said to include DVDs, cinema, free-to-air television, the internet and even magazines and books. Mr Williams, the author of the planning document, described in his evidence Foxtel's corporate mission as '*standing out from and complementing other entertainment sources*'.

2073 A similar ambiguity is evident in a Foxtel memorandum sent to Telstra (with a copy sent to Mr Mockridge) on 23 November 1999. The memorandum recorded that although Foxtel had '*clear leadership*' in pay television, it was not complacent about Optus,

particularly the possibility that it might use pay television as a '*loss leader*'. Having identified this threat, the memorandum stated that Foxtel's main competitor was free-to-air television, which was due to launch a digital service in 2001. The memorandum continued as follows:

> *'In addition, FOXTEL competes in the broad entertainment market which includes [free-to-air], internet, game consoles, video rental and DVD/tape purchases, all of which are constantly innovating and competing for consumers' time'.*

2074 Contemporaneous documents may also have been prepared with a particular audience in mind. Mr Mockridge, for example, accepted that he acted as an advocate for Foxtel in its dealings with the ACCC and that this meant pressing the argument that free-to-air and pay television were in the same market. He also accepted that his understanding of Foxtel's interests in this regard influenced the content of documents created within Foxtel. I do not doubt that Mr Mockridge honestly held the views he expressed, but those views reflected the interests of Foxtel.

2075 Other factors should be borne in mind. In my view, there is some force in Seven's submission that the identification of free-to-air operators as competitors of Foxtel may reflect, in part, the '*cellophane fallacy*'. To the extent that Foxtel was charging above the competitive price, churn may have been more readily seen as a loss of subscribers to the free-to-air '*competition*'. This, however, would not necessarily mean that free-to-air television was a close constraint on Foxtel's ability to change a supra-competitive price for its pay television service.

2076 Another factor influencing the perception of Mr Mockridge and others at Foxtel is likely to have been the link between Seven, as a free-to-air operator, and C7, as a supplier of sports channels. I have found that News and Foxtel were genuinely concerned about Seven's role as a gate-keeper of the AFL pay television rights by virtue of its control of the AFL broadcasting rights. Seven was seen as primarily interested in the free-to-air business and as having a secondary interest in pay television. That link, in my view, influenced perceptions within Foxtel and News.

12.11 Conclusion

2077 In my view, Seven has established that at the relevant times there was a retail pay television market in which Foxtel, Optus and Austar operated. It is necessary therefore to take this market into account when addressing the issues identified earlier in this Chapter.

13. SEVEN'S EFFECTS CASE UNDER SECTION 45(2) OF THE *TRADE PRACTICES ACT*

13.1 Legislation

2078 In this Chapter I address Seven's case that various Respondents breached s 45(2) of the *TP Act* by:

> making a contract or arrangement, or arriving at an understanding when a provision of the proposed contract, arrangement or understanding '*would have or be likely to have the effect ... of substantially lessening competition*' (s 45(2)(a)(ii)); and
>
> giving effect to a provision of a contract, arrangement or understanding where that provision '*has or is likely to have the effect ... of substantially lessening competition*' (s 45(2)(b)(ii)).

The specific focus of this Chapter is Seven's case based on the Master Agreement Provision and other provisions associated with Foxtel's bid (through News) for the AFL pay television rights.

2079 Section 45(2) of the *TP Act* is also concerned with provisions of contracts, arrangements or understandings that have the purpose of substantially lessening competition. In this Chapter I briefly explain the relationship, as I understand it, between Seven's '*effects*' case and its '*purpose*' case, but the substance of Seven's purpose case under s 45(2) is addressed in Chapters 14 and 15. It is, however, convenient to set out the relevant statutory provisions here.

2080 Section 45(2) of the *TP Act* relevantly provides as follows:

'A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if:

(i) ...

(ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or

(b) give effect to a provision of a contract, arrangement or understanding,

... if that provision:

(i) ...

(ii) has the purpose, or has or is likely to have the effect, of substantially lessening competition'.

2081 Section 45(3) defines '*competition*' for the purposes of s 45:

*'For the purposes of this section ... **competition**, in relation to a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding, means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services'.*

2082 Section 45(4) elaborates on the concept of a provision that has or is likely to have the effect of substantially lessening competition:

'For the purposes of the application of this section in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a body corporate related to the corporation is or would be a party;

together have or are likely to have that effect'.

2083 Section 4E defines '*market*':

*'For the purposes of this Act, unless the contrary intention appears, **market** means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first--mentioned goods or services'.*

2084 Section 4F(1) addresses the statutory concept of '*purpose*'. It provides as follows:

'For the purposes of this Act:

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

(i) the provision was included in the contract, arrangement or understanding or is to be included in the proposed contract, arrangement or understanding, or the covenant was required to be given or the proposed covenant is to be required to be given, as the case may be, for that purpose or for purposes that included or include that purpose; and

(ii) that purpose was or is a substantial purpose …'

2085 Section 4G defines '*lessening of competition*':

'For the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition'.

2086 Section 4(1) contains the following definitions relevant to s 45(2):

*'**give effect to**, in relation to a provision of a contract, arrangement or understanding, includes do an act or thing in pursuance of or in accordance with or enforce or purport to enforce;*

…

***provision**, in relation to an understanding, means any matter forming part of the understanding'.*

2087 Section 4L of the *TP Act* is headed '*Severability*'. It provides as follows:

'If the making of a contract after the commencement of this section contravenes this Act by reason of the inclusion of a particular provision in the contract, then, subject to any order made under section 87 or 87A, nothing in this Act affects the validity or enforceability of the contract otherwise than in relation to that provision in so far as that provision is severable'.

2088 Section 4(3) applies to certain unenforceable provisions of contracts:

'Where a provision of this Act is expressed to render a provision of a contract, or to render a covenant, unenforceable if the provision of the contract or the covenant has or is likely to have a particular effect, that provision of this Act applies in relation to the provision of the contract or the covenant at any time when the provision of the contract or the covenant has or is likely to have that

effect notwithstanding that:

(a) at an earlier time the provision of the contract or the covenant did not have that effect or was not regarded as likely to have that effect; or

(b) the provision of the contract or the covenant will not or may not have that effect at a later time'.

13.2 Structure of Seven's Case: A Guide for the Perplexed

2089 Seven's Closing Submissions put its case under s 45(2) of the *TP Act* in a very large number of alternative ways. News' Closing Submissions estimated, plausibly in my view, that Seven had advanced some 100 alternative contentions in support of that case.

2090 Seven's Closing Submissions not only advanced a very large number of alternative claims, but failed to identify which of them should be regarded as its principal contentions. Indeed, the submissions were devoid of any guide as to how I should attempt to work my way through the plethora of alternatives. Nor did the submissions descend to an explanation of the relationship between Seven's case on the purpose of the many provisions it identified and its case on the effect or likely effect of those provisions on competition.

2091 Following the correspondence and the directions hearing preceding the final oral submissions, to which I have referred in Chapter 1, Seven and each of the Respondents filed summaries of their respective arguments. Seven's Case Summary clarified some (but by no means all) of the matters that had been left obscure by its written submissions. The Case Summary also identified, for the first time, a number of causes of action addressed in Seven's Closing Submissions on which Seven no longer relies. The filing of the Case Summary did not, however, deter Mr Sumption from advancing additional or modified arguments in his final oral submissions which, in turn, prompted yet further responses from the Respondents.

13.2.1 Seven's Primary Effects Case

2092 Seven's Case Summary states that the News-Foxtel Licence (by which Foxtel formally acquired the AFL pay television rights) is the '*most straightforward of all the agreements in terms of its effect*'. Nonetheless, the Case Summary first outlines Seven's case on what the Statement of Claim describes as the '*Master Agreement Provision*'.

2093 According to the Case Summary, the Consortium Respondents (News, Foxtel (Sky

Cable and Telstra Media), PBL and Telstra) made an arrangement or understanding at the teleconference held on 13 December 2000 to secure, among other things, the AFL broadcasting rights and the NRL pay television rights. The understanding required the Consortium Respondents to give effect to a proposal containing two elements, one relating to the AFL broadcasting rights and the other relating to the NRL pay television rights. It was this understanding that constituted the Master Agreement Provision.

2094 The effect and likely effect of the Master Agreement Provision were that:

> News acquired the AFL pay television rights under an obligation to sub-license them to Foxtel;
>
> Fox Sports acquired the NRL pay television rights; and
>
> in consequence, C7 ceased business.

2095 The Case Summary states that Seven's 'primary case as to substantial lessening of competition relates to the wholesale sports channel market'. It summarises that case as follows:

> there is a wholesale sports channel market (being a market in Australia for the acquisition and supply of sports channels to retail providers of pay television services or of free-to-air services);
>
> there were significant barriers to entry to that market;
>
> the demise of C7 caused a substantial lessening of competition in the wholesale sports channel market, in that it was the closest constraint on Fox Sports and entry into the market was difficult; and
>
> the barriers to entry were further raised by the conduct of the Consortium Respondents.

13.2.2 Alternative Markets

2096 The Case Summary puts forward alternative arguments upon which Seven relies should I find (as I have) that it has failed to establish the existence of a wholesale sports channel market at the material times. Seven contends that the effect or likely effect of the Master Agreement Provision was substantially to lessen competition in:

the AFL pay rights market;

the NRL pay rights market; and

the retail pay television market.

2097 As I have also found that Seven has not established the existence of the first two of these markets, it is necessary in this Chapter only for me to consider the effect or likely effect of the Master Agreement Provision on competition in the retail pay television market. In the Case Summary, Seven puts its argument in relation to the lessening of competition in the retail pay television market this way:

> *'The exit of C7 left Optus dependent on Foxtel, its main rival, for key content. News and Telstra in particular intended and expected this to weaken Optus as a competitor of Foxtel and it can be inferred that it [presumably the exit of C7] did. It can be seen to have paved the way for the CSA [of 5 March 2002]'.*

13.2.3 Other Provisions

2098 The Case Summary identifies a number of other provisions which are said to have had the effect or likely effect of substantially lessening competition in the four relevant markets. These include:

the News-Foxtel Licence Provision; and

the '*Rights Sub-Licence Agreement Provision*', being an understanding between News, Nine, Ten and Foxtel that News, upon acquiring the AFL broadcasting rights, would sub-license the pay television rights to Foxtel and the free-to-air television rights to Nine and Ten.

13.2.4 What Happens if the Case against the Consortium Respondents Succeeds?

2099 Seven says that if the case based on the Master Agreement Provision (or, presumably, on any of the other provisions relied on by Seven) succeeds against the Consortium Respondents, it will then be necessary only to consider the liability of Nine, Fox Sports and the members of the NRL Partnership (NRLI and ARL).

2100 Nine's liability is said to be most directly dealt with in the claims based on the so-called '*Nine Put Provision*' and the '*News-Nine Licence Provision*' (expressions which are

defined in the Statement of Claim ([2115]). On Seven's case, the Nine Put Provision was an integral part of the AFL Proposal and had the same effect on competition in the various markets as the Master Agreement Provision. The News-Nine Licence Provision gave effect to the Nine Put and was a necessary prerequisite to the '*News-Foxtel Licence'*. Its effects included C7 going out of business and a substantial lessening of competition in each of the markets identified by Seven.

2101 If neither of these claims against Nine succeeds, Seven relies on the *'Rights Sub-Licence Agreement Provision'*. According to Seven, each of Foxtel, Nine and Ten knew that its own acquisition of rights was conditional upon the overall arrangements with News being put into place. News was to acquire the AFL broadcasting rights, with the ability to off-load those rights to the sub-licensees on predetermined terms. The effects of the Rights Sub-Licence Agreement Provision are said to have been the same as those of the Master Agreement Provision.

2102 Seven accepts that the liability of Fox Sports depends on Seven succeeding in relation to the '*NRL Bidding Agreement Provisions*' or, alternatively, the '*Fox Sports-NRL Pay Rights Agreement Provisions*' (also referred to in this judgment as the '***NRL-Fox Sports Licence Provisions***'). The liability of the NRL Partnership depends on Seven's success in its case based on the NRL-Fox Sports Licence Provisions. (These expressions are also defined in the Statement of Claim.)

13.2.5 What Happens if the Case against the Consortium Respondents Does Not Succeed?

2103 If the Master Agreement Provision claim does not succeed against the Consortium Respondents, Seven says it will be necessary for me to consider:

> the Rights Sub-Licence Agreement Provision claim against News, Nine and the members of Foxtel Partnership; and
>
> if the claim against Nine also fails, the claims based on each of the so-called '*News-Foxtel Licence Provision*', the Nine Put Provision and News-Nine Licence Provision.

13.2.6 Purpose Case: What Does It Add?

2104 Seven's Case Summary explains that, while its case under s 45(2)(a)(ii) and (b)(ii) of the *TP Act* primarily rests on the **effect or likely effect** of the various provisions relied on by Seven, findings as to the **purpose** of the Respondents nonetheless may be important. Seven says that the Respondents' purpose is relevant, for example, to market definition and to establishing a basis for inferring the effect or likely effect of particular provisions. (It should be noted, however, that as Mr Sumption accepted, '*purpose*' in this sense is not necessarily the same as '*purpose*' in the sense employed by s 45(2)(a)(ii) and (b)(ii) of the *TP Act*.)

2105 Seven also identifies two particular circumstances in which its '*purpose*' case under s 45(2) may allow it to succeed even though its '*effects*' case fails:

> The Respondents, so Seven suggests, rely on an unduly narrow approach to determining whether '*a provision ... would have or be likely to have the effect of substantially lessening competition*', within the meaning of s 45(2)(a)(ii) and (b)(ii) of the *TP Act*. If this narrow approach were to be adopted, Seven might succeed in establishing that one of the provisions on which it relies in fact resulted in C7's exit from the market and a substantial lessening of competition, yet Seven might fail to establish that the provision had or was likely to have that effect. In these circumstances, Seven says that it might succeed in its purpose case notwithstanding that its effects case fails.
>
> Seven maintains that a corporation may have the purpose of substantially lessening competition in a market, even though it is in fact impossible for it to achieve that objective (for example, because the market which the corporation wishes or attempts to influence in truth does not exist). In other words, a corporation may contravene s 45(2)(a)(ii) or (b)(ii) of the *TP Act* by making a contract or arrangement containing a provision the purpose of which is to substantially lessen competition in a market as **subjectively understood by the corporation**. This is so, Seven argues, whether or not the corporation's understanding is correct. It follows that Seven might succeed on its purpose case where its effects case fails because the relevant markets are not found objectively to exist.

2106 Seven also says that '*purpose*' may be important for another reason relevant to its

s 45(2) case. One answer the Respondents give to Seven's case based on the bidding for the AFL broadcasting rights and the NRL pay television rights in 2000 is that the bidding was merely '*competition on the merits*'. Mr Sumption's response was that, even if it is insufficient for Seven to show that it had been denied an essential input for C7's business, the Consortium Respondents had employed '*anti-competitive means*'. Mr Sumption acknowledged that, in this context, the concept of '*purpose*' as applied to '*anti-competitive means*' is again being used in a different sense than '*purpose*' is used in s 45(2) of the *TP Act*. Nonetheless, it is a third instance of the purpose of the Respondents (or some of them) being relevant to the issues in the case.

13.3 Seven's Pleaded Effects Case

2107 In this section, I summarise Seven's pleadings in support of its effects case under s 45(2) of the *TP Act*, arising out of the various provisions to which I have referred. I do this notwithstanding that, on my market findings, much of Seven's effects case falls away. I think it is convenient to record the substance of the case pleaded by Seven, not least because of the virtual inevitability of an appeal.

2108 The bolded expressions in this section for the most part reflect the terminology in the Statement of Claim, although in some cases I have departed from that terminology in the interests of uniformity. It should be noted that the expression '**Foxtel**' is defined in the Statement of Claim to mean '*Sky Cable and Telstra Media [which] together carry on business in partnership trading under the business name "Foxtel".*'

13.3.1 AFL and NRL Proposals

2109 During the period from August 2000 to December 2000, News formulated a proposal for the acquisition by Foxtel of the AFL pay television rights for 2002 to 2006 ('**AFL pay television rights**'), the acquisition by Nine and Ten of the AFL free-to-air television rights for 2002 to 2006 ('**AFL free-to-air television rights**'); and the acquisition by Fox Sports of the NRL pay television rights for 2001 to 2006 ('**NRL pay television rights**') (par 99). The proposals were developed by Mr Philip with the assistance (in relation to the AFL pay television rights) of Mr Frykberg.

2110 In relation to the acquisition of the AFL pay television rights, News' proposal ('**AFL**

Proposal') was as follows:

> *'(i) News make a bid, and if the bid was accepted enter into a contract with the AFL, for the AFL broadcast rights;*
>
> *(ii) News sublicense the AFL free-to-air rights to Nine and Ten and the AFL pay rights to Foxtel;*
>
> *(iii) the bid by News be supported by put agreements with Nine, Ten and Foxtel enabling News to require them to enter into sublicences on the same terms as were embodied in the put agreements;*
>
> *(iv) Foxtel pay $30 million per annum (adjusted in accordance with the consumer price index for the years 2003 to 2006) plus GST plus a proportion of the amount of free advertising time ("**contra**") to be included in the News bid (being the proportion that the Foxtel rights fee of $30 million bears to the total rights fee being offered by News to the AFL for the AFL broadcast rights) for pay rights to three exclusive live matches per week and the right to broadcast all other AFL matches on pay television on a delayed basis;*
>
> *(v) the bid by News also include undertakings to [provide editorial and promotional support]'* (par 99(c)).

2111 In relation to the acquisition of the NRL pay television rights, News' proposal ('**NRL Proposal**') was as follows:

> *'(i) Fox Sports make a bid, and if the bid was accepted enter into a contract with the NRL Partnership, for the NRL pay rights, and Fox Sports also offer to the NRL partnership to procure that Telstra enter into agreements to acquire the NRL naming rights and the NRL internet rights;*
>
> *(ii) Telstra enter into an agreement with Fox Sports that it would acquire the NRL naming rights and NRL internet rights if required by Fox Sports;*
>
> *(iii) Foxtel agree to accept channels with NRL programming supplied by Fox Sports on certain terms;*
>
> *(iv) Foxtel be given the right to sublicense the NRL pay rights to Optus;*
>
> *(v) the bid by Fox Sports for the NRL pay rights would be $30 million per annum (adjusted in accordance with the consumer price index for the years 2003 to 2006) plus GST plus contra; and*
>
> *(vi) the bid by Fox Sports would include an offer to procure Telstra to acquire the NRL naming rights and the NRL internet rights for $5 million per annum (adjusted in accordance with the consumer price*

index for the years 2003 to 2006) plus GST' (par 99(d)).

13.3.2 Master Agreement and Master Agreement Provision

2112 At a meeting held on 13 December 2000, News, Foxtel, PBL and Telstra entered into a contract, arrangement or understanding to secure the AFL broadcasting rights, the NRL pay television rights and the NRL naming and internet rights (that is, the Master Agreement) (par 100). The agreement was express and was partly in writing and partly oral. To the extent it was written, it consisted of the 13 December 2000 drafts of the Foxtel Put, the Nine Put and the Ten Put (terms which are defined later in the Statement of Claim).

2113 The Master Agreement included the Master Agreement Provision, whereby each of Telstra, News, PBL and Foxtel would:

> *'(a) carry out the AFL [P]roposal and the NRL [P]roposal, including by entering into the contracts which formed part of those proposals; and*
>
> *(b) procure their related bodies corporate to carry out the AFL [P]roposal and the NRL [P]roposal, including by entering into the contracts which formed part of those proposals'* (par 102).

2114 The entry by the Consortium Respondents into the Master Agreement amounted to conduct by each of them in contravention of s 45(2)(a)(ii) of the *TP Act.* Further, in giving effect to the Master Agreement Provision, each of the Consortium Respondents engaged in conduct in contravention of s 45(2)(b)(ii) of the *TP Act.*

13.3.3 Giving Effect to the Master Agreement Provision

2115 Following the meeting of 13 December 2000, Telstra, News, PBL and Foxtel gave effect to the Master Agreement Provision by entering into and procuring the entry into a series of '**Acquisition Agreements**', including the entry into those agreements by Foxtel, Nine and Fox Sports (par 103). The Acquisition Agreements included the following (par 224):

(i) The '**Foxtel Put**', being a contract made between News and Foxtel on about 14 December 2000, whereby Foxtel agreed that, if requested by News, it would acquire the AFL pay television rights. It was a provision of the Foxtel Put ('**Foxtel Put Provision**') that if News made the request, the agreement

would require Foxtel to acquire the exclusive pay television rights to three AFL matches for $30 million per annum (plus GST and adjustments) and to contribute a proportion of '*contra*'. The Foxtel Put Provision also required News to pay Foxtel $500,000 for each pay television match broadcast by a free-to-air broadcaster earlier than 14 days after the date the match was played (pars 104-105).

(ii) The '**Nine Put**', being a contract made between News and Nine on about 14 December 2000, whereby Nine agreed that, if requested by News, it would acquire certain of the AFL free-to-air television rights. It was a provision of the Nine Put ('**Nine Put Provision**') that if News made the request, the agreement would require Nine to acquire the exclusive free-to-air television rights to three AFL matches in each round, plus certain other matches, for $23 million per annum (plus GST and adjustments), contribute a proportion of contra and pay News $500,000 for any other match Nine broadcast earlier than 14 days after the date it was played (pars 106-107).

(iii) The '**Ten Put**'**,** being a contract between News and Ten in terms similar to the Nine Put. The Ten Put contained a provision ('**Ten Put Provision**') requiring Ten to acquire the exclusive free-to-air television rights to two AFL matches in each round, plus all finals and certain other matches, for $23 million per annum (plus GST and adjustments), contribute a proportion of contra and pay News $500,000 for any other match broadcast by it within 14 days of the match being played (pars 108-109).

(iv) The '**News-AFL Licence**', being a contract made on about 19 December 2000 between News and the AFL containing provisions ('**News-AFL Licence Provisions**') that deemed the AFL free-to-air television rights to be sold to News for $46 million per annum (plus GST, contra and adjustments) if no agreement concerning the AFL free-to-air television rights was made with a third party by 29 January 2001. The News-AFL Licence Provisions also required News to acquire the AFL pay television rights for $30 million per annum (plus GST and adjustments) plus the provision of editorial support (pars 110-111).

(v) The '**News-Foxtel Licence**' which News and Foxtel entered into in terms of the Foxtel Put and pursuant to which Foxtel commenced to broadcast AFL matches on its retail pay television service. The relevant provision of the News-Foxtel Licence ('**News-Foxtel Licence Provision**') was equivalent to the Foxtel Put Provision (pars 116-117).

(vi) The '**News-Nine Licence**' which News and Nine entered into in terms of the Nine Put and pursuant to which Nine commenced to broadcast AFL matches on its free-to-air television service. The relevant provision of the News-Nine Licence ('**News-Nine Licence Provision**') was equivalent to the Nine Put Provision (pars 120-121).

(vii) The '**News-Ten Licence**' which News and Ten entered into in terms of the Ten Put and pursuant to which Ten commenced to broadcast AFL matches on its free-to-air television service. The relevant provision of the News-Ten Licence ('**News-Ten Licence Provision**') was equivalent to the Ten Put Provision (pars 124-125).

(viii) The '**NRL Bidding Agreement**', being a contract made on about 13 December 2000, between Fox Sports, Foxtel and Telstra. The NRL Bidding Agreement contained provisions ('**NRL Bidding Agreement Provisions**') whereby:

> Foxtel agreed to pay Fox Sports $18 million per annum (plus GST and adjustments) for NRL coverage to be supplied by Fox Sports, the fee to be reduced if Optus Vision acquired pay television rights directly from the NRL Partnership;
>
> Fox Sports conferred on Foxtel the exclusive right to sub-license the NRL coverage to Optus Vision and to retain all proceeds of such sub-licensing; and
>
> Telstra agreed, if requested by Fox Sports, to acquire the NRL naming rights for $4 million per annum and the NRL internet rights for $1 million per annum (plus GST and adjustments) (pars 129, 130).

(ix) The '**Fox Sports-NRL Pay Rights Agreement**', being a contract entered into between Fox Sports and the NRL Partnership on about 13 December 2000. This agreement contained provisions ('**Fox Sports-NRL Pay Rights Agreement Provisions**'), whereby Fox Sports acquired the NRL pay television rights for $30 million per annum (plus GST and adjustments), the fee to be reduced to $15 million if the NRL Partnership granted the NRL pay television rights to Optus Vision and to be increased by certain percentages if and when Fox Sports' total monthly subscribers exceeded two million or 2.5 million. The NRL Partnership also agreed not to grant NRL pay television rights to any other party on terms more favourable than those contained in the Fox Sports-NRL Pay Rights Agreement (pars 132-133). (The Fox Sports-NRL Pay Rights Agreement is referred to elsewhere in the judgment as the '*NRL-Fox Sports Licence*'.)

13.3.4 Rights Sub-Licence Agreement

2116 At the time of entering into the Foxtel Put, the Nine Put and the Ten Put, there was a contract, arrangement or understanding ('**Rights Sub-Licence Agreement**') between News, Foxtel, Nine and Ten. This contained a provision ('**Rights Sub-Licence Provision**') that News would, upon acquiring the AFL pay television rights, sub-license those rights to Foxtel or, upon acquiring the AFL broadcasting rights, sub-license the AFL pay television rights to Foxtel and the AFL free-to-air television rights to Nine and Ten (pars 239-240). By reason of these matters, the Foxtel Put Provision had the effect or likely effect that News would be the successful bidder for the AFL broadcasting rights (par 246).

13.3.5 Markets

2117 As I have noted, Seven relies principally upon the effect or likely effect of various provisions on competition in the wholesale sports channel market. However, Seven says, in the alternative, that the provisions had the effect of substantially lessening competition in three other markets. Although I have already addressed the question of markets in Chapter 12, I repeat that the relevant markets are pleaded as follows:

(i) **A wholesale sports channel market,** being a market in Australia for the

wholesale acquisition and supply of channels consisting of sports programming to the providers of pay television services in the retail pay television market or, alternatively, in the retail television market (par 145(a)).

(ii) **A retail pay television market,** being an Australia-wide market for the retail supply of pay television services, the principal suppliers of which are Foxtel, Optus and Austar (par 140). The applicants say that Foxtel, at least since November 1998, has had a substantial degree of power in the retail pay television market (par 142).

(iii) **An AFL pay rights market,** being a market in Australia for the acquisition and supply of pay television rights to broadcast AFL matches (par 153).

(iv) **An NRL pay rights market,** being a market in Australia for the acquisition and supply of pay television rights to broadcast NRL matches (par 154).

2118 As I have already explained, the retail pay television market is the only one of the four pleaded markets that, in my opinion, Seven has made out.

13.3.6 Consequences of Acquiring the AFL Pay Television Rights

2119 In order to operate a viable pay television service in Australia, it is necessary to offer attractive Australian sports programming as a subscription driver (par 161). Further, since at least November 1998, in order to reach a sufficiently critical mass to be economically viable, it is important that a retail pay television operator in Australia has access to a sports channel that incorporates a '*must have*' sport, known as a '*marquee sport*'. This is because the most important single factor driving pay television subscriptions is live and exclusive coverage of marquee sports (par 161A(b)). Seven pleads that:

> *'**the only premium sports** in Australia which provide consumers, viewers and subscribers with sufficient depth, intensity, and strength of live coverage at recurrent, predictable, concise and regular times convenient to both the broadcaster and the audience **that can be characterised as marquee sports are the AFL and the NRL**'* (par 161A(e)). (Emphasis added.)

2120 Until early 2002, Optus was reliant on C7 for a major subscription driver, being the

C7 channels incorporating AFL programming (par 162). The C7 channels and in particular, AFL programming, were a major point of differentiation between the pay television services offered by Optus and Foxtel and provided an incentive for subscribers to subscribe to Optus rather than Foxtel (par 163).

2121 The acquisition of the AFL pay television rights by Foxtel and C7's failure to acquire the NRL pay television rights had the consequence that Foxtel filled the last remaining gap in its line-up of marquee sports and could increase its subscriber numbers at Optus' expense (par 164(a), (c)). Optus was required to obtain attractive Australian sports programming from Foxtel and thus had a strong incentive to terminate the C7-Optus CSA and enter into content supply agreements with Foxtel (pars 164(d), 194).

13.3.7 Effect on the Retail Pay Television Market

2122 By reason of the matters pleaded in par 164, the effect or likely effect of the acquisition of AFL pay television rights by Foxtel was a substantial lessening of competition in the retail pay television market (par 165). In the alternative, Seven pleads that with the loss of the AFL pay television rights by C7 and the failure by C7 to secure the NRL pay television rights:

> *'(a) The only suppliers of channels with marquee sports or other sufficiently attractive Australian sports programming to act as a subscription driver were Foxtel and Fox Sports.*
>
> *(b) Optus' programming, and its ability to attract subscribers, was substantially inferior to that of Foxtel.*
>
> *(c) In order to compete with Foxtel, it was a commercial imperative for Optus to obtain sports channels broadcast by Foxtel.*
>
> *(d) Optus could cease providing a pay television service, or, in order to continue providing a viable pay television service, could enter into an arrangement with Foxtel which included the supply of programming'* (par 168).

2123 The entry into an arrangement with Foxtel which included the supply of programming significantly reduced Optus' ability to compete with Foxtel, as Optus was dependent upon its competitor for the supply of programming, with the terms of supply fixed by Foxtel. Optus was therefore not able to compete effectively with Foxtel in circumstances where Foxtel controlled price and other terms of supply of Optus' programming (par 169).

2124 If Foxtel had not acquired the AFL pay television rights, then:

> *'(a) It is likely that C7 would have acquired the AFL pay rights.*
>
> *(b) Optus would not have been required to obtain programming from Foxtel, and the anti-competitive effects referred to [elsewhere in the Statement of Claim] would not have occurred.*
>
> *(c) Optus would have acted as a significant constraint on the ability of Foxtel to increase the price of its services, and there would have been substantial competition between Optus and Foxtel in relation to programming quality and price*' (par 170).

2125 By reason of the matters pleaded in pars 168-170 (and elsewhere), the effect or likely effect of the acquisition of AFL pay television rights by Foxtel was a substantial lessening of competition in the retail pay television market (par 171).

13.3.8 Effect on the Wholesale Sports Channel Market

2126 Seven alleges that the effect or likely effect of the acquisition of the AFL pay television rights by Foxtel was a substantial lessening of competition in:

> the wholesale sports channel market (pars 181, 185); and
>
> the AFL pay rights and the NRL pay rights markets (par 193).

2127 So far as the wholesale sports channel market is concerned, Seven alleges that prior to the acquisition by Foxtel of the AFL pay television rights, C7 provided significant competition to Fox Sports and Foxtel in the wholesale sports channel market (par 176). Following the acquisition by Foxtel of the AFL pay television rights and C7's failure to acquire the NRL pay television rights, C7 was unable to compete with Foxtel and Fox Sports in the supply of pay television sports channels (par 177). Moreover, there was no other significant competition to Foxtel and Fox Sports in the supply of pay television sports channels (par 178). Foxtel and Fox Sports became the only suppliers of channels that incorporated attractive Australian sports programming and the only suppliers of channels incorporating '*marquee sports*'. There was (and is) no competition between Foxtel and Fox Sports as they '*supply complementary channels only*' and have overlapping ownership (pars 179-180).

2128 If Foxtel had not acquired the AFL pay television rights, then:

the C7 channels would have offered a viable alternative to the Fox Sports channels;

the C7 channels would have acted as a significant constraint on the ability of Foxtel and Fox Sports to increase the price of their sports channels by reason of competition on both price and quality;

the Fox Sports channels would not have offered all marquee sports and it would not have been a commercial imperative for pay television service providers, including Optus, to acquire them; and

since the acquisition of the Fox Sports channels would not have been a commercial imperative for pay television service providers (because C7 would have acquired the AFL pay television rights), neither Foxtel nor Fox Sports would have been in a position to exercise power in relation to the extent to which, or the terms on which, channels were supplied to pay television providers (par 184).

13.3.9 Effect of the Master Agreement Provision

2129 The parties to the Master Agreement knew that it was a term of the C7-Optus CSA and of the C7-Austar CSA that C7 would supply programming which included AFL matches (par 210). In March 2002, Optus purported to terminate and Austar did not renew their respective content supply agreements (pars 211-212). Following these events, C7 ceased operations on 7 May 2002 and thereafter Fox Sports became the dominant supplier of channels incorporating Australian sports content (pars 213-214).

2130 The parties to the Master Agreement gave effect to the Master Agreement Provision by entering into and procuring the entry into the 12 Acquisition Agreements (par 224). The Master Agreement Provision had the effect on competition previously pleaded in the Statement of Claim because it required that:

News, Foxtel. PBL and Telstra would carry out and procure their related bodies corporate to carry out the AFL and NRL Proposals;

upon News successfully bidding for the AFL broadcasting rights, the AFL pay television rights would be sub-licensed to Foxtel (par 225).

The Master Agreement Provision also required or was likely to result in the sub-licensing of the AFL pay television rights to Foxtel for several other reasons (pars 225A-225E).

2131 The Master Agreement Provision further had or was likely to have the effect on competition previously pleaded because without the Master Agreement Provision and the assurances provided by the various parties:

> News would not have bid for the AFL broadcasting rights or would have made a less attractive bid;
>
> Fox Sports would have made a less attractive bid for the NRL pay television rights than the C7 bid;
>
> neither Foxtel nor Fox Sports would have acquired the AFL pay television rights from either the AFL or News, and Seven would have acquired the pay television rights from the AFL; and
>
> Fox Sports would not have acquired the NRL pay television rights from the NRL Partnership (par 225K).

13.3.10 Effect of the Acquisition Agreements

2132 Each of the Acquisition Agreements was entered into in compliance with and in furtherance of the Master Agreement and in circumstances which included the entry into and performance of each of the Acquisition Agreements (par 227). The effect or likely effect of each of the relevant provisions of the Acquisition Agreements was the same as the effect or likely effect of the Master Agreement Provision (par 228).

2133 In any event, the effect or likely effect of the Master Agreement Provision must be considered together with the effect or likely effect of each of the Acquisition Agreement Provisions (par 229). Further, the effect or likely effect of each Acquisition Agreement Provision must be considered together with the effect or likely effect of each of the other Acquisition Agreement Provisions and the Master Agreement Provision (par 230).

2134 The Statement of Claim pleads the effects on competition of each of the Acquisition Agreements in turn. I summarise here the pleadings concerning those Acquisition Agreements on which Seven relies in its final submissions. The order of presentation reflects that of Seven's submissions, rather than that of the Statement of Claim.

13.3.10.1 NEWS-FOXTEL LICENCE

2135 News supplies and acquires services in, among others, the AFL pay rights market. Foxtel supplies services in, among others, the retail pay television market and the wholesale sports channel market. Foxtel also supplies and acquires services in, among others, the AFL pay rights market (par 289). The effect of the News-Foxtel Licence Provision was that Foxtel acquired the AFL pay television rights (par 292B). For this reason also (taking into account matters already pleaded relating to the effect of the Master Agreement Provision), News and Foxtel contravened s 45(2)(a)(ii) and (b)(ii) of the *TP Act* (pars 292C-292D).

13.3.10.2 NINE PUT

2136 By reason of the effect or likely effect of the Nine Put Provision as previously pleaded (pars 228-229), in entering into the Nine Put each of Nine and News contravened s 45(2)(a)(ii) and (b)(ii) of the *TP Act* (pars 274-275).

13.3.10.3 NEWS-NINE LICENCE

2137 Seven's pleadings in relation to the News/Nine Licence are to the same effect as the allegations in relation to the Nine Put (pars 296-299).

13.3.10.4 NRL BIDDING AGREEMENT

2138 Two of the parties to the NRL Bidding Agreement, Foxtel and Fox Sports, supply services in the wholesale sports channel market and Foxtel also acquires services in that market (par 308). Foxtel also acquires and supplies services in, among others, the AFL pay rights market, while Fox Sports acquires services in among others, the NRL pay rights market (par 309). By reason of the effect or likely effect of the NRL Bidding Agreement Provisions as previously pleaded (pars 228-229), in entering into the NRL Bidding Agreement each of Telstra, Foxtel and Fox Sports contravened s 45(2)(a)(ii) and (b)(ii) of the *TP Act*.

13.3.10.5 FOX SPORTS-NRL PAY RIGHTS AGREEMENT

2139 Seven's pleadings in relation to the Fox Sports/NRL Pay Rights Agreement are to the same effect as the allegations in relation to other agreements (pars 313-316).

13.4 Seven's Submissions

2140 In this section, I outline Seven's principal submissions in support of its pleaded case. For the same reasons as apply to the summary of Seven's pleadings, I have not confined the outline of its submissions to the case based on the retail pay television market. For the sake of clarity, I also refer in this section to certain arguments advanced by the Respondents.

13.4.1 Markets

2141 Seven submits that there is no real dispute that at least one of the parties to the Master Agreement supplied or acquired goods or services in each of the four primary markets upon which it relies. It says therefore that no issue arises as to whether the terms of s 45(3) of the *TP Act* are satisfied.

13.4.2 Existence of the Agreements

13.4.2.1 MASTER AGREEMENT

2142 In accordance with the pleadings, Seven says that the Master Agreement was entered into on 13 December 2000 between News, Foxtel, PBL and Telstra. The Master Agreement was intended, according to Seven, '*to secure both the AFL broadcast rights and the NRL pay, internet and naming rights*'.

2143 In its Closing Submissions, Seven devotes a chapter (Chapter 6) to an anticipated submission by the Respondents to the effect that the acquisition of the AFL broadcasting rights by News involved a series of bilateral arrangements between News and the sub-licensees, rather than multi-party arrangements among the members of a consortium. Seven apparently assumed that the Respondents would rely on Mr Philip's rather optimistic evidence that he sought to keep the negotiations between News and each of the proposed sub-licensees quite separate from each other and that, accordingly, there was no meeting of minds necessary to constitute an arrangement or understanding for the purposes of s 45(2) of the *TP Act*.

2144 As Seven's Reply Submissions observe, however, the Respondents have chosen not to take issue with Chapter 6 of Seven's Closing Submissions. The only significant point of difference between the parties, so far as the existence of the Master Agreement is concerned, is whether there was an agreement or understanding dealing with **both** the AFL broadcasting

and NRL pay television rights.

2145 The Respondents' position, exemplified by PBL's Closing Submissions, is that there was no overarching agreement between News, PBL, Telstra and Foxtel relating to both the AFL and NRL pay television rights. PBL submits that a number of essential elements of each of the AFL and NRL Proposals were not dealt with at all at the 13 December 2000 teleconference. For example, there was no mention of the Nine Put, which was executed on 14 December 2000, or the Ten Put, which was also executed on that day.

2146 In any event, PBL contends that there was no connection between the AFL and NRL Proposals. The decision by Fox Sports to proceed with the bid for the NRL pay television rights was made separately from any decision at the 13 December 2000 teleconference and was made without Telstra's participation. Further, there was no connection between the NRL and AFL bidding processes, other than that they were co-incident in time and involved some of the same individuals. Neither bid was contingent on the other.

2147 Seven, however, submits that in order to appreciate the scope of the arrangement made on 13 December 2000, it is necessary to examine the events leading up to that day. Mr Philip and Mr Frykberg had formulated a proposal containing many of the elements of the understanding reached on 13 December 2000. The proposal that News should acquire the AFL broadcasting rights and sub-license the AFL pay television rights to Foxtel had the support of News, PBL and Foxtel. But it had encountered resistance from Telstra and therefore from Telstra's representatives on the Foxtel Management board. In particular, on 8 December 2000, Telstra had rejected a proposal that Telstra support a bid for the AFL pay television rights at $30 million per annum (plus adjustments).

2148 According to Seven, Mr Philip not only sought Telstra's support for Foxtel's involvement in News' bid for the AFL broadcasting rights but he also sought Telstra's support for Fox Sports' bid for the NRL pay television rights. Seven contends that there was a clear link between the acquisition of the AFL and the NRL pay television rights. The link, so Seven argues, reflects the circumstances surrounding the 13 December 2000 teleconference, which had been convened to discuss both the bids for both the AFL broadcasting rights and the NRL pay television rights.

2149 Seven's Reply Submissions say this:

> *'Once it is accepted that there were understandings dealing with each of NRL and AFL rights, it does not require much to conclude that there was an understanding dealing with both in the circumstances of the present case where the relevant rights were up for simultaneous renewal. There are obvious reasons why the understanding between the parties would extend to both sets of rights. It was seen as highly undesirable that Foxtel secure AFL rights, but then C7 obtain NRL rights. One of the stated objects of the AFL rights acquisition was to obtain the* ***last remaining gap****. There was no desire to create another one. The objective of securing the premium rights into the hands of Foxtel/Fox Sports would be frustrated if C7 acquired either AFL or NRL.*
>
> *...*
>
> *In these circumstances, there was an understanding to carry out both proposals. The fact that there were two separate rights to acquire does not stand in the way of there being an understanding to acquire both'.* (Emphasis in original.)

13.4.2.2 RIGHTS SUB-LICENCE AGREEMENT

2150 PBL challenges the existence of the Rights Sub-Licence Agreement as pleaded by Seven. PBL submits that the only point in pleading an agreement whereby News, on acquiring the AFL broadcasting rights, would sub-license them to Foxtel, Nine and Ten, is to connect Nine with the alleged contraventions of the *TP Act.* This is being done, so it is argued, in circumstances where Seven cannot establish any separate claim in relation to Nine's acquisition of the AFL free-to-air television rights.

2151 PBL submits that the fact that Nine, Ten and Foxtel knew of each other's participation in a bid organised by News does not establish an agreement or understanding betwween them. There was no meeting of minds. On the contrary, each of the parties was concerned to maximise the benefit to itself, for example in relation to the '*flip-flop*'. Moreover, Nine and Ten each made its own decision independently on 14 December 2000.

2152 In its Reply Submissions, Seven contends that, as a matter of law, an arrangement can exist without direct discussions among all participants. A series of bilateral communications is sufficient, provided that the parties share a common purpose. In this case, the parties shared a common purpose, namely supporting News' bid for the broadcasting rights to be parcelled out between them in a pre-determined manner. Further, each party knew in general

terms how the rights were to be parcelled out. What they were doing made no sense except as a common undertaking.

13.4.3 Effect of The Master Agreement Provision

2153 According to Seven, by the time the Master Agreement was formed, all the essential terms of the Foxtel Put, the Nine Put, the Ten Put and News' bid for the AFL broadcasting rights had been finalised. Seven argues that:

> *'The terms of the Put Agreements supported a bid by News of $76 million per annum (plus CPI for the years 2003 to 2006) for AFL broadcast rights, with additional benefits in the form of newspaper support in newspapers owned by the News Group, magazine support in magazines owned by a subsidiary of PBL, and obligations of News in respect of overseas broadcasts by companies in the News Group. The News bid was the winning bid. (Seven had a right to match the free-to-air bid, but this did not affect the disposition of the AFL pay rights). It follows that the direct effect of the Master Agreement, in relation to the AFL pay rights, was that Foxtel acquired those rights and C7 did not'.*

2154 Seven submits that it is unnecessary to consider whether the **likely effect** of the Master Agreement Provision at the time of its formation was that Foxtel would acquire the AFL pay television rights. The **actual effect** of the Master Agreement was that those rights were acquired. That suffices, so Seven contends, to establish a contravention of s 45(2)(a)(ii) of the *TP Act.*

2155 Nonetheless, Seven also submits that the likely effect of the Master Agreement Provision, at the time the parties entered into the Master Agreement, was that the AFL pay television rights would be acquired by Foxtel. The Master Agreement Provision contemplated and required that, if News' bid was successful, the AFL pay television rights would be sub-licensed to Foxtel. This is said to be sufficient for the Master Agreement Provision to have had the proscribed effect. But the Master Agreement Provision had:

> *'the additional effect of requiring the implementation of a then contemplated bid, being the winning bid'.*

Seven says that it is incorrect to regard this as a case involving an agreement subject to a contingency (that is, that News had first to acquire the AFL pay television rights). The agreement:

'facilitated the acquisition of [the AFL pay] rights, and indeed provided for the making of the successful bid'.

2156 According to Seven, this is sufficient to conclude that the Master Agreement Provision had the requisite likely effect of substantially lessening competition in the pleaded markets at the time the parties entered into the Master Agreement. However, the Master Agreement Provision also facilitated in other respects the News bid for the AFL broadcasting rights. The three respects identified are those pleaded in pars 225A, 225B and 225D of the Statement of Claim, namely that:

> the terms of the Foxtel Put, together with the Nine Put and Ten Put, enabled News to make a bid for the AFL broadcasting rights greater than any amount offered by Seven;
>
> the proposed sub-licence to Foxtel of the AFL pay television rights was very attractive to the AFL because it maximised the number of potential viewers; and
>
> the News bid was supported by undertakings to provide media coverage of the AFL, also a matter of importance to the AFL in allocating the broadcasting rights.

2157 So far as the NRL pay television rights are concerned, Seven submits that if Mr Philip's evidence is accepted it was a foregone conclusion at the time the parties entered into the Master Agreement on 13 December 2000 that C7 would not acquire the NRL pay television rights. It follows, so Seven argues, that the likely and actual effect of the Master Agreement Provision was that Foxtel would acquire the AFL pay television rights, in circumstances where C7 was bound to be unsuccessful in its attempt to secure the NRL pay television rights.

2158 If Mr Philip's evidence was false and News was not prepared to bid more than $25 million per annum for the NRL pay television rights, the Master Agreement Provision ensured Telstra's support for a higher bid. In these circumstances, the Master Agreement Provision had the likely and actual effect of enabling Fox Sports to acquire the NRL pay television rights over C7.

2159 Seven's Reply Submissions seek to develop the cryptic observation made in Seven's

Closing Submissions that the **actual effect** of the Master Agreement Provision was that Foxtel acquired the AFL pay television rights. Seven points to authorities that support the proposition that the '*effect*' of a contract involves a backwards-looking assessment. While some cases concern proposed contracts or contracts which '*have ceased in their incipience*', others concern contractual provisions which have actually been performed. In the latter category of cases, of which the present is an example, an assessment of the effect of the contract is informed by the facts and is therefore '*present or retrospective*'.

2160 Seven's Reply Submissions point out that s 45(2)(a)(ii) of the *TP Act* prohibits the making of a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding **would have or be likely to have** the effect of substantially lessening competition in a market. Seven says that s 45(2)(a)(ii) incorporates a temporal element: that is, the use of the word '*would*' reflects the fact that the prohibition is on **making** a contract or arrangement or **arriving** at an understanding. Section 45(2)(a)(ii) therefore necessarily requires the Court to assess the **prospective** effect of a provision in the contract, arrangement or understanding. However, Seven contends that where a contract is performed (as in the present case), it is permissible to examine the **actual** effect of the contract and draw any reasonable inference when assessing the **likely** effect of the relevant provisions.

2161 Seven also relies on s 45(2)(b)(ii) of the *TP Act* which, so it argues, the Respondents have ignored in their submissions. (If the Respondents did ignore s 45(2)(b)(ii), in my view, it was because Seven's Closing Submissions did not make the argument apparent.) Seven submits that conduct in '*giving effect*' to a provision may be continuing conduct, requiring the assessment of the effect of the provision to be undertaken a considerable time after the agreement was formed or first came into operation. Accordingly, the Court should assess the effect and likely effect of giving effect to a provision on each occasion that such a '*giving effect*' occurs.

2162 For example, on Seven's case, the Consortium Respondents gave effect to the Master Agreement Provision, which came into operation on 13 December 2000, by entering into the News-AFL Licence on 19 December 2000 and the News-Foxtel Licence on about 21 January 2001. In determining whether giving effect to the Master Agreement Provision in this way had or was likely to have the effect of substantially lessening competition, it is necessary to

take account of events that had occurred at the times the licences came into force (that is, at the times the parties gave effect to the Master Agreement Provision). Moreover, Seven submits that it is also permissible to take into account the fact that Foxtel ultimately acquired the AFL pay television rights and that Fox Sports ultimately acquired the NRL pay television rights in determining the effect of the Master Agreement Provision. Seven advances further submissions in relation to s 45(2)(b)(ii), to which I refer below.

2163 Seven submits that News' submissions are flawed insofar as they suggest that, for the purposes of s 45(4) of the *TP Act*, regard may only be had to agreements in force on the date the relevant contract, arrangement or understanding was entered into. News' submissions are said to be based on a mistaken view as to the time when a substantial lessening of competition must be assessed. Further, once the '*temporally extended nature of assessment under s 45(2)(b)(ii) is grasped*', News' submissions are '*manifestly wrong*'. According to Seven, '*[e]ffects are accretive*'.

2164 Even if (contrary to Seven's contentions) it is necessary to consider the likely effect of the Master Agreement Provision at the date the Master Agreement came into force, Seven says that it was likely to have the relevant effect. In particular, Seven rejects News' argument that Seven's conduct in not making its best bid for the AFL pay television rights on 14 December 2000 prevented the Master Agreement Provision having that likely effect. Seven submits that it did not '*deliberately [pull] ... its punches*'. In any event, so it contends, Seven's conduct did not amount to a '*supervening event*' that broke what otherwise would be the chain of causation between the Master Agreement Provision and its effect.

13.4.4 'Competition on the Merits'

2165 Seven, in its Closing Submissions, appears to concede that if the actions of the Consortium Respondents relating to the acquisition of the AFL and NRL pay television rights '*had simply been the ordinary workings of vigorous competition [Seven] would have no case at all'*. This concession seems to have prompted the Respondents to argue that the bidding for the pay television rights simply constituted, in Professor Fisher's phrase, '*competition on the merits*' and was therefore outside the scope of s 45(2) of the *TP Act.*

2166 Seven's Reply Submissions argue that Australian competition law does not recognise a concept of '*competition on the merits*'. Seven contends that s 45(2) of the *TP Act* does not

require the use of anti-competitive means for a provision to have the effect or likely effect of substantially lessening competition. A '*subjectively innocent arrangement'* that is not the result of anti-competitive conduct, such as predation, tying, refusing to deal or price discrimination, nonetheless contravenes s 45(2) if it results in a substantial lessening of competition. It is therefore not to the point, so Seven contends, that the transactions by which Foxtel and Fox Sports acquired the AFL and NRL pay television rights might have involved competitive bids.

2167 Mr Sumption developed this point in his final oral submissions, in the process elevating the significance of s 45(2)(b)(ii) of the *TP Act* to Seven's case. He submitted that, in determining whether a party has given effect to a provision of a contract, arrangement or understanding, the Court:

> assesses whether the original provision is **likely to have the effect** of substantially lessening competition in the light of the circumstances prevailing **at the time the party gives effect to that provision**; and
>
> assesses whether the provision **has the effect** of substantially lessening competition **at the date of the hearing**, in the light of the facts known at that time.

2168 In drawing this temporal distinction, Mr Sumption relied on the language used in s 45(2)(b)(ii), in particular the use of the present tense ('*has the effect'*) in contrast to the prospective operation of the expression '*is likely to have*'. According to Mr Sumption, the fact that the sub-paragraph uses the present tense shows that the language is directed to the Court hearing the case. He also relied on the fact that Parliament's concern with minimising the anti-competitive effect of conduct reflects the public interest and not merely the private interests of particular parties. Accordingly, so he argued, the sub-paragraph should be construed with the statutory purpose in mind.

2169 Mr Sumption identified an issue of principle which arises from the Respondents' insistence that the bidding for the AFL and NRL pay television rights amounted to '*competition on the merits*'. He submitted that:

> *'the acquisition of an essential input or of the whole of a category of essential inputs so that no-one else can compete with the monopolist in the relevant market necessarily brings about a substantial lessening of competition in that*

market, unless new entry into the market is straightforward'.

Mr Sumption accepted that a mere alteration in the number or identity of firms in a given market is not enough to constitute a contravention of s 45(2) of the *TP Act.* But if the provision of a contract, arrangement, or understanding has the consequence of substantially lessening competition in the relevant market, s 45(2) is contravened notwithstanding that the parties making or giving effect to the contract, arrangement or understanding have not employed anti-competitive means to do so. Thus s 45(2) applies:

> *'to a case where the effect of a transaction is to confer substantial market power on one firm in a market or to increase the substantial market power that that firm already has'.*

2170 The Respondents' submissions concerning competition on the merits, according to Seven, elide two distinct propositions. The first, which is common ground, is that the purpose of competition law is to protect competition, not competitors. The second is that where a firm engages in legitimate competitive conduct, any consequences flowing from that conduct cannot amount to a substantial lessening of competition. Seven says that the second proposition is misconceived as a matter of law.

2171 In the present case, so Mr Sumption submitted, C7's demise as a firm constraining Fox Sports in the wholesale sports channel market was attributable to its failure to acquire an essential input for its business (either the AFL or NRL pay television rights). That failure came about by reason of the conduct of News, PBL, Foxtel and Fox Sports in making an arrangement which effectively monopolised the essential inputs. So a contravention of s 45(2) of the *TP Act* is made out.

13.4.5 Logic of Seven's Case

2172 In his oral closing submissions, Mr Sumption accepted that Seven's case would be exactly the same if the understanding or arrangement at the teleconference of 13 December 2000 had been confined to the acquisition of the AFL broadcasting rights and News and Fox Sports had relied entirely upon News' last right to ensure that Fox Sports obtained the NRL pay television rights. Mr Sumption also accepted that the logic of Seven's position, once Fox Sports had a real chance of acquiring the NRL pay television rights, was that News or Foxtel simply could not lawfully bid for the AFL pay television rights. He formulated the issue of

principle this way:

> *'in circumstances where the result of acquiring both rights, possibly ... entirely fairly, is to eliminate a competitor in a market which has high barriers to entry, is that result nevertheless acceptable in section 45 terms if the process by which the rights have been acquired is itself perfectly fair?'*

2173 Mr Sumption's answer was to formulate this principle:

> *'If the facts are that the disposal of an essential input to a single party will produce a substantial lessening of competition in a relevant market, then the AFL would be in a position where it could not let those rights as a single block'.*

He argued that the principle, if accepted, would not put the AFL, as a seller of rights, in an invidious position. It could sell the '*unique input*' (the AFL pay television rights) in segments or, alternatively, apply to the ACCC for authorisation under s 88 of the *TP Act*.

13.4.6 Anti-Competitive Means

2174 If, contrary to Seven's argument, it is necessary for it to establish that the parties to the Master Agreement Provision employed '*anti-competitive means*', Seven says that such means were in fact employed in connection with the bid for the AFL pay television rights. They comprised the following:

> News, supported by the Foxtel Put, '*overbid*' for the AFL pay television rights. Foxtel had assessed the bid to be loss making over the term of the agreement and, in any event, the cost of the rights was likely to be more expensive than acquiring the same content through C7. Thus its bid was '*predatory*'.
>
> Foxtel refused to negotiate for the carriage of C7 from June 1999 to December 2000.
>
> Foxtel made statements to the AFL to the effect that Foxtel would not take C7, even if C7 acquired the AFL pay television rights.

2175 The second and third of the anti-competitive means combined to make Foxtel's bid for the AFL pay television rights (through News) more attractive to the AFL, even if C7 were to match it on price. In particular, C7 could not match an important feature of Foxtel's bid,

namely that Foxtel could guarantee the availability of live AFL content to a large subscriber base, whereas C7 could offer no such assurance.

2176 Seven also submits that certain aspects of the Master Agreement Provision had '*an anti-competitive tendency*'. In particular, the '*tying*' of Foxtel's acquisition of the AFL pay television rights with the bid by Nine and Ten for the AFL free-to-air rights and the '*bundling*' of News' media support with the bid for the AFL broadcasting rights gave the News offer features that Seven's bid could not match.

13.4.7 Effect on the Wholesale Sports Channel Market

2177 Seven submits that one effect or likely effect of the Master Agreement Provision (and the other provisions upon which it relies) was a substantial lessening of competition in the wholesale sports channel market. The steps in the argument seem to be these:

> prior to the acquisition of the AFL pay television rights by News and then Foxtel (acquisitions that were likely at the time the Master Agreement Provision was agreed to) C7 provided significant competition to Fox Sports and Foxtel as wholesale sports channel suppliers;
>
> following the acquisition, C7 was unable to compete with Foxtel and Fox Sports in the wholesale supply of sports channels and ultimately ceased operations;
>
> other wholesale suppliers of sports channels have not provided significant competition to Foxtel or Fox Sports;
>
> Foxtel and Fox Sports do not compete against each other;
>
> had Foxtel not acquired the AFL pay television rights, the likelihood is that C7 would have done so and would have survived as a competitor of Foxtel and Fox Sports.

13.4.8 Effect on the AFL and NRL Pay Rights Markets

2178 The likely and actual effect of the demise of C7 (itself a likely result of the Master Agreement Provision and other provisions relied on by Seven) was that there would only be one potential purchaser of the AFL pay television rights and the NRL pay television rights, namely Foxtel/Fox Sports. In those circumstances, the likely and actual effect of the Master

Agreement Provision was a substantial lessening of competition in the AFL and NRL pay rights markets.

13.4.9 Effect on the Retail Pay Television Market

2179 One of the difficulties presented by litigation of this kind is that the parties are required to argue numerous inter-related issues without the benefit of findings that might drastically curtail the scope of the dispute. The problem has been compounded in this case by Seven's insistence on presenting and persisting with a very large number of alternative contentions. In view of the findings I have made as to the markets pleaded and relied on by Seven, the only aspect of Seven's s 45(2) effects case that I must address is whether any of the agreements, arrangements or understandings identified by Seven contained provisions that had the effect or likely effect of substantially lessening competition in the **retail pay television market**.

2180 Perhaps not surprisingly, given the thrust of Seven's submissions, this issue received (relatively) little attention in the written and oral submissions and the arguments were not systematically developed. References to the issue are scattered among the various written submissions, sometimes subsumed in argument on other issues. When I asked Mr Sumption during his closing address to clarify Seven's position, should I find that there was no wholesale sports channel market, his initial response was that he could not see how Seven's s 45(2) effects case could succeed. However, he subsequently modified that response, stating that Seven could '*succeed only on the basis of the knock-on effects in the retail pay [television] market*'. Mr Sumption referred to Seven's written submissions for further elaboration of the argument.

2181 In the written submissions, Seven contends that Foxtel's acquisition in December 2000 of the AFL pay television rights, together with C7's failure to secure the NRL pay television rights, had the effect or likely effect of substantially lessening competition in the retail pay television market. Seven gives two reasons for this contention:

> *'(a) Optus became dependent upon its competitor, Foxtel, for the supply of key programming, with the terms of that supply fixed by Foxtel. Optus was as a result less able to compete effectively with Foxtel in circumstances where Foxtel exercised a substantial measure of control over the price and other terms of the supply of key programming which Optus needed to compete;*

(b) but for the rights acquisition, Optus would not have entered into the CSA, and accordingly the anti-competitive effects of that agreement would not have occurred'.

Seven acknowledges that the effect of the acquisition of the AFL pay television rights was (on its contentions) '*predominantly anti-competitive at the channel supply level*'. Seven maintains, nonetheless, that there was also an anti-competitive effect at the retail pay television level.

2182 Seven relies on the evidence of Dr Switkowski that he thought that Foxtel had obtained a strategic advantage in relation to Optus, as a pay television provider, by controlling AFL content and that Foxtel had increased its prospects of out-competing Optus. Seven also relies on the evidence of Professor Noll and Dr Smith to the effect that the rights acquisition gave Foxtel a '*gate-keeper*' role in respect of AFL programming and that this permitted Foxtel to determine conditions of access to such programming by Optus and Austar. With fewer resources available to engage in pro-competitive conduct, Optus and Austar would have been less of a competitive constraint than had Foxtel not acquired the AFL pay television rights.

2183 Seven does not press its pleaded allegation that Foxtel's acquisition of the AFL pay television rights caused a substantial lessening of competition in the retail pay television market by removing a major point of differentiation between Optus and Foxtel, with the result that Foxtel acquired significantly more attractive programming than Optus.

13.4.10 Seven's Submissions on Particular Provisions

2184 Seven's submissions address the role of the various provisions identified in the pleadings in the acquisition by Foxtel of the AFL pay television rights (in place of C7) and in the acquisition by Fox Sports of the NRL pay television rights. According to Seven, '*[p]ut simply, the effect was to send C7 out of business*'.

13.4.10.1 NEWS-FOXTEL LICENCE PROVISION

2185 The News-Foxtel Licence Provision was the means by which Foxtel acquired the exclusive AFL pay television rights and C7 did not. There were therefore no '*intermediate steps*' between the News-Foxtel Licence and the acquisition of the rights. Thus, the likely

and actual effect of the rights acquisition and the likely and actual effect of the News-Foxtel Licence Provision were one and the same. The effect or likely effect of Foxtel's acquisition of AFL pay television rights was to substantially lessen competition in each of the four markets relied on by Seven. Accordingly, by entering into the News-Foxtel Licence containing the News-Foxtel Licence Provision, and in giving effect to the News-Foxtel Licence Provision, each of News, Sky Cable and Telstra Media engaged in conduct in contravention of s 45(2)(a)(ii) and (b)(ii) of the *TP Act*.

13.4.10.2 RIGHTS SUB-LICENCE PROVISION

2186 The effect or likely effect of the Rights Sub-Licence Provision was the same as the effect or likely effect of the News-Foxtel Licence Provision.

13.4.10.3 NINE PUT PROVISION

2187 Seven acknowledges that the Nine Put, viewed in isolation, did not have an effect relevant to the pleaded markets. Nonetheless, it was a necessary prerequisite to the finalisation of the AFL Proposal and also defined the content of the AFL pay television rights available for acquisition by Foxtel. Section 45(4) of the *TP Act* permits the effect of the Nine Put Provision to be assessed together with the other agreements to which News was a party. In consequence, the effect and likely effect of the Nine Put Provision were the same as the effect and likely effect of the Master Agreement Provision.

13.4.10.4 NRL BIDDING AGREEMENT

2188 Seven approaches the NRL Bidding Agreement Provisions in a manner similar to its approach to the Nine Put Provision. Seven says that the NRL Bidding Agreement was an essential plank in the arrangements contemplated and required by the Master Agreement Provision. In particular, the NRL Bidding Agreement was designed to ensure that Fox Sports retained control of the NRL pay television rights and it was entered into as one aspect of the '*overarching plan*' reflected in the Master Agreement Provision. In relation to the cause of action against Telstra, the NRL Bidding Agreement Provisions may be considered together with other agreements to which Telstra and Telstra Media were parties. Similarly, in respect of the cause of action against Sky Cable, the effect of the NRL Bidding Agreement Provisions may be considered together with the effect of other agreements to which Sky Cable was a party. In these circumstances, the effect and likely effect of the NRL Bidding

Agreement Provisions were equivalent to the effect and likely effect of the Master Agreement Provision.

13.5 Consortium Respondents' Submissions

2189 The Consortium Respondents give many and varied responses to Seven's s 45(2) effects case.

13.5.1 No Markets

2190 The Respondents' first contention is that Seven's effects case must fail because none of the markets relied on by Seven existed at the relevant times. I have accepted this contention in relation to the wholesale sports channel market, the AFL pay rights market and the NRL pay rights market. The only market that I have found existed at the material times is the retail pay television market. Accordingly, on my findings, the retail pay television market is the only market relevant to Seven's effects case.

13.5.2 No Agreements

2191 Secondly, the Respondents dispute the existence of the Master Agreement and hence the Master Agreement Provision. In substance, as I have noted, the Respondents contend that there was no understanding reached at the teleconference of 13 December 2000 that the AFL Proposal and the NRL Proposal (as pleaded) would be carried out together. According to the Respondents, the proposals were '*coincident in time*' but otherwise unconnected.

2192 PBL (supported by News) also disputes the existence of the Rights Sub-Licence Agreement (which Seven says was entered into at the time the Foxtel, Nine and Ten Puts were executed). Otherwise there is no dispute as to the existence of the contracts or understandings relied on by Seven.

13.5.3 Competition on the Merits

2193 Thirdly, the Respondents say that the ordinary workings of the competitive process, even if it means the elimination of a competitor, cannot substantially lessen competition in a market. This submission is related to the question of the time at which the anti-competitive effect of a provision is to be assessed. However, the Respondents also argue that the test of whether a provision has the effect or likely effect of substantially lessening competition must

be formulated and applied in a manner which does not strike down conduct simply because it happens to damage a particular firm. They adopt Professor Hay's observation that:

> *'[A] future market "without" aggressive bidding conduct by efficient firms is less competitive than a future market "with" such conduct – even if a less efficient firm is eliminated by the efficient firm's bid'.*

2194 The Respondents answer Seven's contention that News' bid for AFL broadcasting rights was not a case of competition on the merits as follows:

> Foxtel's contribution to News' bid (of $30 million per annum for the AFL pay television rights) was not expected to be loss-making and was no higher than was thought necessary to acquire the pay television rights;
>
> Seven misstates the significance of Foxtel's alleged statements to the AFL (that Foxtel would not take C7) and, in any event, the AFL preferred News' bid because it was financially superior to Seven's, not because of any concern about the carriage of AFL on Foxtel; and
>
> there was nothing anti-competitive in any '*tying*' or '*bundling*' aspects of News' bid.

13.5.4 Agreements Did Not Cause Seven's Demise

2195 Fourthly, the Respondents submit that it is **necessary**, but not **sufficient**, for Seven to establish that the various provisions on which it relies, assessed at the time the relevant contracts or understandings were entered into, had the effect or likely effect of putting C7 out of business or causing it to become an ineffective competitor. They argue that Seven has not shown that the effect or likely effect of the provisions was the demise of C7 because:

> viewed prospectively, there was nothing to prevent C7 from seeking a sub-licence of the AFL pay television rights from Foxtel in 2001 (that is, after the allocation of the AFL broadcasting rights in respect of 2002 to 2006);
>
> in any event, C7 could have survived by reconfiguring its business plan (which centred on coverage of the AFL) and acquiring other attractive sports rights; and
>
> in December 2000 and January 2001, it was not likely that Optus would terminate the C7-Optus CSA if C7 lost the AFL pay television rights, at least

not without entering a new channel supply agreement with C7, since at that time Telstra was adamantly opposed to Optus receiving the Fox Sports channels.

13.5.5 Master Agreement Provision Did Not Have the Alleged Effect on Competition

2196 Fifthly, the Respondents contend that the effect or likely effect of a provision of a contract, arrangement or understanding is to be assessed at the time the provision came into force or existence. On this basis, they say that it was not an effect or likely effect of the Master Agreement Provision (if there was such a provision) that News would acquire the AFL broadcasting rights or that Fox Sports would acquire the NRL pay television rights. The '*direct or immediate*' effect of the Master Agreement Provision, at most, was that bids would be made at particular prices for the AFL and NRL pay television rights. There was no agreement that '*winning*' bids should be made.

2197 According to the Respondents, in determining what was likely to occur at the time the Master Agreement Provision came into existence, it is necessary to take account of the contingencies that had to be satisfied before the bids could succeed. In particular, it was not likely that News would succeed if Seven was prepared to make a competitive bid for the AFL pay television rights. The Respondents contend that News' bid succeeded only because Seven chose not to make a competitive bid for the AFL pay television rights. The absence of such a bid from Seven was not something that was likely at the time the Master Agreement Provision came into existence.

2198 News, supported by the other Consortium Respondents, submits that, in any event, the Master Agreement Provision (and other provisions) had no effect on the acquisition by Fox Sports of the NRL pay television rights. This is said to be so for three independent reasons:

Seven did not make an offer for the NRL pay television rights that was capable of acceptance by the NRL Partnership and, in any event, had no intention of acquiring the rights;

Mr Philip had decided by 13 December 2000 that he would vote against the C7 bid if it came before the NRL PEC, thus making it a foregone conclusion that C7 would not acquire the NRL pay television rights; and

in any event, News would have exercised its last right of refusal in relation to

the NRL free-to-air television, pay television and internet rights (which it held until 2023).

13.5.6 Substantial Lessening of Competition

2199 Finally, the Respondents submit that the contracts or arrangements did not have the effect or likely effect of substantially lessening competition in any relevant market. PBL, supported by the other Consortium Respondents, submits that, on the assumption that all their other arguments are rejected, none of the provisions had the effect or likely effect required by s 45(2) of the *TP Act*.

2200 As to the **wholesale sports channel market** (assuming it existed):

> contrary to Seven's contentions, the barriers to entry to the market, such as the need for access to marquee or secondary sports rights and Foxtel's so-called '*signalling*' conduct, were low and the provisions did not alter this characteristic of the market;
>
> the constraints on the ability of Fox Sports to increase the price of its sports channels to Austar and Optus (or to reduce the quality of the channels) were the same with or without the existence of the Master Agreement Provision or any of the provisions on which Seven relies; and
>
> the internal documents of Fox Sports and Foxtel relied on by Seven, such as budgets, are irrelevant to whether there was a substantial lessening of competition in the market.

2201 As to the **AFL** and **NRL pay rights markets** (assuming they existed):

> any barriers to entry in those markets, like the barriers to entry to the wholesale sports channel supply market, were low;
>
> Seven's claim that, in consequence of the various provisions upon which it relies, there would only be one potential buyer of AFL and NRL sports rights is '*demonstrably false*' in view of Seven's success in acquiring the AFL broadcasting rights in 2005; and
>
> the fact that the price paid for the AFL broadcasting rights increased substantially in 2005 was inconsistent with any lessening of competition in the

market for AFL pay television rights following the demise of C7.

2202 In relation to the **retail pay television market** (which I have found did exist at the material times), the Respondents say that, had they not engaged in the conduct complained of, there would have been no difference in the state of competition in the market. Austar, instead of receiving AFL coverage via Foxtel would have received it from C7 on much the same terms (that is, about $2.00 pspm on a tier). Optus would have continued to acquire C7 on the onerous terms of the C7-Optus CSA (that is, subject to the MSG of $30 million per annum).

2203 Insofar as Seven's complaint is that the acquisition of the AFL pay television rights in 2000 caused Optus to enter the Foxtel-Optus CSA in March 2002, there was no causal relationship between the two. If Seven had successfully retained the AFL broadcasting rights or the AFL pay television rights in 2000, the parties to the Foxtel-Optus CSA would have had the same incentive to enter that arrangement. The notion of a single supplier of content to all pay television platforms was considered as early as 1997 and Optus' strategy until 2001 was that sporting content should be available non-exclusively on all retail platforms. The real impetus for what became the Foxtel-Optus CSA was SingTel's decision, after it finalised its acquisition of Optus in August 2001, to review CMM.

13.6 Construction of s 45(2) of the *TP Act*

13.6.1 'Provision'

2204 Section 45(2) of the *TP Act* is concerned with the effect or likely effect on competition of a '*provision*'. The word '*provision*' in s 45(2) is used in a comprehensive, rather than in a technical sense reflecting usage in contract law. Thus it:

> *'invites attention to the content of what has been, or is to be, agreed, arranged or understood, rather than any particular form of expression of that content adopted, or to be adopted, by the parties'.*

Visy Paper Pty Ltd v Australian Competition and Consumer Commission (2003) 216 CLR 1, at 6 [7] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

13.6.2 Prospective or Retrospective?

13.6.2.1 STRUCTURE OF S 45(2)(a)(ii) AND (b)(ii)

2205 Section 45(2)(a)(ii) prohibits a corporation from making a contract or arrangement, or arriving at an understanding, if a provision of the proposed contract, arrangement or understanding

(a) has the purpose; or

(b) would have the effect; or

(c) would be likely to have the effect,

of substantially lessening competition.

2206 The prohibition on the making of a '*contract*' (using that expression to incorporate making an arrangement or arriving at an understanding) therefore applies in three separate circumstances, each of which is defined by reference to the characteristics of a provision of the proposed contract.

2207 Section 45(2)(b)(ii) prohibits a corporation from giving effect to a provision of a contract (whether made before or after the commencement of the section) if the provision:

(d) has the purpose; or

(e) has the effect; or

(f) is likely to have the effect,

of substantially lessening competition.

2208 The prohibition on giving effect to a provision of a contract therefore also applies in three separate circumstances, each of which is defined by reference to the characteristics of the provision of the contract. Giving effect to a provision of a contract includes (s 4(1)) doing an act or thing in pursuance of or in accordance with, or enforcing or purporting to enforce, the provision.

13.6.2.2 COMMON GROUND

2209 It appears to be common ground that the prohibition in s 45(2)(a)(ii) on making a contract containing a provision which would have or be likely to have the effect of substantially lessening competition requires the application of a '*wholly prospective*' test (Mr Sumption's words). This follows from the fact that the effect of a contract which, by hypothesis, is unimplemented, can only be judged prospectively. The drafting of s 45(2)(a)(ii) reflects this reality. The statutory prohibition is directed to the making of a contract, where a provision of the **proposed** contract **would have or be likely to have** the proscribed anti-competitive effect.

2210 It is also common ground, at least so far as the proceedings before me are concerned, that the expression in s 45(2)(a)(ii) of the *TP Act* '*would ... be likely to have the effect*' of substantially lessening competition means a real chance or possibility of having that effect. (I refer to the principal authorities below ([2231]-[2233]). It seems to me to follow that the quoted expression widens the scope of the prohibition in s 45(2)(a)(ii). If that expression had not been incorporated in s 45(2)(a)(ii), the prohibition would have applied only to the making of a contract if a provision of the proposed contract '*would have*' the effect of substantially lessening competition. A statute in that form would require proof of the specified effect on the usual standard: that is, on the balance of probabilities.

2211 That the expression widens the scope of s 45(2)(a)(ii) is consistent with the well-known judgment of Deane J in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, to which both Seven and the Respondents refer in their submissions. That case concerned the secondary boycott provisions of s 45D, which proscribed certain conduct that would have or be likely to have the effect of causing substantial loss or damage to a business. Deane J said this (27 ALR, at 381-382):

> *'Section 45D(1) proscribes conduct only if it be engaged in for the purpose of causing loss or damage to the business of the relevant corporation. Even though conduct be engaged in for such a purpose it will be outside the proscription contained in the sub-section unless it "would have or be likely to have" that effect. Plainly the reference to "would be likely to have" is meant to convey a lower degree of likelihood than the reference to "would have". In the case where conduct has not occurred, a court would be constrained to determine whether conduct "would have" the specified effect by reference to the ordinary standard of whether it was more likely than not that it would. In such a case, if "likely" is interpreted as meaning "more likely than not", it*

> *would add little to the practical scope of the section. On the other hand, if conduct had run its ordinary course and had not had the specified effect, it would be but rarely that a court would feel justified in disregarding the lesson of the event and finding that while the conduct did not have the specified effect it had been more likely than not that it would have that effect (see per Dixon J in* Willis v Commonwealth *(1946) 73 CLR 105 at 116)'.*

2212 The reference to *Willis v Commonwealth* in this passage is to a comment made by Dixon J in the context of a damages claim by a woman in respect of her husband's death. Dixon J said that, where the facts concerning remarriage are available (the widow remarried five months after her husband's death), they are to be preferred to prophecies (73 CLR, at 116). In the light of Deane J's analysis, I do not read the reference to *Willis v Commonwealth* to mean that, in assessing the likely effect of conduct (in the sense of a real chance or possibility) at a given time, the actual course of events necessarily determines the outcome of the assessment. Rather, the actual course of events is to be taken into account in making the assessment of likelihood at the relevant date.

13.6.2.3 PREFERRED CONSTRUCTION OF S 45(2)(b)(ii)

2213 As Seven points out, s 45(2)(b)(ii) of the *TP Act*, in contrast to s 45(2)(a)(ii), uses the present tense to describe the proscribed conduct, namely giving effect to a provision of a contract if the provision **has or is likely to have** the effect of substantially lessening competition. But in my opinion, contrary to Seven's submission, this language does not imply that the prohibition applies whenever a provision to which a corporation gives effect '*causes*' a substantial lessening of competition in a market. In particular, the language does not imply that s 45(2)(b)(ii) is contravened by giving effect to a provision where, as events subsequently turn out, the provision can be said to have '*caused*' a substantial lessening of competition in a market.

2214 In my view, the use of the present tense in s 45(2)(b)(ii) of the *TP Act* is explained by the fact that the subparagraph applies where a corporation gives effect to a provision of an existing contract (or arrangement or understanding). In contrast to s 45(2)(a)(ii), s 45(2)(b)(ii) assumes that a contract is in force at the time the proscribed conduct (giving effect to a provision of the contract) takes place. Indeed, the paragraph expressly contemplates that the contract might even have been made before s 45(2) of the *TP Act* was itself enacted. Consequently, the proscribed conduct may take place long after the contract

itself was made. For example, in *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, the contract (containing the rules of the Goondiwindi Livestock Auction Sales Association) was made in 1965, but the conduct complained of did not occur until 1985, two decades later.

2215 The drafting of s 45(2)(b)(ii) proceeds on the basis that giving effect to a provision of a contract constitutes a contravention of the subparagraph in two situations (leaving aside the case where the provision has the proscribed purpose):

> first, where the provision, in the light of events which have occurred at the time the proscribed conduct takes place, already *has had* or *is having* the effect of substantially lessening competition; and
>
> secondly, when the provision, in the light of those same events, is *likely* in the future to have the effect of substantially lessening competition.

2216 The divergence in language between s 45(2)(a)(ii) and (b)(ii) does not indicate, in my opinion, an intention to introduce what can be described as a retrospective causation test of the kind suggested by Mr Sumption. Use of the word '*has*' in s 45(2)(b)(ii) acknowledges that, once a contract is in force, it may be possible to determine, by reference to a particular time, that a provision of the contract already has the effect of substantially lessening competition. (The use of the word '*has*' instead of '*has had*' reflects the fact that a provision may have a continuing effect on competition.) The expression '*is likely to have*' indicates an intention to prohibit a corporation from giving effect to a provision in a contract where the provision, at the time the corporation engages in the conduct, is likely to have the effect of substantially lessening competition.

2217 This construction of s 45(2)(b)(ii) of the *TP Act* explains the apparent shift in language within s 45(2). It is also consistent with the authorities, such as *Tillmanns Butcheries v AMIEU*, that interpret the references in s 45(2) to the likely effect of a provision on competition as **broadening** the scope of the statutory prohibitions. If Seven's construction is correct, an applicant would generally not be concerned about the likely effect of a provision to which the respondent has given effect. It would be much more straightforward in the typical case to attempt to demonstrate that the provision ultimately '*caused*' a substantial lessening of competition and that the lessening of competition was not the consequence of a supervening independent event.

2218 Furthermore, if Seven is correct, an applicant need not show that, at the time the respondent gave effect to the provision, it was even likely (in the sense that there was a real chance) that the provision would have the effect of substantially lessening competition. The inquiry ceases to be prospective and no longer focuses on the circumstances that prevailed at the time the alleged conduct took place.

2219 It must be remembered that a contravention of s 45(2) can attract civil penalties: s 76(1). On Seven's approach, a corporation can be penalised for giving effect to a provision which, with the benefit of hindsight, caused a substantial lessening of competition. A penalty can be imposed regardless of whether such an outcome was likely at the time the corporation gave effect to the provision. As I point out in Chapter 14 ([2404]), this is not a conclusion that should be reached lightly if another construction is not merely plausible, but is entirely consistent with the statutory language.

2220 I do not think it is an answer to suggest, as Mr Sumption did, that a corporation alleged to have contravened s 45(2)(b)(ii) by giving effect to a provision could have applied to the ACCC for an exemption under s 88 of the *TP Act*. That course assumes that the corporation appreciates that giving effect to a particular provision might have the effect of substantially lessening competition. If, viewed prospectively, there is no real chance of the provision substantially lessening competition, the corporation is not likely to appreciate that giving effect to the provision will in fact substantially lessen competition.

2221 The construction I favour does not mean that events which post-date the televant conduct cannot be considered in determining whether the provision concerned was likely to have the effect of substantially lessening competition. Subsequent events may shed considerable light on what was likely at the material time. As Deane J concluded in *Tillmanns Butcheries v AMIEU*, it would be odd if the actual course of events could not be taken into account in determining what was the likely effect of a provision at a particular time. But that is not the same thing as applying a causation test in the manner proposed by Seven.

2222 The analysis thus far leads to the conclusion that s 45(2)(b)(ii) of the *TP Act* requires the likely effect of a provision to be assessed at the date the allegedly contravening conduct takes place – that is, the date the corporation gives effect to a provision of the contract or

arrangement. It is perhaps arguable that the assessment of the likely effect should be made at the date the original contract or arrangement was made, rather than on the date the corporation gives effect to a provision of the contract or arrangement. News submits that this is the preferable approach, but does not develop the argument.

2223 It may not make a great deal of difference in the present case which of the two dates is chosen for the purpose of applying s 45(2)(b)(ii), since the Master Agreement Provision specifically contemplated a number of further agreements should either or both of the bids have succeeded. In any event, I think the better construction of s 45(2)(b)(ii) is that the relevant time for assessing the likely effect on competition of a provision is the date the alleged contravenor gives effect to the provision. This conclusion applies to the conduct of the Consortium Respondents in giving effect to the Master Agreement Provision. The same principle applies to Seven's case based on the Consortium Respondents (or some of them) giving effect to provisions in other contracts, arrangements or understandings.

13.6.2.4 AUTHORITIES ON S 45(2)(b)(ii)

2224 The parties refer to authorities in support of their respective submissions. However, none of the authorities appears to be precisely in point, since the particular argument advanced by Seven does not seem to have been put in the earlier cases.

2225 There are judicial observations which, taken in isolation, support the Respondents' position. For example, in *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1, Franki J considered the expression '*has or is likely to have a significant effect on competition*', which then appeared in s 45(4) of the *TP Act*. His Honour said this (6 FCR, at 49-50):

> *'I consider that "is" differs somewhat from "would be" and that the question must be answered by looking at the position at or about the time of the arrangements or understandings under consideration were made or entered into ...*
>
> *The word "has" requires the question to be tested against the established facts whereas the words "likely to have", while referring to the period at or about the time when the arrangement was made or the understanding entered into, allows any reasonable inference to be drawn'.*

However, these comments were made in relation to a repealed provision of the *TP Act* which,

in any event, has since been heavily amended.

2226 Seven also refers to judicial observations which, taken in isolation, perhaps appear to support its view. For example, in *Dowling v Dalgety* 34 FCR, at 134, Lockhart J noted that the '*effect of a contract is a relatively simple concept requiring examination of the results*'. However, I do not understand Lockhart J to have decided that s 45(2)(b)(ii) incorporates a causation test of the kind urged on behalf of Seven in these proceedings. Similarly, Franki J's comment in *TPC v TNT* 6 FCR, at 50, that the word '*has*' requires the question to be tested against the '*established facts*', was not accompanied by an examination of precisely how this is to be done. In *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 (affirmed on this issue in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53), to which Seven refers, the question of construction presented by Seven in the present case did not arise for consideration.

2227 In my view, the construction of s 45(2)(b)(ii) of the *TP Act* that I prefer is consistent with the authorities.

13.6.3 Effect: Direct and Immediate?

2228 The Respondents submit that the '*effect*' to which s 45(2) refers '*generally is the direct or immediate effect of the agreement or provision*'. They rely on the reasoning of the Trade Practices Tribunal (Deane J, Mr H N Walker and Professor Maureen Brunt) in *Re Application by Concrete Carters Association (Victoria)* (1977) 31 FLR 193. The Tribunal in that case dealt with an application for an authorisation by an association of owner-drivers. The association sought authorisation for a contract with the producers of pre-mixed concrete which regulated the rates and conditions for the carriage of such concrete. The association argued that in the absence of authorisation the unions representing the owner-drivers would achieve much the same result by industry-wide negotiations.

2229 The Tribunal rejected this argument (31 FLR, at 206):

> *'It was common ground between the applicants and the commission – and it would seem rightly so – that the proposed conduct of the applicants (some of whom are corporations) involving as it does the negotiation with the producers (which are all corporations) of industry-wide rates and conditions for the provision and acquisition of the services of the applicants, would, in*

> *the absence of authorization, involve a contravention of the provisions of s. 45 … The likely direct or immediate effect of an agreement or arrangement between the applicants and producers as to industry-wide rates and conditions pursuant to which the applicants would carry the product would be a substantial lessening of competition in relation to rates and conditions in the market in which the applicants operate. It is possible that, upon analysis and overall assessment, the detriment to the public constituted by any such lessening of competition would, as the applicants maintain, be insignificant or negligible for the reason that in the absence of the agreement or arrangement, competition would be lessened to a similar or greater extent by other factors which would then become legitimately operative. Such an overall assessment or analysis is, of course, vital in assessing the detriment to competition which is to be put into the scales in the ultimate weighing process. It does not however alter the fact that the direct and immediate effect of the agreement or arrangement would be a substantial lessening of competition.* ***It is, in our view, to this direct and immediate effect that the provisions of s. 45 refer****'.* (Emphasis added.)

2230 In my opinion, the decision in *Re Concrete Carters Association* does not support the proposition that *only* the direct and immediate effect of a provision is to be taken into account in determining whether the effect includes a substantial lessening of competition. The reasoning of the Tribunal was directed to the particular factual issue presented by the prospect of union intervention. Nor do I think the observations of Franki J in *TPC v TNT* 6 FCR, at 49-50, which were directed to s 45 prior to its amendment in 1977, advance matters. Moreover, there is no textual warrant for limiting the operation of s 45(2) in this way. Whether a provision has or is likely to have the effect of substantially lessening competition is a factual question. It should not be resolved by introducing artificial limitations into the statute.

13.6.4 'Likely'

2231 The trend of authority in the Federal Court is that, in determining whether a provision is likely to have the effect of substantially lessening competition, the word '*likely*' does not mean '*more probable than not*'. As I have noted, a provision has the proscribed effect if:

> *'there is a real chance or possibility that a substantial lessening of competition will occur'.*

Tillmanns v AMIEU 27 ALR, at 380-382, per Deane J; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110, at 140 [111], per Heerey J (with whom Black CJ and Tamberlin J agreed); *Seven Network Ltd v News Ltd*

(No. 1) [2003] FCA 388, at [25], per Sackville J.

2232 French J elaborated on the interpretation of the word '*likely*' in *Australian Gas Light Co v Australian Competition and Consumer Commission* (2003) 137 FCR 317. Care must be taken not to substitute a judicial gloss for the words of the *TP Act*. Nonetheless, in my view, French J's observations (at 416-417 [348]), made in the context of an analysis of s 50 of the *TP Act* (which concerns acquisitions that would result in a substantial lessening of competition), are helpful:

> *'The meaning of "likely" reflecting a "real chance or possibility" does not encompass a mere possibility. The word can offer no quantitative guidance but requires a qualitative judgment about the effects of an acquisition or proposed acquisition. The judgment it requires must not set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however plausible they may seem, generated by economic theory alone. On the other hand it must not set the bar so low as effectively to allow all acquisitions to proceed save those with the most obvious, direct and dramatic effects upon competition ... The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in [*Re Howard Smith Industries Pty Ltd and Adelaide Steamship Industries Pty Ltd *(1977) 28 FLR 385], the Court is concerned with "commercial likelihoods relevant to the proposed merger". The word "likely" has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration* – Rural Press Ltd v Australian Competition and Consumer Commission *(2003) 216 CLR 53 at [41]'.*

2233 As I have noted, it is common ground in the present case that I should act in accordance with the line of authority to which I have referred. Accordingly, it is enough for Seven to show that there is or was a real chance that the impugned conduct will or would have the effect of substantially lessening competition in a market. I record that the Respondents wish to preserve their entitlement to argue on appeal that '*likely*' means '*more probable than not*'.

13.6.5 'Substantially Lessening Competition'

2234 Section 45(2)(a)(ii) and (b)(ii) of the *TP Act* refer to provisions having the purpose, effect or likely effect of '*substantially lessening competition*'. The word '*substantially*' has been interpreted to mean that the lessening of competition must be '*at least real or of substance*' or '*of significance*': *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44

ALR 557, at 564, per Lockhart J; *Hecar Investments No 6 Pty Ltd v Outboard Marine Australia Pty Ltd* (1982) 62 FLR 159, at 167, per Franki J. Lockhart J in *Radio 2UE v Stereo FM* also thought that there was force in the view that '*substantially*' in s 45(2) means '*considerably*'. It is by no means clear that these descriptions add very much to the statutory language. As I have already observed, it is of limited assistance to substitute a judicial gloss for the statutory language.

2235 Even so, in *Rural Press v ACCC*, the High Court did provide further guidance as to the meaning of '*substantially*'. The joint judgment of Gummow, Hayne and Heydon JJ (with whom Gleeson CJ and Callinan J agreed) found it unnecessary to choose between more and less demanding formulations that can be found in the case law. However, their Honours noted (216 CLR, at 71 [41], n 67) that the authorities:

> *'do not support the proposition that it would be sufficient for liability if the relevant effect was quantitatively more than insignificant or not insubstantial'.*

2236 Their Honours identified (216 CLR, at 71 [41]) the relevant question in a case under s 45(2) of the *TP Act* as:

> *'whether the effect of the [impugned] arrangement was substantial in the sense of being meaningful or relevant to the competitive process'.*

2237 It seems to be common ground that this is the question that should be asked in the present case. The answer to that question, as with the assessment of a '*likely*' effect, requires a qualitative judgment: *AGL v ACCC* 137 FCR, at 417 [351], per French J. That judgment must take into account s 4G of the *TP Act*, which requires references to the lessening of competition to be read as including preventing or hindering competition.

13.6.6 Assessing whether Competition Has Substantially Lessened

2238 The approach to assessing whether conduct has led to a substantial lessening of competition in a market was explained by Burchett and Hely JJ in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] ATPR 41-783, at 41,267 [12]:

> *'in determining whether the proposed conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in the relevant market, the Court has to:*

> *consider the likely state of future competition in the market "with and without" the impugned conduct; and*
>
> *on the basis of such consideration, conclude whether the conduct has the proscribed anti-competitive purpose or effect*

> Dandy Power Equipment Pty Limited v Mercury Marine Pty Limited *[1982] ATPR 40-315 at 43,887; (1982) 64 FLR 238 at 259;* Outboard Marine Limited v Hecar Investments No 6 Pty Limited ... *(1982) 44 ALR 667 at 669-670. The test is not a "before and after" test, although, as a matter of fact, the existing state of competition in the market may throw some light on the likely future state of competition in the market absent the impugned conduct'.*

2239 Once again there is no dispute that these are the principles that should be applied in the present case. It follows from these principles that (*Stirling Harbour Services v Bunbury* [2000] ATPR, at 41,276 [66]):

> *'Conduct has the effect of lessening competition in a market only if it involves a reduction in the level of competition which would otherwise have existed in that market but for the conduct in question. The mere fact that one can conceive of other less restrictive alternatives by which a commercial objective might be achieved is not sufficient of itself to lead to a conclusion that the conduct has the effect of lessening competition ... The comparison required is between practical alternatives likely to be adopted; not between mere theoretical models'.*

13.6.7 Severance

2240 In *SST Consulting Services Pty Ltd v Rieson* (2006) 225 CLR 516, the joint judgment of five members of the High Court pointed out (at 527 [32]) that s 4L of the *TP Act* is engaged only if:

> there is a contract (as distinct from an arrangement or understanding);
>
> the making of that contract contravenes the *TP Act*; and
>
> the contravention is '*by reason of the inclusion of a particular provision in the contract*'.

2241 When s 4L of the *TP Act* is engaged, its '*central proposition*' is that '*nothing in [the TP Act] affects the validity or enforceability of the contract*': *SST v Rieson* 225 CLR, at 527-528 [34]. That proposition is, however, subject to two qualifications:

> first, it is subject to any order made under ss 87 or 87A of the *TP Act* (which

> confer a range of powers on the Court, including a power to declare the whole or any part of certain contracts void); and
>
> secondly, the offending provision is not valid and is not enforceable in so far as it is severable: *SST v Rieson* 225 CLR, at 528 [34].

2242 The second qualification to the central proposition means that s 4L **requires** rather than **permits** the severance of offending conditions. The phrase '*in so far as*' marks the limit of the severance that must be undertaken by the Court: *SST v Rieson* 225 CLR, at 533 [52].

13.7 Existence of the Master Agreement

13.7.1 Principles

2243 Section 45(2)(a)(ii) prohibits a corporation from making a '*contract or arrangement, or arriv[ing] at an understanding*' if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition. Section 45(2)(a)(ii) is therefore predicated upon the existence of a contract, arrangement or understanding.

2244 The word '*contract*' has its ordinary meaning of an agreement enforceable at law: *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, at 32, per Toohey J. The words '*arrangement*' and '*understanding*' are usually treated as more or less synonymous, although it has been suggested that the requirements for arriving at an understanding may be '*somewhat different and more easily satisfied than the requirements for making an arrangement*': *TPC v TNT* 6 FCR, at 25, per Franki J.

2245 There is no dispute (perhaps in a spirit of excessive, but bipartisan deference) that the relevant principles to apply are those stated by me in *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344, at 359-360 [75]:

> *'An arrangement or understanding for the purposes of s 45(2) of the TP Act is apt to describe something less than a binding contract or agreement:* Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd *(1975) 5 ALR 465; 24 FLR 286 at 290-1 (Aust Ind Ct, FC) per Smithers J. However, in order for there to be an arrangement or understanding for the purposes of s 45(2), there must be a meeting of the minds of those said to be parties to the arrangement or understanding. There must be a consensus as to what is to be done and not merely a hope as to what might be done or happen:* Trade Practices Commission v Email Ltd *(1980) 43 FLR 383 at 385 (Lockhart J);*

> Ira Berk *at FLR 291 per Smithers J. Ordinarily, an arrangement or understanding involves communication between the parties arousing expectations in each that the other will act in a particular way:* Email *at 395. There is no necessity for an element of mutual commitment between the parties to an arrangement or understanding, although in practice such an arrangement or understanding would ordinarily involve reciprocity of obligation:* Trade Practices Commission v Service Station Association Ltd *(1993) 44 FCR 206 at 230-1 ... per Lockhart J'.*

See also *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375, at 408 [141], per Lindgren J; *Rural Press v ACCC* 118 FCR, at 257-258 [79].

13.7.2 Arrangement or Understanding

2246 I have set out Seven's pleaded case in relation to the existence of the Master Agreement and of the Master Agreement Provision. I have also summarised the respective submissions made by the parties and I have made findings about the events leading up to and at the teleconference of 13 December 2000. There is no need to repeat that material.

13.7.2.1 AN AMBIGUITY

2247 In my view, the Statement of Claim describes the Master Agreement in somewhat infelicitous terms. The infelicity arises because the Statement of Claim alleges (par 100) that News, PBL, Telstra and Foxtel made an arrangement, or arrived at an understanding '*to **secure** both the AFL broadcast rights and NRL pay ... rights*' (emphasis added). This formulation invites many of the criticisms of Seven's case made by the Respondents.

2248 Seven's submissions by no means resolve the uncertainty about what the pleading is intended to mean. Seven insists that there was an arrangement at the teleconference of 13 December 2000 '*dealing with **both** AFL and NRL rights*' (emphasis in original). Seven also says that there was an understanding to '*carry out both proposals*', which I take to be a reference to the pleaded AFL and NRL Proposals. Each of these, it will be recalled, involved the making of **bids** for the respective rights. One bid was to be made by News and was to be supported by put agreements and other arrangements. The other was to be made by Fox Sports and was to be supported by Telstra's offer for the naming and internet rights and other arrangements. Nonetheless, Seven's Reply Submissions reiterate that the understanding was to **acquire** both sets of rights.

2249 It is important to appreciate what, in substance, was agreed at the teleconference. The understanding embraced the following:

> all participants supported the making of bids for two distinct sets of rights, more or less on the basis proposed by Mr Philip;
>
> News' bid for the AFL broadcasting rights was to be supported, with Telstra's blessing, by the Foxtel Put, which obliged Foxtel, in return for three live games per week, to pay News $30 million per annum (plus adjustments);
>
> Fox Sports would make a bid for the NRL pay television rights offering the NRL Partnership $35 million cash per annum (exclusive of GST), plus contra and production;
>
> Telstra would support Fox Sports' bid by contributing $5 million per annum for naming and internet rights; and
>
> Telstra agreed to Foxtel paying $18 million per annum to Fox Sports for NRL programming, on the basis that Foxtel would receive the benefit of revenue derived from Optus, or flowing from the exercise of Optus' matching rights.

2250 The understanding reached at the teleconference did not include an agreement that News or Fox Sports would **necessarily** acquire either the AFL broadcasting rights or the NRL pay television rights. The understanding contemplated, in substance, that two bids would be made for two distinct sets of rights and that each bid would be supported by defined arrangements involving Telstra and Foxtel. In particular, the understanding did not require or contemplate that News or Fox Sports would make bids on terms that would ensure that either or both would be successful.

2251 The contents of Fox Sports' bid for the NRL pay television rights were decided at the teleconference, including the quantum of the cash component of the bid. The precise amount of News' bid for the AFL broadcasting rights was not determined at the teleconference. However, the price to be paid by Foxtel (assuming, as all parties did, that News would exercise the Foxtel Put if its bid was successful) was part of the understanding reached among the parties. The understanding encompassed a bid by News that divided the fees payable between defined AFL free-to-air rights and defined AFL pay television rights.

2252 The success of Fox Sports' bid, as a practical matter, may have been assured because Mr Philip (a member of the NRL PEC) was determined that it should succeed, although this was not part of the understanding. But the success or otherwise of News' bid for the AFL broadcasting rights depended on the approach or approaches taken by Seven to the rights. From the perspective of the participants at the teleconference, Seven might have bid for the entirety of the AFL broadcasting rights (as it did); separately for the AFL free-to-air and pay television rights (as the AFL preferred); or it may have relied on its last right in relation to the AFL free-to-air rights (perhaps in combination with a separate bid for the AFL pay television rights, a tactic belatedly and unsuccessfully attempted by Mr Stokes on 14 December 2000).

2253 The arrangement made at the teleconference did not incorporate an understanding that the bids to be made for the AFL and NRL pay television rights would exceed a commercially reasonable price. Mr Philip expended a good deal of time and effort, not to mention integrity, in persuading Mr Akhurst of the commercial benefits of each bid to Foxtel and therefore Telstra. Mr Stokes' own evidence was that the $30 million per annum pay television rights component of News' bid for the AFL broadcasting rights (supported by the Foxtel Put) was a good price for the buyer. Telstra's agreement to and support for the proposed bids was not predicated on any understanding on its part that the bids, insofar as they related to the AFL and NRL pay television rights, were commercially unreasonable or above a competitive price. On the contrary, Telstra's understanding was that the bids were required to be at these levels in order to meet the competition from Seven.

2254 Insofar as Seven's case rests on an interpretation of the understanding reached at the teleconference which is at odds with the findings I have recorded, I reject it. If, for example, Seven's version of the Master Agreement is that it was intended to incorporate an understanding by the participants that News and Fox Sports (and through them Foxtel) would necessarily '*secure*' the AFL and NRL pay television rights, it simply does not accord with the facts.

2255 The Respondents are therefore correct to submit that any understanding reached at the teleconference contemplated only the making of **bids** for the two sets of rights, supported in each case by specific arrangements with Foxtel and Telstra. As I have indicated, there was no arrangement, express or implied, that the parties to the teleconference would do whatever was required to make **successful** bids for either or both sets of rights. Whether either or both

of the bids succeeded would depend, at least to a considerable extent, on events beyond the control of the participants in the teleconference. In particular, much would depend upon the nature and content of the bids made by Seven for the AFL free-to-air and pay television rights and whether Seven would choose to exercise its last right in relation to the AFL free-to-air rights.

2256 I have real doubts as to whether my findings are consistent with the way Seven has pleaded and presented its case in relation to the Master Agreement and the Master Agreement Provision. In the end, however, despite the infelicity of Seven's pleadings and the ambiguities in its submissions, I do not think that Seven has rested its entire case on the proposition that the parties to the teleconference reached an understanding that Foxtel and Fox Sports would do whatever was necessary to obtain the AFL and NRL pay television rights (the former as an incident of the AFL broadcasting rights).

2257 Not without hesitation, I have concluded that Seven's case has been presented in a way that encompasses the findings I have made. That is, Seven's submissions, at least in part, proceed on the basis that the understanding reached at the teleconference involved only the making of bids for the two sets of rights by News and Fox Sports, with each bid being supported in pre-determined ways by Foxtel, PBL and Telstra. It is this understanding that Seven says had the purpose or likely effect of substantially lessening competition in the various markets. I do not think that there is any material unfairness in interpreting Seven's case this way, as the Respondents appear to have had no difficulty in responding to Seven's submissions insofar as they adopt this interpretation of the Master Agreement Provision.

13.7.2.2 WAS THERE AN ARRANGEMENT OR UNDERSTANDING?

2258 The Respondents make much of the contention that there was no '*overarching agreement*' between News, PBL, Telstra and Foxtel. It is understandable why this contention has been given such prominence, given Seven's pleaded case. Telstra, for example, asserts that '*the so-called Master Agreement is the embodiment of [Seven's] conspiracy theory*' and argues, not without force, that the two proposals were:

> *'developed separately, analysed separately and the subject of separate decisions by different decision-makers'.*

If, however, I have understood Seven's case correctly, the concentration on an '*overarching*

agreement' creates something of a false issue. At the least, it conflates questions of the motivation, or perhaps the purpose, of the parties to the teleconference with the content of the understanding they reached at the time.

2259 In one sense, it is true, as Dr Switkowski said in evidence, that the two bids were unconnected (apart from Foxtel's desire to secure both sets of rights and the fact that the bidding for the two sets of rights was to occur more or less simultaneously). The bid for the NRL pay television rights, which was accepted by the NRL PEC on the evening of 13 December 2000, did not depend upon the success or failure of the bid for the AFL broadcasting rights. Equally, the bid for the AFL broadcasting rights, which was accepted by the AFL on 14 December 2000, did not depend on the success or failure of the bid for the NRL pay television rights (although the outcome of that bid was known before News made its final presentation to the AFL on 14 December 2000). It is also true, as Telstra suggests, that Foxtel had given consideration to acquiring the AFL pay television rights in early 1999, while Telstra's involvement in Fox Sports' bid for the NRL pay television rights dated only from the latter part of 2000.

2260 Nonetheless, the fact is that the representatives of News, PBL, Telstra and Foxtel agreed at a single discussion that both bids should be made. There was plainly a meeting of the minds of all those present. All parties knew and understood that News, PBL, Telstra and Foxtel would each have a role to play in relation to the making of each of the bids. All representatives knew and understood, not only that both bids would be made, but that both might succeed (as indeed they did). It is therefore not surprising that Mr Macourt agreed in evidence that the outcome of the teleconference was an agreement between the parties '*that the bids for both NRL and AFL would proceed on the basis proposed by Mr Philip'*.

2261 Moreover, I think it somewhat artificial to contend, as the Respondents do, that there was no connection between the two proposed bids. I do not doubt that Dr Switkowski's view of the relationship (or absence thereof) between the two bids was honestly held. However, his perception was influenced by the limited extent of his involvement in the negotiations leading up to the teleconference and his lack of familiarity with the details of the proposed bid for the NRL pay television rights.

2262 In the course of negotiations and discussions preceding the teleconference, the two

proposed bids were discussed together. On a number of occasions, for example, Mr Philip discussed both the AFL and NRL pay television rights in communications with Telstra. In particular, his handwritten fax of 9 December 2000 to Mr Akhurst sought Telstra's support for both sets of rights. Mr Philip acknowledged that he reported to Mr Macourt and Mr Falloon '*as Fox Sports directors*' on the progress of his negotiations in relation to both the AFL and NRL pay television rights. The 13 December 2000 teleconference itself was described in the documentation as an '*AFL/NRL Meeting*'.

2263 PBL points out that not all issues arising out of the proposed bids were addressed at the teleconference, such as the details of the Nine and Ten Puts. But this does not, however, negate the existence of an understanding substantially to the effect of that I have described and for which I interpret Seven as contending. News, PBL and Foxtel, through their representatives, were aware of the proposed terms of the Nine and Ten Puts (which were in fact executed the following day). Mr Akhurst was aware that put options would also be entered into by Nine and Ten, although he did not know the details. The fact that Nine was to take AFL free-to-air television rights was referred to at the meeting in the presence of the Telstra representatives. It is not necessary for the existence of an arrangement or understanding that every element of a proposal be examined in detail or be the subject of express agreement.

2264 I therefore conclude that an understanding or arrangement was reached between News, PBL, Telstra and Foxtel on 13 December 2000. The arrangement contemplated that News would make a bid for the AFL broadcasting rights and that Fox Sports would bid for the NRL pay television rights. The parties understood that News' bid would be supported by a put option with Foxtel, providing for Foxtel to take a sub-licence of the AFL pay television rights at a price of $30 million per annum (adjusted for inflation and GST). The parties understood that News' bid would also be supported by other agreements providing for sub-licences of the AFL free-to-air television rights. Fox Sports' bid for the NRL pay television rights was to be $35 million per annum in cash (adjusted for inflation plus GST) and was to include contra and production. Fox Sports' bid was to be supported by Telstra offering $5 million per annum for internet and naming rights. The existence of the understanding is not affected by the fact that not all representatives were aware of the details of the proposed put agreements with Nine and Ten.

13.8 Existence of the Rights Sub-Licence Agreement

2265 On the view I take of Seven's effects case, the existence or otherwise of the Rights Sub-Licence Agreement is immaterial, although it may be relevant to Seven's purpose case. I think that Seven has made out the existence of the agreement, which is said to have been made on or about 14 December 2000.

2266 Insofar as the Respondents submit that an arrangement or understanding requires direct discussions between the alleged parties, that is not correct: *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, at 573-575, per *curiam*. In the present case, the Foxtel Put, the Nine Put and the Ten Put were executed on the same day, 14 December 2000. This was the day after the teleconference of 13 December 2000 at which PBL (the parent of Nine) and Foxtel were represented. At the teleconference, the participants had agreed that bids would be made for each of the AFL broadcasting and NRL pay television rights. Reference had been made at the teleconference to Foxtel's support for News' bid. Lengthy discussions with Foxtel, Nine and Ten, co-ordinated by Mr Philip, had preceded the teleconference. These discussions were directed to securing agreements that would support News' bid for the AFL broadcasting rights.

2267 The covering letters of 14 December 2000 from Nine and Ten to Mr Philip, enclosing the respective put agreements, were in substantially identical terms. Each of Nine and Ten acknowledged that similar arrangements were to be entered with the other. Mr Philip, who represented both News and Foxtel at the teleconference, was effectively the ringmaster orchestrating the inter-related arrangements.

2268 I would be prepared to infer that Foxtel, Nine and Ten entered into an arrangement or understanding that they would support the acquisition of the AFL broadcasting rights by News and, to that end, each would enter into a put arrangement with News. Accordingly, I find that Seven has made out the existence of the Rights Sub-Licence Agreement.

13.9 Effect of the Master Agreement Provision on the Retail Pay Television Market

2269 As I have noted, Seven's submissions do not systematically develop the contention that the Master Agreement Provision (and the other provisions on which Seven relies) had the effect proscribed by s 45(2) of the *TP Act*. One difficulty is to determine what is left of that

contention once Seven's suggested construction of s 45(2)(b)(ii) is rejected. For example, Seven argues that, but for News' and Fox Sports' acquisition of the AFL broadcasting and NRL pay television rights, Optus would not have entered the Foxtel-Optus CSA and therefore the anti-competitive effect of that agreement would not have occurred. This argument appears to assume, in my view incorrectly, that a corporation contravenes s 45(2)(b)(ii) if it gives effect to a provision which, in the light of subsequent events, can be said to have '*caused*' a substantial lessening of competition in a particular market. Another difficulty is that Seven's submissions concerning the effect of the Master Agreement Provision on the retail pay television market do not make it clear how far, if at all, Seven intends to rely not only on s 45(2)(b)(ii), but on s 45(2)(a)(ii).

2270 It is asking a great deal of a Judge, especially in a complex case such as this, in effect to reformulate submissions so that they conform to what is ultimately held to be the correct construction of the relevant statutes. Even so, I shall attempt the task, consistently with my understanding of Seven's position concerning the effects of the Master Agreement Provision on the retail pay television market.

13.9.1 Application of s 45(2)(a)(ii): Was It Likely That News Would Acquire the AFL Broadcasting Rights?

2271 The parties are agreed that s 45(2)(a)(ii) of the *TP Act* embodies a wholly prospective test. The issue, then, so far as the Master Agreement Provision is concerned, is whether there was a real chance that it would substantially lessen competition in the retail pay television market. That question is to be answered at the time the Master Agreement was made (that is, 13 December 2000). However, the assessment should take into account subsequent events, although these do not necessarily determine what was '*likely*' at the relevant time. As I have explained, assessing whether there was a real chance that the Master Agreement Provision would substantially lessen competition in the retail pay television market requires a qualitative judgment of the kind identified by French J in *AGL v ACCC*.

13.9.1.1 TWO ASSUMPTIONS

2272 Two particular assumptions underlie Seven's submissions:

> first, that there was a real chance on 13 December 2000 that the Master Agreement Provision would have the effect that News would acquire the AFL

broadcasting rights (including the AFL pay television rights) **and** that Fox Sports would acquire the NRL pay television rights; and

secondly, that there was also a real chance on that date that the acquisition of both sets of rights would lead to the demise of C7 as a viable sports channel supplier.

13.9.1.2 SEVEN FAILS TO PUT ITS BEST BID FORWARD

2273 In my view, both assumptions are not without difficulties, especially the first. This is because at the time the Consortium Respondents entered into the Master Agreement, neither they nor any objective observer could reasonably have anticipated that Seven would fail to take whatever steps were commercially necessary and feasible to maximise its chances of obtaining the AFL pay television rights. Yet that is precisely what happened.

2274 In a case which has many extraordinary features, perhaps the most extraordinary is that Seven has consistently maintained that securing the AFL pay television rights was essential to C7's commercial survival after 2001, yet the evidence clearly establishes that Seven failed to make its best offer for those rights. Mr Stokes admitted that News had secured the AFL pay television rights for a '*good*' price and that there was no impediment to Seven matching News' bid in a timely fashion. On Mr Stokes' own analysis of the content of the AFL pay television rights secured by News, his assessment that the price paid by News was '*good*' was an understatement.

2275 Seven's failure to maximise its chances of securing the AFL pay television rights was primarily due to two factors. One was an apparent misinterpretation of the First and Last Deed, which led Mr Stokes and others within Seven to assume that Seven would have a second opportunity to secure the AFL pay television rights. The second factor was Seven's adamant refusal, for tactical reasons, to contemplate separate bids for the free-to-air and pay television rights (remembering that the content of the pay television rights can vary according to constraints imposed either by the potential licensor or the potential licensee). As Mr Wise explained, Seven's insistence on bidding for all rights had its origins in Seven's belief that no-one else was likely to be interested in the free-to-air rights and that a bid for both sets of rights would therefore increase Seven's chances of obtaining the pay television rights without competitive bidding. Seven's refusal to countenance a separate bid for the AFL pay television rights continued until the AFL had already announced its decision to award the

rights to News. At that point, Mr Stokes changed his mind and indicated that Seven was prepared to make an offer for the AFL pay television rights alone that in substance matched the pay rights component of News' offer.

2276 In my view, if the chances of News and Fox Sports obtaining both sets of pay television rights is assessed as at 13 December 2000, there was no reason for any of the Consortium Respondents or, for that matter, any objective observer to think that Seven would not take every reasonable commercial step available to it to secure the AFL pay television rights. An objective observer at that date would have taken into account that:

the AFL pay television rights were regarded by Seven as essential to C7's commercial survival;

there was a very strong likelihood that Seven would not succeed in obtaining the NRL pay television rights, making the acquisition of the AFL pay television rights even more important to C7's future;

the proposed offer by News, as contemplated by the Master Agreement Provision, valued the AFL pay television rights at an amount that Seven's key decision-maker considered would constitute a good deal for News if the bid were accepted;

there was no impediment to Seven making a separate and timely offer for the AFL pay television rights if it chose to do so;

Seven could not only have matched the pay television component of News' offer to the AFL, but (as I find) could have offered significantly more, had it chosen to do so in the interests of ensuring the survival of C7;

Seven could have taken these steps while preserving its entitlement under the First and Last Deed in respect of the AFL free-to-air television rights; and

if Seven chose to make an offer to the AFL for the pay television rights, it had an opportunity to do so after the Master Agreement was entered into (Seven's presentation to the AFL was on 14 December 2000).

13.9.1.3 WAS IT LIKELY THAT NEWS' BID WOULD SUCCEED?

2277 In assessing whether there was a real chance on 13 December 2000 that News would

obtain the AFL pay television rights, it is also necessary to consider the precise content of the Master Agreement Provision. As I have explained, the understanding reached at the teleconference of 13 December 2000 was not that the Consortium Respondents would do whatever was required to obtain the AFL broadcasting rights (including the pay television rights) and the NRL pay television rights. The arrangement, so far as the AFL broadcasting rights were concerned, was that News should make a bid for the rights and that its bid should be supported by the various put options and other arrangements agreed at the meeting. In particular, the Master Agreement Provision contemplated the execution of the Foxtel Put by which Foxtel undertook to acquire the AFL pay television rights (comprising three exclusively live matches) for $30 million per annum (plus adjustments). There was nothing in the arrangement or understanding that required or even contemplated that News' bid, insofar as it embraced the AFL pay television rights, would preclude Seven from making a superior offer for these rights, if it chose to do so. Mr Stokes' evidence made it clear that the Foxtel Put was not set at a fee that was higher than reasonable commercial considerations could justify. The AFL bidding process involved the making of sealed bids and there was nothing that prevented Seven from matching or exceeding News' bid if it chose to do so.

2278 Of course, the fact is that News did acquire the AFL broadcasting rights, including the AFL pay television rights (as defined in News' bid). To conclude that the Master Agreement Provision, as at 13 December 2000, would not be likely to have the effect that News and Fox Sports would acquire between them both the AFL and NRL pay television rights therefore seems to be odd. The apparent oddity dissipates somewhat when it is recognised that Seven itself was essentially responsible for the demise of C7 by reason of its failure to maximise its chances of securing the very rights that it considered central to C7's commercial survival. There was nothing in the Master Agreement Provision that was intended to dissuade Seven from putting its best offer forward for the AFL broadcasting rights or for the AFL pay television rights or, indeed, that had such an effect.

2279 It is true, as Seven points out, that the AFL's decision to accept News' offer was influenced by factors other than price. However, in the AFL's words, News' bid was '*clearly a financially superior offer*'. This was the most important consideration for the AFL. Had Seven offered significantly more for the AFL pay television rights than News, the AFL would have been extremely unlikely to refuse the superior financial offer. In any event, had Seven determined to do everything reasonable within its power to secure the AFL pay

television rights, it would certainly have addressed any non-monetary issues that were of concern to the AFL.

2280 It follows that if the matters are viewed objectively as at 13 December 2000, no objective observer could reasonably have anticipated that Seven would fail to take commercial steps well open to it to secure the AFL pay television rights offered by the AFL. Had Seven taken those steps, I think that the strong likelihood is that it would have succeeded in securing the rights it considered so important to the survival of its pay television arm.

2281 That finding, however, does not resolve the question posed by s 45(2)(a)(ii) of the *TP Act* adversely to Seven. The question is whether Seven has established that on 13 December 2000 there was a likelihood, in the sense of a real chance, that the Master Agreement Provision would have the effect of depriving Seven of *both* the AFL and NRL pay television rights. As to the NRL pay television rights, it was plainly more than likely that Fox Sports would succeed in its bid. In relation to the AFL pay television rights, the fact is that the parties to the Master Agreement spent a good deal of time and effort in formulating a bid that was intended to have a very good commercial chance of succeeding and in fact did succeed. In these circumstances, I think that Seven has shown that the Master Agreement Provision was likely (in the requisite sense) to have the effect that News would acquire the AFL broadcasting rights (including the pay television rights) and that Seven would not acquire those rights.

2282 In my opinion, insofar as Seven's failure to acquire the AFL pay television rights was critical to the fate of C7, Seven was largely the author of its own misfortune. Nonetheless, I consider that Seven has made out that the likely effect of the Master Agreement Provision, assessed as at 13 December 2000, was that News would acquire the AFL broadcasting rights and that Foxtel, through News' exercise of the Foxtel Put, would take a sub-licence of the AFL pay television rights.

2283 I also assume for the purpose of considering the effect of the Master Agreement Provision, without deciding the point, that Seven can establish that C7's failure to acquire either the AFL or NRL pay television rights led to its demise.

13.9.2 Application of s 45(2): Was the Master Agreement Provision Likely to

Substantially Lessen Competition in the Retail Pay Television Market?

13.9.2.1 THE QUESTION

2284 As I have noted, it is common ground that s 45(2)(a)(ii) of the *TP Act* is prospective in operation. The question that must be addressed, therefore, is whether the Master Agreement Provision, as at 13 December 2000, was likely, in the relevant sense, to have the effect of substantially lessening competition in the retail pay television market.

2285 On the construction of s 45(2)(b)(ii) of the *TP Act* that I prefer, the question that must be addressed is whether, at the date or dates any of the Consortium Respondents gave effect to the Master Agreement Provision, it was likely, in the relevant sense, to have the effect of substantially lessening competition in the retail pay television market. Seven would also be able to succeed in its case under s 45(2)(b)(ii) if, at the material time or times, the Master Agreement Provision **already** had the effect of substantially lessening competition in that market. Since Seven does not advance any such contention, it is only the first question that must be addressed in relation to s 45(2)(b)(ii).

2286 Seven's submissions in relation to s 45(2)(b)(ii), concerning the effect of the Master Agreement Provision on competition in the retail pay television market, do not specifically identify the conduct which is said to constitute giving effect to the provision. However, the pleadings suggest that the relevant conduct was entering into the various agreements implementing the arrangements embodied in the Master Agreement. These agreements include the Foxtel Put and the News-Foxtel Licence. I am prepared to assume that the parties entering these agreements gave effect to the Master Agreement Provision, in the sense that they did an act in pursuance of or in accordance with the Master Agreement Provision: *TP Act*, s 4(1) (definition of '*give effect to*'). For present purposes, the execution of the News-Foxtel Licence on 25 January 2001 can be taken as representative of conduct giving effect to the Master Agreement Provision.

2287 By 25 January 2001, News had already acquired the AFL broadcasting rights, including the AFL pay television rights. There is therefore no need to consider whether the acquisition of those rights was likely as at that date, although I have found in any event that the acquisition of the rights was likely once the Master Agreement was entered into on 13 December 2000. So far as the News-Foxtel Licence is concerned, the question is then

whether the Master Agreement Provision was likely, as at 25 January 2001, to have the effect of substantially lessening competition in the retail pay television market.

2288 Once it is accepted that the Master Agreement Provision was likely to prevent Seven from acquiring either the AFL or NRL pay television rights, none of the submissions suggests that the likely effects on competition in the retail pay television market would be different if the date selected is 13 December 2000 rather than 25 January 2001, or *vice versa*. Determining whether the Master Agreement Provision, or whether giving effect to the Master Agreement Provision, was likely to have the effect of substantially lessening competition in that market requires a comparison to be made between the likely state of competition in the market with and without the impugned conduct. The impugned conduct is the making of the Master Agreement and the entry into the various agreements contemplated by the Master Agreement Provision. In undertaking the comparison, the existing state of competition in a market is not determinative of the likely state of competition without the impugned conduct, but it may shed light on the likely state of competition in the absence of such conduct.

13.9.2.2 COMPETITION WITH AND WITHOUT THE MASTER AGREEMENT PROVISION

2289 Seven's submissions variously describe the competition provided by Optus to Foxtel in the retail pay television market as '*weak*' and '*significant but not close*'. Seven's approach is no doubt influenced by the need to steer a course between advocating that Foxtel had substantial market power and inviting the conclusion that Foxtel had so much market power that there was no competition on price or quality in the market. Be that as it may, Seven's experts supported the view that, before the execution of the Foxtel-Optus CSA in March 2002, Optus was no more than a weak constraint on Foxtel as a provider of a retail pay television service.

2290 Dr Smith said that for most of the two year period preceding the Foxtel-Optus CSA, Optus '*really imposed no pricing constraint upon Foxtel*'. She considered that Optus had the **potential** to be a closer constraint on Foxtel, since she thought that Optus had the ability to win market share away from Foxtel if it chose to introduce cut-price packages. Professor Noll characterised Optus as a '*weak*' competitor of Foxtel, but seemed to be more equivocal than Dr Smith. He accepted that the price of Foxtel's service was the same in areas where Optus was available and in areas where it was not. Professor Noll also accepted that Optus had not affected Foxtel's price in the short run. Accordingly, he did not:

'believe [that] Optus was much of a competitor against Foxtel. It wasn't an entity that had a substantial effect on the monopoly power of Foxtel'.

2291 The weakness of Optus as a competitor of Foxtel reflected the commercial realities facing Optus in late 2000 and early 2001. I have referred to CMM's woes in Chapter 11 ([1507]-[1514]. By way of summary, the realities included the following:

Optus had failed to achieve anything like its planned penetration into the retail pay television market and, indeed, had had an essentially stagnant subscriber base for some time (although numbers increased in 2001 as the result of Optus' marketing campaign linked to its bundling of telephony services);

CMM had incurred heavy losses over a sustained period, in part as a result of the heavy burden imposed by the MSGs applicable to long-term content supply agreements;

Optus had attempted over the years to sell CMM, but these efforts had not borne fruit;

Optus had given consideration to a variety of options, including shutting down its pay television business;

Optus had repeatedly sought the Fox Sports channels to remedy deficiencies in its programming, but had been denied access to the content by the exercise of Telstra's effective veto over the supply of Fox Sports to Optus; and

Optus had pressed for the creation of a single company to supply content to all platforms on a non-exclusive basis as early as 1997, as a means of rationalising the acquisition of key programming by retail pay television platforms.

2292 During the period in which Optus' pay television business was floundering, the Foxtel partners were in dispute on key policy issues. The resolution of those disputes was made more difficult by the requirement of unanimity for decision-making imposed by the Umbrella Agreement. The important contentious issues included:

the setting of price and other conditions for the long-term supply of the Fox Sports channels to Foxtel;

Telstra's desire to bundle Foxtel's pay television service with Telstra's

telephony products and, to that end, to acquire the Foxtel Service for on-selling to telephony customers; and

the longstanding desire of News and PBL (as the partners in Fox Sports) to supply Fox Sports channels on a non-exclusive basis to Optus.

2293 Discussions on the first two issues took place during 1999 and 2000, while the third had been discussed as early as 1998. Telstra's aspiration to bundle Foxtel with its telephony services was opposed by Mr Philip of News, because he feared that Telstra would acquire the bulk of Foxtel's retail customers and thus reduce Foxtel to a wholesaler of its own service. Telstra opposed resolution of the Fox Sports supply issue on the terms proposed by its Foxtel partners because the responsible executives within Telstra saw the proposal as a device for transferring value from Foxtel to Fox Sports, to the disadvantage of Telstra. Telstra also opposed the supply of Fox Sports to Optus, because additional premium pay content would strengthen the hand of Telstra's major telecommunications competitor in its bundling of pay television and telephony products.

2294 The idea that content sharing might provide a solution to some of these problems was revived within Optus by Mr Fletcher's '*end game*' memorandum of May 2001. The perceived urgency of finding a solution for CMM's financial woes was intensified by SingTel's takeover of Optus which effectively got under way in March 2001.

2295 The McKinsey review of CMM was established in June 2001, even before the formal completion of SingTel's takeover of Optus. It was the McKinsey review and its consideration by Optus' senior management and board that prompted Optus to embrace Project Alchemy (the content sharing proposal ultimately embodied in the Foxtel-Optus CSA). Nonetheless, the circumstances that induced Optus to prefer Project Alchemy to the other options long pre-dated SingTel's takeover of Optus and McKinsey's review of CMM. These circumstances were also present long before the AFL, in December 2000, awarded the AFL broadcasting rights for 2002 to 2006, including the AFL pay television rights, to News.

2296 Optus' need to stop CMM's haemorrhaging of cash was not materially affected by Seven's failure to obtain the AFL pay television rights. Seven's loss of the AFL pay television rights ultimately allowed Optus to terminate the C7-Optus CSA and thus relieve itself of the burden under the C7-Optus CSA of paying a minimum licence fee of $30 million

per annum (CPI adjusted) for the supply of C7. But Optus' fundamental problems remained. Similarly, the circumstances that gave rise to the disputes among the Foxtel partners long pre-dated the award of the AFL broadcasting rights in December 2000. News' success in obtaining the AFL broadcasting rights did not alter the fact that the Foxtel partners were in dispute on important issues.

2297 By January 2001 (and from the time the Master Agreement was entered into) the dynamics among the Foxtel partners had changed. Dr Switkowski was instrumental in bringing about a more conciliatory approach by Telstra to the aspirations of its Foxtel partners, reflected in the making of the Master Agreement itself. He effectively discarded the more combative approach of the '*Cold War Warriors*' within Telstra and opened the way to greater cooperation. Moreover, Telstra had powerful incentives to reach an accommodation with its partners on the issues that divided them. While Optus' CMM was struggling, its ability to bundle pay television with telephony services was a threat to Telstra's telephony operations. Without an agreement among the Foxtel partners, Telstra would not have been able to counter the threat from Optus by offering its own bundled services. The evidence shows that Telstra was concerned about this threat (for example, Mr Philip's report to Mr Lachlan Murdoch of 1 June 2001 recorded Telstra's worry that Optus would take Telstra's telephony customers).

2298 The resolution of the disputes among the Foxtel partners owed something to Optus' renewed, vigorous pursuit of a content supply agreement. Optus' strong interest in such an agreement dovetailed to some extent with Telstra's desire to bundle Foxtel's service with its telephony products. The supply of Foxtel to **both** Telstra and Optus as resellers of the Foxtel content largely overcame News' objections to Telstra's proposal that Foxtel should be supplied on a wholesale basis to it. Fox Sports, in which News and PBL were partners, had negotiated with Optus in 1998 for the supply of the Fox Sports channels. A content supply agreement offered the opportunity for Fox Sports to place its channels on Optus, since Telstra's opposition to the supply of Fox Sports to Optus could be overcome by concessions to Telstra on other issues. Once agreement could be reached on the matters of concern to Telstra, its objections to a long-term deal between Foxtel and Fox Sports could be overcome.

2299 The imperatives that gave rise to the resolution of the disputes among the Foxtel partners and to the conclusion of a content supply agreement would have been present even if

News had not acquired the AFL broadcasting rights in December 2000 and Foxtel had not acquired the AFL pay television rights. The explanations given by Mr Lee and Mr Anderson of the problems faced by CMM do not suggest that the problems would have been ameliorated in any significant way had Seven retained the AFL pay television rights. Nor does their evidence suggest that the solutions preferred by Optus would have been any different. Similarly, it is difficult to see why the nature of the disputes dividing the Foxtel partners and the pressures for resolving those disputes would have been any different had Seven, instead of News, acquired the AFL pay television rights.

2300 I have explained in Chapters 6 and 11 my reasons for accepting the evidence of Messrs Lee and Anderson. Of course, in late December 2000 or early 2001, SingTel had not yet taken over Optus and Mr Lee was not yet involved in Optus' affairs. Nonetheless, if the position is assessed at the time of the allegedly contravening conduct (that is, making the Master Agreement and giving effect to the Master Agreement Provision), on the assumption that the conduct had not taken place, it seems to me that there were only two realistic possibilities open to Optus:

> Optus could have decided to wind down its pay television business along the lines of the Manage for Cash strategy ultimately formulated as an option during 2001 and early 2002; or
>
> Optus could have decided to enter into a content supply agreement with Foxtel on terms much to the same effect as those incorporated in the Foxtel-Optus CSA executed in March 2002.

2301 In determining what was likely to occur in late 2000 or early 2001, on the assumption that Seven secured the AFL pay television rights, it is appropriate to take into account not only the circumstances facing Optus at the time but subsequent events. No doubt these were influenced to some extent by the fact that SingTel effectively took over Optus in about June 2001. But the decisions SingTel and the management of Optus faced would have had to be addressed by Optus even had SingTel had not become involved. There is no reason to think that the deliberations would have produced different outcomes had SingTel (and Mr Lee in particular) not participated. The views of Mr Lee and Mr Anderson (the latter of whom remained with Optus throughout the period when CMM's role was reassessed) were not substantially different.

2302 In my view, of the two alternatives I have identified, the second was much more likely. The considerations that ultimately prompted Optus to opt for Project Alchemy over Manage for Cash would have been present even if Seven had acquired the AFL pay television rights. Optus wanted, among other things, assistance in meeting its MSGs. Furthermore, had Optus had been unable to terminate the C7-Optus CSA (because Seven retained the AFL pay television rights) the desirability of a content supply agreement on terms similar to those in fact negotiated would have been even more apparent to Optus.

2303 Seven argues against this conclusion on the ground that the decision by Optus to enter the Foxtel-Optus CSA was made in an '*as is*' world, in which C7 could no longer offer Optus an independent subscription driving wholesale sports channel. But this argument overlooks the fact that the problems faced by Optus' CMM were of long standing and had become more acute over the years. The cash haemorrhage from CMM's pay television operations took place during the period when Optus had access to C7's '*subscription driving content*'.

2304 Seven also draws a distinction between Optus sharing content with other pay television platforms (that is, on a non-exclusive basis as was proposed in 1998) and being reduced to a mere reseller of Foxtel programming (effectively the position under the Foxtel-Optus CSA). By early 2001, Optus' CMM had experienced years of heavy losses and Optus needed help to offset the burden of the MSGs payable under long-term content supply agreements. In August 2001, McKinsey identified Optus' fundamental problems as including a relatively weak pay television position and a difficult industry structure (too many players and excessive costs). Optus' position in 2001 was therefore very different than it was in 1998 and would have been just as different even if Seven had retained the AFL pay television rights.

2305 One of the options advanced by McKinsey was '*play to win*', but this proposal centred on Optus being able to acquire Austar. By early 2001, Optus seems to have given no consideration to acquiring Austar as a possible solution to the problems facing CMM. The idea was apparently first mooted within Optus as part of the CMM review in mid-2001, although speculation about a possible merger was published in the financial press in June 2001.

2306 An observer looking ahead in, say, January 2001 perhaps might have formed the view

that there was a real chance that Optus would consider taking over or merging with Austar, even though the idea had not yet surfaced. But such an observer, in my opinion, would not have concluded that there was a real chance that Optus would actually decide to pursue that option. As Mr Lee explained, once the take-over proposal was analysed, it became apparent that Project Emu (as the proposal became known) presented too many problems to be implemented. Those problems led Mr Lee to conclude in February 2002 that, although the board had asked for the proposal to remain on Optus' agenda as a possibility, it was unlikely to be acceptable as a commercially sound strategy for Optus to follow and was clearly inferior to the Manage for Cash option. There is nothing to suggest that if Seven had retained the AFL pay television rights, a merger of Optus and Austar would have been a more likely option.

2307 Seven also submits that it was '*highly unlikely*' that Foxtel would have agreed to assume Optus' MSG obligations under the C7-Optus CSA. The evidentiary basis for this submission is unclear, particularly given the extent of the MSGs in fact assumed by Foxtel under the C7-Optus CSA. In any event, the submission pays no regard to the fact that cl 9.3 of the C7-Optus CSA allowed Seven to license the C7 channel to Optus. In that event, the fees payable by Optus were to be reduced by $2 million per annum, plus 25 per cent of the licence fees paid by Foxtel.

2308 Had Seven retained the AFL pay television rights, there is every reason to think that Foxtel would have taken AFL content via C7. Much evidence points in this direction. After all, the whole point of the arrangements between the Foxtel Partnership, Optus and the individual Foxtel partners was to share content. If Seven had indeed retained the AFL pay television rights, the strong likelihood is that '*industry rationalisation*' could have been achieved in a way that accommodated the minimum payment obligations imposed on Optus by the C7-Optus CSA.

2309 In my view, looking at the circumstances prevailing on 13 December 2000 or 25 January 2001, the very strong likelihood was that, in the absence of the conduct alleged to have contravened s 45(2)(b)(ii) of the *TP Act*, the major pay television retailers would have entered into an agreement on terms similar to those incorporated in the Foxtel-Optus CSA. That being the case, the allegedly contravening conduct was not likely to have had the effect of substantially lessening competition in the retail pay television market. The weak

competition provided by Optus to Foxtel in the retail pay television market would have become even weaker.

2310 The other, much less likely, alternative was that Optus would have adopted something like the Manage for Cash strategy, as a means of winding down the pay television business in a reasonably orderly fashion. Had such a strategy been adopted, the very strong likelihood is that Optus would have left the pay television business within a period of three to four years. During that period Optus would have wound down its pay television activities and, in particular, would not have sought to attract new subscribers or to replace those it lost through churn. As Mr Lee and, more particularly, Mr Anderson explained, a plan that sought to pare back costs and not actively to seek subscribers was in substance an exit strategy, albeit one to be implemented over a period of time. The principal object of any such strategy would have been to cushion the financial impact of Optus' MSGs, rather than to keep the business going. Despite the guarded optimism by McKinsey that CMM might have survived (an optimism not shared by Optus' management), had an approach similar to Manage for Cash been adopted, it would have resulted in Optus ceasing to be a retail supplier of pay television within a relatively short time.

2311 The '*counter-factual*' requires an assumption to be made that Seven acquired the AFL pay television rights in respect of 2002 to 2006. On that assumption, even if it is accepted that there was a real chance on 13 December 2000 or 25 January 2001 that Optus would have selected a Manage for Cash strategy (or something very like it), there would have been no real chance that competition in the retail pay television market would have been substantially lessened. Under the Manage for Cash strategy, the strong likelihood is that Optus would have left the retail pay television market within a few years, following a winding down process. Consequently, Optus would have been removed as any kind of constraint, weak or otherwise, on the Foxtel Partnership in the retail pay television market. Accordingly, if the allegedly contravening conduct had not occurred, and if Seven had acquired the AFL pay television rights, competition in the retail pay television market would not have been any more robust than in the events which did occur.

13.10 Conclusions

2312 The findings I have made are fatal to:

Seven's case under s 45(2)(a)(ii) of the *TP Act*, based on the making of the Master Agreement; and

Seven's case under s 45(2)(b)(ii) of the *TP Act*, based on entry into the News-Foxtel Licence as conduct alleged to have given effect to the Master Agreement Provision.

2313 Seven also relies on entry by the Consortium Respondents (or some of them) after 13 December 2000 into various contracts as:

constituting the making of contracts containing provisions each of which had the effect of substantially lessening competition in the retail pay television market; or

constituting conduct giving effect to the Master Agreement Provision, itself having the likely effect of substantially lessening competition in the retail pay television market.

2314 The findings I have made as to the likely effect of the Master Agreement Provision on competition in the retail pay television market apply equally to the provisions in the other contracts relied on by Seven and to the Master Agreement Provision on all relevant dates after 13 December 2000. The contracts implementing the Master Agreement were entered into December 2000 and January 2001. As I have noted, Seven does not suggest that there is any reason to differentiate between the contracts entered into during this brief period, so far as their effects on competition in the retail pay television market are concerned. In any event, I see no basis in the evidence for making different findings as to the effect on competition of provisions in those contracts or of the Master Agreement Provision itself at different times in December 2000 and January 2001. The circumstances I have identified were present throughout that period.

2315 For the reasons in this Chapter, I reject Seven's effects case under s 45(2) of the *TP Act*.

2316 I add, for the sake of completeness, that in Chapter 15 I reject Seven's contention that Foxtel, through News, overbid for the AFL pay television rights. I also reject Seven's claims that Foxtel took advantage of its market power by refusing to negotiate with C7 for the

carriage of its channels and by making statements to the AFL to the effect that Foxtel would not take C7's channels even if C7 acquired the AFL pay television rights. These findings may be significant in relation to Seven's argument that the Consortium Respondents employed anti-competitive means to obtain the AFL pay television rights. However, in view of the conclusion I have reached in this Chapter, it is not necessary to consider the significance of the findings for that argument.

14. SEVEN'S PURPOSE CASE UNDER SECTION 45(2) OF THE *TRADE PRACTICES ACT*

14.1 Scope of Chapter

2317 This Chapter is primarily concerned with Seven's purpose case against News, Foxtel (Sky Cable and Telstra Media), PBL and Telstra (that is, the Consortium Respondents), insofar as it is founded in s 45(2) of the *TP Act*. Seven contends that the Consortium Respondents made contracts or arrangements, or arrived at understandings, containing various provisions which had the purpose of substantially lessening competition. Seven also alleges that the Consortium Respondents gave effect to the various provisions.

2318 The Chapter addresses two issues of construction that are important to Seven's case. One issue is whether, in order for a contravention of s 45(2) to be made out by reason of an anti-competitive purpose, all the parties responsible for including a provision in a contract (including an arrangement or understanding) must share that purpose. If so, Seven's case based on a particular provision (such as the Master Agreement Provision) will fail unless all the parties responsible for its inclusion in the contract have the purpose of substantially lessening competition.

2319 The second issue of construction is whether s 45(2) can be contravened where the alleged anti-competitive purpose, even if achieved, could not have the effect of substantially lessening competition in a market. Seven argues that an alleged contravenor can have the proscribed purpose notwithstanding that it is in fact impossible for the alleged contravenor to achieve the purpose. In particular, Seven contends that a party can contravene s 45(2) by having the purpose of substantially lessening competition in a market which it **believes** exists, even if the market does not in fact exist.

2320 The second issue of construction leads to a related question: where a party seeks to achieve a particular objective (such as killing C7), but that objective, even if achieved, cannot have the effect of substantially lessening competition in a market, does the party have the purpose of substantially lessening competition?

2321 I commence the Chapter with an explanation of why findings as to the purpose or purposes of the Consortium Respondents are significant to the issues in the proceedings. I

then outline Seven's pleaded purpose case under s 45(2) of the *TP Act* and address the issues of construction I have identified. Since I conclude that a contravention of s 45(2) of the *TP Act* by reason of an anti-competitive purpose cannot be made out unless all parties responsible for including the provision in the contract shared that purpose, I consider whether Seven can show that to be the case in relation to each of the provisions upon which it relies. That analysis requires findings to be made as to Telstra's purpose. I also consider whether, on the findings I have made, the purpose alleged against the Consortium Respondents is one that can be said to involve substantially lessening competition.

2322 As will appear, it is not strictly necessary for me, in addressing Seven's purpose case under s 45(2) of the *TP Act*, to make findings as to whether the Consortium Respondents, other than Telstra, had the purpose of substantially lessening competition. However, findings on that issue will be significant if my analysis in this Chapter is wrong and, in any event, bear on other issues in the case. Accordingly, I deal with these factual questions in Chapter 15.

14.2 Relevance of 'Purpose'

2323 Seven's Closing Submissions address the purpose of the Consortium Respondents as a discrete factual issue. It is necessary to go elsewhere in Seven's submissions to ascertain why the proposed findings as to the purpose of the Consortium Respondents are significant.

14.2.1 Purpose of Substantially Lessening Competition

2324 The first reason why the purpose of the Consortium Respondents is material is that Seven seeks to make out a purpose case against them under s 45(2) of the *TP Act*. In summary, that case is as follows:

> the Consortium Respondents, or some of them, contravened s 45(2)(a)(ii) of the *TP Act*, because they made contracts (using that term to include arrangements or understandings) containing provisions that had the purpose of substantially lessening competition in the four markets specifically relied on by Seven; and
>
> the Consortium Respondents, or some of them, gave effect to provisions having the purpose of substantially lessening competition, thus contravening s 45(2)(b)(ii) of the *TP Act*.

2325 The purpose Seven alleges in its case under s 45(2) of the *TP Act* is that the Consortium Respondents intended that Foxtel should acquire the AFL pay television rights and that C7 should be prevented from acquiring the NRL pay television rights. Their object, so Seven says, was to force C7 out of business and thereby prevent it from competing:

> against Fox Sports as a buyer in the AFL pay rights and NRL pay rights markets;
>
> against Foxtel and Fox Sports as suppliers in the wholesale sports channel market; and
>
> against Foxtel as a provider of services in the retail pay television market.

14.2.2 Foxtel's Taking Advantage of Market Power for an Anti-Competitive Purpose

2326 Secondly, purpose is material to Seven's case against News, Foxtel and PBL under s 46(1) of the *TP Act*. Seven alleges that Foxtel:

> failed to accept offers of supply of the C7 channels for its pay television platform in 1999;
>
> determined not to negotiate with C7;
>
> made various statements as to the unlikelihood of the C7 channels appearing on the Foxtel platform; and
>
> agreed to pay $30 million for the AFL pay television rights.

Foxtel is said to have acted in these ways for one or more of the following purposes:

> to prevent C7 from competing in the retail pay television market;
>
> to deter or prevent Optus from engaging in competitive conduct in the retail pay television market; and
>
> to deter or prevent C7 from engaging in competitive conduct in the wholesale sports channel market.

2327 It follows, according to Seven, that Foxtel contravened s 46(1) of the *TP Act* because it took advantage of its substantial power in the various markets for the purpose of preventing the entry of C7 into the relevant markets or deterring or preventing C7 from engaging in competitive conduct in the markets. This part of Seven's case is addressed in Chapter 16.

14.2.3 Seven's Claim under s 45D

2328 Thirdly, purpose is material to Seven's case under s 45D of the *TP Act*. Seven claims that the Consortium Respondents, together with Nine and Fox Sports, engaged in conduct in concert that '*hindered*' or '*prevented*' Foxtel, Optus or Austar acquiring goods or services from C7 for the purpose of destroying or at least causing significant harm to the business of C7. This part of Seven's case is addressed in Chapter 21.

14.3 Seven's Pleaded Purpose Case under s 45(2)

2329 Seven's pleaded purpose case alleges that 11 provisions or sets of provisions were included in contracts for a proscribed purpose. Seven's Case Summary indicates that its purpose case under s 45(2) of the *TP Act* relies on six provisions:

> the Master Agreement Provision;
>
> the News-Foxtel Licence Provision;
>
> the Rights Sub-Licence Provision;
>
> the Nine Put Provision;
>
> the News-Nine Licence Provision; and
>
> the NRL Bidding Agreement Provisions.

2330 I limit the summary of the pleadings to these provisions. The pleadings refer to the various markets on which Seven relies to make out its case. It is necessary to bear in mind that I have rejected three of the four markets on which Seven relies to make out its case, namely the wholesale sports channel market, the AFL pay rights market and the NRL pay rights market. It is also necessary to bear in mind that the Statement of Claim defines '*Foxtel*' to mean the business carried on in partnership by Sky Cable and Telstra Media (par 8).

14.3.1 Master Agreement Provision

14.3.1.1 PURPOSE AND THE RETAIL PAY TELEVISION MARKET

2331 A substantial purpose of the Master Agreement Provision was to permit Foxtel to secure the AFL pay television rights (and to stop C7 acquiring the NRL pay television rights), so as to prevent C7 from competing against Foxtel in the retail pay television markets,

whether by supplying retail pay television services:

> by digital multicasting over Seven's free-to-air broadcasting infrastructure; or
>
> via the Telstra Cable pursuant to the access regime under Pt XIC of the *TP Act* (par 198).

2332 This pleading is supported by an allegation that from early 1999 until December 2000, Foxtel was concerned about the potential for C7 to compete with Foxtel by digital multicasting over Seven's free-to-air broadcasting infrastructure or by supplying retail pay television services over the Telstra Cable (par 198(a)). In particular, C7 was threatening Foxtel's monopoly in relation to the Telstra Cable and was threatening to compete with it over the same infrastructure (par 198(b)).

2333 A substantial purpose of Foxtel entering into the Master Agreement incorporating the Master Agreement Provision was '*to kill C7*' (par 198(c)). News and PBL were '*privy to [Foxtel's] purpose*', while Telstra was '*aware*' of Foxtel's purpose (par 198(d), (f)). Telstra was also aware that the likely effect of Foxtel obtaining the AFL pay television rights was that C7 would cease to operate (par 198(g)).

2334 The terms of the AFL Proposal, reflected in the Foxtel Put, were such that to the knowledge of News, Foxtel, PBL and Telstra, Foxtel was unlikely to make a profit from the acquisition of the AFL pay television rights except by curtailing competition in the retail pay television market (par 198(i)). Telstra's own assessment was that the acquisition of the AFL pay television rights was '*value dilutive*' for Foxtel and would be likely to result in a significant loss for Foxtel over the five year term of the rights proposal (par 198(j)). Telstra thus endorsed an acquisition of the AFL pay television rights which its management had concluded was financially unjustified. Foxtel's assessment was to the same effect as that of Telstra (par 198(k)). Further, a substantial purpose of News and PBL, as the ultimate shareholders of Foxtel and Fox Sports, was to remove or substantially lessen C7's ability to compete against Foxtel and Fox Sports (par 198(q)).

2335 Alternatively, a substantial purpose of the Master Agreement Provision was to enable Foxtel to secure the AFL pay television rights (and to prevent C7 from acquiring the NRL pay television rights) so as to reduce the competitive strength of Optus in the retail pay

television market (par 199).

2336 By reason of the matters pleaded in the Statement of Claim, a substantial purpose of the Master Agreement Provision was to substantially lessen competition in the retail pay television market (par 201).

14.3.1.2 PURPOSE AND THE WHOLESALE SPORTS CHANNEL MARKET

2337 A substantial purpose of the Master Agreement Provision was also to prevent C7 from competing effectively in the wholesale sports channel market, thus to substantially lessen competition in that market (pars 202, 203). The purpose of the parties was to remove C7 from the wholesale sports channel market or to prevent it from competing effectively in that market, thus ensuring that Optus and Austar became dependent on Foxtel and Fox Sports for the supply of Australian sports programming.

14.3.1.3 PURPOSE AND THE PAY RIGHTS MARKETS

2338 A further substantial purpose of the Master Agreement Provision was to enable Foxtel to:

> ensure that C7 would cease to compete, or to compete effectively against Foxtel and Fox Sports;
>
> ensure that only Foxtel and Fox Sports were able to supply channels consisting of attractive Australian sports events; and
>
> thereby ensure that nobody other than Foxtel or Fox Sports could compete for the acquisition of attractive sports rights (par 205).

By reason of these matters, a substantial purpose of the Master Agreement Provision was to substantially lessen competition in (among others) the AFL pay rights market and the NRL pay rights market (par 206).

14.3.2 News-Foxtel Licence Provision

2339 In including the News-Foxtel Licence Provision in the News-Foxtel Licence, the purpose of News and Foxtel was the same as their purpose in entering into the Master Agreement containing the Master Agreement Provision (par 290). Alternatively, the purpose

of News and Foxtel was the same as their purpose in entering into the Foxtel Put: that is, preventing C7 from competing against Foxtel in the retail pay television market by supplying services in competition with Foxtel over the Telstra Cable, pursuant to the access regime in Pt XIC of the *TP Act* (par 292A).

14.3.3 Rights Sub-Licence Provision

2340 By entering into the Rights Sub-Licence Agreement, including the Rights Sub-Licence Provision, the purpose of News and Foxtel was in substance the same as their purpose in entering the Master Agreement containing the Master Agreement Provision (par 250).

14.3.4 Nine Put Provision

2341 The pleading in relation to the Nine Put Provision mirrors that in relation to the News-Foxtel Licence Provision (par 273).

14.3.5 News-Nine Licence Provision

2342 The pleading in relation to the News-Nine Licence Provision also mirrors that in relation to the News-Foxtel Licence Provision (par 297).

14.3.6 NRL Bidding Agreement Provisions

2343 The purpose of Telstra and Foxtel in entering into the NRL Bidding Agreement was the same as their purpose in entering into the Master Agreement. Accordingly, a substantial purpose of the NRL Bidding Agreement Provisions was the same as the purpose of the Master Agreement Provision (par 310).

14.4 Seven's Submissions on Purpose: General

2344 The basis of Seven's factual case on purpose is set out in Chapter 4 of its Closing Submissions and in Chapter 7 of its Reply Submissions. In those Chapters, Seven does not address the legal significance of its submissions on the facts, leaving that to other parts of its Closing and Reply Submissions. In this section, I summarise Seven's factual submissions as to the purpose of the Consortium Respondents. The summary is relevant to the analysis in this Chapter and in Chapter 15.

14.4.1 News, PBL and Foxtel

2345 Seven's case, as explained in its Reply Submissions, is not merely that the object or purpose of News, Foxtel and PBL was to eliminate C7 as an ongoing business. Rather, Seven's case is that News, Foxtel and PBL had the purpose of eliminating or damaging C7 '***so as to cause*** *a substantial lessening of competition by making Fox Sports dominant*' (emphasis in original). Seven puts its contention in this way in order to avoid the riposte that it is of the essence of competition that a firm will attempt to harm its competitors. According to Seven, the purpose of News, Foxtel and PBL '*was not merely to strike at a competitor, but was to strike at competition*'.

2346 Seven says that from the first half of 1998, News formulated a strategy to make Fox Sports the exclusive supplier of Australian sports programming to all other pay television platforms. This strategy involved promoting the interests of Fox Sports, in which News initially had a 100 per cent (later 50 per cent) interest, over the interests of Foxtel, in which News initially had a 50 per cent (later 25 per cent) interest. News' strategy was, however, frustrated by the creation of C7 and its success in June 1998 in entering into a ten year supply agreement with Optus (the C7-Optus CSA).

2347 News saw C7 as the only significant competitor to Fox Sports in the supply of premium sports channels and in the acquisition of sports rights. News fully appreciated the benefit to Fox Sports if competition from C7 was removed. This perception, according to Seven, was shared by PBL once it acquired its interest in Fox Sports. Foxtel, whose CEO was appointed by News, aligned itself with News and PBL in relation to issues concerning C7. News, PBL and Foxtel also saw C7 as a potential competitor in the retail pay television market.

2348 Seven says that News and PBL took every opportunity to stifle C7 as a competitor. Their actions included vetoing any carriage of the C7 channels by Foxtel and participating in the arrangements leading to the acquisition of the AFL pay television rights by Foxtel. The availability of the AFL broadcasting rights in 2000 gave News and PBL the opportunity to bring about the termination of the C7-Optus CSA (by creating the circumstances in which Optus could exercise its right of termination) and, in effect, to remove C7 as a competitor to Fox Sports. It was for this reason that News and PBL supported Foxtel's acquisition of the AFL pay television rights, even though they well understood that this was a much more

expensive option than acquiring more or less equivalent rights by agreement with C7.

2349 In the lead-up to the acquisition of the AFL pay television rights, News and PBL maintained their opposition to Foxtel taking the C7 channels. They did so because otherwise Foxtel would have been able to negotiate down the price of the Fox Sports channels and C7 may have become entrenched as a strong competitor to Fox Sports. Seven points to evidence suggesting that modelling conducted by Foxtel in 1999 showed that the carriage of the C7 channels would have been profitable for Foxtel. Indeed, Seven argues that in 1999, executives within Foxtel thought that a deal with C7 could be consummated on terms satisfactory to Foxtel, at a price slightly less than C7 had already offered. Ultimately, however, Foxtel (principally through Mr Mockridge) harmonised its interests with those of News and made concessions to Fox Sports at Foxtel's own expense.

2350 Seven also places considerable reliance on a number of internal Telstra memoranda. These suggest, so Seven argues, that the Telstra representatives on the Foxtel Management board held the view that News and PBL wanted C7 to fail and that it was this that prompted Foxtel's refusal to take the C7 channels. Seven says that the perception of the Telstra representatives was that by forcing Foxtel to take sporting content from Fox Sports at inflated prices, profits were effectively being diverted from Foxtel to Fox Sports and that News and PBL intended to '*kill C7*'. According to Seven, Telstra's perception was completely accurate.

2351 Seven recognises that there is evidence suggesting that one reason why News and PBL opposed Foxtel carrying C7 was that they wanted to resolve a long-term supply arrangement between Foxtel and Fox Sports. Seven submits that, even if this was a reason for their opposition, their actions were consistent with a desire to prevent competition between Fox Sports and C7. Specifically, News and PBL prevented Foxtel from carrying C7 so as to ensure that Fox Sports had an advantage in its commercial negotiations with Foxtel.

2352 Seven also recognises that News' witnesses gave evidence that one reason for being opposed to Foxtel taking C7 was that, by late 1999, a view had been formed that to do so would interfere with Foxtel's or News' negotiations for the AFL pay television rights. Seven submits that Foxtel's decision to acquire the AFL pay television rights from the AFL (through News) was inexplicable except as conduct designed to hinder C7 from competing

with Fox Sports. The direct acquisition of the rights was understood by the Foxtel partners to be an inferior option and, in any event, was never the subject of a careful comparison with the option of taking sports content from C7.

2353 Seven argues that, even on Foxtel's own analyses, the direct acquisition of the AFL pay television rights was less profitable than the acquisition of AFL pay television rights through C7, as had been discussed in 1999. In any event, even if News and PBL were motivated by the desire to preserve the option of direct acquisition of the AFL pay television rights, they engaged in '*exclusionary conduct*' which contravened the *TP Act*.

2354 Seven rejects the contention advanced by the Respondents that the quality of the C7 channels provided a genuine reason for Foxtel to decline to take them. In truth, Seven contends, the refusal to take the C7 channels was a refusal in principle, unaffected by any issue as to quality or the terms on which the C7 channels could be obtained.

2355 In summary:

> *'Where News and PBL had a motive to damage C7, had a plan to make Fox Sports dominant, took steps to prevent C7 competing with Fox Sports for carriage on Foxtel, and knew that the likely impact of acquiring AFL rights would be to damage C7 … it may be inferred that News and PBL intended the likely consequences of their actions'.*

2356 Seven also says that it is significant that News and PBL achieved their objectives, in that:

> Optus terminated the C7-Optus CSA;
>
> C7 ceased to operate;
>
> there was no longer any serious threat that C7 would access the Telstra Cable;
>
> Optus entered into an agreement to take the Fox Sports channel; and
>
> Foxtel entered into a wider content sharing agreement with Optus (the Foxtel-Optus CSA), which conferred significant advantages on Foxtel.

14.4.2 Telstra

14.4.2.1 SEVEN'S CLOSING SUBMISSIONS

2357 In its Closing Submissions, Seven submits that the evidence establishes that Telstra:

> had clear knowledge that Foxtel's purpose was to '*kill C7*';
>
> was aware that News and PBL were using their position in the Foxtel Partnership to prefer the interests of Fox Sports over Foxtel in the pricing negotiations relating to the supply of the Fox Sports channels to the Foxtel platform; and
>
> appreciated that News and PBL had a more fundamental basis for opposing the carriage of C7 on Foxtel, in that their objective was to damage C7.

2358 Seven relies particularly on conversations between Mr Blomfield of Foxtel Management and Telstra executives, as recorded in the answers to interrogatories supplied by Telstra to which I have referred in Chapter 8. According to this material, Mr Blomfield (who did not give evidence) said that the acquisition of the AFL pay television rights by Foxtel was '*about killing C7*'. Seven also relies on Dr Switkowski's acknowledgement in his evidence that Telstra executives had expressed the view to him that News' refusal to countenance C7 on Foxtel was contrary to Foxtel's interests and favoured Fox Sports on pricing.

2359 In addition, Seven draws attention to contemporaneous internal Telstra documents complaining about the lack of concern displayed by News and PBL for Foxtel's best interests and suggesting that both wanted C7 to fail. It also relies on internal Telstra documentation which recorded concerns about the reliability of the assumptions underlying financial models prepared within Foxtel relating to the proposal for the acquisition of the AFL pay television rights.

2360 Seven invites me to make a finding that Telstra appreciated that, if C7 failed to acquire the AFL pay television rights, it would cease to have a viable business and Fox Sports would become a monopoly supplier of popular Australian sports content. To the extent that Dr Switkowski and Mr Akhurst gave evidence to the contrary, Seven asks me not to accept that evidence.

2361 Seven contends that Telstra had a motive for joining in the purpose of News and PBL

to destroy C7 and create a monopoly for Fox Sports. The principal motive lay in Telstra's view that significant additional value could be unlocked from the Foxtel business if the scope of the business were to be expanded. Seven identifies, for example, a presentation to senior executives of Telstra by Mr Akhurst in April 2000. In that presentation, Mr Akhurst suggested that an expanded Foxtel business could be worth as much as $4.9 billion, compared with a value on a stand alone basis of between $1.3 and $2.2 billion dollars. An important component of the plan to add value to Foxtel, from Telstra's point of view, was the role played by Foxtel in Telstra's telephony defence – that is, assisting Telstra to offer a full range of services, including pay television, to prevent the loss of revenue to its telephony competitors.

2362 The difficulty from Telstra's perspective was that an expansion of Foxtel's business required the cooperation of News and PBL. According to Seven, Telstra regarded support for the acquisition of the AFL pay television rights by Foxtel as a way of building trust within the Foxtel Partnership. Greater trust would assist Telstra to make progress on other issues, including Telstra's desire to offer bundled products and to expand Foxtel's business.

2363 Seven gives two answers to the Respondents' argument that Dr Switkowski and Mr Akhurst were the decision-makers within Telstra and that they disclaimed knowledge of any plan by News and PBL to destroy C7 or create a monopoly for Fox Sports as a supplier of Australian sporting content. One answer is to invite me to reject the evidence of Dr Switkowski and Mr Akhurst. A second answer is that the knowledge or state of mind of Mr Greg Willis, the head of Telstra's Media division, should be attributed to Telstra, even if I find that Dr Switkowski and Mr Akhurst did not share his views or understanding. According to Seven, there is no doubt that Mr Willis, and other Telstra executives, knew of the monopolistic aspirations of News and PBL.

14.4.2.2 SEVEN'S REPLY SUBMISSIONS

2364 It is not clear from Seven's Closing Submissions whether it contends only that Telstra was **aware** that News and PBL had the purpose or objective of killing C7, or whether its argument is that Telstra **shared** that purpose or objective. The Closing Submissions identify a '*motive for [Telstra]* ***joining*** *the purpose of News and PBL*' (emphasis added) – that is, the motive of unlocking the value of the Foxtel business – but it is not entirely clear whether Seven asserts that Telstra in fact shared that purpose.

2365 Seven's case is made somewhat clearer in its Reply Submissions, although not so as to eliminate all ambiguity. It submits that:

> *'Telstra **joined in the purpose of News, PBL and Foxtel** in relation to the acquisition [of the] AFL and NRL pay rights. Telstra **participated in the acquisitions knowing that they were designed, in part, to bring about the death of C7** because Telstra wanted to keep its Foxtel partners happy, and so as to secure strategic advantages for Foxtel vis-à-vis Optus'.* (Emphasis added.)

2366 The '*key points*' on which Seven relies are as follows:

> Mr Greg Willis was told by Mr Blomfield in late October or early November 2000 that the acquisition of AFL pay television rights was '*about killing C7*';
>
> Mr Akhurst was aware in October 2000 that Foxtel had said that the acquisition of the AFL pay television rights was NPV negative, and that the rights acquisition was a '*strategic decision*' for the board;
>
> Telstra, including Dr Switkowski, was aware that the reason for News and PBL opposing carriage on C7 was their preference for the interests of C7's competitor, Fox Sports;
>
> Telstra executives, including Mr Greg Willis, were '*very concerned*' about Foxtel's modelling of the AFL acquisition;
>
> Telstra, including Dr Switkowski and Mr Akhurst, understood that Optus and Austar could terminate their respective CSAs if C7 lost the AFL pay television rights; and
>
> both Dr Switkowski and Mr Akhurst understood that the loss of the AFL pay television rights would have created difficulties for C7 remaining a viable competitor to Fox Sports and might have brought down C7's business.

14.5 Seven's Submissions as to the Purpose of the Provisions

14.5.1 Master Agreement Provision

2367 Seven submits that a substantial purpose of the Master Agreement Provision was to enable Foxtel to acquire the AFL pay television rights, with the anticipated impact on competition in the various markets on which Seven relies. A further substantial purpose was to ensure that C7 did not acquire alternativemarquee sporting content, in the form of the NRL

pay television rights. All parties to the Master Agreement shared this purpose.

2368 Seven anticipates the possibility that I might find that Telstra did not share the subjective purpose of News, PBL and Foxtel. However, it submits that this should not affect the conclusion as to the purpose of the Master Agreement Provision. The Agreement resulted from the '*capitulation*' of Telstra and the purpose of the three moving parties constituted at least a substantial purpose of the Master Agreement Provision. Seven contends, in the alternative, that the Master Agreement Provision was formulated by News and inserted into the Master Agreement at its insistence and that the purpose of the Master Agreement Provision should be regarded as that of News. These submissions raise questions of statutory construction that I address later in this Chapter.

14.5.2 Purpose in Relation to Markets

2369 Seven's submissions distinguish the purpose of the various Consortium Respondents by reference to the various pleaded markets.

14.5.2.1 WHOLESALE SPORTS CHANNEL MARKET

2370 Seven takes as the starting point that the purpose of News (and later of PBL) was to eliminate competition from C7 and thus substantially increase the value of Fox Sports as a supplier of wholesale sports channels. The ultimate object was to ensure that Fox Sports became the dominant supplier of Australian sports programming to all pay television platforms and that competition for rights (and thus rights fees) would be reduced.

2371 Whether they appreciated it or not, News and PBL acted on the basis that there was a separate wholesale sports channel market in which C7 was the only significant competitor to Fox Sports. Their actions were only consistent with an understanding that, in the absence of C7, Fox Sports would not be constrained to any significant extent by close competitors. The understanding of News and PBL is therefore powerful evidence of the existence of a wholesale sports channel market. It follows that:

> *'a substantial purpose of News and PBL in participating in the acquisition of AFL pay rights and supporting Foxtel's acquisition of those rights [was] to achieve a significant reduction of competition to Fox Sports in the wholesale sports channel market.*
>
> ...

> *[T]he objective which News and PBL sought to achieve, the end in view, was the substantial reduction of competition to Fox Sports in the wholesale sports channel market'.*

2372 As I have noted, Seven submits that it does not matter, so far as its purpose case is concerned, that there was in fact no lessening of competition in a given market or even that the market envisaged by the participants did not exist. Similarly, it is not to the point if it be the case that News and PBL did not think in terms of a wholesale sports channel market. The consequence of eliminating C7, or rendering it an ineffective competitor to Fox Sports, was substantially to lessen competition in the wholesale sports channel market.

2373 According to Seven, Foxtel's purpose was the same as that of News and PBL. Foxtel was well aware of the '*ambitions*' of News and PBL for Fox Sports:

> *'Foxtel was content with the reduction of competition in the wholesale sports channel market because the removal of C7 conferred other advantages on Foxtel, being that C7 was removed as a competitive threat in the retail pay television market, C7 was prevented from depriving Foxtel of its exclusive access to infrastructure which was under threat by C7 in the access proceedings, and the acquisition of AFL rights conferred a competitive advantage on Foxtel vis-à-vis Optus'.*

2374 Telstra joined with the purpose of News, Foxtel and PBL, well knowing the consequences for C7 and for competition in the wholesale sports channel market.

14.5.2.2 AFL PAY RIGHTS MARKET

2375 News and (later) PBL understood that if Fox Sports could become the dominant supplier of sports channels to all pay television platforms it would obtain considerable benefits in reducing the costs of sports rights. For example, News' financial models assumed that in the absence of competition, rights costs would inflate at three per cent per annum less than if there were competition. Similarly, News understood that the frustration of its plan to sell Fox Sports non-exclusively to all platforms because of C7's advent was likely to increase the fees paid for sports rights. Thus, a substantial purpose of News and PBL in eliminating C7 was the substantial lessening of competition for the acquisition of sports rights in the AFL pay rights market. This conclusion is not affected by the fact that it was ultimately the Foxtel Partnership, rather than Fox Sports, that bid for the AFL pay television rights, since there was

no prospect of competitive bidding between the Foxtel Partnership and Fox Sports for sports rights.

2376 The purpose of Foxtel was the same as the purpose of News and PBL, while Telstra joined in the purpose of News, PBL and Foxtel.

14.5.2.3 NRL PAY RIGHTS MARKET

2377 The position in relation to the NRL sports rights pay television market was the same as that in relation to the AFL sports rights pay television market.

14.5.2.4 RETAIL PAY TELEVISION MARKET

2378 A further purpose of Foxtel's acquisition of the AFL pay television rights was to reduce competition to Foxtel in the provision of retail pay television services:

> Foxtel saw a competitive threat from the prospect that Seven might use the AFL pay television rights as part of a subscription service to attack the Foxtel subscriber base;
>
> the acquisition of the AFL pay television rights would resolve the problems created by C7's request for access to the Telstra Cable; and
>
> Foxtel would obtain an important competitive advantage if it supplied an important subscription driver to its competitor, Optus.

14.5.3 News-Foxtel Licence Provision

2379 The News-Foxtel Licence was the very agreement by which the AFL pay television rights were acquired. The purpose of the News-Foxtel Licence Provision was to substantially lessen competition in each of the four markets relied on by Seven.

14.5.4 Rights Sub-Licence Provision

2380 At the time of entering into the Foxtel Put, Nine Put and Ten Put, there was a contract, arrangement or understanding between News, Foxtel, Nine and Ten containing a provision that News would, upon acquiring the AFL broadcasting rights:

> sub-license the AFL pay television rights to Foxtel;

sub-license certain AFL free-to-air television rights to Nine; and

sub-license certain AFL free-to-air television rights to Ten,

in accordance with various bipartite arrangements.

2381 The Rights Sub-Licence Provision was an aspect of the arrangement formulated by News for the acquisition of the AFL pay television rights by Foxtel. So far as News and Foxtel were concerned, the critical aspect of the arrangement was that Foxtel would acquire the AFL pay television rights. The purpose of News and Foxtel in relation to the Rights Sub-Licence Provision was the same as their purpose in relation to the News-Foxtel Licence Provision. That purpose may be seen as a substantial purpose of the Rights Sub-Licence Provision, in the sense described by Gummow J in *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, at 586 [62].

14.5.5 Nine Put Provision

2382 Seven accepts that '*viewed in isolation*' the Nine Put had no effect relevant to the pleaded markets, although it argues that, viewed in context, it was part of the overall arrangements by which Foxtel obtained the AFL pay television rights. Seven advances a related argument on the question of purpose.

2383 The Nine Put was formulated by News as an integral aspect of News' bid for the AFL broadcasting rights, the purpose of which was to acquire the AFL pay television rights for Foxtel. A substantial purpose of the Nine Put Provision was therefore the same as the purpose of the News-Foxtel Licence Provision.

14.5.6 News-Nine Licence Provision

2384 Seven submits that there is no relevant distinction between the Nine Put Provision and the News-Nine Licence Provision.

14.5.7 NRL Bidding Agreement Provisions

2385 The NRL Bidding Agreement was formed on the afternoon of 13 December 2000. The parties to it were Fox Sports, Foxtel (Sky Cable and Telstra Media) and Telstra. The pleaded terms of the Bidding Agreement Provisions have been set out in Chapter 13.

2386 Seven submits that the purpose of Telstra and Foxtel in entering into the NRL Bidding Agreement, including the NRL Bidding Agreement Provisions, was to implement the overall arrangements contemplated by the Master Agreement. Having made provision for the acquisition of the AFL pay television rights, the NRL Bidding Agreement was designed to prevent C7 from obtaining an alternative to its AFL pay television rights in the form of the NRL pay television rights. A substantial purpose of the NRL Bidding Agreement Provisions was therefore to shore up the impact of the acquisition by Foxtel of the AFL pay television rights, and thus to substantially lessen competition in the relevant markets.

2387 Seven submits that although Fox Sports was a party to the NRL Bidding Agreement, four of the five directors of Fox Sports were present at the teleconference of 13 December 2000 representing News and PBL and had the mental state that characterised the purpose of News and PBL.

14.6 Construction of s 45(2): Purpose

14.6.1 Common Ground

2388 Section 45(2)(a)(ii) of the *TP Act* provides that a corporation shall not make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose of substantially lessening competition. Section 45(2)(b)(ii) of the *TP Act* provides that a corporation shall not give effect to a provision of a contract (including an arrangement or understanding) if that provision has the purpose of substantially lessening competition. Section 4F deems a provision to have had or to have a particular purpose if the provision was included in the contract, or is to be included in the proposed contract, for that purpose or for purposes that included or include that purpose **and** the purpose was or is a substantial purpose.

2389 Seven's Reply Submissions helpfully identify the common ground among the parties in relation to the construction of the expression '*purpose*' in s 45(2) of the *TP Act*:

> It is first necessary to identify the impugned provision of the contract. The relevant purpose is that of the provision.
>
> The purpose of a provision is to be ascertained by reference to the subjective purpose for its inclusion in the contract, although this test does not exclude

consideration of the circumstances surrounding the making of or giving effect to the contract: *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10, at 38, per Toohey J; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460, at 474-477, per *curiam*; *News v South Sydney* 215 CLR, at 573 [18], per Gleeson CJ; at 580-581 [41]-[44] per McHugh J; at 585 [60], per Gummow J; at 636-637 [212], per Callinan J.

The purpose is the effect that the parties sought to achieve through the inclusion of the provision in the contract: *Tillmanns Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 27 ALR 367, at 383, per Deane J; *News v South Sydney* 215 CLR, at 586 [63], per Gummow J. Purpose, however, is distinct from motive:

> *'The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end. The appropriate description or characterisation of the end sought to be accomplished (purpose), as distinct from the reason for seeking that end (motive), may depend upon the legislative or other context in which the task is undertaken ... [I]n the context of competition law, it is necessary to identify purpose by describing what is sought to be achieved by reference to what is relevant in market terms'.*

News v South Sydney 215 CLR, at 573 [18], per Gleeson CJ.

A purpose may be a proscribed purpose if it is one of a number of purposes, provided it is a '*substantial*' purpose: s 4F(1)(b). (Section 4F uses the expression '*deemed*' not in order to create a statutory fiction, but for a definitional purpose: *News v South Sydney* 215 CLR, at 585 [60], per Gummow J.) In this context, '*substantial*' means '*considerable or large*': *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, at 139, per Lockhart J; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110, at 136 [97], per Heerey J (with whom Black CJ and Tamberlin J agreed). As Heerey J said in the latter case (at 136 [97]), the question is whether the proscribed purpose '*loom[ed] large among the objects the corporation sought to achieve by the conduct in question*'.

14.6.2 Is a Shared Purpose Required?

14.6.2.1 THE ISSUE

2390 Seven's Closing Submissions advance contentions that appear not always to be consistent in their approach to the construction of '*purpose*'. On one reading, the Closing Submissions accept, subject to one qualification, that the subjective purpose for including a provision in a contract must be common to all parties to the contract. The qualification, drawn from observations in *ASX v Pont Data* 27 FCR, at 477, is that in certain circumstances it will be appropriate to look solely to the purpose of the party or parties as the result of whose efforts the provision was included in the contract. In a footnote to the Closing Submissions, Seven adds the comment that several passages in *News v South Sydney* '*carry an implication that the relevant purpose must be shared*'.

2391 News' and PBL's Closing Submissions interpret Seven as correctly conceding that, ordinarily, the purpose of a provision must be a purpose common to all the parties responsible for its inclusion in a contract. Not surprisingly they also endorse Seven's interpretation of the High Court's observations in relation to *News v South Sydney*. News argues that Seven's concession is compelled by authority.

2392 Seven appears to have had something of a change of heart by the time it filed its Reply Submissions, doubtless prompted by a realisation of where its apparent concession might lead. Seven's Reply Submissions contend that:

> *'having regard to the language of s 4F, the question whether a provision has a proscribed purpose requires an* ***evaluation of the substantiality*** *of the subjective object or objects behind the inclusion of the term. This evaluation, in the case of a simple two party agreement where purposes are common, will be straightforward. But in other cases the evaluation may require attention to:*
>
> *(a) the degrees of responsibility of the various parties for the inclusion of the provision;*
>
> *(b) the differing objects of those parties; and*
>
> *(c) the knowledge of other parties of those objects.*
>
> *The court then decides whether, in all the circumstances, it is correct to say that a substantial subjective purpose of the provision was a proscribed one'.* (Emphasis in original.)

Seven submits that this proposition is consistent with the authorities.

14.6.2.2 AUTHORITIES

2393 A useful starting point is *ASX v Pont Data*, as certain propositions flow from the reasoning of the Full Court in that case. *ASX v Pont Data* concerned agreements whereby ASX was to supply Pont with financial data in electronic form. Each agreement contained restrictions on the use that Pont could make of the data, in particular on resupply of the information. Pont alleged, among other things, that the provisions had the purpose of substantially lessening competition in the wholesale financial information market. The trial Judge, Wilcox J, found that Pont had signed the agreements only because otherwise it faced losing access to critical data. Moreover, Pont had unsuccessfully objected to inclusion of the provisions in the agreements.

2394 The Full Court pointed out (27 FCR, at 475) that s 46 of the *TP Act* strikes at the unilateral activity of a monopolist in taking advantage of its power for a particular purpose, while s 45 operates upon contracts between two or more parties some of whom may not have the proscribed purpose. Their Honours observed that where not all the parties have the necessary subjective purpose, the question is how one determines whether the contract they make (or a provision of the contract) has a particular purpose.

2395 The Court answered the question as follows (27 FCR, at 476):

> *'In its operation upon provisions stated to have a particular purpose, s 4F uses the words "the provision was* included *in the contract ... for that purpose or for purposes that included or include that purpose". **This indicates that s 4F, in this operation, requires one to look to the purposes of the individuals by whom the provision was included in the contract, arrangement or understanding in question**. It therefore directs attention to the "subjective" purposes of those individuals'.* (Emphasis added.)

After referring to Wilcox J's findings, the Court stated (27 FCR, at 477) that:

> *'In considering complaints by Pont as to the alleged anti-competitive purpose, it is therefore appropriate to look to the purposes of the **party as a result of whose efforts they were included**, that is to say [ASX]'.* (Emphasis added.)

2396 The three propositions that flow from the reasoning in *ASX v Pont Data* are these:

> a provision in a contract may have the purpose of substantially lessening competition in a market even though not all parties to the contract share that purpose;
>
> the relevant purpose for the application of s 45(2) of the *TP Act* is that of the party or parties responsible for the inclusion of the provision in the contract; and
>
> accordingly, where only one of two parties to a contract is responsible for the insertion of a particular provision in the contract, it is the subjective purpose of that party that is material.

2397 Contrary to Seven's submissions, the reasoning in *ASX v Pont Data* is not binding on me, since the Court ultimately held that the purpose case against ASX under s 45(2) of the *TP Act* failed (27 FCR, at 487). Nonetheless, the carefully considered views of the Full Court have persuasive force and, in any event, I think that the reasoning is sound. However, it will be seen that the reasoning in *ASX v Pont Data* does not address the approach to be taken in circumstances where two or more parties are responsible for the insertion of a provision in a contract, but where not all of those parties share the subjective purpose of substantially lessening competition. That is the point at which the submissions in the present case diverge.

2398 There is authority supporting the proposition that, in order to come within s 45(2) of the *TP Act*, the relevant purpose must be common to all parties responsible for the inclusion of the provision in a contract. In *Carlton & United Breweries (NSW) Pty Ltd v Bond Brewing New South Wales Ltd* (1987) 16 FCR 351, T Co granted B Co, a brewer, head leases of a large number of hotels, thus interposing B Co between the owner and the individual licensees. In proceedings for interlocutory relief, Wilcox J held that the applicant, another brewer, had failed to establish that a provision of the agreement had the purpose of preventing or limiting the supply of goods to particular persons or classes of persons within s 4D(1)(b) of the *TP Act*. Wilcox J said (at 356):

> *'The purpose referred to in par (b) of the definition is a purpose common to the parties. I have no doubt that it was a purpose of [B Co] to reduce the supply of beer by [the applicant] to operators of the hotels with which the agreement was concerned, but there is no evidence to indicate that this was a purpose shared by [T Co]. It was conceded in the Supreme Court by Mr Spalvins, the chief executive of [T Co], that, at the time of the agreement, he was aware that [B Co] wished to acquire the leases in order to improve its*

> *market share; but to say that a party is aware of the purpose of another party is a very different thing from saying that the former shared the latter's purpose. So far as the evidence indicates, there is no reason to suppose that Mr Spalvins, or [T Co], was actuated by any purpose other than that of obtaining the best bargain which was commercially attainable'.*

Although Wilcox J was concerned with s 4D of the *TP Act*, the same reasoning would seem to apply to s 45(2).

2399 Wilcox J's reasoning was followed by Young J in *Stokely-Van Camp, Inc v New Generation Beverages Pty Ltd* (1998) 44 NSWLR 607, at 617. However, Young J's comments were obiter dicta and, like Wilcox J, his Honour did not find it necessary to examine the operation of s 4F of the *TP Act*. See, too, *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236, at 266 [105], per *curiam*.

2400 Seven does not suggest that its contention has been authoritatively upheld in Australia. However, it claims support from dicta of Gummow J in *News v South Sydney*. His Honour said (215 CLR, at 585-586 [59]-[62]):

> *'It will be noted that [the trial Judge] focused on the subjective reasons of the parties to the contract in which the relevant provision is contained. At first glance, such an approach might appear to conflict with the terms of s 4D(1)(b), which speaks not of human or corporate actors but of the provision* itself *having the purpose of preventing, restricting or limiting the supply or acquisition of the relevant goods or services. A construction which fixes upon subjective intent also may be difficult to apply to a multipartite contract, arrangement or understanding. However, s 4F of the Act doubtless has a role to play in such circumstances.*
>
> *...*
>
> *The operation of s 4F upon provisions stated to have a particular purpose is significant. The phrase "the provision* was included *in the contract ... for that purpose or for purposes that included or include that purpose" suggests that s 4F requires examination of the purposes of the individuals by whom the provision was included in the contract, arrangement or understanding in question. Moreover, s 4F contemplates that a provision may be included in a contract, arrangement or understanding for a plurality of purposes and, in such circumstances, directs that the relevant purpose must be "substantial". This is a further indication that the Act requires examination of the purposes of individuals, the inevitable multiplicity of which may be contrasted with an examination of the "objective" purpose of an impugned provision.* ***In this way, the introduction of a "substantial purpose" test avoids difficulties in discerning the relevant purpose of multiple parties to a contract,***

arrangement or understanding'. (Emphasis added.)

2401 In this passage, Gummow J was not specifically addressing the issue confronting me. It is therefore not surprising that the passage does not speak unequivocally to that issue. I think that his Honour's observations are capable of bearing the meaning attributed to them by Seven. On the other hand, as News suggests, Gummow J may have been concerned only to explain why the '*substantial purpose*' test in s 4F of the *TP Act* suggests that s 4D (and presumably s 45(2)) applies where the **subjective** purpose of the parties responsible for the provision, rather than an objectively ascertained purpose, included the substantial lessening of competition.

14.6.2.3 PREFERRED CONSTRUCTION

2402 Since the particular question of construction I have identified is not concluded by authority, I must express my own view. This is no easy task, because the text of ss 45(2) and 4F of the *TP Act* is of even less assistance than usual in cases of statutory ambiguity. The fundamental reason for this is that, as Gummow J noted in *News v South Sydney* (in relation to s 4D), s 45(2) of the *TP Act* does not speak of human or corporate actions, but of the **provision itself** having the purpose of substantially lessening competition. A process of judicial exegesis has taken the rather curious statutory language to refer to a subjective purpose: cf *News v South Sydney* 215 CLR, at 580 [41], per McHugh J. It is not surprising in these circumstances that s 4F does not clearly indicate whether it is directed to the position of a single corporation which has multiple purposes or to that of a number of corporations each of which has a different purpose or set of purposes.

2403 McHugh J said in *News v South Sydney* 215 CLR, at 580 [42], that:

> *'Questions of construction are notorious for generating opposing answers, none of which can be said to be either clearly right or clearly wrong. Frequently, there is simply no "right" answer to a question of construction'.*

In my view, this is a prime example. Nonetheless, on balance, I prefer a construction that limits the operation of s 45(2) to cases where the substantial purpose of each of the parties responsible for including the relevant provision in a contract is to substantially lessen competition. Several factors point to this conclusion.

2404 First, if Seven's construction of ss 45(2) and 4F is correct, a party to a contract may be exposed not only to claims for damages and other relief, but to civil penalties under the *TP Act* because another party to the contract has included a provision for the '*substantial purpose*' of substantially lessening competition. The '*innocent'* party will be liable to penalties notwithstanding that it had neither knowledge of, nor a reasonable opportunity to ascertain, the substantial anti-competitive purpose of the other party or parties.

2405 A hypothetical example loosely based on the present case illustrates the point. The AFL might have been held liable under s 45(2) of the *TP Act* for entering into the AFL-News Licence if, entirely unknown to it, News' purposes for obtaining the AFL broadcasting rights included the substantial purpose of lessening competition. It is true that an innocent party, like the AFL in this hypothetical example, would only be liable if it was also responsible for including the relevant provision in the agreement. But it is easy to envisage circumstances in which one party responsible for including a provision in a contract has no inkling of the anti-competitive purpose of another party sharing responsibility for including the provision in the contract.

2406 Seven points out that s 45(2) of the *TP Act* already imposes a form of strict liability, in that a party to a contract may be held liable by reason of the anti-competitive effect of the provision of that contract, whether or not the party recognises the effect. However, on the construction of s 45(2) that I have held in Chapter 13 to be the better view, the issue will be whether, at the relevant time (the making of or giving effect to the contract) the provision has already had the effect of substantially lessening competition or is likely to have that effect. Ordinarily, all parties to a contract are in a position to assess objectively the actual or likely effect on competition of a particular provision in a contract. Ascertaining the subjective purpose or purposes of a contracting partner for including a provision in the contract is likely to be a very different undertaking. Not only does the innocent party have to assess the various purposes of each of the other parties to the contract, but it has to make an assessment of the substantiality of any anti-competitive purpose in relation to the other purposes held by each.

2407 Secondly, on Seven's construction of ss 45(2) and 4F of the *TP Act,* the Court is required to evaluate the collective substantiality of anti-competitive purposes among a range of purposes held (or not held) by multiple contracting parties. The Court, on this approach, is

required to go beyond ascertaining the varying purposes held by each of the parties to the contract. It must determine whether the proscribed purpose is a substantial purpose when, by hypothesis, that purpose has not been held by one or more of the parties responsible for inclusion of the particular provision in the contract.

2408 There is no shortage of difficult judgments the *TP Act* requires the Court to make. But any assessment of the substantiality of a particular subjective purpose held by some, but not all, parties to a contract necessarily moves away from any meaningful assessment of subjective purpose. Inevitably it must rely on objective criteria such as (in Seven's language) '*the degrees of responsibility of the various parties for the inclusion of the provision*'. It is difficult to see how an assessment of this kind can be reconciled with the insistence of the High Court in *News v South Sydney* that s 4D (and, accordingly, s 45(2)) is concerned with the subjective purpose of those parties to a contract responsible for the inclusion of a particular provision in the contract.

2409 Thirdly, as I have already noted, s 45 is a penal provision. Accordingly, the Court approaches its construction:

> *'using the ordinary rules of statutory construction and interpretation, but recognising that if as a matter of last resort, after those rules are applied, the language of the statute remains ambiguous or doubtful such ambiguity or doubt may be resolved in favour of the subject'.*

Australian Competition and Consumer Commission v Liquorland (Australia) Pty Ltd [2006] ATPR 42-123, at 45,184 [45], per Allsop J. As Allsop J pointed out in that case (at 45,185 [47]), this does not mean that the Court adopts a literal analysis '*with an eye to the discernment of textual ambiguity through finely spun distinctions*'. However:

> *'provisions of the [*TP Act*] which are intended to govern and effect business decisions and commercial behaviour should, if such a construction is fairly open, be construed in such a way as to enable the business person, before he or she acts, to know with some certainty whether or not the act contemplated is lawful'.*

ACCC v Liquorland [2006] ATPR, at 45,185 [48], citing *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, at 10-11 [8], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

2410 In my view, the present is a case for the application of these principles. The construction I prefer is consistent with the statutory language – textual ambiguity is present without any judicial straining of language. Unless the construction urged by the Consortium Respondents is adopted, there is a clear risk that corporations and individuals will be exposed to penalties for commercial decisions that involve neither a conscious determination to engage in anti-competitive conduct, nor an opportunity to ascertain that anti-competitive conduct has occurred or is likely to occur.

2411 Mr Sumption argued in his oral submissions that if there can be no contravention of s 45(2) of the *TP Act* unless all those responsible for including a provision in the contract have the proscribed anti-competitive purpose, there is a danger that a person who deliberately sets out to subvert competition will avoid the consequences by contracting with a commercial innocent. Perhaps there is such a risk, but it is ameliorated by the fact that s 45(2) applies whenever the contractual provision is likely to have the **effect** of substantially lessening competition. Moreover, the risk Mr Sumption identifies is more than matched, in my opinion, by the risk that an innocent party will be held liable by reason of the unascertainable purpose or purposes of other parties to the contract.

2412 Finally, I note that perhaps it could plausibly be argued that the correct construction of s 45(2), read in conjunction with s 4F, is that a party to a contract contravenes s 45(2) if that party:

> was responsible, in whole or in part, for including a provision in the contract; and
>
> that party included the provision in the contract for the substantial purpose of substantially lessening competition.

This would have the result, in a multi-party contract, that only those with the proscribed purpose would contravene s 45(2) by making or giving effect to the contract or giving effect to the provision.

2413 None of the parties supported this construction and Mr Sumption specifically disavowed it. I therefore have not given it further consideration.

14.6.3 An Impossible Purpose?

14.6.3.1 SEVEN'S CONTENTION

2414 Seven submits that a contravention of s 45(2) by reason of a proscribed purpose is predicated upon effecting specific mental states, as opposed to the realisation of a particular state of affairs. Seven points out that a party may have a proscribed purpose to do that which is impossible to achieve. It identifies three types of impossibility:

> *'(a) logical (the means chosen could not, in any possible circumstances, have effected the objective sought);*
>
> *(b) causal (the means chosen could not, in the contingent circumstances, have effected the objective sought); or*
>
> *(c) conceptual (the respondent formed a substantial purpose of substantially lessening competition in the market which he understood to exist at the time of the conduct by which he sought to effect the purpose, which market did not in fact exist at the time)'.*

2415 Seven contends that a contravention predicated on the existence of a particular purpose is not undermined by any of these three types of impossibility. In particular, so Seven argues, a party may contravene s 45(2) by making a contract containing a provision, or giving effect to a provision, which has a substantial purpose of substantially lessening competition in the market:

> *'as subjectively understood by the [party] at the time of the making or giving effect to ... the provision, whether or not that market is found to exist'.*

14.6.3.2 UNIVERSAL MUSIC V ACCC

2416 Seven's starting point for this argument is correct. In *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529, the Full Court said this in the context of an analysis of s 47 of the *TP Act* (at 587 [249]):

> *'A person may have the purpose of securing a result which it is, in fact, impossible for that person to achieve. That no doubt explains the reference to purpose, in para (a) of s 47(10) of the Act, as an alternative to effect and likely effect. The paragraph is satisfied if the relevant corporation has the requisite purpose, regardless of whether or not that purpose has been, or was or is likely to be, achieved. It may conceivably be satisfied even in a case where the court finds the purpose could never in fact have been achieved;*

although that finding would be relevant in determining whether to infer the proscribed purpose'.

2417 As Seven suggests, there are circumstances in which a party to a contract might be found to have the purpose of substantially lessening competition even though the relevant contractual provision cannot have the effect or likely effect of substantially lessening competition in a market. Examples are where the anti-competitive conduct is nipped in the bud by the regulator or the market participants to whom the alleged contravenor's conduct is directed refused to bow to persuasion or threats: *Universal Music v ACCC* 131 FCR, at 586 [246], per *curiam*. Viewed from the time the allegedly contravening conducts occurs, an objective observer might conclude that there never had been any possibility of a substantial lessening of competition in any existing market.

2418 The Court in *Universal Music v ACCC* did not, however, hold that a proscribed purpose will be present where the object sought to be achieved by those including a provision in a contract is incapable of substantially lessening competition in any existing market. The proposition accepted in that case was that a party may have the purpose required for contravention of s 47 (and, it follows, s 45(2)), even though the purpose could never be achieved in practice. The Court did not need to consider whether a party can have the proscribed purpose of substantially lessening competition in a market if the object to be achieved can only substantially lessen competition in a market which, by hypothesis, does not exist.

2419 In *Universal Music v ACCC*, there was no real dispute that the relevant market was the wholesale market for recorded music in Australia (131 FCR, at 542 [34]). The material question arising in that case was whether the appellants had engaged in certain conduct for the purpose of substantially lessening competition. The conduct involved closing the accounts of music retailers in order to deter them from engaging in the lawful parallel importation of recordings under particular labels. The retailers whose accounts were closed were all small traders. Thus the cessation of supply to them could have had no significant effect on competition in the wholesale market for recorded music.

2420 Nonetheless, the Full Court considered that the appellant's objective was to snuff out intra-brand competition before it gained a foothold. The Court upheld a finding, based on the whole of the evidence, that each corporate appellant had the purpose of deterring all its retail

account holders from purchasing parallel imports (131 FCR, at 591 [264]).

2421 The Court then proceeded to consider whether that purpose involved a substantial lessening of competition in the relevant market, within the meaning of s 47(1)(a) of the *TP Act*. Their Honours reasoned as follows (131 FCR, at 591 [265]–[266]):

> *'It certainly involved a purpose of substantially lessening (but not altogether eliminating) competition with PolyGram and Warner, as the case may be, in respect of their own labels. But the competition contemplated by s 47(10)(a) is competition in the relevant market considered as a whole; not competition with a particular market participant.*
>
> *Whether the purpose of lessening competition with a particular market participant amounts also to the purpose of substantially lessening competition in the market must depend upon the facts of the particular case; a matter of major importance being that participant's market share. A question of degree arises, about which a judgment must be made'.*

The Court ultimately held that, having regard to the nature of the market and the appellants' respective market shares, the requisite purpose existed.

2422 The Court in *Universal Music v ACCC* was concerned with purpose in relation to an existing market. The construction question presented by Seven in the present case therefore did not arise. There is nothing in the Court's reasoning that suggests that a contravention of s 45(2) can occur when the object sought to be achieved by the alleged contravenor is incapable of lessening competition in an existing market, but is capable of lessening competition in a market which '*exists*' simply in the corporate mind of the alleged contravenor. If anything, the reasoning of the Court suggests otherwise.

14.6.3.3 PREFERRED CONSTRUCTION

2423 A textual difficulty with Seven's submissions is that they pay little regard to s 45(3) of the *TP Act*. The subsection provides that, for the purposes of s 45(2), '*competition*' in relation to a provision of a contract or of a proposed contract means:

> *'competition in any market in which* ***a corporation that is a party to the contract … supplies or acquires****, or is likely to supply or acquire,* ***goods*** *or* ***services*** *or would, but for the provision, supply or acquire, or be likely to supply or acquire, goods or services'.* (Emphasis added.)

2424 The ordinary meaning of s 45(2), when read with s 45(3), seems to me to be clear

enough. The prohibition in s 45(2) is directed (relevantly) to a corporation which makes a contract containing a provision, or which gives effect to a provision in a contract, where those responsible for including the provision had the purpose of substantially lessening competition in a market which actually exists. In other words, the object sought to be achieved must be capable of substantially lessening competition in an actual market.

2425 The only answer Seven offers to this textual argument is an assertion that s 45(3) embraces a market as subjectively understood by the alleged contravenor. However, in my view, the language of s 45(3) does not support Seven's position. On its plain meaning, it contemplates that s 45(2) is concerned with conduct undertaken with the purpose of substantially lessening competition in an existing market, not in an imaginary market.

2426 Textual considerations aside, other factors suggest that Seven's construction should not be accepted. If it were to be accepted, a corporation whose principal decision-maker was under a complete misapprehension as to the nature or parameters of the market could be penalised or be held liable to damages or other relief, because he or she authorised entry into a contract containing a provision incapable of substantially lessening competition in any existing market. It is one thing to impose penalties on a corporation which has the subjective purpose of substantially lessening competition in an existing market, even though there may be circumstances, beyond the corporation's control, which make it unlikely or perhaps impossible for the corporation to achieve its objective. It is quite another thing to impose penalties on a corporation which never had an object capable of substantially lessening competition in an existing market. In the first case, the object is harmful, in the sense that if achieved, it would have led to a substantial lessening of competition in an existing market. In the second, the object is harmless, in the sense that, even if achieved, it could not have led to any substantial lessening of competition.

2427 It is also difficult to determine how the purpose of substantially lessening competition in a non-existent market could be established. It is hard enough to make judgments about the characteristics or boundaries of a market on the basis of orthodox evidence, such as the behaviour of market participants or the expert opinions of economists. To attempt the exercise on the basis of the subjective thought processes (or, possibly, the conflicting thought processes) of corporate decision-makers would seem to present virtually insoluble problems. How is the Court to determine the boundaries of the market if the decision-maker has not

given any clear thought to that issue? How is the Court to assess the extent to which competition would have been lessened in a market which, by hypothesis, never existed? A market, after all, is an instrumental concept, designed to assist analysis of the processes of competition and the sources of market power: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, at 399 [293], per Heerey and Sackville JJ.

14.6.3.4 ASCERTAINING WHETHER THE PURPOSE IS TO SUBSTANTIALLY LESSEN COMPETITION

2428 The conclusion I have reached on the application of s 45(2) to a non-existent market does not mean that a contravention of s 45(2) of the *TP* Act requires proof that the alleged contravenor subjectively appreciated the precise nature of the market in which competition would be lessened. Often the party concerned would simply not have adverted to this question. Whether the proscribed purpose has been proven may be a matter of inference from all the circumstances, including the objective evidence: *Universal Music v ACCC* 131 FCR, at 588-589 [256], 589-590 [259]–[261].

2429 Nor does the conclusion I have reached mean that the impossibility of the alleged contravenor achieving its objective immunises it against a contravention of s 45(2) of the *TP Act* based on an anti-competitive purpose. The fact that the alleged contravenor could never have effectuated its objective, for example because the regulator had already intervened or because target corporations were resistant to threats or blandishments, is not necessarily fatal to the existence of the practice proscribed by s 45(2).

2430 The question posed by s 45(2)(a)(ii) and (b)(ii), in my view, is whether the object sought to be achieved by the alleged contravenor, if effectuated, is capable of substantially lessening competition. If so, a contravention of s 45(2) may be made out regardless of whether the alleged contravenor appreciated that the objective, if achieved, would substantially lessen competition in any existing market. On the other hand, if the objective, even if achieved, was incapable of substantially lessening competition in an existing market, no contravention of s 45(2)(a)(ii) or (b)(ii) will be established.

2431 It follows, in my opinion, that in a case where an issue arises as to whether the alleged contravenor had the purpose of substantially lessening competition, the Court should deal

with the issue in two stages:

> First, the Court must identify the object the alleged contravenor sought to achieve by including the relevant provision in the contract. As *News v South Sydney* explains, the purpose with which s 45(2) is concerned is the end sought to be achieved. The end sought to be achieved will not usually be framed by the alleged contravenor in terms of a particular market. More commonly, the objective will be framed more prosaically, such as deterring retailers of recordings from lawfully engaging in parallel importation of the product.
>
> Secondly, the Court must inquire whether the object sought to be achieved, if effectuated, was realistically capable of substantially lessening competition in any relevant market. If so, a contravention of s 45(2) may be made out. If not, no contravention can be established.

14.7 Did the Consortium Respondents Have the Purpose of Substantially Lessening Competition?

2432 It follows from what I have said that a party to a contract may have a substantial purpose of substantially lessening competition without specifically adverting to questions of market definition. The critical factual issue is the object that party sought to achieve by including the relevant provision in the contract. Once identified, the question is whether the object, if actually achieved, was realistically capable of substantially lessening competition in an existing market.

2433 Seven's purpose case rests on the contention that the parties to the Master Agreement Provision and to the other contracts upon which Seven relies had the object of '*killing C7*' – that is, eliminating C7 as an entity capable of carrying on business in the various pleaded markets. I have found that the only pleaded market that existed at the times the Master Agreement or other contracts or arrangements were made (or the provisions given effect) was the retail pay television market. Thus, assuming Seven can establish that the parties had the alleged object or purpose of killing C7, the question is whether that was an object or purpose which, if effected, was realistically capable of substantially lessening competition in the retail pay television market.

2434 In Chapter 12, I have found that neither the Master Agreement Provision nor any of

the other provisions relied on by Seven was likely to have the effect (in the sense that there was a real chance they would have the effect) of substantially lessening competition in the retail pay television market. These findings were made on the assumption that the provisions were likely (in the same sense) to have the effect of causing C7 to cease business because the acquisition of both the AFL and NRL pay television rights by News and Fox Sports would have denied C7 inputs essential to its survival. I made these findings because, in my view, in the absence of the contracts containing the impugned provisions or the conduct giving effect to those contracts there were only two realistic possibilities:

> Optus would have decided to wind down its pay television business in conformity with the Manage for Cash Strategy; or
>
> Foxtel and Optus would have decided to enter into a content supply agreement on terms much to the same effect as those incorporated into the Foxtel-Optus CSA.

That being so, the impugned conduct was not likely (in the relevant sense) to have had the effect of substantially lessening competition in the retail pay television market. Any lessening was going to occur in any event.

2435 In my view, these considerations must be taken into account in assessing Seven's purpose case under s 45(2) of the *TP Act*. That case rests on the contention that each of the Consortium Respondents had the objective of killing C7. For present purposes I assume that the factual contention can be made out (this factual issue is addressed for Telstra in this Chapter and for the other Consortium Respondents in Chapter 15).

2436 The critical question, then, is whether that objective, assuming it to have been carried into effect, was realistically capable of substantially lessening competition in the retail pay television market. The answer to that question is, in my opinion, no. The demise of C7 would not have led to any substantial lessening of competition in the retail pay television market. Any lessening of competition in that market would have occurred in any event. In other words, regardless of C7's fate, Optus would have ceased to provide even weak competition to Foxtel in the retail pay television market.

2437 Seven does not seem to make any submission in support of its pleaded case that the Consortium Respondents had the objective of killing C7 in order to prevent it entering the

retail pay television market via the Telstra Cable. Be that as it may, I have found that C7 never had any genuine intention to avail itself of retail access via the Telstra Cable. Thus the demise of C7 would not have prevented it entering the retail pay television market since it had no intention of doing so in any event.

2438 For these reasons, Seven's purpose case under s 45(2) must fail. This conclusion applies to each of the six provisions on which Seven relies for its case.

14.8 Shared Purpose? Provisions Other Than the Master Agreement Provision

2439 In view of this conclusion, it is not strictly necessary to consider whether the parties to the various provisions relied on by Seven had the shared purpose of substantially lessening competition in the retail pay television market. Nonetheless, I propose to do so. In this section, I explain why Seven cannot make out that the parties to the Nine Put Provision, the News-Nine Licence Provision, the Rights Sub-Licence Provision and the NRL Bidding Agreement Provisions had the shared purpose of substantially lessening competition. For reasons I shall explain, the News-Foxtel Licence Provision falls into a separate category.

2440 In the following section, I consider whether the parties responsible for the inclusion of the Master Agreement Provision in the Master Agreement had the shared purpose of substantially lessening competition. This requires an assessment of Telstra's purpose.

14.8.1 Nine Put Provision

2441 For reasons I have explained, s 45(2) will be contravened by reason of the provision having a proscribed purpose only if all parties responsible for including the relevant provision in the contract share that purpose. It follows that if one or more parties responsible for the inclusion of the provision in the contract does not share the proscribed anti-competitive purpose, there can be no contravention of s 45(2).

2442 The Nine Put was entered into between News and Nine on 14 December 2000. Nine agreed that, if required by News, it would acquire from News certain of the AFL free-to-air television rights. Seven identifies the Nine Put Provision as the term in the Nine Put stipulating that the licence agreement between News and Nine would require Nine to pay $23 million per annum (plus adjustments) and contribute contra, in return for the entitlement to

take exclusive rights to three AFL matches in each round and certain other benefits.

2443 Seven pleads that News included the Nine Put Provision in the Nine Put and that it had the purpose of substantially lessening competition in the four markets identified by Seven. No allegation is made that Nine, the other party to the contract, shared the proscribed purpose.

2444 Seven does not appear to explain why a finding should be made that only News was responsible for the inclusion of the relevant provisions in the Foxtel Put. In any event, I am not satisfied that I should make such a finding. This was not a case like *ASX v Pont Data*, where one party to a contract imposed a provision on the other, against the express wishes of the latter. On the contrary, Nine was a willing party to the Nine Put. Although it was News that could trigger the requirement that Nine take the defined AFL free-to-air television rights, both parties understood that News would act in this way if and when it acquired the AFL broadcasting rights. The Nine Put Provision, as identified by Seven, was of benefit to Nine since, in return for its promise to pay a fee, it effectively received the licence to televise three AFL matches exclusively live each week. Nine was jointly responsible with News for including the Nine Put Provision in the Nine Put.

2445 For these reasons, I conclude that Seven has not shown that the Nine Put Provision had the purpose of substantially lessening competition within the meaning of s 45(2) of the *TP Act*.

14.8.2 News-Nine Licence Provision

2446 The same reasoning applies to the News-Nine Licence Provision. It follows that Seven has not made out that the News-Nine Licence Provision had the purpose of substantially lessening competition within the meaning of s 45(2) of the *TP Act*.

14.8.3 Rights Sub-Licence Provision

2447 Seven pleads that, at the time of entering into the Foxtel Put and the Ten Put, there was a contract, agreement or understanding between News, Foxtel, Nine and Ten, which Seven designates as the Rights Sub-Licence Agreement. Seven pleads that the Rights Sub-Licence Agreement contained a provision that News would, upon acquiring the AFL

broadcasting rights, sub-license the AFL pay television rights to Foxtel and the AFL free-to-air television rights to Nine and Ten. In Chapter 13 ([2265]ff), I find that Seven has established the existence of the Rights Sub-Licence Agreement as pleaded.

2448 Seven alleges that the purpose of News and Foxtel in entering into the Rights Sub-Licence Agreement, which incorporated the Rights Sub-Licence Provision, was a substantial lessening of competition. No allegation is made that Nine and Ten, both parties to the agreement, shared that purpose.

2449 In my opinion, there is no basis for finding that only News and Foxtel were responsible for including the Rights Sub-Licence Provision in the agreement. Each of Nine and Ten, so far as the evidence goes, freely entered into the agreement and agreed to the terms identified by Seven as the Rights Sub-Licence Provision. Each stood to benefit from those terms, even though the benefits were accompanied by reciprocal obligations. I therefore conclude that Seven has not made out its purpose case in relation to the Rights Sub-Licence Provision.

14.8.4 NRL Bidding Agreement Provisions

2450 Seven pleads that the parties to the NRL Bidding Agreement were Fox Sports, Foxtel and Telstra. It alleges that Foxtel and Telstra, but not Fox Sports, had the purpose of substantially lessening competition in entering into the agreement containing the NRL Bidding Agreement Provisions.

2451 The same reasoning that applies to the other provisions also applies to the NRL Bidding Agreement Provisions. Seven seeks to meet the problem by submitting that officers of Fox Sports participated in the teleconference of 13 December 2000. But this fact cannot overcome the absence of a pleading that Fox Sports shared the alleged purpose of Foxtel and Telstra.

14.9 Shared Purpose? Master Agreement Provision

14.9.1 Was Telstra Responsible for Including the Master Agreement Provision?

2452 If each of News, PBL, Foxtel and Telstra was responsible for the inclusion of the Master Agreement Provision in the Master Agreement, Seven must establish that all four had

the purpose (in the relevant sense) of substantially lessening competition in order to establish a contravention of s 45(2) of the *TP Act*. Seven submits that News was responsible for formulating both the AFL and NRL Proposals and that the Master Agreement Provision resulted from the '*capitulation of Telstra*'. This is said to bring the present case within the principle applied in *ASX v Pont Data*.

2453 The inclusion of the Master Agreement Provision in the Master Agreement (leaving aside the question of whether the two were co-extensive) was not the responsibility of News alone. Section 4F of the *TP Act* speaks of a provision being '*included in the contract*' for a particular purpose. It does not speak of a provision being formulated by a party for a particular purpose. The fact that one party has formulated or drafted a provision does not necessarily mean that that party is exclusively responsible for including the provision in the contract. As I have explained, the facts of *ASX v Pont Data* involved a term being imposed by one party to a bipartite contract on the other party, against its will.

2454 The Master Agreement, including the understanding comprising the Master Agreement Provision, was the product of negotiations among the four parties. Specifically, Telstra's participation in the understanding was the product of negotiations and discussions principally between Mr Akhurst and Mr Philip, but also at the teleconference in which Dr Switkowski participated. Telstra's assent to the understanding may have been procured, at least in part, by Mr Philip's deliberate misrepresentations in the fax of 9 December 2000. But in no sense could its assent be described as a capitulation. Telstra, represented by Dr Switkowski and Mr Akhurst, formed the view that there were good commercial reasons for Telstra to support the Master Agreement Provision.

2455 I find that Telstra was jointly responsible with the other parties to the teleconference for the inclusion of the Master Agreement Provision. It follows that if Telstra did not have the purpose of substantially lessening competition, Seven cannot establish that the Master Agreement Provision had the purpose proscribed by s 45(2) of the *TP Act*.

14.9.2 Did Telstra Have the Proscribed Purpose?

2456 It will be recalled that Seven's primary case seems to be not merely that Telstra was aware that News, Foxtel and PBL had the purpose of killing C7 when entering into the Master Agreement. Seven seeks to establish that Telstra joined in that purpose when

agreeing to the Master Agreement Provision. Seven does not say that Telstra itself sought the objective of killing C7, but that it participated in the acquisition of the AFL and NRL pay television rights (by which I assume it means the Master Agreement Provision) knowing that the acquisition was designed, at least in part, to bring about the death of C7.

2457 Seven's submissions appear to assume that Telstra can be found to have had the purpose proscribed by s 45(2) of the *TP Act* if it knew that the Master Agreement Provision was intended by News to kill C7, even if Telstra itself did not have that objective. Having regard to the comments made by Wilcox J in *CUB v Bond Brewing* ([2398]), its is far from clear that the assumption is well-founded. It is certainly arguable that knowledge by one party, when it agrees to a contract or arrangement, that another party has a proscribed purpose does not suffice, of itself, to attribute the same purpose to the first party. The difficulty is not resolved by Seven's use of the ambiguous expression '*joined in*' in its Reply submissions.

2458 I shall, however, proceed on the basis that if Telstra agreed to the Master Agreement Provision, knowing that News, Foxtel and PBL had the purpose of substantially lessening competition, it also had the purpose proscribed by s 45(2) of the *TP Act*.

14.9.2.1 TELSTRA'S DECISION-MAKERS

2459 Before addressing whether Telstra agreed to the Master Agreement Provision knowing that News, Foxtel and PBL had the purpose of substantially lessening competition, a threshold question arises. When considering whether a corporation has entered into, or given effect to, a contract with the subjective purpose of substantially lessening competition, whose thought processes are to be taken into account in making the assessment of purpose?

2460 As the Privy Council explained in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500*,* the search is not for the '*directing mind and will*' of the corporation. Rather the task is to apply the relevant '*rules of attribution*' that determine which acts count as those of the corporation. That in turn depends on the proper construction of the substantive rule.

2461 Section 45(2) of the *TP Act,* read with s 4F, directs attention to the subjective purpose of the corporation or corporations responsible for including a provision in a contract. To determine the purpose of the corporation it is necessary to ascertain the persons within the

corporation who made the decision to include the provision in the relevant contract. In a particular case this might involve questions of authority under the corporation's constitution, but no such issue arises here. The question is who were the decision-makers within Telstra responsible for the inclusion of the Master Agreement Provision.

2462 In my view, the evidence clearly establishes that the decision-makers within Telstra in relation to Telstra's commitment to the Master Agreement Provision were Dr Switkowski and Mr Akhurst. Seven, anticipating a finding that neither Dr Switkowski nor Mr Akhurst had the objective of killing C7, seeks to characterise Mr Greg Willis as a decision-maker. Seven's Reply Submissions point out that Mr Willis was present at the Foxtel Management board meeting of 9 November 2000 which gave approval in principle to Foxtel entering a put option at a fee of $17.5 million per annum for three pay television games per week.

2463 It is important to bear in mind that there was a serious division of opinion within Telstra as to the commercial value to Foxtel of acquiring the AFL pay television rights for $30 million per annum by means of News' exercise of the Foxtel Put. Mr Fogarty and Mr Greg Willis, among others, were opposed to Telstra supporting the News bid, even at a fee of $17.5 million per annum. They were also opposed to an increase in that figure. Mr Willis wrote to Mr Philip as late as 8 December 2000 expressing the view that Telstra was not comfortable moving beyond the proposal agreed to at Foxtel's board meeting of 9 November 2000.

2464 Mr Greg Willis reported to Mr Akhurst. Mr Akhurst was the decision-maker within Telstra who determined that Telstra should give support in principle to the Foxtel Put proposal (in its then form) at the Foxtel board meeting of 9 November 2000. That decision made '*in consultation with Messrs Rizzo and Willis*', but it was Mr Akhurst's decision.

2465 The spokespersons for Telstra at the teleconference of 13 December 2000 were Dr Switkowski and Mr Akhurst, although the notes recorded Mr Willis as making a contribution to the discussion. The decision that had to be made at that meeting was quite distinct from the decision of the Telstra board on 9 November 2000, since the board had endorsed in principle a licence fee of $17.5 million per annum, not the $30 million per annum under discussion at the teleconference. Mr Willis participated in the teleconference, but at a different location from Mr Akhurst and Dr Switkowski. Mr Akhurst conveyed Telstra's

support for the terms of the Fox Sports bid for the NRL pay television rights. When Telstra went '*off-line*', it was Dr Switkowski who made the critical decision to commit Telstra to the terms of the Foxtel Put. By this time, Mr Willis' memorandum, if not irrelevant, had been overridden. As Dr Switkowski said, '*Mr Willis didn't get a vote*'. Indeed, he did not participate when the Telstra representatives went off-line to determine the appropriate course of action in relation to the AFL pay television rights. Mr Willis was not one of Telstra's decision-makers in relation to the Master Agreement.

14.9.2.2 FACTUAL FINDINGS

2466 These are three findings, or sets of findings, that are particularly important in determining whether Telstra shared any anti-competitive purpose with the other parties to the Master Agreement Provision in the sense advanced by Seven. First, as I have explained, I accept Dr Switkowski's evidence as to his state of mind and reasoning process in giving Telstra's support to the bids for the AFL and NRL pay television rights. I have made specific findings concerning these matters in Chapters 8 and 9. It is sufficient to note for present purposes that Dr Switkowski:

> believed that the acquisition of the AFL pay television rights was highly desirable for Foxtel, particularly as a subscription driver in the southern States;
>
> believed that the modelling used by News and Foxtel to support Foxtel's acquisition of the AFL pay television rights was marginally economic on reasonably aggressive assumptions, but the assumptions themselves were not unreasonable;
>
> was influenced to a degree by the desire to promote partnership harmony, but this was not a *quid pro quo* for approving or joining in any anti-competitive purpose of the other parties;
>
> understood that there was a strategic element to Foxtel's acquisition of the AFL pay television rights because of the high value of premium sports content; and
>
> did not understand the strategic benefits to include the denial of the pay television rights to C7 in its capacity as a competitor of Fox Sports.

2467 In addition, I find that Dr Switkowski was not told of any concerns within Telstra as

to the possibility that News, Foxtel or PBL wished to kill C7. Even Seven's Closing Submissions acknowledge that Dr Switkowski's denial that he was unaware of the '*kill* C7' statements made by Mr Blomfield to Telstra officers '*probably [had] the ring of truth*'. The killing of C7 formed no part of his objective in committing Telstra to the Master Agreement Provision. More particularly, Dr Switkowski was not aware that any other party to the Master Agreement had the objective of killing C7. He did not commit Telstra to the Master Agreement Provision knowing that it was designed to kill C7.

2468 Secondly, although I have some reservations about aspects of Mr Akhurst's evidence, I accept the substance of his explanation as to his state of mind and objectives in deciding to support Fox Sports' bid for the NRL pay television rights and (to the extent his contribution was important) the Foxtel Put in relation to the AFL pay television rights. While I consider that Mr Akhurst appreciated that there was a risk that if Seven lost the AFL pay television rights C7's survival would be threatened, he saw this as an incident of the ordinary processes of competition for the AFL pay television rights.

2469 Mr Akhurst wanted Foxtel to have the AFL pay television rights because he thought they were important for the success of the business and because he thought the rights would give Foxtel greater control over its own destiny. He was influenced in his judgment by Mr Chisholm's strong advocacy of Foxtel acquiring the AFL pay television rights and by Dr Switkowski's assessment of the benefits flowing from Telstra's support of the Foxtel Put. Mr Akhurst also saw benefits to Telstra in its role in supporting the Fox Sports bid. Mr Akhurst was not aware that News, PBL or Foxtel had the objective of killing C7 (if they did). His objective was to secure commercial advantages for Foxtel and Telstra.

2470 Thirdly, a good deal of the cross-examination of Dr Switkowski and Mr Akhurst appeared to be directed to showing that Telstra's decision to agree to the Master Agreement Provision was motivated, in part at least, by a desire to improve relations with News and PBL. It was put to both that Telstra was interested in Foxtel expanding the scope of its activities, thus increasing the value of Telstra's interest in Foxtel. Dr Switkowski and Mr Akhurst each accepted that one factor in their decision was a desire to improve relations between Telstra and the other Foxtel partners. Perhaps in other circumstances the desire to improve the relationship might have provided a motive for Telstra to adopt or support News' or PBL's anti-competitive objectives (assuming they existed). But the evidence does not

demonstrate that in this case the desire to improve relations with the Foxtel partners prompted Dr Switkowski or Mr Akhurst to adopt or support any anti-competitive objective that News or PBL may have sought to achieve.

14.9.2.3 SEVEN'S KEY POINTS

2471 I have identified the '*key points*' relied on by Seven to support its contention that Telstra had the purpose proscribed by s 45(2) of the *TP Act.* Some of the points, in effect, have been answered by the findings I have made. For example, although it is true that Mr Willis was very concerned about the validity of Foxtel's modelling, Dr Switkowski formed his own assessment that the assumptions, although aggressive, could be achieved in practice.

2472 In this connection, Seven's submissions sometimes appear to proceed on the basis that changes to a financial model frequently reflect a manipulative and perhaps dishonest determination to reach a pre-determined '*bottom line*'. It is quite clear from the evidence that modelling can serve a number of purposes. One is to predict likely financial outcomes given particular assumptions which represent the best estimate that can be made of the future effect of crucial variables, such as penetration rates, subscription fees and programming costs. Another is to identify the targets that must be achieved in order to produce profitable outcomes. Obviously enough, altering the assumptions underlying a particular model may have a malign purpose, depending on the circumstances. But reconstituting a model so as to change a negative NPV to a positive NPV is not necessarily a cynical exercise. Indeed, if the changes in assumptions are clearly identified, it is hard to see how a sophisticated reader can be misled. It is odd that Seven should be so critical of the modelling within News and Foxtel, when it was quite prepared to make offers involving commitments of hundreds of millions of dollars with no modelling at all.

2473 Seven relies on the fact that Dr Switkowski and Mr Akhurst were aware that Optus and Austar could terminate their content supply agreements if Seven lost the AFL pay television rights. But that fact is in no way inconsistent with both of them being unaware of any purpose News, PBL and Foxtel may have had of substantially lessening competition. Similarly, as I have already explained, the fact that Mr Akhurst appreciated that the loss of the AFL pay television rights created a risk that C7 might not survive is consistent with him believing (as he did) that any such consequence would flow from the ordinary processes of competition in relation to the AFL pay television rights.

2474 Perhaps Seven's principal '*key point*' is that Telstra was informed by Mr Blomfield in two conversations with Mr Fogarty in October or early November 2000 that Foxtel's purpose was to kill C7. (The second conversation included other Telstra officers.) Seven also points to two emails from Mr Brenton Willis to Mr Fogarty, on 11 and 13 December 2000 respectively, which refer to Mr Blomfield having stated to Telstra that Foxtel had the objective of killing C7.

2475 The fundamental difficulty facing Seven is that there is no evidence that Mr Willis' emails came to Mr Akhurst's attention. The emails were not forwarded to him and they were not referred to in any subsequent correspondence that came to his attention. Mr Akhurst denied in his written statement that he became aware of the emails at the material times. Mr Akhurst also denied that he had been told that Foxtel or News had the wider objective of killing C7 or that Mr Blomfield had made statements to that effect.

2476 Mr Akhurst was not seriously challenged on his evidence that he had not seen the emails. This is not surprising. The second email was sent to Mr Fogarty nine minutes before the teleconference of 13 December 2000 actually commenced. At the time, Mr Fogarty was in Sydney and Mr Akhurst was with Dr Switkowski in Melbourne. Mr Fogarty had the opportunity to refer to Mr Willis' first email in his (Mr Fogarty's) briefing papers, forwarded to Mr Akhurst on 13 December 2000. Mr Fogarty did not do so. Indeed, Mr Fogarty (who was a party to both conversations with Mr Blomfield) never referred to the conversations in any written or electronic communications with Mr Akhurst.

2477 Mr Akhurst was asked in cross-examination, somewhat obliquely, whether anybody at Telstra had mentioned to him that a Foxtel representative had indicated that Foxtel wanted to kill C7. He denied that any such thing had been said and was not pressed further on the issue. Because of my reservations about aspects of Mr Akhurst' evidence, I have carefully considered whether I should accept his denial, notwithstanding that the issue was not pressed in cross-examination. I have taken into account that Telstra called neither Mr Fogarty nor Mr Brenton Willis as witnesses. In the end, however, the issue turns on whether I accept Mr Akhurst's denial.

2478 In my view, Mr Akhurst's denial receives support not only from the fact that Mr Fogarty chose not to comment in writing or via electronic means on Mr Willis' emails after

11 December 2000, but from the absence of any reference to the conversation with Mr Blomfield in any of Mr Fogarty's communications to Mr Akhurst. There are many possible reasons why Mr Fogarty chose not to refer to Mr Blomfield's comments. Perhaps the most obvious is that he gave the comments little credence or that he understood them to be hyperbole on Mr Blomfield's part.

2479 It is of course possible that Mr Fogarty did not refer to the conversations in memoranda or emails because he informed Mr Akhurst verbally. Given the strong differences of opinion on the question of the Foxtel Put and the indication that Mr Fogarty was by no means shy in expressing his views, I think this is very unlikely. In any event, I accept Mr Akhurst's denial that he was told of Mr Blomfield's comments.

14.10 News-Foxtel Licence Provision

2480 I have concluded that none of the provisions relied on by Seven had the purpose of substantially lessening competition because the objective (killing C7), even if achieved, could not have substantially lessened competition in the only relevant market, the retail pay television market. This conclusion applies to the News-Foxtel Licence Provision as it does to the other provisions on which Seven relies.

2481 I have also concluded that Seven cannot make out its case in relation to any of the provisions, other than the News-Foxtel Licence Provision, because it has not demonstrated that all parties responsible for including the provision in the relevant contract shared the proscribed purpose. The reasoning thus far does not apply to the News-Foxtel Licence Provision because Seven alleges that both News and Foxtel (Sky Cable and Telstra Media) had the purpose of substantially lessening competition.

2482 If I am wrong in my construction of s 45(2) of the *TP Act*, it will be necessary to determine whether News and Foxtel (and indeed PBL) had the purpose attributed to them by Seven. It is to this issue that I now turn.

15. SEVEN'S PURPOSE CASE AGAINST NEWS, FOXTEL AND PBL

2483 As I have explained, the conclusions I have reached in Chapter 14 make it strictly unnecessary for me to make findings about the purpose of News, Foxtel (Sky Cable and Telstra Media in partnership) and PBL in the context of Seven's case under s 45(2) of the *TP Act*. However, such findings will be important if the construction I have given to s 45(2) is incorrect. Moreover, findings as to the purpose of News, Foxtel and PBL may be significant for Seven's case that Foxtel took advantage of its substantial market power in the retail pay television market in contravention of s 46(1) of the *TP Act* (dealt with in Chapter 16). As I have explained in Chapter 12, the findings also have some bearing on questions of market definition.

2484 I therefore consider in this Chapter whether Seven has established that News, Foxtel and PBL had the purpose alleged against them, namely to '*kill C7*' in order to achieve dominance for Fox Sports and thereby substantially lessen competition in the various pleaded markets. I have outlined in Chapter 14 Seven's general submissions in relation to the purpose of News, Foxtel and PBL, although I supplement the outline in this Chapter.

15.1 Purpose of Destroying a Competitor

2485 There is something a little odd about Seven's emphasis upon '*killing C7*' as the purpose of Foxtel in entering into the Master Agreement, a purpose to which News and PBL are said to be '*privy*'. The oddity stems from the assumption, seemingly implicit in Seven's submissions, that the substantial objective of destroying a competitor constitutes, of itself, the purpose of substantially lessening competition.

2486 If this assumption is indeed implicit in Seven's submissions, it seems to me to encounter two obstacles. The first is a proposition recognised not only by the Respondents' experts (at considerable length) but, more importantly for my purposes, by the High Court. The proposition is that competition is necessarily ruthless and that competitors often try to injure and even eliminate each other. The second is that when Parliament wishes to characterise a purpose of eliminating or substantially damaging a competitor as anti-competitive behaviour, it says so specifically and defines the circumstances in which the behaviour is prohibited.

15.1.1 Competition and Competitors

2487 In relation to the first obstacle, Mason CJ and Wilson J pointed out in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, at 191 that:

> *'the object of s. 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort ... and these injuries are the inevitable consequence of the competition s. 46 is designed to foster'.*

2488 In *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, Gleeson CJ and Callinan J echoed these observations (at 411-412 [87]-[88]):

> *'The purpose of the Act is to promote competition, not to protect the private interests of particular persons or corporations. Competition damages competitors. If the damage is sufficiently serious, competition may eliminate a competitor. The critical question in the present case is whether [Boral's] behaviour involved the taking advantage of a substantial degree of power in a market. If it did, then acting with one or more of the purposes set out in s 46(1) was illegal. If it did not, then [Boral's] conduct amounted to lawful, vigorous, competitive behaviour.*
>
> *The danger of confusing aggressive intent with anti-competitive behaviour, in the context of alleged predatory pricing behaviour, was pointed out by the United States Court of Appeals, Seventh Circuit, in* AA Poultry Farms Inc v Rose Acre Farms Inc *[(1989) 881 F 2d 1396 at 1401-1402]. The Court said:*
>
> > *"Firms 'intend' to do all the business they can, to crush their rivals if they can ... Entrepreneurs who work hardest to cut their prices will do the most damage to their rivals, and they will see good in it ...*
> >
> > *Almost all evidence bearing on 'intent' tends to show both greed-driven desire to succeed and glee at a rival's predicament ... [T]ake [a witness's] statement that [his firm's] prices were unrelated to its costs. Plaintiffs treat this as a smoking gun. Far from it, such a statement reveals [the firm] to be a price taker. In perfect competition, firms must sell at the going price, no matter what their own costs are. High costs do not translate to the ability to collect a high price; someone else will sell for less. Monopolists set price by reference to their costs ... competitors set price by reference to the market."'*

2489 Later their Honours pointed out that the purposes expressly proscribed by s 46 of the *TP Act* include the purpose of eliminating or damaging a competitor. Their Honours

continued (215 CLR, at 420 [122]-[123]):

> *'Where the conduct that is alleged to contravene s 46 is price-cutting, the objective will ordinarily be to take business away from competitors. If the objective is achieved, competitors will necessarily be damaged. If it is achieved to a sufficient extent, one or more of them may be eliminated. That is inherent in the competitive process. The purpose of the statute is to promote competition; and successful competition is bound to cause damage to some competitors.*
>
> *It follows that, where the conduct alleged to contravene s 46 is competitive pricing, it is especially dangerous to proceed too quickly from a finding about purpose to a conclusion about taking advantage of market power'.*

2490 The difficulty of showing that a desire to cause harm to a competitor is necessarily indicative of an anti-competitive purpose is illustrated by the observation of an American commentator. Professor Hovenkamp, a leading antitrust scholar, argues that jury trials in the United States are an unfortunate way to decide contested issues in complex anti-trust cases. The reason he gives is this:

> *'Jurors are often unskilled in business and have a difficult time distinguishing aggressive competitive intent from anticompetitive intent. In the minds of many jurors "intending" to knock out a rival sounds evil. The fact is that such intentions are the subject of hundreds of business seminars every day. In markets of every type sales personnel are urged to "destroy" or "kill" the competition or to sink new rivals before they have a chance. But this is nothing more than the rhetoric of competition, which anti-trust seeks to preserve but jurors often misinterpret'.*

H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, 2005), at 61.

15.1.2 Statutory Prohibitions

2491 The second obstacle in the path of the assumption apparently underlying Seven's submissions is that the *TP Act*, not surprisingly, does not equate an intent to harm a competitor with a purpose of substantially lessening competition. A corporation contravenes the *TP Act* if it takes advantage of a substantial degree of market power for the purpose of eliminating or substantially damaging a competitor: s 46(1)(a). (Seven does not allege that Foxtel took advantage of its market power for that purpose, although it relies on the other purposes identified in s 46(1)). Certain kinds of behaviour, such as so-called secondary boycotts, may contravene the *TP Act* if the corporation engages in the behaviour for the

purpose of causing substantial loss or damage to the business of another person: s 45D(1)(a)(ii).

2492 There is, however, no general provision in the *TP Act* which equates an intent to cause harm to a competitor with having the '*purpose of ... substantially lessening competition*' (the language used in s 45(2)(a)(ii) and (b)(ii)), even if the competitor has a significant share of the relevant market. If it were otherwise, the making of a contract for the distribution of a technologically superior product, designed (literally) to decimate the sales of a competitor and to destroy the competitor, would contravene s 45(2)(a) of the *TP Act*. It is difficult to see why, in the absence of substantial market power, a corporation which seeks legitimate commercial objectives such as the manufacture of superior products should contravene the *TP Act*, even if it acts with the deliberate intent of harming competitors.

2493 In the course of oral submissions, I asked Mr Sumption whether there was a difference between two situations. The first is where a corporation decides upon a course of action, such as the acquisition of sporting rights, notwithstanding that its officers contemplate that one consequence of the acquisition will be to force a competitor out of business or to reduce its operations. The second is where the officers of the corporation actively desire that the competitor be forced out of business. Mr Sumption's answer was as follows:

> *'There is clearly a difference between contemplating that something will follow and desiring it, and there is a further difference I suppose between that being your purpose. You can say, "I would be delighted to be rid of these people," but nevertheless rebut a suggestion that a transaction that was likely to have that effect was designed to do so. It is very difficult to rebut that suggestion if there is actually no other commercial rationale or no plausible rationale for entering into that [transaction]'.*

2494 Mr Sumption's response seems to me to imply that if a corporation, not having substantial market power, has legitimate commercial reasons for pursuing a particular course of conduct, it may be difficult to find that it has engaged in the conduct for the purpose of substantially lessening competition, even if its officers contemplate with undisguised pleasure the demise of a competitor as a consequence of the conduct. The Respondents appear to be content to approach the question of purpose on this basis.

15.2 News' Evidence on Purpose

2495 News, supported by the other Consortium Respondents, rejects Seven's contention that the substantial purpose of the Master Agreement Provision was to kill C7 and thus substantially reduce competition. News submits that the relevant decision-makers for News (in its own capacity and as an equal shareholder in Sky Cable, one of the Foxtel partners) were Mr Macourt and Mr Philip, although primarily the former since Mr Philip reported to him. News contends that the evidence of Mr Macourt and Mr Philip demonstrates that killing C7 was not a substantial part of News' purpose.

2496 Mr Macourt said this in his statement:

> *'My purpose in developing and procuring the making on behalf of News of the bid for the AFL free to air and pay rights was to bring about a situation in which I considered there were reasonable prospects of News being awarded the pay TV rights. In that event I would have caused News to exercise its put agreement option to FOXTEL. I considered the acquisition of the AFL rights ultimately by FOXTEL to be in its interests and therefore the interests of News.*
>
> *My purpose in procuring News to enter into the FOXTEL put agreement was to achieve the delivery to FOXTEL of the pay TV rights to the AFL in the event that News was successful in bidding for those rights. As a director of FOXTEL my purpose in entering into the FOXTEL put agreement was to acquire on behalf of FOXTEL the AFL pay TV rights. My purpose in procuring News to enter into the Nine and Ten put options ... was to enable News in the event that it was successful in acquiring the free to air rights from the AFL to transfer those rights or sublicense those rights to Nine and Ten and thereby remove the exposure of News to the AFL in respect of the free to air rights'.*

2497 Mr Philip's evidence was to the same effect, although a little more specific:

> *'My purpose in formulating the AFL bid was to secure the AFL pay TV rights for FOXTEL so that FOXTEL was in a position to produce and brand AFL coverage, and incorporate that coverage in its service in order to make FOXTEL more attractive, and thereby attract more subscribers, particularly in the southern States of Australia.*
>
> *My purpose in bidding for the AFL free TV rights was because I did not believe that the AFL would accept a bid for the pay TV rights unless it was confident that it could sell the free TV rights on terms which were consistent with that pay TV bid.*
>
> *My purpose in participating as an alternate director of FOXTEL in approving*

> *FOXTEL's entry into the FOXTEL put was to enable FOXTEL to acquire the AFL pay TV rights, add AFL coverage FOXTEL produced and brand it with service and thereby attract additional subscribers particularly in the southern States.*
>
> *...*
>
> *My purpose in putting forward the AFL bid for News was to secure the AFL pay TV rights for FOXTEL so as to improve the value of News's investment in FOXTEL.*
>
> *My purpose in entering into the AFL rights agreement was to implement agreements that secured the AFL pay TV rights for FOXTEL for the reasons given above'.*

2498 In his oral evidence in response to a question from Mr Sumption, Mr Philip encapsulated News' position as follows:

> *'In your capacity as a director of FoxSports [sic], you wanted FoxSports to have as little competition in the business of providing sports channels as possible? --- I don't think I ever – I don't think I think about it in terms of having as little competition. I wanted FoxSports to be successful and to be the most successful sports business possible. If that meant other channels were unsuccessful, then so be it'.*

2499 News submits that if the evidence of Mr Macourt and Mr Philip is accepted, as it should be, News' conduct clearly fell on the legitimate side of the line that divides competitive and anti-competitive behaviour.

15.3 Seven's Principal Contentions

2500 Seven seeks to demonstrate that the purpose of News (and therefore the purpose of the various provisions relied on by Seven) was to substantially lessen competition by advancing what the Respondents characterise as an '*overarching*' explanation for the conduct of News and Foxtel throughout the period commencing in 1998 until News and Foxtel succeeded in obtaining the AFL pay television rights in late 2000. The explanation, according to Seven, lies in the decision by News and Foxtel to pursue a strategy of killing C7 as an entity capable of competing in any of the relevant markets.

2501 Seven challenges the evidence of Mr Macourt and Mr Philip. However, Seven mounts its challenge primarily by pointing to many communications and transactions that it

says illustrate or demonstrate that News and Foxtel had a substantial objective of killing C7 and that PBL aligned itself with that objective.

2502 It is convenient to commence by examining three propositions that are central to the way Seven puts its case. The reliability of the claims made by Mr Macourt and Mr Philip can then be assessed in the context of the relevant events. The three propositions are that:

> as early as 1998, News formulated a strategy to make Fox Sports the dominant or exclusive supplier of sports programming to all pay television platforms and, to that end, sought to destroy C7;
>
> contemporaneous documentation, particularly communications between Mr Blomfield and Telstra, shows that the strategy of News and Foxtel was to kill C7; and
>
> Foxtel's bid for the AFL pay television rights (through News and the Foxtel Put) amounted to predatory behaviour, in the form of overbidding, which was designed to ensure that Foxtel's bid succeeded and that C7 would be deprived of its sports rights life-blood.

In his oral closing submissions, Mr Sumption identified the third proposition as the most important for Seven's purpose case.

15.4 A Strategy in 1998?

2503 Seven's starting point is that News, by mid-1998, had decided on a strategy of harming C7 because C7 posed a threat to News' goal of making Fox Sports the dominant supplier of Australian premium sports channels. It needs to be borne in mind that there is nothing inherently wrong with the objective of becoming a dominant supplier of a product or service, provided that attaining that objective does not require the use of anti-competitive means or conduct in contravention of the *TP Act*. In order to assess the cogency of Seven's contention that News had formulated an anti-competitive strategy it is necessary to place the events of mid-1998 in context.

15.4.1 Context

2504 The circumstances at the time included the following:

News had already shown an interest in acquiring AFL pay television rights in 1997 when Mr Lachlan Murdoch and Mr Stokes signed the Docklands Stadium Consortium Proposal. Thus News' interest in the rights pre-dated C7's entry into the business of supplying channels with sporting content.

Prior to its collapse on 5 May 1998, Australis supplied what became the Fox Sports channels to Austar.

From 13 May 1998, Austar supplied Foxtel with what became the Fox Sports channels under an interim licence. This arrangement continued until 2002 because the dispute among the Foxtel partners prevented a long-term arrangement for the supply of Fox Sports to Foxtel being finalised.

Seven's business plan of May 1998 contemplated that its sports channel would be shown on both Optus and Foxtel.

On 12 June 1998, News bought Australis' 50 per cent interest in Fox Sports from the receiver, thereby acquiring 100 per cent of the shares in Fox Sports.

Prior to its liquidation on 29 June 1998, SportsVision supplied AFL content to Optus. After the liquidation, production of the SportsVision channels moved to Seven's sports channels.

With the collapse of SportsVision, Optus feared the consequences of the loss of Australian sports content and asked News for the non-exclusive supply of Fox Sports to Optus.

In June 1998, News negotiated with Optus for the supply of Fox Sports. The negotiations were frustrated by Telstra's opposition to the proposed arrangement. Telstra was motivated by its concern about the impact on Foxtel of supplying Fox Sports content to Optus, a competitor of Foxtel.

On 30 June 1998, the C7-Optus CSA was executed.

From about mid-1998, parties interested in the AFL pay television rights thought there was a likelihood that the AFL would dispose of the 2002-2006 rights within a few months.

15.4.2 Mr Macourt and the Financial Models

2505 Mr Macourt was the person at News responsible for the negotiations between Fox

Sports and the pay television platforms, although he consulted with Mr Lachlan Murdoch (to whom he reported) and Mr Philip (who reported to him). Mr Macourt was closely questioned by Mr Sumption about the financial models prepared by Mr Parker under his direction in May and June 1998. The cross-examination confirmed that the models were prepared on two principal alternative hypotheses: that Fox Sports would be supplied exclusively to Foxtel and Austar, or that Fox Sports would be supplied non-exclusively to all three retail pay television platforms. The modelling showed that the second alternative was likely to be very much more profitable than the first. The modelling also incorporated different assumptions as to the rate of inflation of sporting rights costs, depending on whether there was an alternative sports programmer. Seven maintains that the modelling shows that News had a strategy for establishing Fox Sports as a monopoly supplier of sports programming.

2506 Seven also points to the fact that in 1997 Optus and News had worked towards a single content company to supply all pay television platforms. In addition, it relies on clauses inserted into the June 1998 proposals for the non-exclusive supply of Fox Sports to Foxtel and Optus, that would have prevented the retail platforms from incorporating programming not supplied by Fox Sports, with limited exceptions such as ESPN and AFL programming. Another proposed clause would have required Optus and Foxtel to provide non-exclusive pay television rights to Fox Sports for all AFL programming on the same terms as it was supplied to Optus and Foxtel.

2507 I am not persuaded that this and the other material relied on by Seven establish that in 1998 News or Mr Macourt had embarked on a strategy of destroying C7 as a means of establishing the dominance of Fox Sports. I leave to one side the fact that if there was any such strategy it plainly did not succeed, since C7 secured a long-term supply agreement with Optus on 30 June 1998. It is, however, important to bear in mind that in 1998 the pay television industry was not only new in Australia, but in a considerable state of flux.

2508 Following the demise or impending demise of Australis and SportsVision, Fox Sports was seeking to supply all three pay television platforms. Seven contemplated that it might achieve the same result through its new sports channel (at least for so long as it retained the AFL pay television rights). Fox Sports' objectives were frustrated by Telstra's opposition to any content supply arrangement between Fox Sports and Optus. However, News' conduct, in my view, did not go beyond the deliberate, ruthless and aggressive behaviour that is

characteristic of competition, as distinct from conduct which had the objective of destroying C7.

2509 Mr Macourt frankly acknowledged that, in 1998 and later, he thought that Fox Sports would be better off financially without competition from C7 and that he would have preferred it if C7 had gone out of business. I also think it clear enough – indeed News does not deny – that News was concerned in 1998 about possible inflation in the costs of acquiring sports rights. Mr Macourt denied, however, that his preference for the disappearance of a competitor (hardly a unique hope among business people) was a factor in News' strategy for the pay television business between 1998 and 2002.

2510 If attention is focussed on 1998, I see no conflict between Mr Macourt's acknowledged preference that C7 should go out of business and his assertion that News' commercial strategy was motivated by a determination to maximise Fox Sports' position in the market by legitimate commercial means, rather than a determination to kill C7. Mr Macourt explained the assumptions in the financial modelling on the basis that, at the time, there were only two relevant hypotheses: either there would be competition for sports rights or there would not. If the latter, he considered at the time that it was reasonable to expect a lower rate of inflation in the cost of sports rights.

2511 The evidence suggests that if Fox Sports had succeeded in its efforts to supply content to Optus, the latter may not have agreed to take C7. Mr Keely of Optus, for example, gave evidence that in June 1998 he regarded C7's (potential) sports programming as inferior to that of Fox Sports and that he would have preferred to take Fox Sports. Mr Gammell said that if he had not been able to secure an MSG from Optus, he would not have recommended that Seven proceed with the C7 business. Thus a '*dominant*' position for Fox Sports as a supplier of high quality premium sports content, at least in the short term, was by no means out of the question.

2512 Mr Macourt rejected the proposition that if Fox Sports managed to supply all three platforms a competitor would be unable to create a rival sports channel. His evidence was that:

> *'basically if you are prepared to go and buy sports rights that are attractive to Australian consumers, it's likely that you are going to be in a strong*

negotiating position to compete'.

That evidence seems to me to be plausible, not least because, as I have discussed in relation to market issues, sports rights (including premium sports rights) become available from time to time to anyone who cares to bid for them.

2513 The plausibility of Mr Macourt's denial that his objective was to kill C7 is enhanced by his opposition, expressed at the Foxtel Management board meeting of 8 July 1999, to the direct acquisition by Foxtel of the AFL pay television rights. It would be very curious indeed, had Mr Macourt been party to a plan designed to destroy C7, that he would have opposed a necessary (but not sufficient) step towards achieving the desired objective. Seven seeks to discount the significance of Mr Macourt's opposition at this stage because (as he said in his evidence) it was based on his belief that Foxtel was unlikely to succeed in any bid. But if Mr Macourt was committed to the objective, as Seven insists, it is hardly likely that he would have been deterred at the outset by the practical difficulties facing Foxtel in acquiring the AFL pay television rights.

2514 There is no doubt that News prepared financial models on the assumption, among others, that there might be only one supplier of Australian premium sports content. But this was a distinct possibility, at least until the execution of the C7-Optus CSA, without News engaging in any anti-competitive behaviour. Prior to the execution of the C7-Optus CSA, C7's position as a supplier of premium sports content was uncertain.

2515 As Seven points out, the letter of 23 July 1998 from Mr Macourt to Mr Moriarty of Telstra attached models showing the same assumptions as to the inflation of sports rights costs as the earlier models. By this time, C7 and Optus had entered into the C7-Optus CSA, a fact referred to in the letter. Thus it was unlikely that Fox Sports could have assumed that in the future there would be no competition for sports rights from other channel suppliers (leaving aside free-to-air operators).

2516 I do not, however, interpret the models or the letter as indicating that the C7-Optus CSA had stimulated News to develop or refine a strategy of acquiring the AFL pay television rights in order to destroy C7. The most likely explanation for the models incorporating different rates of sports rights inflation depending on the existence or absence of competition

is that this approach had been adopted in the earlier models. I do not think that Mr Macourt intended the letter to convey that News was planning to acquire the AFL pay television rights in order to remove C7 as a competitor. The letter uses the aggressive language of competition and talks of '*several important rights*' becoming available, not merely the AFL pay television rights. Moreover, it would have been extraordinarily foolish of Mr Macourt to propose to Mr Moriaty, at a time when News and Telstra were in conflict, an anti-competitive strategy specifically designed to remove a competitor. I do not assess Mr Macourt as likely to have acted so foolishly.

2517 I should add that Mr Macourt's evidence satisfies me that he could not recall the details of particular assumptions or why they had been adopted in the models (including an assumption in one model that the AFL pay television rights could be acquired for what Mr Macourt, in the witness box, regarded as a plainly unrealistically low price). The absence of Mr Parker from the witness box, in my opinion, carries the matter no further. Mr Parker was an accountant whose role was to prepare models based on assumptions supplied to him by Mr Macourt and others. There is no reason to think that Mr Parker would have been able to shed further light on the matters upon which Mr Macourt's recollection was imperfect.

15.4.3 Four Further Matters

2518 Four other matters (among many) were emphasised by Seven in its submissions. The first was the drafting of the clauses to which I have referred. This was the work of Mr Philip. As it happened, Telstra made it clear that the provision requiring Fox Sports to approve sporting content on Foxtel was unacceptable and, of course, no agreement was entered into between Fox Sports and Optus. Clearly enough the provision giving Fox Sports the right to approve content was intended by Mr Philip, if accepted by Foxtel and Optus, to prevent C7 being taken on those platforms without the approval of Fox Sports.

2519 Mr Macourt said that he saw the provision as applicable to content supplied by all sports providers over the term of the agreement (not just C7) and as an attempt to protect Fox Sports, by making it a gate-keeper of sports programming for Foxtel. I accept that that was his understanding, although he appreciated that the only channel supplier against whom the provision would be likely to operate in 1998 was C7. There may have been issues about the lawfulness of the clause drafted by Mr Philip (issues have been raised in relation to equivalent provisions in the present proceedings). Nonetheless, I do not think that it, either

alone or in combination with other matters relied on by Seven, justifies reaching a conclusion, contrary to Mr Macourt's evidence, that News had decided in 1998 on a strategy of killing C7 in order to achieve market dominance for Fox Sports.

2520 The second matter is Mr Macourt's response to questions concerning his rejection of Seven's proposal for the supply of C7 to Foxtel, made on 7 June 1998 ([598]). Clearly, price was his major (and justifiable) concern. However, Mr Macourt said in evidence that one reason he rejected the offer was because he did not want Foxtel to carry a channel from a competitor (by which he meant Seven, not its sports channel). I accept the qualification Mr Macourt put, namely that it would have been difficult to reject the channel if the price was '*demonstrably good*'. The qualification is consistent with Mr Macourt's evidence that he was conscious that, as a director of Foxtel Management, his duty was to make decisions in the interests of the Foxtel Partnership, not simply to act in News' or Fox Sports' interests regardless of the consequences for Foxtel. It follows from this evidence (which I accept represented his understanding of his obligations) that Mr Macourt did not reject the proposal simply because he determined that Foxtel should never take C7. Further, a buyer's distaste for assisting a perceived competitor by declining to take its branded product, whatever issues that may raise in competition law, is not the same as deciding to implement a strategy of destroying the competitor.

2521 The third matter arises out of the negotiations between News and Austar preceding the Fox Sports-Austar CSA of 3 September 1998. In the course of the negotiations, Austar complained in a letter to Optus (which was entitled to sub-license C7 to Austar) that it was being forced to choose between C7 and Fox Sports. As I follow Seven's submission, it argues that the Austar prize gave News a further incentive to eliminate C7.

2522 The Fox Sports-Austar CSA was to continue until 2006. It is somewhat difficult to understand how the prospect of renegotiating a contract that was not due to expire until 2006 could have provided a powerful incentive for News to eliminate C7 in 1998. In any event, Austar decided to acquire both Fox Sports (on basic) and C7/ESPN (on a tier). Despite Austar's protestations, it did not have to select one channel to the exclusion of the other. Moreover, the contemporary documentation relied on by Seven, such as the letter from Messrs Macourt and Philip to Mr Rupert Murdoch of 21 October 1998, is couched in the language of competition, not that of exterminating a competitor. It is true, as Seven points

out, that in the lead-up to the Fox Sports-Austar CSA, News refused to permit Austar to compile NRL coverage on any channel of its choosing. But there were commercially justifiable reasons for this stance.

2523 The fourth matter is Seven's claim that the pricing dispute between News and Telstra concerning the supply of Fox Sports to Foxtel was linked to News' objective of killing C7. As I follow Seven's argument, it is that News prevented Fox Sports and C7 from competing against each other for the supply of content to Foxtel, with the objective of destroying C7. This was designed to leave Fox Sports in a dominant position in the market and, presumably, improve its chances of benefiting from the transfer pricing (that is, the diversion of revenue from Foxtel to Fox Sports) which Seven says was incorporated into the terms of the content supply arrangements between Fox Sports and Foxtel.

2524 This argument would have force if the pricing dispute between News and Telstra (later involving PBL) was a subterfuge, designed to mask a plan to drive C7 from the marketplace. However, there can be little doubt that the dispute was genuine and vigorous, if not bitter. News wanted Fox Sports to supply Foxtel at a price substantially higher than Telstra thought was reasonable or appropriate. It is quite possible that News' insistence on the higher price was because it preferred Fox Sports to benefit from its content supply arrangements with Foxtel, if necessary at the expense of Foxtel. In any event, the part that C7 played in the dispute was essentially to be adopted by Telstra as a bargaining chip in its efforts to force down the price paid by Foxtel for the Fox Sports channels.

2525 Mr Macourt agreed that he had adamantly opposed Foxtel taking C7 until the dispute with Telstra was resolved. He was asked by me why he regarded resolution of the dispute as a precondition to Foxtel taking C7. His answer was as follows:

> *'Our relationship with Telstra I think through this period was still very poor, and I was still concerned that Telstra – once having secured a sports service for the platform – would then use the opportunity to take legal action to have FoxSports [sic] removed from the service with the allegations they made about us not complying with our contractual arrangements with them, which we disputed but you can always lose a court case.*
>
> *Very true, yes? --- So that without a fall-back sports program, I didn't think it was likely that Telstra would pursue that course. But with a fall back I thought there was reasonable probability they would'.*

2526 I accept Mr Macourt's evidence as to his motivation. It is consistent with the terms of the letter he wrote to Mr Rizzo of Telstra on 30 July 1999 ([747]-[748]), in which he complained of Telstra's apparent desire '*for some inexplicable reason*' to strip Foxtel of the Fox Sports channels and replace them with a sports channel supplied by a free-to-air operator. Moreover, by early 1999 Telstra was indeed contemplating legal action. A Telstra Pay Television Sub-Committee information paper prepared in January 1999 recorded the view that News had breached its good faith obligations by seeking to benefit its own financial interests to the detriment of Foxtel (by seeking to have Foxtel pay an excessive amount for Fox Sports). The paper recommended that legal action be considered. Dr Switkowski confirmed that legal action was actively under consideration at this time. I am not satisfied that News' position, to the effect that Foxtel should not take C7 until resolution of the Fox Sports pricing issue, had anything to do with the asserted objective of killing C7, whether as a means of securing market dominance for Fox Sports or otherwise.

15.4.4 Findings

2527 For these reasons, I do not accept Seven's contention that by mid-1998, or indeed by later that year, News had settled on a strategy of destroying Seven's sports channel whether as a means of securing market dominance for Fox Sports or otherwise. While perhaps some of News' tactics conceivably could have attracted scrutiny under the *TP Act*, I do not think that Mr Macourt, as the decision-maker for News, had the objective attributed to him by Seven. Nor am I satisfied that Mr Philip had that objective.

2528 I should add that PBL did not acquire its interests in Foxtel or Fox Sports until December 1998 (although it had exercised its option in relation to Foxtel in October 1998). Thus in mid-1998, when the modelling took place within Foxtel and Fox Sports negotiated with Optus, PBL had no involvement in either Foxtel or Fox Sports. It therefore was hardly likely to have been party to any objective of killing C7 at this time.

15.5 '*Kill C7*'

15.5.1 Mr Blomfield's Comments

2529 Seven relies on the two internal Telstra emails, sent by Mr Brenton Willis to Mr Fogarty in December 2000. These referred to comments made by Mr Blomfield in conversations in late October or early November 2000, that there was a wider objective of

killing C7. Telstra's answers to interrogatories, recording Mr Blomfield's comments, were admitted into evidence only against Telstra. However, the emails are evidence that Mr Blomfield made the comments attributed to him in conversations with Mr Fogarty of Telstra. In the absence of Mr Blomfield and Mr Fogarty from the witness box, I accept that the statements to the effect recorded in the emails were made by Mr Blomfield to Mr Fogarty, although due allowance must be made for the lapse of time between the conversations and the sending of the emails more than a month later. (I appreciate that neither Mr Blomfield nor Mr Fogarty can be regarded as within PBL's camp, but the emails were admitted into evidence for all purposes.)

2530 Mr Blomfield was an officer of News, the CEO of Foxtel Management and a non-voting member of the Foxtel Management board. What is not clear from the evidence is the context in which Mr Blomfield made his remarks to Mr Fogarty and what they were intended to convey. In particular, it is not clear whether Mr Blomfield was expressing his own view, reporting someone else's view, recording Seven's position or even repeating media speculation. Nor is it clear in what sense he was using the expression '*killing C7*'.

15.5.2 Usage of 'Kill C7'

2531 Mr Stokes' position, at first, was that he had never heard anybody use the expression '*kill C7*' or words to that effect. If Mr Blomfield's use of the expression was unique, or nearly so, his remarks might have particular significance.

2532 Mr Stokes' evidence was not, however, correct. Mr Stokes himself told the ACCC in November 1999 that should Foxtel acquire the AFL pay television rights, it would kill C7. Moreover, Mr Stokes agreed in evidence that the phrase had been used as the equivalent of losing the AFL broadcasting rights. Mr Gammell used the expression in his conversation with Mr Falloon on 4 November 1999 and, indeed, claimed that he had coined the expression. Mr Gammell agreed that he had subsequently used the expression and that it had been employed within Seven to describe what were asserted to be the consequences of Seven losing the AFL pay television rights. Mr Gammell also thought that Mr Stokes '*may well have*' used the expression from time to time. Clearly Seven's senior executives were anxious, in their dealings with the ACCC and others, to link the loss of the AFL pay television rights to drastic consequences for C7's business.

2533 The point is reinforced by the evidence of Mr Wise. He used the phrase '*killing C7*' in an email to Mr Stokes of 8 November 2000, by which he said he meant:

> *'Putting in a bid ... the only purpose of [which] was to ensure that C7 didn't have AFL rights'.*

Mr Wise agreed that the expression had been used within C7 for some time and, although he could not recall Mr Stokes or Mr Gammell using it, he thought that others within C7, such as Mr Francis and Mr Aspinall, had.

2534 Mr Wise also recalled that the expression had been used in the newspapers. His recollection was accurate. For example, an article in the *Australian Financial Review* of 14 November 2000, published after the journalist concerned had spoken to Mr Francis the previous day, said that :

> *'If Stokes were to lose the rights, it would, of course, kill his pay-television sport programmer C7'.*

2535 Mr Brenton Willis, the author of the two Telstra emails to Mr Fogarty, had seen that article before sending the emails. A number of other newspaper articles published at about this time referred to News' bid for the pay television rights (as well as the free-to-air television rights) as being likely to '*blow up*', '*wipe out*' or result in the death of C7. The probabilities are that all the authors of these articles were briefed by Seven in advance of publication and that the briefings included reference to the dire consequences for C7 of the loss of the AFL pay television rights.

15.5.3 Significance of the Comments

2536 Neither of Mr Willis' emails specified when Mr Blomfield made his cryptic comments. The answers to interrogatories (admissible only against Telstra) indicate that the conversations occurred in late October or early November 2000. If this is correct, the conversations pre-dated the newspaper articles to which I have referred. On the other hand, there was a gap, apparently of over a month, between the conversations and the emails. During this period, Mr Willis had seen the newspaper commentary and this may well have affected his recollection. Moreover, the expression '*killing C7*', by late October or early November 2000, had gained wide currency, in no small measure because Seven's senior executives had used it in an attempt to link the potential loss of the AFL pay television rights

to drastic consequences for C7's business.

2537 In assessing the significance of Mr Blomfield's comments, it is necessary to take into account that the Foxtel parties did not call him as a witness. As Seven points out, although Mr Blomfield's employment with News was terminated on 18 December 2001, apparently in circumstances involving dissatisfaction with his performance, he signed confidentiality undertakings in his employment contract and in a deed of release of 5 April 2002. In the absence of those undertakings, there would have been no impediment to Seven seeking to interview Mr Blomfield for the purposes of obtaining a statement for use in these proceedings. However, Seven submits that the undertakings prevented Mr Blomfield from divulging any confidential information to Seven's solicitors, even for the purposes of taking a statement for use in the proceedings: see the very carefully reasoned decision of Campbell J in *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464. Moreover, it appears that News' solicitors met with Mr Blomfield in connection with this case, but did not call him as a witness. Thus it appears that News had the opportunity to obtain a statement from Mr Blomfield yet did not seek to adduce evidence from him.

2538 News submits that Mr Blomfield should not be regarded as in its camp because of the circumstances in which his employment was terminated and because in recent years he has had no business connection with News. News also points out that there is evidence that Seven's solicitors communicated with Mr Blomfield over a period of several months, apparently in connection with this case. The content of those communications has not been revealed because Seven has claimed client legal privilege over the communications.

2539 I cannot draw inferences adverse to Seven from its claim to privilege in respect of the communications between its solicitors and Mr Blomfield. Furthermore, I would not readily attribute any impropriety to Seven's solicitors. This point is relevant because Seven's submissions plainly imply that its solicitors were unable to interview Mr Blomfield because of the constraints imposed by the confidentiality provisions in his contracts. In my view, it would have been less than proper for Seven's solicitors to be party to such submissions if they had indeed interviewed Mr Blomfield with a view to his giving evidence in this case.

2540 In the circumstances I have outlined, I think it is appropriate, in the absence of an explanation by News as to why it did not call Mr Blomfield, to regard him as within News'

camp and available to be called as a witness. News' failure to call Mr Blomfield therefore lends support to an inference that his comments to Mr Fogarty in late October or early November 2000 reflected his view that News or Foxtel had the objective of killing C7 when seeking to acquire the AFL pay television rights. Furthermore, I think it appropriate to take into account that News' assiduous policy of deleting electronic communications deprived Seven of the opportunity to examine whether News' internal communications shed light on what Mr Blomfield was intending to convey to Mr Fogarty although, as I have already noted, that policy did not apply to communications within Foxtel.

2541 Nevertheless, after giving due weight to the availability of inferences adverse to News, in my opinion the totality of the circumstances I have identified makes Mr Blomfield's comments of limited assistance in determining whether News (or, *a fortiori*, PBL) had the purpose attributed to it by Seven. Insofar as Seven interprets Mr Blomfield as having asserted that Foxtel's bid (through the Foxtel Put) for the AFL pay television rights was designed to destroy C7, the contemporaneous Foxtel documentation does not directly support that interpretation. (By '*directly*', I mean that, apart from the otherwise equivocal material from which Seven seeks to draw inferences, no emails or other internal Foxtel communications suggest that Foxtel or News had the intention of destroying C7. I shall refer in more detail to that material later.)

2542 Further, Seven's interpretation implies that Mr Blomfield was responsible for putting his name to documents, such as his letter of 2 November 2000 to Mr Willis and his paper of 6 December 2000 recommending that directors of Foxtel Management authorise execution of the Foxtel Put at a fee of $30 million per annum, knowing full well that his conduct formed an integral part of an anti-competitive strategy designed to kill C7. On Seven's case, Mr Blomfield knew all this yet made no protest; more than this, he helped effectuate the plan. This is also not a conclusion to be reached lightly, even taking account of the inferences available due to Mr Blomfield's absence from the witness box.

2543 I leave to one side for the moment the evidence of Mr Macourt and Mr Philip, both of whom denied having the purpose or objective of killing C7 in relation to the acquisition of the AFL pay television rights. However, Mr Mockridge, who was CEO of Foxtel Management until February 2000, denied that he had ever been told by representatives of News or PBL that they had the objective of killing C7's business. Nor did he have an

expectation himself that the loss of the AFL pay television rights would kill C7's business. While Mr Mockridge had ceased to be CEO of Foxtel nine months before Mr Blomfield made his comments, it would be extremely odd, given the way Seven presents its case, if Mr Mockridge was unaware that the objective of the Foxtel partners was to kill C7 if that had been their objective all along. I accept Mr Mockridge's evidence.

2544 The fact is that at the time Mr Blomfield made his comments to Mr Fogarty and others at Telstra, the expression '*killing C7*' was not only in widespread use, but the expression had been promoted by Seven (even though the particular newspaper articles to which I have referred had not yet appeared). In the circumstances I have identified, the comments made by Mr Blomfield are to be given some weight in assessing whether News, Foxtel or PBL had the purpose attributed to them by Seven, but in my view they are far from decisive or even persuasive. Whether the parties had that purpose must be assessed by reference to the totality of the evidence.

15.6 Overbidding for the AFL Pay Television Rights?

15.6.1 Seven's Contention

2545 Seven's contention is that Foxtel entered into the Foxtel Put notwithstanding that its executives thought the acquisition of the AFL pay television rights would be loss-making over the term of the agreement. According to Seven, the financial models were manipulated to present an optimistic picture for Telstra. Despite poorer quality pay television rights, notably through a reduction in the number of live games from four to three and the introduction of the flip-flop ([971]ff), the models were amended to improve the predicted performance of the AFL channel.

2546 Seven submits in relation to the flip-flop that:

> *'The impact on the attractiveness of the product in Brisbane, Sydney, Adelaide and Perth of the inability to ever show a local team match exclusively live is so blindingly obvious that it is not credible that Foxtel and News were unaware that this was a significant disadvantage with the proposal. The evidence of Mr Frykberg supports a finding that Foxtel and News were well aware of the significant disadvantage'.*

Seven invites me to find that News and Foxtel never genuinely believed that a direct acquisition of the AFL pay television rights was preferable to an acquisition through C7. At

best, they were recklessly indifferent to whether the News proposal was likely to be profitable for Foxtel.

2547 When Mr Sumption opened Seven's case, he said that Foxtel's indirect bid for the AFL pay television rights:

> *'was predatory in the sense that the price offered was loss making and known to be loss making and was far in excess of what it would have cost to buy in a channel showing those same games.* ***It was … an offer which made economic sense only on the footing that in the longer term Fox Sports would benefit by the removal of competition in the market in which it operated*** *...'* (Emphasis added.)

This argument involves at least two contentions: first, that Foxtel's acquisition of the AFL pay television rights was substantially above market price; and, secondly, that by reason of the modelling, Foxtel knew the offer was bound to be loss-making and thus appreciated that it was devoid of rational economic justification.

2548 By the time Seven filed its written submissions, its representatives doubtless realised that Mr Stokes had made certain concessions in his evidence concerning the reasonableness of the price paid by Foxtel for the AFL pay television rights. Seven's Reply Submissions address this difficulty by contending that the overbidding case '*is a case of subjective overbidding, not objective overbidding*'. Seven maintains, as I follow its submissions, that Mr Stokes' acknowledgement that the fee of $30 million per annum was a '*good price*' is irrelevant because:

> whatever the objective '*worth*' of the AFL pay television rights, Foxtel **thought** it was paying too much; and
>
> in any event, Mr Stokes' concessions reflected the benefits to C7 of the MSG under the C7-Optus CSA.

2549 The first of these submissions implies that Foxtel intended to pay, and thought it was paying, a supra-competitive price for the AFL pay television rights in order to kill C7 but, despite its best efforts, managed to acquire the rights for a competitive price (or at least at a price no greater than C7 thought they were worth). Moreover, Foxtel managed to achieve its anti-competitive objective. This is not, in my view, an easy position to maintain.

15.6.2 Five Difficulties with Seven's Contention

2550 In assessing Seven's overbidding contention, five points need to be borne in mind. **First**, Seven's submissions on this point are substantially based on the assumption that in 1998 News formulated a plan to dominate pay sports rights by killing off the incipient C7. Seven's contentions about the purpose of Foxtel's indirect bid, through News, for the AFL pay television rights in late 2000 seem to me to attempt to place square facts into round holes. The attempt reflects the fact that Seven's submissions interpret the relevant events through the prism of their starting point. I do not accept the starting point.

2551 **Secondly**, in my opinion Seven places altogether too much significance on the financial modelling undertaken by Foxtel in late 2000. The submissions – and indeed a good deal of the cross-examination – appear to have been based on an assumption that financial models are necessarily designed to predict likely financial outcomes. The assumption is that models must be based on the most realistic predictions that will determine the profitability of a particular endeavour.

2552 That indeed may be the objective underlying the preparation of particular financial models. But, as I have previously suggested, this case demonstrates, if the point needs demonstration, that financial models may be prepared with other objectives in mind. It is not necessarily to engage in '*manipulation*', much less in dishonesty, to prepare models working backwards from a given outcome, such as attributing a positive NPV to the exploitation of particular rights over a given period. The point of the exercise may be to isolate the financial targets (the variables) that must be achieved in order to attain the desired outcome. For example, what must a pay television operator charge and what penetration rates must it achieve in order to produce a positive return for compiling and distributing a particular sports channel?

2553 Despite Mr Philip's general unreliability as a witness, he gave what seemed to me to be reasonably frank evidence on this aspect of the case. In his statement, he volunteered that he had asked Mr Boyd to prepare models that showed a positive NPV for the acquisition of the AFL pay television rights at prices, respectively, of $25 million and $30 million per annum. He said that he wanted the models in this form in order to convince Telstra to support Foxtel's bid. Mr Philip agreed that he saw the acquisition of the AFL pay television rights as a strategic acquisition and that he did not necessarily expect it to be cashflow

positive. He accepted that he was nonetheless perfectly content to ask for models that showed the acquisition to be cashflow positive.

2554 Mr Philip had no compunction about deliberately misleading Telstra. He did exactly that in his fax of 9 December 2000 to Mr Akhurst seeking Telstra's support for the Fox Sports bid. On one view, the preparation of the model showing a positive NPV for an acquisition of the AFL pay television rights for $30 million involved an element of deception on Mr Philip's part, since he himself did not necessarily accept that the financial outcome would be positive. But he said in his evidence, fairly enough in my view, that it was a matter for Telstra to evaluate for itself the validity of the assumptions incorporated into the model. The model prepared on Mr Philip's instructions exposed the assumptions sufficiently for Telstra to make its own assessment.

2555 As has been seen, there were in fact sharp divisions of opinion within Telstra as to whether the assumptions were realistic. But the senior decision-makers within Telstra, including Dr Switkowski, were not under any illusions as to what targets had to be achieved if the acquisition of the AFL pay television rights was to generate positive returns to Foxtel.

2556 **Thirdly**, as Dr Switkowski and others made clear, in this context assumptions in financial models are essentially predictions or estimates as to future business performance or economic measures. They cannot substitute for the exercise of judgment in decision-making by the responsible executives. This may require decisions to be made for '*strategic*' reasons, rather than on the basis of financial predictions or modelling. There is something more than passing strange about Seven's complaint about Foxtel's '*manipulation*' of financial models to achieve a predetermined outcome. After all, Mr Stokes, on his own account, was prepared for Seven to offer hundreds of millions of dollars for the NRL pay television rights over a period of years without troubling to carry out any modelling at all. Mr Sumption's answer is that it is worse to have a model that undermines one's case than to have no model at all. At the very least, however, Seven's '*seat of the pants*' approach (to use Mr Sumption's language) suggests that very large financial decisions in this industry often involve very broad-brush, even instinctive, judgments, in which the results of modelling play a minor part or perhaps no part at all.

2557 **Fourthly**, there is no escaping the elephant in the room. The fact is that Mr Stokes

thought that the bundle of AFL pay television rights acquired by Foxtel for $30 million per annum was a good deal. The concessions he made, bearing in mind that he had been prepared for C7 to pay $30 million per annum for one exclusive AFL pay television game, cannot be explained on the ground that his belated offer to the AFL on 14 December 2000 merely reflected the value of Optus' MSG. In any event, Mr Wise's confused explanation of how he came to justify Seven's bid of $60 million per annum for the AFL broadcasting rights suggests that if he had undertaken an analysis on the basis of accurate information he would have been able to support a considerably higher bid.

2558 Furthermore, Seven's bid was influenced by its misapprehension about the future course of the bidding process and its determination (until after the presentation to the AFL had concluded) that its bid should cover both the free-to-air and pay television rights. As Mr Wise and Mr Stokes explained, that strategy was originally a product of Seven's desire to maximise its chances of securing the AFL broadcasting rights without the inconvenience of a competitive process (because they thought that no one else was interested in the free-to-air television rights). In substance, the strategy backfired. I do not accept Mr Sumption's submission that Mr Stokes' evidence is irrelevant to the issue of Foxtel's alleged overbidding for the AFL pay television rights.

2559 **Fifthly**, the uncontested evidence is that Mr Frykberg told Mr Philip in early December 2000 that a bid of up to $30 million per annum would be required to obtain the AFL pay television rights. No suggestion was put to Mr Frykberg that he was party to or aware of any objective of killing C7, nor that his advice might have been distorted by the prospect of his earning a success fee. If it is accepted (as I do accept) that Mr Frykberg was not aware of any malign objective, his advice to Mr Philip could only have been based on his assessment of what was needed to beat a likely bid for the rights by Seven. Of course, Mr Frykberg's advice is not necessarily inconsistent with Mr Philip and Mr Macourt having the objective attributed to them by Seven. But it tends strongly against a belief on their part that a $30 million per annum bid for the AFL pay television rights was predatory, as distinct from a bid reasonably likely to succeed in a competitive auction for the rights.

15.6.3 Models

2560 Seven's submissions analyse in detail the modifications to the various models undertaken within Foxtel. News and PBL respond with equally detailed analyses of their

own. I have outlined in Chapter 8 the essential content of the models and there is no need to repeat the account here. In my view, the evidence is consistent with News and Foxtel acting on the perception that the acquisition of the AFL pay television rights was highly desirable in the interests of Foxtel as a retail pay television platform, particularly as a subscription driver for the southern States. The evidence is also consistent with them deciding to support a bid (through the Foxtel Put) that had a good chance of succeeding in a competitive auction for the AFL pay television rights.

2561 There is no doubt that Mr Macourt and Mr Philip were extremely keen to secure the AFL pay television rights for Foxtel. Mr Philip was prepared to engage in forceful advocacy (and more) to achieve the result. He was prepared to lie to Telstra to obtain its support for Fox Sports' bid for the NRL pay television rights, but he seems not to have resorted to similar deception in endeavouring to persuade Telstra to support the Foxtel Put, perhaps because he did not need to.

2562 It is clear enough that Mr Philip, despite his reticence to acknowledge the fact in the witness box, appreciated that there was a risk that C7 would cease to be commercially viable if its bids for the AFL and NRL pay television rights both failed. Mr Philip, like Mr Macourt, would not have been in the least perturbed if he knew that C7 was likely to collapse as a consequence of losing the AFL pay television rights. But a lack of concern – or even pleasure – at that outcome does not demonstrate that Mr Philip (or Mr Macourt) actively sought the destruction of C7, particularly if there were good commercial reasons for Foxtel to seek the AFL pay television rights. Nor does a lack of concern about C7 of itself support the contention that Foxtel offered (indirectly) a predatory price to the AFL for the pay television rights in order to bring about C7's demise.

15.6.3.1 FLIP-FLOP

2563 Seven points to a number of factors that, so it argues, support the contention that Mr Macourt and Mr Philip must have known that the bid for the AFL pay television rights would be loss-making for Foxtel. It emphasises, in particular, the introduction of the flip-flop as a development which must have had, and have been understood to have, a substantial negative impact on the value of the AFL pay television rights ultimately obtained by Foxtel. Undoubtedly the flip-flop turned out to be disadvantageous to Foxtel. But in my view, in late 2000, while the flip-flop was plainly seen as a negative, neither News nor Foxtel fully

appreciated the likely significance of the flip-flop for Foxtel's future pay television operations.

2564 Both Mr Macourt and Mr Philip said that, although they resisted the introduction of the flip-flop, they did not regard it as '*blindingly obvious*' (as Seven submits it was) that the flip-flop would have a significant adverse effect on the value of the pay television rights. I would not accept Mr Philip's assertion to this effect if it was unsupported by other evidence. However, Mr Frykberg, who was more experienced in relation to AFL content than either Mr Macourt or Mr Philip, miscalculated the likely significance of the flip-flop because he underestimated the extent of the parochial allegiances of AFL fans. At the time, he believed that the flip-flop would not necessarily result in Nine and Ten broadcasting the games with greater viewer appeal. Moreover, he conveyed his belief to Mr Philip.

2565 In the light of Mr Frykberg's evidence, I accept Mr Philip's claim that in late 2000 he thought that the flip-flop would '*potentially [work] out okay for Foxtel*', even though he regarded it as an undesirable feature of the proposed arrangements. I also accept Mr Macourt's evidence that, on the basis of his experience with the ratings of NRL games on pay television, he did not consider that the flip-flop would necessarily result in the broadcasting of inferior AFL games on pay television.

2566 The miscalculations were not confined to Mr Macourt and Mr Philip. Mr Campbell, who conducted modelling with Mr Boyd for Foxtel, first learned of the flip-flop from Mr Frykberg on 27 October 2000. At first, Mr Campbell proceeded on the misconception that under the flip-flop, when free-to-air television covered a local game in, say, Adelaide, pay television would be able to show that game non-exclusively and would have exclusive rights to the '*national*' games. Mr Campbell therefore did not see the flip-flop, as he understood it, as much of a negative. When he was disabused of this particular misconception in late November 2000, he thought that the flip-flop would have a negative impact in cities outside Melbourne, but that Foxtel could still expect a very considerable boost in the Melbourne market. In making this assessment he, too, underestimated the significance of subscribers' interest in local AFL games, rather than better '*quality*' games.

15.6.3.2 PENETRATION RATES AND NPV

2567 Seven also strongly criticised the assumptions incorporated into the models as to the

increased penetration on basic that Foxtel could achieve in the southern States by reason of acquiring the AFL pay television rights. The model that accompanied Mr Mockridge's paper to the Foxtel Management board meeting of 26 October 1999 assumed an increase of 2.9 per cent. The financial model accompanying Mr Blomfield's paper of 6 December 2000 incorporated a figure of 30 per cent. This corresponded to 163,000 additional subscribers rather than a mere 8,000. The increased penetration rates were critical to producing a positive NPV.

2568 The most substantial increases in assumed penetration rates occurred in a model prepared on about 1 December 2000 by Mr Boyd. Mr Boyd prepared the model at Mr Blomfield's request. Mr Blomfield told Mr Boyd that the Foxtel Management board meeting of 9 November 2000 had agreed (as it had) that the models should assume equal penetration rates in the southern and northern States. Mr Blomfield directed Mr Boyd to assume that equalisation would be achieved over a five year period.

2569 Mr Boyd initially believed that the earlier models had already assumed equal penetration rates, but he discovered that this was incorrect. He then proceeded to implement the instruction he had received by incorporating into the model a penetration rate of 30 per cent, to be achieved in 2006. The model incorporated alternative rights fees of $17.5 million per annum and $25 million per annum.

2570 The next models were prepared on 5 December 2000, on the basis of assumed alternative rights fees of $25 million and $30 million per annum. The first model produced a positive NPV of $13.1 million, while the second model produced an NPV of -$5.8 million. This prompted Mr Philip to ask Mr Boyd to prepare a revised model assuming rights fees of $28 million and $30 million. The latter was to assume higher penetration rates for the southern States in the early years and was also to assume that 30 per cent penetration would be reached earlier. Mr Boyd complied and produced a model with a positive NPV of $2.3 million.

2571 The parties disagree as to whether the substantial increase in penetration rates in the models pre-dated Mr Philip's involvement in the modelling process. News says the substantial changes in the assumed penetration rates occurred before Mr Philip's involvement; Seven says that Mr Philip instigated the major changes. The evidence on the

point is unclear. However, I think it more likely that Mr Philip asked Mr Blomfield on or shortly before 1 December 2000 to request Mr Boyd to prepare a model assuming equal penetration rates in southern and northern States. Given (as I have found) that the Foxtel Management board had agreed to equalise the penetration rates on 9 November 2000, in my view, nothing of substance turns on the precise date of Mr Philip's involvement in the modelling process.

2572 A number of witnesses gave evidence that they thought that the assumptions about penetration rates and the feasibility of achieving the targets embodied in the final model were reasonable. Mr Macourt was not consulted about the model before its preparation and did not compare it with earlier versions, largely because he thought they lacked adequate detail. His evidence was that he thought the assumptions contained in the model were reasonable and that the NPV, if anything, was conservative because no terminal value had been attributed to the AFL pay television rights.

2573 Contrary to News' submissions, I interpret Mr Macourt's cross-examination as challenging his evidence on this point. His evidence requires careful examination. He was reluctant to accept that in July 1999 he had been concerned about the (then) projected cost of Foxtel acquiring the AFL pay television rights. While that was some 17 months before Foxtel finally committed itself to a bid of $30 million per annum for the rights, his reservations about bidding in mid-1999 (at a projected fee of $15 million per annum) shows that he had been troubled about the cost to Foxtel of acquiring the rights. Moreover, Mr Macourt's analysis of the final model was cursory and, on his own evidence, he paid little attention to the assumptions built into the model.

2574 There is no doubt that Mr Macourt understood that Foxtel's acquisition of the AFL pay television rights would be expensive and that it would not be easy to make good the projections embodied in the model. But I am not prepared to reject Mr Macourt's denial that the reason or a substantial reason, as he saw it, for Foxtel being prepared to bid $30 million per annum was that '*it made sense for News to pay a large premium to push C7 out of the market*'. There is a substantial gap between accepting a significant risk that models may not prove to be accurate and deliberately entering a transaction known to be loss-making in order to drive a competitor out of the market. That gap is more difficult to bridge when the price being offered is thought to be the amount required to succeed in a competitive auction.

Moreover, as I have found in Chapter 8 ([1042]ff), Mr Macourt's conversation with Mr Gammell on 4 December 2000 tends against the conclusion that his objective in supporting News' bid for the AFL pay television rights was to destroy C7 as a viable supplier of premium sports channels.

2575 Mr Campbell said that he had been told by Mr Blomfield to achieve a particular result in the modelling exercise, namely a positive NPV at a rights fee of $30 million per annum. Nonetheless, he said that if he did not think that the numbers were achievable, he would have told Mr Blomfield. He thought the assumptions were optimistic, but not wildly so. Furthermore, they were supported by inquiries he made within Foxtel.

2576 Mr Campbell was questioned as to the extent of his inquiries and the cross-examination showed that they were in fact superficial. But there is no reason to doubt that Mr Campbell did make inquiries, such as they were, in order to test the assumptions and that the information he obtained was consistent with the assumptions incorporated into the model. While Mr Campbell's state of mind is not central to the case, I do not think that there is a sound basis for rejecting his evidence that he thought at the time that the assumptions were within the bounds of reasonableness and were achievable. Optimism is one thing; belief that a venture is necessarily loss-making is another.

2577 Mr Boyd said that the assumptions incorporated into the models were aggressive, but not unreasonable. In particular, he thought that the accelerated rate of penetration assumed in the final model was achievable because the total number of subscribers did not increase from the earlier model. The only change was to assume that the subscriber growth would occur over a shorter period.

2578 Mr Philip's position was not entirely consistent throughout his evidence. In substance, he maintained that he believed, on the basis of conversations with Mr Macourt, that the assumptions built into the final model were not unreasonable. He added that he had not paid much attention to the assumptions himself. I would not be prepared to accept Mr Philip's evidence on these matters if it stood uncorroborated. The circumstances, however, lend support to his claim.

2579 Clearly enough, Mr Philip was galvanised into action by Mr Frykberg's advice that a

bid of $30 million per annum would be needed to secure the AFL pay television rights, having regard to the likely competition. His response was to instruct Mr Boyd to prepare a $30 million model which showed a positive NPV as the outcome. The other findings I have made lend support to Mr Philip's evidence that he was unsure as to whether the acquisition of the rights would prove to be cashflow positive; that he did not think that the acquisition would necessarily be loss-producing; and that he considered that the amount being offered by Foxtel, through the Foxtel Put, was not appreciably above a reasonable price in a competitive auction. Accordingly, despite Mr Philip being an unreliable witness – and indeed a witness capable of dishonesty in his dealings – I am not satisfied that he saw the bid by Foxtel as necessarily loss-making for it. Nor am I satisfied that his objective in constructing the bid was to '*overbid*' in order to destroy C7.

15.7 Assessment

2580 In assessing News' purpose in securing the agreement of other parties to the Master Agreement Provision (and the other provisions relied on by Seven), the relevant decision-makers were Mr Macourt and Mr Philip. Of the two, Mr Macourt was the more senior decision-maker, but his role was only a little more important than that of Mr Philip. Mr Philip, among other positions held by him, was a director of Sky Cable and Fox Sports. His contract of employment suggested that he reported directly to News' CEO (Mr Lachlan Murdoch and, from October 2000, Mr Hartigan). However, during the relevant periods, Mr Philip in fact reported to Mr Macourt on a regular basis. Nonetheless, Mr Philip's role was not limited to providing legal advice. As he said in evidence, he was deeply involved in executing commercial strategies devised by News in the field of sports rights acquisition. Furthermore, despite his reticence on the subject, his role included making judgments on commercial issues.

2581 In his oral reply submissions on behalf of Seven, Mr Sumption invited me to find that Mr Philip had the full authority of News to bid and make the relevant commercial judgments on its behalf. Mr Sumption accepted that Mr Macourt was senior to Mr Philip and could have overruled him. Nonetheless, he submitted that Mr Macourt chose to:

> *'delegate everything to Mr Philip, subject to being consulted and kept informed, and did not interfere with what Mr Philip was doing'.*

2582 Mr Philip took over the role of negotiating with the AFL in August 2000, after he

informed Mr Macourt that he had lost confidence in Mr Blomfield's ability to successfully negotiate an agreement. However, he continued to consult with Mr Macourt (whose office was next-door to his) on a regular basis. It is true that, as Mr Macourt accepted, the organisation of the put options and the acquisition of the AFL broadcasting rights by News was planned and executed by Mr Philip, in conjunction with Mr Frykberg. But Mr Macourt was still the senior decision-maker and continued to participate in the decision-making process, including the decisions made at the teleconference of 13 December 2000. There is no reason to doubt Mr Philip's evidence that he not only consulted frequently with Mr Macourt on commercial issues, but deferred to Mr Macourt's experience and authority when there were differences of view. There was no formal delegation of authority to Mr Philip and no informal abdication by Mr Macourt of his responsibilities as the senior executive (subject to the role of Mr Lachlan Murdoch).

2583 I should add that Mr Blomfield was engaged by News and appointed by News to be CEO of Foxtel Management. Mr Blomfield acted on instructions and did not determine whether News or its associated entities would become parties to the Master Agreement Provision. Foxtel Management is not alleged to have been a party to the Master Agreement.

2584 My overall assessment of a very large amount of material is that News, through Mr Macourt and Mr Philip, thought that there were good commercial reasons for Foxtel to acquire the AFL pay television rights. A judgment was made that, in order to have a good chance of succeeding in a competitive auction for the AFL pay television rights, a bid of $30 million per annum would be required. The decision to support a bid at this price did not rest simply or even primarily on the results of modelling, but took account of other considerations, such as the '*strategic*' advantages of controlling the presentation of the AFL and avoiding the perceived problems of dealing with Seven as a free-to-air operator in charge of the rights. I do not regard the strategic advantages as having included the destruction of C7 as a specific objective, although both Mr Macourt and Mr Philip would have regarded that consequence with equanimity, if not enthusiasm, if it came about.

2585 The models based on a rights fee of $30 million per annum were constructed for a variety of purposes. One was to persuade Telstra of the merits of the acquisition by presenting a positive NPV as the likely outcome of a successful bid. Another was to expose the assumptions that would have to be made good in order to produce a positive cashflow. A

third was to provide a measure of comfort among the Foxtel partners for the bid. All persons involved in the exercise appreciated that the assumptions were both aggressive and optimistic. The consensus was that the targets were achievable, but that there was a significant risk that they would not be realised within the time-frame spanning the period for which the rights were to be granted. The Foxtel Put was by no means a commercially safe bet.

2586 As events turned out, the scepticism amply on display within Telstra proved to be well justified. In my view, that is not inconsistent with the News and Foxtel executives holding the more optimistic views I have identified. As Dr Switkowski pointed out, there were some '*Cold War warriors*' within Telstra who displayed a degree of '*emotions and ferocity*' in their dealings that Dr Switkowski thought '*should have been left behind*'. While some of their predictions turned out to be sound, their assessment was not the only reasonable commercial view that could have been taken.

2587 It follows that I do not think that the entry into the Foxtel Put involved '*subjective overbidding*', as Seven submits. While the commercial judgment supporting a bid at $30 million per annum for the AFL pay television rights was flawed, I do not think that the bid was made in the knowledge by the decision-makers that it was certain or even very likely to be loss-making over the term of the rights agreement. There was clearly a significant commercial risk, as the decision-makers perceived, but News and Foxtel, like Mr Stokes, were prepared to run the risk.

15.8 Inferior Option?

2588 The conclusions I have reached make it difficult for Seven to establish that the acquisition of the AFL pay television rights by Foxtel was both an inferior option and known to be an inferior option, to the alternative of Foxtel taking the C7 channels including coverage of the AFL. As Seven acknowledges, it is:

> *'somewhat difficult to undertake a comparison between the direct acquisition of AFL rights and the carriage of C7'.*

It is also difficult to know what comparison Foxtel, through Foxtel Management, could have made in December 2000. Everything would have depended upon which AFL matches C7 could have offered and the terms upon which any offer might have been made. That, in turn,

would have depended, in part, on the price C7 paid for the rights.

2589 Seven approaches this difficulty by relying on the evidence of Mr Williams, who was CEO of Foxtel Management at the time he gave evidence. Mr Williams was asked to compare what Seven described as '*the proposed pay TV schedule included in Seven's offer to the AFL of 14 December 2000*' with Foxtel's entitlement under its arrangement with News. It was put to Mr Williams that the schedule provided three nationwide slots for pay television in each week, plus additional live games in other cities. On this basis, Mr Williams agreed that the AFL coverage would be a '*significant improvement*' over that available to Foxtel under the News-Foxtel Licence.

2590 As PBL points out, the schedule put to Mr Williams was never put to Foxtel. It was therefore not feasible for Foxtel, prior to the teleconference of 13 December 2000, to make the comparison Mr Williams was asked to make in the witness box. A more substantial problem for Seven is that the presentation it made to the AFL did not lock it into a commitment to a particular pay television schedule. Seven told the AFL that it would offer '*live and exclusive coverage of **up to** three matches, depending on scheduling of matches*' on pay television (emphasis added).

2591 In his cross-examination, Mr Wise conceded that this language was chosen quite deliberately because Seven did not wish to guarantee three matches per week for pay television. He accepted that Seven wished to have the flexibility to decide how many games would be broadcast on pay television. Although Mr Wise maintained that the presentation was intended to define the pay television rights in a '*conclusive way*', clearly it did not. The comparison Mr Williams was asked to make was not helpful in comparing Foxtel's entitlement under the Foxtel Put and any alternative programming that might have been provided through C7's channels.

2592 No doubt it is true, as Mr Williams accepted, that direct negotiations between Foxtel and Seven might well have led to a precise definition of the pay television rights, just as ultimately occurred in the agreement between Fox Sports and Foxtel. That proposition does not mean that Foxtel had a ready means, while the bidding process was under way, of comparing the position, should its bid succeed, with its position should it acquire AFL content by taking C7's channels.

2593 It is also significant that the last proposal that Foxtel had received from C7 was its '*final offer*' of 17 November 1999. The fee structure proposed in C7's offer was very much higher than the earlier proposals made by C7 to Foxtel, and in effect, required Foxtel to take C7 on basic. Mr Stokes acknowledged that, if Foxtel had accepted the offer, it would have cost Foxtel many multiples of the price which had been the subject of earlier negotiations between Seven and Foxtel. No doubt these considerations have played some part in Seven's forensic decision not to rely on Foxtel's rejection of the offer as a contravention of s 46 of the *TP Act.*

2594 For present purposes, the significance of C7's offer of 17 November 1999 is in relation to any comparison Foxtel could have undertaken in December 2000 between the cost of acquiring the AFL pay television rights from the AFL (through News) and the cost of acquiring AFL content through C7. The November 1999 offer had been C7's most recent proposal, subject only to Mr Wood's somewhat disingenuous letter of 6 December 1999 in response to Foxtel's rejection of the proposal. Any comparison between C7's November 1999 offer and the cost of directly acquiring the AFL pay television rights for 2002 to 2006 would have been very difficult. As News' submissions suggest, the comparison would have involved an assessment of many imponderables. Nonetheless, there is no basis for concluding that the comparison would have demonstrated that the cost of direct acquisition would have been greater than the cost of taking C7 on the terms C7 put forward in November 1999. On the contrary, the likelihood is that any comparison would have been distinctly adverse to C7.

15.9 Direct Acquisition of the AFL Pay Television Rights

15.9.1 Was the Acquisition Inexplicable?

2595 A further aspect of Seven's factual case on purpose is that Foxtel declined to carry C7 in 1998 and 1999 essentially for spurious reasons and that the true reason, or at least a substantial reason, was that News simply did not want an alternative to Fox Sports to be available on the Foxtel platform. This is said to support the contention that News and Foxtel (with the support of PBL) sought to acquire the AFL pay television rights directly, rather than from C7, not simply because it was in the interests of Foxtel to obtain attractive sporting rights, but substantially because the acquisition was part of the plan to kill C7. According to Seven, the decision to acquire the rights was '*inexplicable except as conduct designed to*

hinder C7 from competing with Fox Sports'. The direct acquisition of the rights '*was, and would have been perceived to be, an inferior option*'.

2596 To some extent, I have already addressed this contention. I have found that the reason Mr Macourt refused to contemplate taking C7 on Foxtel was his view that the Fox Sports pricing dispute had to be resolved first. (I shall return to Foxtel's refusal to take C7's channels in Chapter 16.) I have also found that Foxtel did not engage in '*subjective overbidding*' for the AFL pay television rights and that News and Foxtel did not know, in December 2000, that the direct acquisition of the AFL pay television rights was '*an inferior option*' to taking C7. Nonetheless, I shall consider, relatively briefly, whether the decision-makers at News and Foxtel considered that they had legitimate grounds for seeking to acquire the AFL pay television rights directly.

2597 It is important to appreciate, as I have previously pointed out, that News was interested in acquiring the AFL pay television rights as early as 1997, when the Docklands Stadium Consortium Agreement was signed. It is also important to bear in mind that the responsible executives at News and Foxtel considered, at all times, that the acquisition of AFL content was critical to Foxtel increasing its penetration rates in the southern States. The AFL was the last sporting link for Foxtel and thus the rights, in one form or another, were commercially important to it. Indeed this much is common ground, since the significance of AFL content to Foxtel forms an essential plank in Seven's case under s 46 of the *TP Act.* It follows that this is not a case where a large and well-resourced corporation acquires an asset that is of marginal or purely speculative value to its operations and the true economic worth of the asset lies only in the harm the acquisition will occasion a competitor.

2598 The planning within Foxtel to acquire the AFL pay television rights began in February 1999, with Mr Mockridge's draft outline. The outline noted that Seven, the current holder of the rights, had a vested interest in maximising free-to-air coverage and giving as little as possible to pay television. This analysis led to the Foxtel Management board authorising Mr Mockridge, on 23 March 1999, to lead efforts to obtain the AFL pay television rights on a non-exclusive basis. By this time Mr Mockridge had suggested to Mr Lachlan Murdoch that Foxtel should consider taking AFL content from C7. However, Mr Mockridge made it clear that an arrangement with C7 would not be to the exclusion of dealing directly with the AFL for the acquisition of the rights. This approach was confirmed

in a note he distributed at a meeting on 8 April 1999, which envisaged that Foxtel could take the AFL pay television rights '*short term from C7 and long term directly*'.

2599 The '*AFL Strategy*' paper distributed to Foxtel Management board members in late June 1999 is an important document. The paper identified the AFL as the '*one remaining gap*' in Foxtel's programming and explained why direct acquisition of the AFL pay television rights was important to Foxtel. The reasons included:

> a concern that, if Seven remained the '*gate-keeper*' for the AFL pay television rights, AFL content would not become a true subscription driver for Foxtel; and
>
> a view that C7's quality was weak, in terms of both AFL and non-AFL content.

The paper described and compared C7's proposal to sell non-exclusive rights to Foxtel, with the possible structure of Foxtel's arrangement to acquire the AFL pay television rights through News.

15.9.2 A Gate-keeper Role

2600 Seven seems to suggest that the concerns expressed in the AFL Strategy paper and subsequently about Seven's gate-keeping role were not genuine. The fact is that the concerns about Seven's role as a gate-keeper were repeatedly expressed in circumstances which suggest that they were indeed genuinely held. For example, Mr Mockridge's memorandum of 29 March 1999, to Foxtel staff working on the AFL bid, suggested drafting a submission that emphasised that the:

> *'AFL should entrust its Pay-TV product to a proper Pay-TV operator and not permit a free operator on the defensive to be the gatekeeper'.*

It was this idea that found its way into the June 1999 AFL Strategy paper.

2601 Mr Mockridge's paper for the Foxtel Management board meeting of 26 October 1999 expressed the strong view that if Seven was left as the '*gate-keeper*' on AFL pay television rights:

> *'it is unlikely that the network will ever co-operate by releasing sufficient*

exclusive live pay television games to permit AFL to become a true subscription driver for pay television'.

2602 The point made by Mr Mockridge was not novel. Mr Harold Anderson, Seven's Director of Sports at the relevant time, agreed in his evidence that his experience in New Zealand was that a pay television operator should not leave a free-to-air operator as the gate-keeper to determine what rights the pay television operator should have. That this observation had force in the present context was demonstrated by evidence of the difficulties C7 experienced on the occasions when Seven's executives decided that its free-to-air television outlets needed to be given priority as to sporting content over the interests of C7.

2603 A very considerable amount of cross-examination was devoted to establishing that concerns about Seven's gate-keeping role might have been met by entering into agreements precisely defining Foxtel's entitlements, just as occurred in relation to the Foxtel Put. No doubt this has force as a theoretical proposition, as some witnesses, including Mr Williams, acknowledged. But Foxtel operated in a commercial world of rivalry, lack of trust (particularly in relation to Seven's real or exaggerated litigious propensities) and uncertainty as to what terms might be negotiated. The potential difficulties were nicely illustrated by the terms of Seven's final presentation to the AFL (in the context of a bid for the AFL broadcasting rights), which were carefully structured to preserve flexibility for Seven's free-to-air AFL programming. They are also illustrated by C7's retreat, in its letter of 9 June 1999, from the commitment it had given in May 1999 to ensuring that two exclusively live AFL matches would be shown on C7 each week.

2604 Mr Macourt said in evidence that he had been influenced by the fact that Seven could have allowed more pay television games on SportsVision but it had not, indicating a preference for protecting its free-to-air operations. Mr Macourt was later asked about negotiating with a company holding both free-to-air and pay television rights:

'[MR SUMPTION:] What I was suggesting to you was that if you have a situation in which all the free-to-air rights and all the Pay TV rights are held by companies in the same group and the company holding Pay TV rights wishes to negotiate the carriage of his channel on a platform like Foxtel, it is easier for Foxtel to negotiate terms as to how many games will be released for exclusive Pay TV transmission because he is negotiating with somebody who is part of the same group as the free-to-air broadcaster in a position to release the games. Do you follow my point? --- I think so. I'm not sure I agree with it.

...

An example where ... the point which you make doesn't seem to hold true is we attempted to negotiate the Commonwealth Games rights from Channel 9 shortly after SportsVision went into receivership, and we were unable to negotiate an agreement that was satisfactory both financially and quality wise. I'm sure you can find an example that proves me wrong, but my perception is, no, I don't agree.

[HIS HONOUR:] But that was a case where FoxSports [sic] were negotiating with an entity that held both free-to-air and Pay TV rights? --- That's right.

...

[MR SUMPTION:] Now, if you are being offered by the holder of some Pay TV rights a channel with a particular number of games per week and you want to say, "We don't think that's enough. We want you to show more games per week live", it's easier, isn't it, to negotiate that if you are dealing with somebody who is an associated company of the holder of the free-to-air rights than it is if you are not; that's logic, isn't it? --- I can see the logic. It depends on what the alternative is. If you are negotiating with the owner of the rights, then the owner of the rights can dictate to the free-to-air broadcaster what rights and how they are prepared to sell those rights. Our experience is that it has been easier to do that than it has been to negotiate with free-to-air broadcasters on those rights'.

I accept that this evidence reflects Mr Macourt's understanding of the position in 1999 and 2000.

2605 A further aspect of the gate-keeper role was the concern expressed within Foxtel at the threat posed by the possibility that legislative changes would open the way to free-to-air networks being permitted to engage in multi-channelling. Mr Mockridge's AFL Strategy paper for Foxtel Management's 8 July 1999 board meeting made the point that if Seven was left with monopoly control of AFL content and if multi-channelling was permitted, Seven would be in an excellent position to attack Foxtel's subscriber base. In fact, at about this time Seven was making submissions to the Commonwealth Government arguing in favour of multi-channelling for free-to-air operators.

2606 The point, it seems to me, is not whether there was an alternative commercial approach available to Foxtel to satisfy its desire to acquire AFL content. The question is whether its decision to attempt to acquire the AFL pay television rights directly from the

AFL, rather than acquire AFL content through C7, indicated that News and Foxtel had a substantial purpose of killing C7 in order to achieve market dominance, rather than a legitimate commercial objective intended to enhance Foxtel's product in the marketplace. The fact that genuine concerns were held within Foxtel about Seven's gate-keeper role suggests a negative answer to the question.

15.9.3 Quality of C7

2607 Similarly, I think the evidence indicates that there was genuine concern within Foxtel as to the quality of C7's channels. The parties in effect invited me to undertake a kind of royal commission into the comparative attributes and deficiencies of Fox Sports and C7. I said during the hearing that I failed to see the point of this exercise. My scepticism did not deter the parties from referring me to a vast amount of material relating to the merits or demerits of each service, the bulk of which I regard as largely irrelevant to the issues in this case or simply unhelpful. However, the critical question for present purposes is whether News or Foxtel considered that quality issues with C7 added weight to the arguments for seeking the AFL pay television rights directly from the AFL.

2608 I do not doubt that some of the references to the quality of C7 in the correspondence drafted within News or Foxtel were self-serving or perhaps intended to score points. But the contemporaneous documentation suggests that the quality of C7 was a genuine concern to News and Foxtel. As I have noted, the issue was explicitly raised in the AFL Strategy paper for the Foxtel Management board meeting of 8 July 1999. A little earlier, on 24 May 1999, Mr Freudenstein included in the term sheet he sent to Mr Wood detailed provisions as to content, scheduling and production, designed to ensure that Foxtel was '*happy with the quality and content of the channel*'. Mr Macourt told Mr Gammell at their meeting of 4 December 2000 that the quality of C7 was flawed and that the business had been run for the benefit of Seven, not pay television. The teleconference of 13 December 2000 included a number of comments by Mr Philip and Mr Moriarty to the effect that C7's quality was poor.

2609 The material relating to the objective '*quality*' of C7 is, to a limited extent, relevant to this issue. Optus had raised issues of the quality of C7 with Seven on a number of occasions. It is a reasonable inference that these complaints were known, at least in outline, in the industry. The fact that subscribers to C7 made a significant number of complaints that its AFL games were sometimes shown concurrently on free-to-air television was also likely to

be widely known in the industry. Similarly, the complaints within Seven itself that C7 games usually received four-camera coverage, compared with the standard nine-camera coverage for free-to-air games, would have struck a chord with informed viewers and people within the industry.

15.10 Conclusion

2610 In my view, Seven has not established that the Foxtel Partnership's bid for the AFL pay television rights lacked a plausible commercial rationale. In particular, I do not accept that:

> News developed a strategy in 1998 of harming or destroying C7 because C7 posed a threat to News' goal of making Fox Sports the dominant supplier of Australian premium sports channels;
>
> the comments made by Mr Blomfield, when assessed in the context of the totality of evidence, demonstrate that News or the Foxtel Partnership pursued the AFL pay television rights with the objective of destroying C7;
>
> Foxtel '*overbid*' for the AFL pay television rights, in the sense that the bid (through News) was thought by the relevant decision-makers of Foxtel, News and PBL to be substantially more than the rights were worth;
>
> Foxtel's acquisition of the AFL pay television rights was known to be inferior to the alternative of taking the rights from C7 (if Seven had acquired the AFL pay television rights itself); or
>
> the direct acquisition of the AFL pay television rights by Foxtel (through News) lacked a plausible commercial rationale.

2611 In these circumstances, it seems to me very difficult to attribute to News, Foxtel or PBL the objective of destroying C7. I accept that both Mr Macourt and Mr Philip appreciated that C7 might well suffer serious and perhaps even irremediable harm if Foxtel's bid succeeded. As I have found, I do not think that either would have been perturbed by this possible consequence.

2612 I do not think, however, that the evidence warrants a conclusion that News or Foxtel actually sought the objective of destroying C7 as a means of securing market dominance for

Fox Sports (or Foxtel), as distinct from the objective of acquiring rights thought to be of considerable value to Foxtel's business. The killing of C7 was neither the primary purpose nor a substantial purpose of News' and Foxtel's bid for the AFL pay television rights. Thus the purpose of the Master Agreement Provision, so far as News was concerned, was not the substantial lessening of competition in the sense advanced by Seven. The same conclusion applies to the other provisions relied on by Seven for its case under s 45(2) of the *TP Act*.

2613 I do not understand Seven to submit that, if I find that News did not have the purpose of substantially lessening competition in entering into the Master Agreement or the other contracts identified by Seven, such a purpose should be attributed to PBL. In any event, I see no basis for doing so.

2614 It follows that, independently of the reasoning in Chapter 14, Seven has not made out a contravention of s 45(2) of the *TP Act* by reference to the purpose of News and PBL, either separately or as partners (through Sky Cable) in the Foxtel Partnership. Nor is any such case made out against Sky Cable or Telstra Media.

16. SEVEN'S CASE BASED ON SECTION 46 OF *THE TRADE PRACTICES ACT*

2615 In this Chapter I address Seven's case that Foxtel (Sky Cable and Telstra Media in partnership) took advantage of its substantial power in the retail pay television market for a purpose proscribed by s 46(1) of the *TP Act*.

16.1 Legislation

2616 Subsections 46(1) and (1A) of the *TP Act* provide as follows:

> *'(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:*
>
> *(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
>
> *(b) preventing the entry of a person into that or any other market; or*
>
> *(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*
>
> *(1A) For the purposes of subsection (1):*
>
> *(a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and*
>
> *(b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons'.*

2617 Subsections 46(2) and (3) provide guidance as to when a corporation has a substantial degree of power in a market. Subsections 46(4) and (7) provide as follows:

> *'(4) In this section:*
>
> *(a) a reference to power is a reference to market power;*
>
> *(b) a reference to a market is a reference to a market for goods or services; and*
>
> *(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as*

> *a supplier or as an acquirer of goods or services in that market.*
>
> ...
>
> *(7) Without in any way limiting the manner in which the purpose of a person may be established for the purposes of any other provision of this Act, a corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances'.*

2618 Sections 4E (which defines '*market*') and 4F (which provides an inclusive definition of '*purpose*') have been reproduced in Chapter 13.

16.2 Seven's Pleaded Case

16.2.1 Case against Foxtel

2619 Seven does not plead a case under s 46(1) of the *TP Act* against Foxtel Management. The case is pleaded against '*Foxtel*', defined to mean Sky Cable and Telstra Media which '*together carry on business in partnership trading under the business name "Foxtel"*' (par 8). In this Chapter, I use '*Foxtel*' in the same sense as the Statement of Claim. The fact that the case is pleaded against Foxtel (that is, Sky Cable and Telstra Media) is a matter of some significance.

2620 According to the Statement of Claim, Foxtel has, and has had since November 1998, a substantial degree of power in the retail pay television market (par 142). During the period from November 1998 to April 2000, C7 negotiated with Foxtel for the supply of the C7 channels for incorporation into the '*Foxtel Service*' (par 63). On 30 November 1999, Foxtel refused C7's offer to supply channels, stating that this would '*interfere with our negotiations for the AFL rights*' (par 64). Foxtel maintained this refusal thereafter (par 65).

2621 From November 1998 until December 2001, the C7 channels contained '*attractive programming*', including AFL matches, that was not otherwise available to Foxtel subscribers (par 400). The terms on which C7 offered to supply its channels to Foxtel included a term that Foxtel could terminate the supply agreement if C7 ceased to hold the

AFL pay television rights (par 401). Nonetheless, Foxtel did not accept four separate '*offers*' made in April, May, June and November 1999 by or on behalf of C7 for the carriage of its channels on the Foxtel Service (par 401A).

2622 Further, from 9 June 1999 (the date of the third offer) until December 2000, Foxtel determined not to negotiate with C7 for the carriage of its channels on the Foxtel Service (par 401B). This was so notwithstanding that, at least since November 1998, Foxtel viewed the AFL pay television rights as the one remaining gap in its programming which, if filled, would permit subscriber numbers in the southern States to be brought into line with the northern States (par 198(2)(p)).

2623 By refusing to take the C7 channels, Foxtel deprived itself of programming that would have attracted subscribers, produced additional revenue and assisted it to compete with Optus (par 402). Furthermore, when acquiring the AFL pay television rights, Foxtel knew that it had agreed to pay an amount likely to result in a loss to it over the term of the agreement (pars 403-404).

2624 Foxtel was aware that the AFL would be influenced in granting the AFL pay television rights by whether the successful licensee would be able to broadcast AFL games on the Foxtel Service (par 405). Foxtel's representatives, or representatives of News, PBL and Telstra, stated to both the AFL and the NRL Partnership that C7 would not be able to broadcast its channels on the Foxtel Service (par 406).

2625 Foxtel took advantage of its substantial power in the retail pay television market by:

refusing to accept the offers made by C7;

refusing to accept the C7 channels and incorporate them into the Foxtel Service;

agreeing to pay the consideration contained in the Foxtel Put for the AFL pay television rights; and

stating to the AFL and the NRL Partnership that C7 would not be able to broadcast its channels on the Foxtel Service (pars 407-408).

2626 Foxtel, by refusing to accept C7's channels and agreeing to pay the consideration

specified in the Foxtel Put, took advantage of its market power. Had Foxtel operated in a competitive market, it:

> would have negotiated in and after June 1999 with a view to taking the C7 channels, until the end of 2001;
>
> would not have entered a transaction likely to yield a loss over the period 2002 to 2006;
>
> would not have been able to pay $30 million per annum (plus CPI increases and GST) for the AFL pay television rights; and
>
> would not have been able to use its refusal to allow the C7 channels on the Foxtel Service as an inducement to the AFL to prefer News' offer for the AFL pay television rights (pars 407-408).

2627 In addition to using its refusal to take the C7 channels as an inducement to the AFL, Foxtel's market power facilitated its refusal to take the C7 channels (par 408). Moreover, had Foxtel faced significant competition from other pay television providers, it would not have been able to refuse to negotiate with C7 or to enter transactions which were likely to result in Foxtel sustaining a loss (par 408).

2628 By reason of these matters, Foxtel took advantage of its substantial power in the retail television market for the purpose of preventing C7 from entering the retail pay television market or from engaging in competitive conduct in:

> the retail pay television market;
>
> the wholesale sports channel market; and
>
> the wholesale channel market (pars 410, 414).

Foxtel also took advantage of its substantial power for the purpose of deterring or preventing Optus from engaging in competitive conduct in the retail pay television market (par 412). Accordingly, Foxtel engaged in conduct in contravention of s 46 of the *TP Act* (par 415).

2629 The Statement of Claim also pleads that Foxtel took advantage of its substantial market power in the retail television market, but that claim is not pressed.

16.2.2 Ancillary Claims against News, Telstra and PBL

2630 Seven pleads that each of News, Telstra and PBL:

> *'(a) was involved in, and supported, the decisions by Foxtel to refuse to take the C7 channels on its pay television service;*
>
> *(b) were aware of the financial assessments of Foxtel's management as to the viability of acquiring the AFL pay rights;*
>
> *(c) were aware of Foxtel's purpose in refusing to take the C7 channels on its pay television service and for agreeing to pay the consideration contained in the Foxtel Put for AFL pay rights; and*
>
> *(d) participated in making statements to the AFL and NRL, and were aware of Foxtel making statements to the AFL and NRL, that C7 would not be able to broadcast its channels on the Foxtel Service'* (par 561).

By reason of these matters, each of News, Telstra and PBL was knowingly concerned in the pleaded contraventions of s 46 of the *TP Act* (par 562).

2631 Sky Cable engaged in the conduct pleaded against it under the direction of News Pay TV and PBL Pay TV, acting through their agent Pay TV Management Pty Ltd (par 564). Accordingly, News Pay TV and PBL Pay TV were knowingly concerned in Foxtel's contraventions of the *TP Act* (par 565).

16.3 Construction of s 46(1)

16.3.1 Common Ground

2632 For the most part, the parties were agreed as to the principles that govern a claim that a corporation has contravened s 46(1) of the *TP Act* by taking advantage of its substantial market power for a proscribed purpose. The principles stated in this section appear to be common ground.

2633 For a contravention of s 46(1) of the *TP Act* to be established, three elements must be satisfied:

> the corporation must have a substantial degree of power in a market;
>
> the corporation must take advantage of that power; and
>
> the corporation must do so for one or more of the proscribed purposes listed in

s 46(1)(a), (b) and (c).

2634 In the present case, Seven argues that the third requirement is satisfied because Foxtel took advantage of its substantial market power for the purpose of hindering C7 from engaging in competitive conduct in the wholesale sports channel market or entering or engaging in competitive conduct in the retail pay television market. Alternatively, Foxtel took advantage of its substantial market power for the purpose of deterring or preventing Optus from engaging in competitive conduct in the retail pay television market.

2635 There is a close relationship between questions of market definition, degree of power in the market and whether the alleged contravenor has taken advantage of its market power: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339, at 396 [278], per Heerey and Sackville JJ. In *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, Mason CJ and Wilson J said (at 187-188) that:

> *'The analysis of a s 46 claim necessarily begins with a description of the market in which the defendant is thought to have a substantial degree of power. In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated ... After identifying the appropriate product level, it is necessary to describe accurately the parameters of the market in which the defendant's product competes: too narrow a description of the market will create the appearance of more market power than in fact exists; too broad a description will create the appearance of less market power than there is'.*

2636 Nonetheless, the fact that a corporation has substantial power in a market does not mean that its conduct necessarily involves the use of that power. The point was made by Gleeson CJ and Callinan J in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, at 422 [132]:

> *'The questions whether [Boral] had a substantial degree of power in a market between April 1994 and October 1996, and whether its behaviour, and in particular its pricing behaviour, during that period involved taking advantage of, that is, using, that power, are closely related. But, as the decision in [*Melway Publishing Pty Ltd v Robert Hicks Pty Ltd *(2001) 205 CLR 1] shows, they are two questions, not one. The appellant in that case conceded that it had a substantial degree of power, but it was held that its conduct did not involve taking advantage of that power. In the present case, both*

questions are in issue'.

2637 A contravention of s 46 therefore involves not merely the co-existence of substantial market power, conduct and a proscribed purpose, but:

> *'[a] connection such that the firm whose conduct is in question can be said to be taking advantage of the power'.*

Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1, at 21 [44], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

2638 In *Melway Publishing v Hicks* 205 CLR, at 21 [41], the joint judgment approved comments made by Dawson J in *Queensland Wire* 167 CLR, at 200, concerning the concept of market power:

> *'The term "market power" is ordinarily taken to be a reference to the power to raise price by restricting output in a sustainable manner ... But market power has aspects other than influence upon the market price. It may be manifested by practices directed at excluding competition such as exclusive dealing, tying arrangements, predatory pricing or refusal to deal ... The ability to engage persistently in these practices may be as indicative of market power as the ability to influence prices'.*

2639 Their Honours also quoted with approval (205 CLR, at 21 [42]) a passage from C Kaysen and D Turner, *Antitrust Policy* (1959), at 75:

> *'A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions'.*

They continued (205 CLR, at 21 [43]):

> *'The notion of market power as the capacity to act in a manner unconstrained by the conduct of competitors is reflected in the terms of s 46(3). Such capacity may be absolute or relative. Market power may or may not be total; what is required for the purposes of s 46 is that it be substantial'.*

2640 The expression '*take advantage of*' in s 46(1) does not require proof of any hostile intent. The question is simply whether a corporation with a substantial degree of market power has used that power for a proscribed purpose, thereby undermining competition: *Queensland Wire* 167 CLR, at 191, per Mason CJ and Wilson J. In other words, the statutory

expression does not mean anything materially different from '*use*': *Melway Publishing v Hicks* 205 CLR, at 17 [26], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

2641 On the other hand, the words '*take advantage of*' do not extend to any kind of connection between market power and a purpose proscribed by s 46(1). As was said by Gummow, Hayne and Heydon JJ (with whom Gleeson CJ and Callinan J agreed on this point) in *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, at 76 [51]:

> *'Those words do not encompass conduct which has the purpose of protecting market power, but has no other connection with that market power. Section 46(1) distinguishes between "taking advantage" and "purpose". The conduct of "taking advantage of" a thing is not identical with the conduct of protecting that thing. To reason that Rural Press and Bridge took advantage of market power because they would have been unlikely to have engaged in the conduct without the "commercial rationale" – the purpose – of protecting their market power is to confound purpose and taking advantage. If a firm with market power has a purpose of protecting it, and a choice of methods by which to do so, one of which involves power distinct from the market power and one of which does not, choice of the method distinct from the market power will prevent a contravention of s 46(1) from occurring even if choice of the other method will entail it'.*

It follows that the fact that a corporation which has a substantial degree of market power acts with the purpose of eliminating or damaging a competitor does not necessarily mean that the corporation has taken advantage of its market power: *Boral Besser v ACCC* 215 CLR, at 424 [141], per Gleeson CJ and Callinan J.

2642 In determining whether a corporation has taken advantage of its market power, it is enough that the corporation does something that is '*materially facilitated*' by the existence of the power, even though the conduct may not have been absolutely impossible without the power. Thus s 46 is contravened if a corporation's market power makes it easier for the corporation to act for the proscribed purpose than otherwise would be the case: *Melway Publishing v Hicks* 205 CLR, at 23 [51], per Gleeson CJ, Gummow, Hayne and Callinan JJ.

2643 In *Melway Publishing v Hicks*, the joint judgment (205 CLR, at 23 [50]) interpreted the decision in *Queensland Wire* as resting on a finding that if there had been a competitive market for Y-bar, BHP would not have been able (as it did) to refuse to supply Y-bar to QWI (which wished to use the Y-bar to make star picket fences in competition with a BHP

subsidiary). The joint judgment, while dubious about the particular factual finding in *Queensland Wire*, accepted that that case stood for the proposition that:

> *'the way to test whether BHP was taking advantage of its power was to ask how it would have been likely to behave in a competitive market ... The important thing was that, once it was concluded that in a competitive market BHP would have been constrained to supply QWI, and that BHP's ability to refuse to supply resulted from the absence of such constraint, it followed that, in refusing to supply (for an anti-competitive purpose), BHP was taking advantage of its market power'.*

2644 In applying this counter-factual test, the Court does not assume an economist's theoretical model of perfect competition. Section 46 only requires the Court to assume, for the purposes of the comparison, a sufficient level of competition to deny a substantial degree of power to any competitor in the market: *Melway Publishing v Hicks* 205 CLR, at 23 [52]. Even so, this necessarily requires the Court to make assumptions that are contrary to the present fact of uncompetitive conditions: *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90, at 144 [147], per McHugh ACJ, Gummow, Callinan and Heydon JJ.

16.3.2 Application of s 46 to a Partnership

2645 Section 46 of the *TP Act* applies to the conduct of '*a corporation*' as defined in s 4(1). In addition Pt IV of the *TP Act*, including s 46, has the extended operation provided for in s 6(2). Thus, for example, s 46 can apply to the conduct of a natural person if that person's conduct takes place in interstate trade or commerce: s 6(2)(a)(ii), (h).

2646 A partnership is not an entity to which s 46 applies: *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43, at 60-61, per Lockhart and Gummow JJ. The correct approach is that stated by Lockhart J in *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, at 140:

> *'A corporation charged with contravention of s 46 must itself have a substantial degree of market power. It cannot be liable under the section on the basis of a shared position of substantial market power with another unrelated corporation. The only circumstance in which the aggregation of market power may be considered is where a corporation occupies its position of substantial market power acting through or together with its related corporations as defined in ss 46(2) and 4A(5) of the Act.*

In my opinion, it is permissible, however, when considering the market power of a corporation, to have regard not only to its individual power but to additional power which it has through agreements, arrangements or understandings with others. While aggregation of the market power of a number of unrelated corporations is impermissible, it is important to recognise that a corporation can gain a position of substantial market power through its agreements, arrangements or understandings with others; and market power gained through acting in concert with others must add to the corporation's individual market power. Additional market power thus gained must enhance a corporation's individual market power. An individual corporation may have, as one of the weapons in its armoury, gained through agreements, arrangements or understandings, a facility to increase its market power and this must be considered as relevant to the factual matrix involved in determining the extent of that corporation's market power in a market. In this sense jointly held power and control in relation to a market is a matter which must be taken into account when considering the individual market power of a corporation for the purposes of s 46'.

16.3.3 Disputed Issue of Construction

2647 The point at which the submissions diverge is in relation to Seven's contention that the '*materially facilitated*' test is satisfied if the alleged contravenor **would** not have engaged in the same conduct if it lacked substantial market power, assuming it acted in an economically rational manner. The Respondents submit that the better view is that the test is satisfied only if the conduct **could** not have occurred if the corporation, lacking substantial market power, were to act in an economically rational manner. They contend that, on this approach, the question is whether the conduct complained of could not have occurred in a competitive market because, without market power, it would have been commercially impossible for the alleged contravenor to act in that way.

2648 The point was raised in *Rural Press v ACCC*. The issue in an action brought by the ACCC was whether Rural Press, a publisher of regional newspapers, had taken advantage of its market power in region A by threatening to compete with Waikere Printing, another publisher of regional newspapers, in region B. The object of Rural Press was to dissuade Waikere Printing from a competitive foray into region A. Rural Press had no market power in region B.

2649 The Full Court of this Court reasoned as follows (*Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236, at 276 [139]-[140]):

'The test to be applied in determining whether a corporation has taken

> *advantage of its market power is to ask how it would have been likely to behave in a competitive market. This, generally speaking, involves a process of economic analysis having regard to the purpose of s 46, namely to promote competition rather than the private interests of particular persons or corporations ... But the process does not require it to be assumed that the corporation is operating in a perfectly competitive market. The comparison is between what has been done with what it might be thought the corporation would do if the corporation lacked substantial market power ...*
>
> *In* Melway Publishing v Hicks *itself, Melway's refusal to supply its former distributor with its street directories was held to be "a manifestation of [its] distributorship system". In these circumstances, the majority stated (at 26) that:*
>
> > *"... the real question was whether, without its market power, Melway* ***could have maintained*** *its distributorship system, or at least that part of it that gave distributors exclusive rights in relation to specified segments of the retail market."*
>
> *The High Court answered that question in the affirmative, because Melway's segmented distribution system had predated its position of market dominance and there was no reason to believe that it would not be willing and able to continue its system in a competitive market'.* (Emphasis added.)

2650 The Full Court accepted that Rural Press' threat to compete in region B had been made more credible by the fact that it had access to a printing press and to the necessary staff and skills in region A. But that did not involve any use of its market power in region A. A new entrant into the region A market, even if lacking market power, could have made the same credible threat in relation to region B provided it had the requisite facilities and expertise. The Court held that the mere use by a corporation of resources derived from the region A market, where it has market power, to facilitate conduct in the region B market, where it has no such power, does not involve taking advantage of power in the region A market: 118 FCR, at 277 [146].

2651 In the High Court, the ACCC argued that the Full Federal Court had applied the wrong test by asking whether Rural Press '*could*' have engaged in the same conduct in the absence of market power. The joint judgment pointed out that precisely this test had been applied in *Melway Publishing v Hicks*. Their Honours said the test meant what it said. They continued as follows (216 CLR, at 76-77 [53]):

> *'The [ACCC] failed to show that the conduct of Rural Press was materially facilitated by the market power in giving the threats a significance they would*

> *not have had without it. What gave those threats significance was something distinct from market power, namely their material and organisational assets. As the Full Federal Court said, Rural Press were in the same position as if they had been new entrants … to market [A], lacking market power in it but possessing under-utilised facilities and expertise'.*

2652 It seems to me to follow from the reasoning of the High Court in *Rural Press v ACCC* that the question is whether the alleged contravenor, on the counter-factual assumption that it lacked power in the relevant market, **could** have conducted itself in the same way. This is consistent with the High Court's view that:

> a firm with market power does not contravene s 46 simply because it would not have engaged in the alleged contravening conduct if it did not have market power to protect (216 CLR, at 76 [51]);
>
> a firm with market power does not contravene s 46 simply because, if it had lacked market power, it would not have had the motivation to engage in the allegedly contravening conduct (216 CLR, at 75 [49]); and
>
> the conduct of a firm in making threats to a competitor is not materially facilitated by its market power simply because the threats are taken seriously by the competitor (216 CLR, at 76-77 [53]).

The fact that a firm, assuming it lacked market power, **would** not have acted in the manner it actually did (for example, because it would have lacked the motivation or because the absence of market power would have deprived its conduct of any commercial rationale) does not necessarily demonstrate that the firm's conduct has been materially facilitated by its existing market power.

16.4 Seven's Submissions

16.4.1 Overview

2653 Seven relies on Foxtel's failure to accept what Seven describes as '*offers*' made by C7 in 1999. The offers are identified in Seven's Closing Submissions as those made by Mr Wood to Mr Mockridge or Mr Freudenstein on 16 April 1999, 13 May 1999, 9 June 1999 and 17 November 1999. However, Seven does not rely (for very good reasons) on Foxtel's rejection of the 17 November 1999 offer as giving rise to a discrete cause of action.

2654 Seven says that the evidence justifies a finding that by refusing C7's offers and refusing to negotiate with C7 for the carriage of its channels, Foxtel effectively deprived itself of the ability to fill the gap in its sports programming line-up for a period of two and a half years, until the end of the 2001 AFL season. Foxtel thereby deprived itself of the ability to compete more effectively against Optus. Moreover, it denied itself the opportunity of deriving additional profits from the carriage of C7's channels. Seven's primary position is that Foxtel decided not to take C7 under any circumstances during the period from June 1999 to December 2000.

2655 Seven relies on three other matters, individually or together, as showing that Foxtel took advantage of its substantial power in the retail pay television market. The three matters are these:

> Foxtel's refusal, between June 1999 and December 2000, to negotiate with C7, notwithstanding that C7 channels provided attractive programming on terms that would have been profitable for Foxtel;
>
> Foxtel's statements to the AFL and the NRL Partnership that C7 would not be able to broadcast its channels on the Foxtel Service; and
>
> Foxtel's agreement to pay the consideration contained in the Foxtel Put for the AFL pay television rights, in circumstances where Foxtel believed it to be likely that the payment would result in a loss over the term of the agreement.

2656 Seven submits that the conduct it identified was carried out for one or more of the following proscribed purposes:

> preventing C7 from entering into or engaging in competitive conduct in the retail pay television market;
>
> deterring or preventing Optus from engaging in competitive conduct in the retail pay television market; and/or
>
> deterring or preventing C7 from engaging in competitive conduct in the wholesale sports channel market.

Mr Sumption characterised the central purpose of Foxtel's conduct as:

'facilitating the acquisition of the AFL rights in order ... to make Foxtel and

Fox Sports the dominant participants in their respective markets and to marginalise C7'.

2657 Initially, Seven invited me to reject Foxtel's explanations for its refusal to take C7 and for the other conduct of which Seven complains. Seven identified the proffered explanations as:

> the poor quality of the C7 channels;
>
> the unacceptable commercial terms stipulated by C7 for the carriage of its channels; and
>
> the need to resolve the dispute over the long-term supply of Fox Sports to Foxtel before considering taking C7.

2658 However, in his oral closing submissions, Mr Sumption accepted that one reason for Foxtel rejecting C7 was that News and PBL refused to deal with C7 until the dispute with Telstra concerning the supply of Fox Sports to Foxtel was resolved. Mr Sumption qualified this position by submitting that:

> the refusal to take C7 for this reason was for the purpose of ensuring that competition between C7 and Fox Sports did not occur and thus contravened s 46 in any event; and
>
> News and PBL would not have taken C7 even if the Fox Sports pricing issue had been resolved.

2659 Mr Sumption also readily accepted that one of the reasons for Foxtel declining to take C7 was that it did not wish to prejudice the bid for the AFL pay television rights by signalling to the AFL that C7 could secure carriage on the Foxtel platform. He contended, however, that this reason actually assists Seven's case because it is consistent only with Foxtel wishing the AFL to gain the false impression that C7 would never get onto the Foxtel platform, even if C7 succeeded in obtaining the AFL pay television rights.

2660 Seven's submissions in relation to s 46 of the *TP Act* proceed on the basis that Foxtel had a substantial degree of power in the retail pay television market. Seven submits, relying on the decision of the Full Federal Court in *Eastern Express v General Newspapers* 35 FCR, at 60-62, per Lockhart and Gummow JJ, that the conduct of Foxtel should be understood as

the conduct of each of the partners (Sky Cable and Telstra Media), acting through its agent, Foxtel Management.

16.4.2 Refusals to Accept C7's Proposals

16.4.2.1 16 APRIL 1999 LETTER

2661 In its Closing Submissions, Seven characterises C7's letter of 16 April 1999 as an '*offer*'. It contends that the pricing proposed in the offer was '*consistent with an amount that Foxtel's management would have recommended that Foxtel pay*'. Seven invites me to find that Foxtel's modelling showed that the carriage of C7 on the terms offered by it would have been very profitable for Foxtel. Even so, Foxtel rejected the offer.

2662 In Seven's Reply submissions, the letter is no longer characterised as an offer. Seven now says that its case does not depend on the letter being an offer in the strict contractual sense, notwithstanding that the Statement of Claim refers to '*written offers*' and alleges that the offers were not accepted. Rather, the conduct relied upon in Seven's Reply Submissions is the failure of Foxtel '*to accept those terms for incorporation into an agreement between Foxtel and C7*'.

2663 Seven submits that a price comparison with Austar is irrelevant because Foxtel's refusal to accept the terms had nothing to do with price. Foxtel never suggested that the price was too high and, in any event, C7 was offering it more than the agreement with Austar provided (44 AFL matches versus 16 per annum).

16.4.2.2 13 MAY 1999 LETTER

2664 Seven says that the letter of 13 May 1999 merely clarified the terms proposed by C7 in the April 1999 letter. It should therefore be considered together with the earlier letter.

16.4.2.3 9 JUNE 1999 LETTER

2665 Both Seven's Closing Submissions and Reply Submissions refer to the letter of 9 June 1999 as an offer. Seven recognises that the letter actually proposed an increase in the price that Foxtel would have to pay for the supply of C7's channels. Once again, however, Seven submits that the rejection of the offer had nothing to do with price or the terms of the offer. In any event, Foxtel appreciated that the offer, if accepted, would still have proved profitable

for its business.

16.4.3 Refusal to Deal

2666 Seven submits that Foxtel's refusal to accept the two offers and its determination, between June 1999 and December 2000, not to take the C7 channels '*on any terms*' were the product of its desire to harm C7 and to confer competition-related benefits on Fox Sports and on Foxtel itself.

2667 In its Reply Submissions, Seven answers the Respondents' contention that a commercially rational Foxtel, on the counter-factual hypothesis that it lacked market power, could have refused C7's April and June 1999 offers because the price proposed was more than Austar's and for the same content. Seven says that this was not the reason for Foxtel's refusal and that a corporation takes advantage of market power notwithstanding that its conduct could have been (but was not in fact) done for a different reason. Foxtel's conduct was undertaken for the wider purpose of preventing competition between C7 and Fox Sports.

2668 Seven contends that Foxtel clearly regarded the absence of AFL programming as a significant gap in its line-up, and that such programming would have enabled it to compete more effectively against Optus. In refusing C7's offers and in declining to negotiate for the carriage of C7, Foxtel effectively deprived itself of the ability to fill the gap for two and a half years, until the end of the 2001 AFL season. Indeed, Seven maintains that Foxtel's conduct, in breaking off negotiations with C7 in mid-1999 and in persisting with its refusal to deal with C7, lacked any business rationale. Its bidding for the AFL pay television rights against a potential supplier had the inevitable consequence that the cost of rights would be substantially inflated.

2669 Seven submits that in May 1999 Mr Mockridge had at least an open mind as to the benefits of Foxtel acquiring C7. But by the time of the July 1999 board meeting he knew that News would not support Foxtel taking C7 until the long-term arrangements with Fox Sports had been finalised. PBL shared this view. Mr Mockridge's draft board paper for the October 1999 Foxtel board meeting proposed taking C7 as an interim arrangement, but he removed the paragraph in the face of Mr Lachlan Murdoch's refusal to contemplate taking C7 until the Fox Sports issue was resolved.

2670 Because of the disputes between the Foxtel partners and the intractable opposition of News and PBL to Foxtel carrying C7 (as Telstra fully realised at the time), there was no occasion for News or PBL to exercise a formal veto at a board meeting. Accordingly, Seven argues there was no point putting the question to the board.

2671 Seven further argues that even if Foxtel's reason for declining to take C7 was not to kill C7, but to put off the issue until resolution of the Fox Sports question or to secure a negotiating advantage in the bidding for the AFL pay television rights, Foxtel still used its market power for a proscribed purpose.

16.4.4 Statements to the AFL and the NRL Partnership

2672 Seven points out that Sky Cable and News admit on the pleadings that representatives of Foxtel stated to the AFL that Foxtel could not be compelled to carry C7 as part of the Foxtel Service. In any event, Seven submits that a finding should be made that Foxtel communicated to the AFL that it **would not** carry C7 as part of the Foxtel Service (not merely that carriage on the Foxtel Service could not be guaranteed). Seven also seeks a finding that Foxtel was successful in persuading the AFL that C7 would not be carried on Foxtel. The AFL therefore proceeded on the basis that the C7 channels would not be carried on the Foxtel Service and that, if it granted the pay television rights to C7 exclusively, the AFL content would not be available to Foxtel's subscribers.

2673 Seven submits that the documents recording the AFL's consideration of the bids show that it took the view that C7 had low penetration and was unlikely, even if Seven succeeded in its bid, to get on to the Foxtel Service. Thus the AFL was influenced by its perception that there was no guarantee that C7 would have anything like the number of subscribers that Foxtel would be able to deliver with non-exclusive supply on the Foxtel, Optus and Austar platforms.

2674 Seven also relies on statements made by or on behalf of Foxtel to the NRL Partnership as conduct that involved taking advantage of Foxtel's market power. Seven invites me to find that Foxtel told the NRL Partnership that C7 would not be able to broadcast its channels on the Foxtel Service and that it also told the NRL that there was considerable uncertainty about whether and when C7 would gain access to the Telstra Cable. These statements (which Seven does not suggest were untrue) were important to the NRL

Partnership (through the NRL PEC), because of the NRL PEC's concern to ensure maximum coverage for NRL matches.

2675 Seven submits that in making these statements to the NRL Partnership, Foxtel took advantage of its market power in the retail pay television market. That power gave Foxtel's threat added credibility.

16.4.5 Overbidding

2676 I have outlined in Chapter 15 Seven's overbidding argument and given my reasons for rejecting it. There is no need to repeat either the description or the analysis.

16.4.6 Taking Advantage of Market Power

2677 Seven recognises that in *Rural Press v ACCC*, the High Court held that a firm may protect its market power by methods that do not involve taking advantage of that power. Seven submits that the present case is different from *Rural Press v ACCC*, because Foxtel was not merely acting to protect its market power. On the contrary, by refusing to take the C7 channels and, in effect, threatening the AFL, Foxtel's conduct was '*materially facilitated by its market power*'. Seven identifies two ways in which Foxtel utilised its market power in relation to its decision not to negotiate with C7 for the carriage of its channels during the period from June 1999 until the end of December 2000: its statements to the AFL and its entry into the Foxtel Put.

2678 First, Foxtel's market power gave '*content and significance*' to its refusal to take the C7 channels and to its threat that AFL matches would not be shown to Foxtel subscribers even if C7 acquired the AFL pay television rights. It was only because Foxtel already had a dominant share of the retail pay television market that it could credibly threaten to deny itself subscription-driving content, such as the AFL, if that content could only be obtained through C7.

2679 Seven argues that if Foxtel had been operating in a competitive pay television market with its competitors eager to take AFL content, Foxtel would have found it commercially impossible to refuse to take C7. Furthermore, a threat to refuse to carry C7 would not have been taken seriously by any third party. It was only because Foxtel had a dominant share of

the retail pay television market that the refusal to take C7 was such a '*potent negotiating tactic*'. Foxtel's conduct was materially facilitated by its market power. According to Seven, the conclusion that Foxtel utilised its market power in this sense does not depend on a finding that it expected to be able to recoup the costs of its conduct by any future exercise of its market power.

2680 Secondly, Foxtel refused to accept attractive and profitable programming, in circumstances where it would not have engaged in that conduct in the absence of market power. If it lacked market power, it would have been exposed to a competitive response. Foxtel could '*afford*' to refuse to carry C7 only because it contemplated deriving supra-competitive profits later in a market in which it had substantial market power. In particular, by declining to deal with C7, Foxtel deprived itself of attractive programming that would have assisted it to compete with Optus (which already had C7).

2681 The absence of any analysis of the profitability of a direct acquisition compared with the profitability of carrying C7, both from the period from June 1999 to 2001 and in the later period from 2002 to 2006, was indicative of strategic conduct. That is, Foxtel hoped to confer the benefits of a sports channel supply monopoly on its associate, Fox Sports, and to benefit itself by entrenching its dominant position in the retail pay television market.

2682 Seven submits that Foxtel's conduct in refusing to take the C7 channels can be understood only as part of a strategy to maximise its long-term profits by entrenching its dominant position in the retail pay television market. It argues that in a competitive market, a profit-maximising firm would be unlikely to refuse to acquire an input that was likely to attract additional customers and increase profits. Seven contends that the rationale for Foxtel's conduct – obtaining a strategic benefit by gaining dominance in the retail pay television market – would not have existed in a competitive market.

16.5 Telstra's Submissions

2683 I do not think it necessary to set out News' submissions in answer to Seven's case under s 46(1) of the *TP Act*. The critical issues raised by News should emerge clearly enough from my reasoning in this Chapter.

2684 I should record, however, that Telstra seeks to distinguish the position of Telstra

Media from that of its Foxtel partner, Sky Cable. Telstra submits that when conduct is the result of a '*positive decision*' by Foxtel, it may be possible to attribute the market power of the firm to each partner. But when the conduct of the firm involves a failure to act because of an actual or likely use of the veto power of one of the partners, it is not permissible to attribute the market power of the partner exercising the right of veto, nor of the firm, to the partner not exercising that right of veto. Accordingly, if Foxtel did not take the C7 channels because of Sky Cable's actual or threatened veto, neither the market power of the Foxtel Partnership, nor of Sky Cable, can be attributed to Telstra Media.

2685 According to Telstra, even if Telstra Media had market power, a mere failure by Foxtel to do something did not involve the exercise of market power by Telstra Media. This follows, so Telstra argues, because Telstra Media, unlike Sky Cable, was always willing to accept C7 on the Foxtel platform on appropriate commercial terms. Moreover:

> *'It would be a perverse application of s.46 if Telstra Media could be held to have taken advantage of any market power it possessed in circumstances where it was opposed to the very conduct upon which the claim is based and would have had FOXTEL do the opposite'.*

2686 Telstra also submits that Telstra Media:

> did not make or join in the making of any statements to the AFL or the NRL Partnership; and
>
> supported the taking of C7 on the Foxtel platform on appropriate terms and therefore did not have any purpose proscribed by s 46(1) of the *TP Act*.

16.6 Reasoning

2687 I intend to approach Seven's contentions on the assumption, contrary to Telstra's submissions, that no distinction can be drawn between the position of Sky Cable and Telstra Media. If Seven's case cannot succeed even if that assumption is made in its favour, there is no need to consider whether Telstra's contentions should be accepted.

16.6.1 Rejection of C7's 'Offers'

16.6.1.1 16 APRIL 1999 LETTER

2688 I have considerable difficulty understanding the basis on which Seven says that it has

a cause of action under s 46(1) of the *TP Act* by reason of Foxtel's refusal to accept C7's '*offer*' of 16 April 1999. As I have noted, the pleaded case is that Foxtel did not accept the offer, either before or after its amendment by the letter of 13 May 1999. By depriving itself of attractive programming, Foxtel is said to have taken advantage of its market power in the retail pay television market.

2689 Seven's Reply Submissions attempt to recast the pleaded case. They rely on what is said to be Foxtel's conduct in failing to accept the '*indicative*' terms, contained in the letter of 16 April 1999, for incorporation into a subsequent agreement, presumably to be arrived at by a process of negotiation between the parties. This, however, is not the pleaded case the Respondents were required to answer. Nor is it the case argued in Seven's Closing Submissions which, consistently with the pleadings, speak of Foxtel '*refusing C7's offer of April 1999*'. The vagueness of Seven's revised position is illustrated by its assertion that Foxtel's refusal to accept the terms set out in C7's letter was not conduct that occurred at any particular time. In my opinion, it is not open to Seven to use its Reply Submissions to reconstruct a case outside the pleadings.

2690 The letter of 16 April 1999 was plainly not an offer capable of acceptance by Foxtel. Moreover, it expressly invited further negotiations. Even if the Statement of Claim is not to be read as alleging that the letter was a formal offer in the contractual sense, it is difficult to follow how Foxtel could have been expected to signify its willingness to accept some or all of the indicative terms without further discussions. It is even more difficult to see how it can be an exercise of market power to seek genuine clarification of indicative terms or to engage in negotiations as to the terms of a possible agreement.

2691 I have outlined in Chapter 7 ([692]ff) the events that followed C7's April 1999 letter. Negotiations and discussions continued between the parties. Foxtel raised what seem, on their face, to be perfectly legitimate commercial issues requiring resolution before an agreement could be reached. This phase of the negotiations culminated in Mr Freudenstein's letter of 24 May 1999, enclosing the draft term sheet he had prepared. There is no basis for finding (if Seven intends to make this submission) that the negotiations were not carried out by Foxtel in good faith, nor that the dealings were structured in a manner designed to cause harm to C7. The fact that Mr Freudenstein's term sheet did not specify a price genuinely reflected the point made in his covering note, namely that Foxtel wished to resolve other

issues, including questions of quality, before proceeding to price negotiations.

2692 Nor is there a basis for concluding that any delay by Foxtel in concluding this phase of the negotiations reflected a decision by News that no agreement could be concluded with C7. It is true that Mr Mockridge had been told in March 1999 by Mr Lachlan Murdoch that News did not support the taking of C7 while the Fox Sports pricing issue remained unresolved with Telstra. Mr Mockridge clearly appreciated, as his internal memorandum of 29 March 1999 showed, that in the absence of a long-term agreement governing the supply of Fox Sports to Foxtel, the latter would be unlikely to enter any arrangement to take C7.

2693 Mr Mockridge said, however, that he remained optimistic that the dispute concerning Fox Sports could be resolved. He also said that until 24 May 1999, he had been prepared to negotiate with C7 with a view to taking its channels and it was not until late June 1999 that he changed his mind. Mr Mockridge's evidence is supported, among other things, by the note he prepared for Mr Rupert Murdoch in early April 1999 and the handwritten annotations he made on Mr Freudenstein's report of 5 May 1999 and on Mr Wood's letter of 13 May 1999. I accept his evidence.

2694 In my view, Seven has not made out its pleaded case in relation to Seven's letter of 16 April 1999. In any event, in my opinion there is no basis for finding that the course of negotiations between Foxtel and C7 until early June 1999 was materially influenced by News' determination that there should be no deal with C7 until the Fox Sports pricing issue had been resolved. Negotiations were conducted in a manner that might have been expected between two parties at arm's length. So far as Mr Mockridge was concerned, a deal with C7 was still possible. I therefore do not accept Seven's submission that by the end of May 1999, Foxtel had declined to take C7 and had broken off negotiations for taking the channels.

2695 Foxtel's response to C7's letter of 16 April 1999 was not materially facilitated by its power in the retail pay television market. In the absence of such power, Foxtel could have (and, if it matters, probably would have) acted in the same way. No contravention of s 46(1) has been established by Foxtel's refusal to accept the proposal made by C7 in its letter of 16 April 1999.

16.6.1.2 13 MAY 1999 LETTER

2696 Seven says that the letter of 13 May 1999 merely clarified the terms proposed in C7's letter of 16 April 1999. Insofar as Seven relies on Foxtel's failure to accept the substance of the terms proposed in the 13 May 1999 letter as a contravention of s 46(1) of the *TP Act*, it faces the same difficulties as its case based on the earlier letter. My findings are the same.

2697 News correctly points out that C7's letter of 13 May 1999 promised Foxtel something that C7 could not deliver. The letter agreed to rebrand the channel to a name that did not include any reference to Seven. However, C7 could not make good on this commitment without the consent of Optus, which turned out not to be forthcoming. In view of the conclusion I have reached, it is not necessary to consider the significance of this point in the present context.

16.6.1.3 9 JUNE 1999 LETTER

2698 Foxtel's response to C7's letter of 9 June 1999 (through Foxtel Management) was different from its response to the April and May l999 letters. No negotiations took place between Foxtel and C7 in relation to the June 1999 term sheet submitted by Mr Wood. As I have found, the letter was a genuine proposal (even if it had deliberate ambiguities) and was intended to elicit a commercial response from Foxtel. After the proposal had been made, Mr Wood attempted to engage in negotiations with Mr Freudenstein, but was unable to make contact with him until 30 June 1999. At that time, Mr Freudenstein informed Mr Wood that the whole idea of Foxtel taking C7 would be discussed at the forthcoming Foxtel Management board meeting, although he also told Mr Wood that the pricing proposed by C7 was too high.

2699 The issue was indeed discussed at Foxtel Management's board meeting of 8 July 1999 (postponed from 22 June 1999). In the meantime, the draft AFL Strategy papers, prepared within Foxtel Management, proposed an agreement to carry C7 from 1 July 1999 until 31 December 2001 (when the new rights period would commence). The drafts proposed that C7 should be carried as a stand alone channel to be sold by Foxtel to subscribers for $6.95 pspm. Foxtel would pay no more than $3.10 pspm (compared with $5.00 pspm in C7's June 1999 term sheet) and would provide an MSG of $4 million per annum. The business case, also prepared within Foxtel Management, produced a positive NPV of between $27.48 million

and $70.32 million.

2700 The final AFL Strategy paper presented to the meeting proposed that consideration of the potential carriage of C7 be deferred until an assessment could be made as to whether a decision to take C7 would detract from the proposed bid by Foxtel to acquire the AFL pay television rights directly. (At that stage, the AFL pay television rights were expected to be awarded by the end of 1999, although the rights themselves related to the years 2002 to 2006.) The paper argued the case for Foxtel to acquire the rights directly. While the paper set out the terms of C7's proposal, it recommended against taking the proposal further, in part because it was thought undesirable for Seven to be able to show the AFL that C7 could secure arrangements to supply all pay television platforms. The board meeting neither accepted nor rejected the recommendations in the AFL Strategy paper, but contemplated that informal discussions between Foxtel and the AFL would take place. Telstra continued to contend that C7 should be regarded as a comparator of Fox Sports for the purposes of resolving the pricing dispute relating to the supply of Fox Sports to Foxtel.

2701 There were two reasons for the disinclination of Foxtel Management at this time to pursue negotiations with C7 on behalf of Foxtel. Neither had to do with the price asked by C7, nor with the other proposed terms of supply. The first reason was that Mr Mockridge had formed the view by late June 1999 that Foxtel should seek the AFL pay television rights directly. He considered that any decision concerning the supply of C7 to Foxtel should be deferred until Foxtel could assess the extent to which a decision to take C7 would adversely affect its bid to acquire the pay television rights directly from the AFL. Mr Mockridge's principal concern, reflected in the final AFL Strategy paper and the discussion at the 8 July 1999 board meeting, was that he did not want Seven to gain an advantage by presenting itself to the AFL as an established supplier to all pay television platforms.

2702 The second reason was that News made it clear, through Mr Macourt, that it was not prepared to negotiate for the carriage of C7 on Foxtel, even on a temporary basis, until the pricing dispute relating to the carriage of Fox Sports on the Foxtel platform had been resolved. The dispute was between News (supported by PBL) and Telstra. Mr Macourt's concern, as I have found, was that Telstra would initiate legal proceedings based on News' alleged breaches of the Umbrella Agreement, as a means of forcing Foxtel to replace Fox Sports with C7 on the Foxtel platform or to renegotiate the price paid by it to Fox Sports. Mr

Macourt was not motivated by a blanket desire to prevent C7 gaining access to the Foxtel platform, regardless of price or whether C7 was taken on basic or on a tier. Nor was his objective in taking this stance to bring about the destruction of C7, in order to increase Fox Sports' dominance in any market.

2703 Mr Macourt's concern, no doubt in accordance with the views expressed to him by Mr Lachlan Murdoch, was to prevent Telstra using the carriage of C7 on the Foxtel platform as a means of furthering its objectives in the pricing dispute. Mr Macourt appreciated that Telstra thought that the price paid by Foxtel to Fox Sports under the '*interim*' arrangements was unreasonably high and represented, in effect, a transfer of profits from Foxtel to Fox Sports. He also appreciated that Telstra wished to invoke the Umbrella Agreement to force News to accept a lower price for Fox Sports by demonstrating that the price then charged to Foxtel was unreasonably high and thus in breach of the Umbrella Agreement. Telstra was seeking to use the availability of C7 as a content supplier to Foxtel as a basis for arguing that the price under the interim arrangement was unreasonable for the purposes of the Umbrella Agreement, and therefore should be lowered.

2704 The disinclination of Foxtel, through Foxtel Management, to negotiate for the carriage of C7 on the Foxtel Service does not mean that if such negotiations had taken place, the terms proposed by C7 on 9 June 1999 would have been acceptable to, or accepted by, Foxtel. Mr Mockridge regarded a number of features of C7's proposal to be unacceptable. They included the following:

> C7 proposed that it should have an option to extend the supply agreement for two years beyond 1 March 2002, should Seven acquire the AFL pay television rights for that period. This was unacceptable to Mr Mockridge because he thought that such an option would give Seven a strategic advantage in the parties' negotiations with the AFL.
>
> The proposed prices were higher than Mr Mockridge was prepared for Foxtel to pay (as Mr Freudenstein informed Mr Wood on 30 June 1999). In particular, Mr Mockridge understood the pricing to be higher than that paid by Austar for the same service.
>
> On Mr Mockridge's understanding, C7's term sheet did not provide for two **exclusively** live games per week, despite Foxtel having emphasised that this

was its minimum position.

In addition, the 9 June 1999 term sheet provided that C7 would use its best endeavours to rebrand the C7 channels on the Foxtel Service. This represented a retreat from the earlier commitment by Seven, a retreat made necessary by Optus' unwillingness to consent to the rebranding.

2705 Foxtel's unwillingness to negotiate in relation to C7's 9 June 1999 term sheet is a component in Seven's case that Foxtel, during the period from 9 June 1999 until the end of December 2000, determined not to negotiate with C7 for the carriage of its channels on the Foxtel Service. I shall consider that aspect of Seven's case shortly. However, I do not think that Seven has made out, as a separate cause of action, its pleaded case that Foxtel:

> *'in refusing to accept the offer [of 9 June 1999 took] advantage of its substantial degree of power in the retail pay television market'* (par 407(3)).

2706 The pleaded case concerning this cause of action is that Foxtel, if it had faced significant competition from other pay television service providers, **would have accepted** the offer so that it could obtain the additional subscribers who would be attracted by C7's channels and the additional revenue which would result (par 407(a)). Assuming the term sheet of 9 June 1999 was an offer capable of acceptance (in the sense used in the Statement of Claim), Seven has not shown that in a more competitive market Foxtel **would have accepted** that offer.

2707 I put to one side Mr Mockridge's (genuine) concerns that C7's proposed option to renew the supply agreement would give it an advantage in the bidding for the AFL pay television rights, since Seven's position is that Foxtel's capacity to deny C7 a negotiating advantage was itself a manifestation and exercise of Foxtel's market power. The rest of Foxtel's concerns, especially as to price and the supply of exclusively live games, would have remained in a competitive market. Had further negotiations taken place, assuming competitive market conditions, Foxtel would not have accepted C7's proposal without substantial modification. An agreement on different terms ultimately might have been reached. But that is not sufficient to make out Seven's pleaded case.

2708 I appreciate that Seven contends that it is necessary to ascertain why Foxtel refused to accept the offer. It submits that if the refusal was for reasons that would not have been

rational in a competitive market, it does not matter that Foxtel could or would have rejected the offer for other reasons. In these circumstances, Foxtel would still have taken advantage of its market power for (so Seven says) one of the proscribed purposes.

2709 There are two answers to this contention. First, Seven, by its pleading, has taken upon itself to prove that if Foxtel had faced significant competition from other pay television service providers, it would have accepted the offer. This was the basis on which the case was fought and explains why the Respondents focussed on the unacceptable features of the '*offer*'. Seven has not made out the case it has attempted to prove.

2710 The second is that, as I have already noted, Foxtel's refusal to negotiate in relation to the 9 June 1999 letter is a component in Seven's broader '*refusal to deal*' case and needs to be considered in the context of that case. I now turn to that issue.

16.6.2 Refusal to Deal

16.6.2.1 SOME REFINEMENTS

2711 Seven and the Respondents accuse each other of misrepresenting or misunderstanding their respective submissions in relation to Seven's '*refusal to deal*' claim. Some matters emerge from the confusion with reasonable clarity.

2712 First, Mr Sumption, in his oral closing submissions, accepted that one reason for News and PBL refusing to support the idea that Foxtel should negotiate with C7 to take its channels was their determination that negotiations should not take place until the Fox Sports pricing dispute with Telstra had been resolved. However, Mr Sumption contended that even if that were so, Foxtel had taken advantage of its market power for the purpose of marginalising C7.

2713 Secondly, News does not dispute that, following Foxtel Management's board meeting of 8 July 1999, Foxtel adopted a strategy of deferring any negotiations with C7 until after the AFL pay television rights for 2002 to 2006 had been dealt with. News says that Foxtel adopted the strategy in order to give itself an advantage in bidding (through News) against Seven for the AFL pay television rights.

2714 Thirdly, Seven's primary position is that the refusal to deal with C7 was part of a

strategy designed to enable Foxtel to acquire the AFL pay television rights and, by that means, to destroy C7. However, Seven contends that, even if News' '*deferral*' scenario is correct, Foxtel had nonetheless used its market power. This is said to be so for two reasons:

> the market power of Foxtel facilitated the combined conduct of refusing to take C7 and making statements to the AFL and the NRL Partnership to the effect that C7 would not be shown on Foxtel; and
>
> the conduct had no commercially rational basis in the absence of market power.

16.6.2.2 FACTUAL FINDINGS

2715 The principal findings of fact relevant to Seven's claim based on Foxtel's refusal to deal with C7 follow, for the most part, from findings already made, on or from the events described in Chapter 7:

> News, supported by PBL, had decided by June 1999 that Foxtel should not negotiate with C7 to take its channels until the Fox Sports pricing dispute with Telstra was resolved.
>
> By June 1999, Mr Mockridge had formed the view, for what he saw as sound commercial reasons, that Foxtel should acquire the AFL pay television rights directly from the AFL. He had also formed the view, reflected in the AFL Strategy paper for the Foxtel Management board meeting of 8 July 1999, that Foxtel should not consider a deal with C7 until Foxtel had concluded an agreement with the AFL or had decided that such an agreement was not feasible.
>
> The Foxtel Management board, at its meeting of 21 September 1999, encouraged Mr Mockridge to continue his contacts with the AFL with a view to securing the AFL pay television rights, perhaps through a joint venture with the AFL.
>
> Mr Mockridge's draft AFL Strategy paper, prepared for Foxtel Management's 26 October 1999 board meeting, sought approval for Foxtel to make an offer to the AFL for the AFL pay television rights. It also recommended that if Foxtel succeeded in its bid, an interim deal should be negotiated with C7 until

the end of 2001. The latter recommendation was removed from the final version because Mr Lachlan Murdoch made it clear that News would not agree to C7 being taken on the Foxtel Service until the Fox Sports pricing dispute between News and Telstra had been resolved. The board approved the recommendation to negotiate directly with the AFL. It was implicit in the board's endorsement of the recommendation that Foxtel would not pursue negotiations for the carriage of C7 until the outcome of the bidding process was known.

Foxtel Management rejected Seven's offer of 17 November 1999 on valid commercial grounds. The terms of the rejection, however, made it clear that, in any event, Foxtel was not interested in taking C7 because to do so would interfere with Foxtel's negotiations for the AFL pay television rights.

Telstra Media did not agree at any time between June 1999 and December 2000, whether at a Foxtel Management board meeting or otherwise, that Foxtel should not negotiate for the carriage of C7 until the Fox Sports pricing dispute had been resolved. On the contrary, Telstra wanted negotiations to take place in order to assist it to achieve its objective of reducing the price paid by Foxtel for Fox Sports. Nonetheless, by agreeing to the recommendation that Foxtel Management negotiate directly with the AFL on behalf of the Foxtel Partnership, the Telstra representatives appreciated that there would be no negotiations with C7 pending the outcome of the bidding for the AFL pay television rights.

The decision by News, supported by PBL, not to negotiate with C7 until the Fox Sports pricing dispute was resolved was not the product, in whole or in substantial part, of an objective of destroying C7.

Mr Mockridge's view that Foxtel should not negotiate with C7 until the AFL pay television rights bidding process had run its course had nothing to do with any objective of destroying C7. His reasons were explained in his evidence ([733]-[735]). Mr Falloon shared Mr Mockridge's view, as seen by his contribution to the discussion at the Foxtel Management board meeting of 8 July 1999.

Throughout the period from July 1999 to December 2000, Foxtel expected the

AFL pay television rights to be awarded within a period of a few months. In particular, in July 1999, the Foxtel Management board understood that the rights would be awarded by the end of that year (that is, within a period of about five months).

16.6.2.3 THRESHOLD PLEADING ISSUE

2716 A threshold issue arises in relation to Seven's contention that if News and PBL decided that Foxtel should not deal with C7 until the Fox Sports pricing issue had been resolved, that would suffice to establish that Foxtel had contravened s 46(1) of the *TP Act*. Seven's written submissions make no reference to this contention.

2717 The first reference to the argument appears in Seven's Case Summary, filed after its Reply Submissions. Paragraph 68 of the Case Summary includes the following sentence:

> *'Further, on the Respondents' own case, the purpose of News and PBL was to exclude C7 so as to prevent C7 from competing with Fox Sports until the resolution of a long term supply agreement between Fox Sports and Foxtel. The Applicants say that if Foxtel proceeded on this basis this is a purpose falling within s.46(1)(c) [ASR 8.35-70]'.*

The cross-reference in this sentence is to pars 8.35 to 8.70 of Seven's Reply Submissions. There is nothing in these paragraphs, however, that seeks to make out the argument identified in the Case Summary.

2718 I asked Mr Sumption in his oral closing submissions what Seven's position was if I were to find that a substantial reason for Foxtel's refusal to deal with C7 was News' and PBL's unwillingness to allow Foxtel to negotiate with C7 until the Fox Sports pricing dispute with Telstra had been resolved. Mr Sumption accepted that one of the reasons for Foxtel refusing to take C7 was News' desire (supported by PBL) to secure long-term arrangements relating to the supply of Fox Sports to the Foxtel platform. He said that a finding to that effect, on the basis that News was seeking to avoid competition from C7, would be enough of itself for Seven to succeed in its claim under s 46(1) of the *TP Act*. Mr Sumption acknowledged that, if this claim succeeded, the measure of damages would be smaller than Seven's claims for the '*whole scheme*'.

2719 In response to my inquiry as to whether a case to this effect had been pleaded, Mr

Sumption initially said he was unsure. He later submitted that the pleading of the cause of action under s 46 of the *TP Act* covered the case sought to be made in par 68 of Seven's Case Summary. This was so because the Statement of Claim (par 414) alleged that '*Foxtel*' had taken advantage of its power in the retail pay television market for the purpose of deterring or preventing C7 from engaging in competitive conduct in the wholesale sports channel market and the wholesale channel market.

2720 Mr Sumption's response prompted a protest from Mr Hutley that no s 46 case had been pleaded that Foxtel had refused to take C7 because News and PBL had refused to support negotiations with C7 until the Fox Sports pricing issue had been resolved. Mr Hutley, in his closing submissions, contended that the Statement of Claim did not cover the argument Seven had belatedly raised and that the Respondents would be prejudiced by any application to amend the pleadings at such a late stage. In the event, Seven made no application to amend further the Statement of Claim.

2721 In my view the pleadings do not cover the contention identified by Seven in par 68 of its Case Summary. There is no express reference in the pleadings, or (so far as I am aware) in any particulars, to the Foxtel Partnership resolving not to negotiate with C7 because of the Fox Sports pricing issue. This is not surprising, because the primary focus of Seven's case from the beginning has been that '*Foxtel*' (meaning Sky Cable and Telstra Media as partners in the Foxtel Partnership) determined not to deal with C7 **at any time or on any terms** and that this was an element of the conduct of the Foxtel Partnership engaged in for the purpose of destroying C7 as a viable channel supplier.

2722 The key allegation made by Seven is that during the period from 9 June 1999 until the end of December 2000, Foxtel determined not to negotiate with C7 for the carriage of C7's channels on the Foxtel Service (par 401B). If that allegation was intended to cover what can be described as the Fox Sports contention (that is, that Foxtel had determined not to negotiate with C7 until the Fox Sports pricing issue had been resolved), it is extremely odd that the allegation is limited to the period of 18 months ending with the award of the AFL pay television rights to Foxtel. The Fox Sports pricing issue was not resolved between the Foxtel partners until many months after December 2000. The dispute therefore constituted an impediment to Foxtel taking the C7 channels well beyond December 2000.

2723 More importantly, the allegation made by Seven is that **Foxtel** (Sky Cable and Telstra Media carrying on business as partners under the name '*Foxtel*') determined not to negotiate with C7. No allegation is made that News or PBL (or, for that matter, Sky Cable) separately made that determination. It is abundantly clear that Telstra did not share the view of News and PBL that the Foxtel Partnership should not negotiate with C7 until the Fox Sports pricing issue had been resolved.

2724 If the Statement of Claim was intended to embrace the Fox Sports contention, the pleading should have alleged the material facts necessary to demonstrate that Foxtel determined not to negotiate with C7 until the Fox Sports pricing dispute had been resolved. In the absence of the material facts being identified, it is quite unclear how the pleaded '*determination*' can be sheeted home to each of the Foxtel partners. Is it because Sky Cable (or News and PBL through Sky Cable) exercised its veto power? If so, precisely how was this a decision of the Foxtel Partnership? What is Telstra Media alleged to have done in relation to the Fox Sports pricing issue?

2725 If Seven intended to rely on the Fox Sports contention only against Sky Cable (or against News and PBL), the Statement of Claim should have spelled out how Sky Cable took advantage of its market power to prevent Foxtel dealing with C7. In particular, if Seven wished to make out a case based on something other than a '*determination*' of Foxtel, that something should have been precisely identified. Sky Cable and Telstra Media (and News, PBL and Telstra) were entitled to be told the case they had to meet. They were also entitled to conduct the proceedings on the basis that Seven's case was bounded by a fair reading of the Statement of Claim.

2726 It follows that, in the absence of any application to amend the pleadings (which doubtless would have been vigorously opposed), Seven cannot rely on the Fox Sports contention as an independent basis for establishing its pleaded cause of action under s 46(1) of the *TP Act*.

16.6.2.4 WHAT DID FOXTEL FOREGO?

2727 In view of the findings I have made and the pleading issue I have identified, Seven's case based on Foxtel's refusal to deal with C7 essentially rests on the determination by Foxtel not to negotiate with C7 until the AFL pay television rights had been awarded. Seven

contends that in making this determination, Foxtel forewent the opportunity to fill the last significant gap in its sports programming line-up for a period of two and a half years. Seven also contends that Foxtel (through Foxtel Management) knew that the C7 channels could be obtained for the Foxtel platform on terms that would be '*very profitable*' for Foxtel.

2728 Seven considerably overstates the first of these contentions. As I have previously pointed out, the Statement of Claim alleges, for the purposes of Seven's s 46(1) cause of action, that Foxtel determined not to negotiate with C7 **in the period from 9 June 1999 until the end of December 2000.** No allegation is made in this context of a determination not to negotiate during any period **after** December 2000. (There is an allegation in par 198(2)(p) of the Statement of Claim, in quite a different context, that the Foxtel Partnership refused to take C7 from November 1998 until December 2001. However, this allegation is not incorporated into the pleaded cause of action under s 46(1) of the *TP Act.*)

2729 In any event, the facts do not support Seven's contention that Foxtel understood that refusing to negotiate with C7 pending allocation of the AFL pay television rights would deprive the Foxtel platform of highly desirable sporting content for a period of two and a half years. On the pleadings and on the findings I have made, Seven is in effect limited to a claim that Foxtel decided not to negotiate with C7 because a refusal to negotiate would have enhanced Foxtel's prospects of successfully bidding against Seven for the AFL pay television rights.

2730 In July 1999, when Mr Mockridge suggested direct negotiations with the AFL, he and the members of the Foxtel Management board thought that the award of the AFL pay television rights would be finalised by the end of 1999. As I have found, at any given time between June 1999 and December 2000, the AFL's decision was thought to be no more than five or six months away, if that. For example, Mr Mockridge told the Foxtel Management board at the 7 February 2000 meeting that the AFL wanted to deal with the rights within the next two months. Mr Mockridge and representatives of the Foxtel partners thought that the decision not to negotiate with C7 until the AFL awarded the pay television rights would deprive the Foxtel platform of AFL content for no more than a few more months. Once the rights had been awarded, there was no impediment to discussions with C7 (other than News and PBL's wish that the Fox Sports pricing issue should be resolved).

2731 Seven relies on several financial models prepared for or within Foxtel Management to support its contention that taking C7 on the Foxtel Service would have been profitable for Foxtel, namely:

> the business case prepared by Mr Freudenstein on 20 May 1999, which modelled the carriage of C7 on a sports tier with ESPN;
>
> a separate 10 year model prepared at about the same time within Foxtel Management, based on the carriage of C7 on a stand alone tier; and
>
> the model attached to the draft AFL Strategy paper prepared for Foxtel Management's board meeting of 22 June 1999 (postponed to 8 July 1999), which produced the same result as Mr Freudenstein's model, but on the basis of C7 being placed on a stand alone tier.

2732 Seven acknowledges that Mr Mockridge annotated Mr Freudenstein's models to the effect that the assumed take up rate of 20 per cent on a tier (the most conservative of the assumptions utilised by Mr Freudenstein) was '*too high; particularly with cannibalisation*'. Seven also acknowledges that the ten year model did not take into account the MSGs incorporated into C7's 16 April 1999 '*offer*', but points out that this model assumed a 10 per cent take-up rate. Seven nonetheless says that the models indicate that C7 would have been profitable for Foxtel. Indeed, Seven contends, by reference to an analysis of the models and the terms of C7's 16 April 1999 letter, that Foxtel's '*adjusted profit*' from the carriage of C7 would have been somewhere between $1.98 million and $3.53 million per annum over the years 2000 to 2003.

2733 As News points out, the final version of the AFL Strategy paper represented Mr Mockridge's views, while the drafts did not. The final version recorded, by reference to C7's 9 June 1999 letter, that Foxtel would require a tier penetration of 23 per cent to break even if it was to carry C7. Mr Mockridge, whose evidence I accept, confirmed in evidence that at the time he regarded Mr Freudenstein's most conservative take-up assumptions (that is, a tier penetration rate of 20 per cent) as unacceptably optimistic. It is also true, as News points out, that Mr Freudenstein's models did not precisely adopt the terms offered by C7 and, in some respects, assumed terms more favourable than those put forward by C7.

2734 News submits that the board of Foxtel Management, which had the benefit of Mr

Mockridge's views but not of Mr Freudenstein's, cannot be regarded as having foregone any opportunity to make a profit out of the carriage of C7. On the contrary, News contends that Foxtel was not foregoing anything of value by deferring consideration of taking C7 on the Foxtel platform until after the bidding for the AFL pay television rights had been resolved.

2735 News' submissions seem to me to understate somewhat the perceived value to Foxtel of taking the C7 channels during the period 1999 to 2000, pending the award of the AFL pay television rights. By the same token, I think that Seven's submissions substantially overstate the perceived benefits. Seven's assessment gives insufficient weight to Mr Mockridge's genuine scepticism about the assumptions incorporated into the models, which he conveyed to the Foxtel Management board.

2736 The decision by the Foxtel Management board not to consider taking the C7 channels until the AFL pay television rights had been awarded was seen at the time by the representatives of News and PBL as likely to involve some costs to Foxtel. In my view, Mr Mockridge and representatives of the Foxtel partners must have understood that Foxtel, by declining to deal with C7, was foregoing an opportunity to derive some profits from the carriage of the C7 channels pending the award of the AFL pay television rights. In addition, they would have understood that Foxtel would probably secure some advantages from the Foxtel Service filling its one remaining premium sports '*gap*' sooner rather than later.

2737 The nature of the opportunity foregone by Foxtel must, however, be assessed in context. At any given time from mid-1999 to the end of 2000, the AFL was expected to make its decision within, at most, five or six months. A decision not to negotiate with C7 until the AFL awarded the pay television rights did not preclude negotiations with C7 once the AFL had awarded the rights. The decision left it open to Foxtel, if it succeeded in its bid for the AFL pay television rights, to take the C7 channels from a time very shortly after the AFL awarded the rights until the commencement of the new rights period in 2002 (by which time C7 would no longer be able to supply AFL content).

2738 The Foxtel Management board and Mr Mockridge believed that the costs to Foxtel (including opportunities foregone) of not taking the C7 channels, pending the award of the AFL pay television rights, were very modest. In my opinion, any fair assessment of the likely profits foregone (bearing in mind that the Foxtel Partnership was understood to be

depriving itself of the C7 channels for only a short period) would not have exceeded $500,000 to $750,000. The intangible benefits foregone by not taking the C7 channels for a short period would have been of little consequence to Foxtel. Having regard to what the representatives of Foxtel and the Foxtel partners thought was at stake in the bidding for the AFL pay television rights, the costs of not negotiating with C7 pending the outcome of the bidding contest were minor.

2739 The question is whether, in these circumstances, the conduct of Foxtel in refusing to deal with C7 until the AFL awarded the pay television rights was materially facilitated by Foxtel's substantial degree of power in the retail pay television market. This requires consideration of whether Foxtel could have acted in the same way in a competitive market. As the authorities establish, this does not mean a perfectly competitive market, but a hypothetical market in which there is a sufficient level of competition to ensure that no participant has a substantial degree of power in the market.

2740 The relevant counter-factual thus assumes a retail pay television market in which:

> Foxtel had a substantial and growing number of subscribers, but not sufficient to give it a substantial degree of market power;
>
> the Foxtel Service did not carry C7 and thus had no AFL content;
>
> the AFL content was important to Foxtel's aspirations to increase its share of the market; and
>
> all other retail pay television platforms in competition with Foxtel carried C7 or AFL content.

2741 In such a market, it would not have been economically irrational for Foxtel to:

> assess that there were significant commercial advantages to be gained from the direct acquisition of the AFL pay television rights;
>
> recognise that the AFL saw benefits for itself in ensuring that AFL matches were shown across all pay television platforms; and
>
> form the view, in the light of the AFL's desire for complete pay television coverage, that it might assist Foxtel in the contest for the rights to deny a competing bidder the advantage of incumbency in all retail pay television

platforms pending the outcome of the bidding process.

2742 So far as the last point is concerned, in a competitive market it is true that Foxtel would have faced competitive pressures to take subscription-driving AFL content, whether or not it acquired the AFL pay television rights directly from the AFL. Similarly, there would have been competitive pressures on other retail pay television platforms to take AFL content from Foxtel, should it have acquired the AFL pay television rights. The AFL would therefore have been likely to conclude that, whoever won the rights, the probabilities were that AFL content would find its way on to all retail pay television platforms.

2743 Nonetheless, it is one thing for a bidder for the AFL pay television rights already to have secured carriage on all pay television platforms; it is another thing for the bidder (and the AFL) to rely on future commercial negotiations to bring about that outcome on satisfactory terms. In the former case, the terms of carriage would be known, even though there might be no assurance that the arrangements would continue into the new rights period. In the latter case, negotiations, by hypothesis, would take place within the constraints imposed by a competitive retail pay television market, but they would necessarily involve some degree of uncertainty that might prove to be troubling for (in this case) the AFL. There are many possible impediments to establishing satisfactory commercial relationships, even if a potential buyer of sporting content is operating in a competitive market.

2744 Whether Foxtel could have denied itself access to the C7 channels pending the outcome of the bidding process, assuming a competitive retail pay television market, depends on the costs it would have incurred (including the opportunities foregone) by pursuing this strategy, compared with the assessed benefits of taking that course. On the findings I have made, the costs would have been low, partly because the AFL's decision was expected within a short period and partly because the foregone benefits that Foxtel denied itself by not taking C7 were very modest by the standards of this industry. The benefits would no doubt have been difficult to assess precisely, because the assessment would have involved determining the likely response of the AFL to the uncertainties of future negotiations between C7 and Foxtel. In my view, it would have been commercially rational for Foxtel, assuming a competitive retail pay television market, to have denied a competing bidder a perceived advantage in the bidding process for the AFL pay television rights if the costs of doing so were both very modest and short-term.

2745 It follows that, in my view, Foxtel, in refusing to deal with C7 pending the award of the AFL pay television rights, did not take advantage of its substantial power in the retail pay television market.

16.6.3 Statements to the AFL

16.6.3.1 FACTUAL ISSUE

2746 News accepts that Foxtel, through Mr Mockridge, told the AFL that:

> Foxtel could not be compelled to carry C7 as part of the Foxtel Service;
>
> if C7 gained access to the Telstra Cable via the compulsory access regime, that would not make C7 part of the Foxtel Service; and
>
> selling the rights to Foxtel was the only way in which the AFL could guarantee that AFL matches would be shown on the Foxtel Service.

2747 News, however, disputes that representatives of Foxtel said to the AFL that:

> Foxtel would not carry C7, even if Seven won the AFL pay television rights;
>
> Foxtel would not carry C7 on any terms; or
>
> Foxtel would not carry C7, even on terms that allowed it to do so profitably.

2748 News submits that the evidence does not support a finding to the effect that Foxtel made a threat to the AFL that if it did not license the pay television rights to Foxtel, AFL matches would simply not be shown on the Foxtel platform. According to News, the effect of the statements made to the AFL was that:

> *'if the AFL sold the rights to Seven instead of FOXTEL, then the question of whether AFL matches would appear on the FOXTEL Service would depend on the commercial uncertainties of whether FOXTEL and C7 would conclude a channel supply agreement'.*

2749 The difference between the respective submissions is rather fine. The presentations made to the AFL by Mr Mockridge were all verbal. He was taken at length to various drafts that were prepared within Foxtel Management, some of which he annotated. In particular, Mr Mockridge was asked to comment on handwritten notes he made to a draft document dated 1 October 1998, that read as follows:

'this section needs to present Austar as our ally and Fox Sports franchisee holder[. That is,] together we have access to 400+250=650k [subscribers] gross by 20k+ a month while Optus has 180k and is static[. That is, the] conclusion is that C-7 Sports channel with Optus/Ch7 is a dead-end and counter-productive to AFL's longer term distribution objective'.

2750 Mr Mockridge's cross-examination on the note was as follows:

'[MR SHEAHAN:] What you were intending to explain to the AFL was that in the long term if it did not go with Foxtel it would be stuck in a dead end on Optus with C7; isn't that right? --- That's the proposition.

That was your view in October 1998, was it not? --- That was my view in preparing this submission to the AFL, yes.

...

The two answers you have previously given carry with them that your view was that C7 would not be on Foxtel even if it had the AFL? --- I think in terms of this presentation that is the implication of that remark, yes.

And in terms of your view in preparing the submission to the AFL? --- I think I make a distinction between the submission and what my position might have been in regard to C7.

Just to be quite clear about this, you were intending to try to create the impression in the AFL that C7 would not be taken by Foxtel even if it had the AFL rights, but that was not necessarily your view in fact? --- Correct.

An approach you were quite comfortable with? --- Yes'.

2751 Mr Mockridge made the point in his evidence that his views had evolved over time and that the contents of drafts did not necessarily reflect the terms of any of his oral presentations to the AFL. He also made the point that the AFL was a sophisticated negotiator and was hardly likely to believe that, if Seven succeeded in obtaining the AFL pay television rights, Foxtel would simply refuse to negotiate with C7. Understandably enough, however, Mr Mockridge could not remember the precise contents of his conversations with the AFL.

2752 In my view, it is unlikely that Mr Mockridge said unequivocally that Foxtel would not take C7 even if Seven obtained the AFL pay television rights. It seems to me quite plausible that Mr Mockridge would have assessed that his AFL audience was sophisticated enough to take such an unvarnished assertion with more than a grain of salt. Rather, the likelihood is that Mr Mockridge would have implied that Foxtel would be quite prepared not to take C7,

leaving it unclear whether this would come about because of a blanket refusal to deal with C7 or simply because of the parties' likely inability to come to commercial terms. The fact that the AFL documents do not record any unequivocal statement that Foxtel would not take C7, even if Seven obtained the AFL broadcasting rights, tends to support this interpretation of Mr Mockridge's position.

2753 The precise information conveyed by Mr Mockridge to the AFL does not seem to me to be of crucial significance because a more or less *verbatim* record is available of a presentation made to the AFL by Mr Blomfield in the company of Mr Lachlan Murdoch, Mr Campbell and others, on 9 May 2000. (This was after Mr Mockridge had ceased to be CEO of Foxtel Management in February 2000.) I have already referred to the presentation ([893]), which included the following:

> *'In the interests of the game, Foxtel will not seek PAY TV exclusivity of Network AFL.*
>
> *We propose the channel will also be sold to Austar and Optus TV for an agreed per subscriber figure. Maximum exposure for the game - maximum revenue share for the code.*
>
> *This gives the AFL access to a combined PAY TV audience of more than one million homes.*
>
> ***While the AFL is already seen on Austar and Optus, this proposal is the only one that will deliver the FOXTEL audience as well**. C7 has been offered to FOXTEL and we have declined.*
>
> *Lets [sic] be quite frank here - even if the Government legislates that Telstra [C]able is available to other channel providers, that does not mean that it is a FOXTEL channel. Each channel may require their own set top box, their own sales team, separate accounts.*
>
> *...*
>
> *PAY TV is our business and one we have been proven to excel in'.* (Emphasis added.)

2754 There was a calculated ambiguity about Mr Blomfield's presentation. He did not state explicitly that Foxtel would not deal with C7, but he implied that C7 would find it extremely difficult, for one reason or another, to get onto the Foxtel platform even if Seven succeeded in its bid. In substance, he was content to convey the impression that if the AFL wanted AFL content to be broadcast on every platform, it could achieve that result with certainty only by

awarding the AFL pay television rights to Foxtel.

2755 That this was the substance of the message conveyed to the AFL and understood by it is supported by a paper prepared for the AFL's Broadcast Negotiating Committee on 30 May 2000, three weeks after Mr Blomfield's presentation. The paper assessed the strengths and weaknesses of Seven's proposals. Among the strengths was the existence of a direct relationship between a free-to-air operator and a pay television operator (suggesting that the AFL saw benefits in a single entity or a joint venture controlling all AFL broadcasting rights). The recorded weaknesses of Seven's proposal included the following:

> *'C7 continues to struggle to win Market Share. There is no guarantee to end up on Foxtel'.*

2756 This internal assessment indicates that the AFL did not understand that Foxtel had asserted that C7 would not be taken on the Foxtel platform even if Seven won the AFL pay television rights. (An alternative, although I think less probable, explanation is that the AFL understood Foxtel to have made such a threat, but the AFL did not take the threat literally in view of its perception of the realities of the marketplace.) The AFL understood that there could be no guarantee that C7 would be on the Foxtel platform, since that outcome depended on successful negotiations between the parties once the AFL pay television rights had been awarded.

2757 It follows that Seven has not made out its pleaded case that representatives of Foxtel told the AFL that C7 **would not** be given the opportunity to broadcast its channels on the Foxtel platform. In any event, for much the same reasons as I have given in relation to Foxtel's refusal to deal with C7 pending the award of the AFL pay television rights, I do not think that Foxtel's making of the statements to the AFL was materially facilitated by its substantial degree of power in the retail pay television market. If the market had been competitive, Foxtel could rationally have made the statements it did in order to capitalise on the uncertainty as to whether C7 would be taken by the Foxtel platform once the AFL pay television rights had been awarded.

16.6.3.2 RELIEF

2758 If this conclusion is wrong and, in making the statements to the AFL, Foxtel took advantage of its market power in contravention of s 46 of the *TP Act,* an issue arises as to

whether Seven is entitled to any relief in respect of that contravention. The relief Seven seeks in the application includes:

> a declaration that Foxtel, in stating to the AFL that C7 would not be able to broadcast its channels on the Foxtel Service, engaged in conduct in contravention of s 46 of the *TP Act*; and
>
> damages pursuant to ss 82 and 87 of the *TP Act.*

2759 As I have noted, one of the difficulties in a large and complex case such as this is that submissions as to liability and relief may have to be made without the parties (or the Court) having the benefit of findings of fact. The possible combinations and permutations in this case are virtually limitless. It is therefore not surprising that Seven does not appear to have specifically addressed the question of what relief, if any, should flow from a finding that Foxtel's conduct in making statements to the AFL contravened s 46(1) of the *TP Act*.

2760 The Statement of Claim is not clear on the point. It alleges that Foxtel's statements to the AFL '*reinforced*' certain consequences flowing from other contraventions of s 46 of the *TP Act* (par 472). They include C7 being prevented from acquiring the AFL pay television rights (par 468). It may be that Seven intends to assert that, if the relevant statements had not been made to the AFL, Seven's bid for the AFL broadcasting rights (including the pay television rights) would or might have succeeded.

2761 If Seven intends to advance such a claim, it cannot succeed. The evidence suggests that the AFL's preference for News' bid over that of Seven had nothing to do with the statements that were made to the AFL. It is true that the paper prepared for the AFL's Broadcasting Negotiating Committee in May 2000 recorded that there was no guarantee that C7 would end up on Foxtel. However, there is nothing in the later AFL documentation assessing the competing bids which suggests that the statements played any part in the final decision to award the pay television rights to Foxtel (through News). Indeed, there is nothing in the AFL's contemporaneous records to suggest that, as the time for awarding the rights came closer, the AFL thought that Foxtel would not take the C7 channels if Seven succeeded in its bid.

2762 On the contrary, Seven's bid failed because the AFL considered that News was

offering a much higher price and that the other terms of its bid were satisfactory. As I have found in Chapter 8, Seven put itself out of the running by not making its best bid for the AFL pay television rights and, in that sense, was the author of its own misfortune. There was no causal relationship between the statements made by Foxtel to the AFL concerning C7's access to the Foxtel platform and any loss sustained by Seven.

2763 In the absence of proof of any compensable loss to Seven, I would not be disposed to grant declaratory relief in respect of any contravention of s 46 of the *TP Act* that may have occurred by reason of Foxtel making the statements to the AFL concerning the carriage of C7. The contraventions took place some seven years ago and, like so many other matters in this case, the transactions of which they were part have been superseded by subsequent events. Without minimising the importance of any breach of s 46, the contraventions here were not of major significance and had no discernible impact on the recipients of the statements. Had the Statement of Claim not added the complaint about the statements to the more serious alleged contraventions of s 46 of the *TP Act*, the complaints of themselves are unlikely to have warranted the institution of proceedings in this Court.

16.6.4 Statements to the NRL Partnership

2764 Seven supports its pleaded case that Foxtel stated to the NRL Partnership (through NRL Ltd) that C7 would not be able to broadcast its channels on the Foxtel platform by relying on two matters only:

> an admission by Sky Cable, Telstra Media, News and PBL that the representatives of Foxtel stated to the NRL Partnership that Foxtel could not be compelled to carry C7 on the Foxtel platform; and
>
> the letter of 13 December 2000 sent by Ms Ireland of Foxtel Management to Mr Gallop at NRL Ltd ([1340]-[1344]).

According to Seven, the letter of 13 December 2000 conveyed to the NRL Partnership the proposition that Foxtel would not carry C7 even if Seven won the NRL pay television rights.

2765 Seven says that a statement to this effect was of particular significance since the amount offered by C7 for the NRL pay television rights depended on the number of subscribers to the pay television services carrying NRL content. Seven relies on five matters

to support an inference that C7's likely access to Foxtel subscribers was a factor taken into account by the NRL PEC in preferring Fox Sports' bid over that of C7:

> NRL Ltd, which briefed the NRL PEC, was concerned about the number of pay television platforms that would carry C7;
>
> the NRL PEC, at its 28 November 2000 meeting, discussed the likely number of C7 subscribers;
>
> the NRL PEC sought and received information from Foxtel on the status of the access dispute on the day it made its decision;
>
> the files of Mr Philip and the NRL Partnership included briefing notes raising access to subscribers as an issue; and
>
> the NRL Partnership's media release of 14 December 2000 referred to it having guaranteed access to 1.1 million subscribers.

2766 Ms Ireland's letter to NRL Ltd must be placed in context. It was a reply to Mr Gallop's request for information **concerning the litigation relating to the use of the Telstra Cable**. The entirety of Ms Ireland's letter, with the possible exception of one sentence, provides information relating to C7's application for '*retail access*' (to use Seven's term) via the Telstra Cable. Seven does not suggest that any of the information provided by Ms Ireland was inaccurate or misleading.

2767 The only part of the letter that relates to C7 being taken on the Foxtel platform ('*wholesale access*') is a single sentence, as follows:

> *'Under no circumstance can C7 force FOXTEL to include the C7 channels in FOXTEL's channel-line up whether on basic or in a tier, even if C7 does ultimately gain access to FOXTEL's STUs'.*

2768 When read in context, that sentence merely conveys the proposition that Seven's claim for compulsory retail access could not have the consequence that Foxtel could be compelled to take C7 on the Foxtel retail platform. That was a perfectly accurate statement and, in my view, carried no implication as to whether or not C7 would be taken on the Foxtel Service if C7 succeeded in acquiring the NRL pay television rights.

2769 Given this interpretation of Ms Ireland's letter, its contents do not give rise to any

issue under s 46(1) of the *TP Act*. The admissions in the Respondents' defences carry Seven's s 46 case no further.

16.6.5 Aggregation of Conduct

2770 In view of the conclusions I have reached, there is no basis for attributing a different character to the totality of the conduct than to its component parts. If none of the conduct complained of by Seven constituted a contravention of s 46 of the *TP Act*, it is difficult to see how the conduct as a whole could constitute such a contravention. Indeed, I do not understand Seven to argue that if its individual claims fail it should nonetheless succeed by reference to the totality of the conduct.

2771 It follows that Seven's case based on s 46 of the *TP Act* cannot succeed.

17. SEVEN'S CASE BASED ON DENIAL OF ACCESS TO THE TELSTRA CABLE

2772 As I have noted in Chapter 10, Seven pleads a cause of action under s 45(2) of the *TP Act* based on the conduct of Foxtel (Sky Cable and Telstra Media) and Telstra Multimedia in giving effect to cl 5.2 of the BCA. In this Chapter I consider whether Seven has made out that case.

17.1 Clause 5.2 of the BCA

2773 As I have explained in Chapter 6, the BCA (the Broadband Co-operation Agreement) was executed on 14 April 1997, although the terms had been agreed by the parties in 1995. The parties to the agreement were Telstra Multimedia and Foxtel Management on behalf of the Foxtel Partnership.

2774 The BCA recited that on the '*Commencement Date*' (23 October 1995), Telstra Multimedia was:

> *'establishing business as a broadband system operator delivering broadband system services to customers in Australia'.*

The recitals referred to the respective businesses of the parties to the agreement and recorded their acknowledgment that:

> *'the successful establishment of each of their respective businesses would in turn be dependent on the successful establishment of each other's business ...'*

2775 Seven alleges that the conduct of Foxtel and Telstra Multimedia, in giving effect to cl 5.2 of the BCA, contravened s 45(2)(b) of the *TP Act*. Seven pleads that the effect of cl 5.2 was that Telstra Multimedia could not permit any party other than Foxtel to use the Telstra Cable (the cable network owned by Telstra Multimedia and used by Foxtel to provide its pay television service) (par 45).

2776 Sky Cable makes admissions in its Defence as to the effect of cl 5.2 of the BCA with which Seven appears to be content. Sky Cable admits that under the BCA, subject to law:

> *'(a) ... Telstra Multimedia granted to FOXTEL the sole and exclusive right to provide and manage the provision by other service providers of pay television services to residential subscribers delivered by means of the*

[Telstra] Cable;

(b) … Telstra Multimedia was until 21 November 2002 precluded from using or permitting the use of the [Telstra] Cable to deliver the pay television services of any other service provider or from managing the provision of the pay television services of any other service providers …'

2777 The Telstra parties are a little less forthcoming in their Defence, but their position does not appear to differ in substance. They say that, subject to law, it was a term of the BCA that Telstra Multimedia could not:

'use or permit the use of Telstra Multimedia's Broadband System (as defined in the BCA) to deliver the Services (as defined in the BCA) of any Other Service Providers (as defined in the BCA) …'

2778 The actual terms of cl 5.2 of the BCA were as follows:

'(a) Subject to Law and this clause 5, Telstra Multimedia:

(i) grants to FOXTEL the sole and exclusive right to provide and manage the provision by Other Service Providers of Services delivered by means of the Broadband System Service; and

(ii) may not, except in accordance with this clause 5:

(A) use or permit the use of Telstra Multimedia's Broadband System to deliver the Services of any Other Service Providers; or

(B) manage the provision of the Services of any Other Service Providers.

(b) Subject to Law, FOXTEL may not use or permit use of the Broadband System Service except as the means of delivering to Residential Subscribers who are Subscribers:

(i) Services provided by FOXTEL; and

(ii) Services provided by an Other Service Provider where provision of those Services is managed by FOXTEL for the Other Service Provider.

(c) …'

2779 The following definitions in the BCA (among others) are relevant to cl 5.2 and are set

out in the order in which the expressions appear in, or are incorporated into, cl 5.2:

> *'**Law** means any law or regulation of the Commonwealth or any State or Territory or any lawful authorisation, notification, licence, licence condition or direction made by any Minister or any Government Body …*
>
> ***Other Service Provider** … means a person who provides, proposes to provide or manages the provision of Services where FOXTEL or a Joint Venture Entity does not or is not proposed to have the retail relationship with subscribers for the provision of those Services.*
>
> *… **Service** means, subject to clauses 1.7 and 1.8, a service that:*
>
> *(a) provides to a Residential Subscriber either a Video Program on a Television via an STU [set top unit] or an Audio Program via an STU;*
>
> *(b) … ; and*
>
> *(c) is not a Narrowband Service.*
>
> ***Broadband System Service** means the service provided by Telstra Multimedia to enable the delivery and management of the delivery of Services to Subscribers in accordance with this agreement.*
>
> ***Broadband System** means a telecommunications network that is used or capable of being used to provide a Broadband Transmission Service.*
>
> ***Broadband Transmission Service** means a service provided as the means of delivering a Broadband Service.*
>
> ***Broadband Service** means any service that is not a Narrowband Service or an Audio Program and is delivered by a means that involves using a telecommunications network to transmit a signal.*
>
> ***Residential Subscriber** means a person who receives or utilises the relevant service in their Home'.*

2780 Several points should be noted about these definitions:

The definition of '*Law*' is wide enough to embrace the access obligations imposed by Pt XIC of the *TP Act*.

An ordinary pay television broadcast is not a '*Narrowband Service*' and thus falls within the definition of '*Service*'.

If C7 was to establish its own retail pay television platform on the Telstra Cable, it would be an '*Other Service Provider*' within the meaning of cl 5.2.

> As Seven notes, the definition of '*Broadband System Service*' is uninformative. Under the BCA, Telstra Multimedia provided both the physical means of distribution and the distribution service for carriage of Foxtel broadcast signals to STUs of individual customers.

17.2 Seven's Pleaded Case

2781 Seven pleads that C7 made a number of requests pursuant to Pt XIC of the *TP Act* (discussed in Chapter 4) for the supply of declared services to enable C7 to supply pay television channels on the Telstra Cable (par 66). The requests commenced on 25 August 1999 and continued until December 2000. However, Seven does not seek to press a case that Foxtel or Telstra Multimedia continued to give effect to cl 5.2 of the BCA after the Full Federal Court handed down its decision in favour of Seven in the '*protected contractual right*' proceedings on 18 August 2000: *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 102 FCR 464. Thus the only pleaded matters on which Seven now relies are those that occurred prior to 18 August 2000.

2782 By refusing C7's requests and resisting the supply of any services to C7, Foxtel and Telstra Multimedia gave effect to cl 5.2 of the BCA (par 377). This conduct constituted a contravention of s 45(2)(b)(ii) of the *TP Act* (par 392C) because at the time Foxtel and Telstra Multimedia gave effect to cl 5.2, the effect or likely effect of the clause was to substantially lessen competition in a market (par 392B).

2783 Seven identifies the particular requests made by C7 pursuant to s 152AR(3) of the *TP Act* as follows:

> a request on 25 August 1999 to Telstra Multimedia and to Foxtel for the supply by Telstra Multimedia of a broadcast access service as declared by the ACCC, to enable C7 to supply three pay television channels on the Telstra Cable (par 67);
>
> a request on 30 August 1999 for the supply to C7 of analogue subscription broadcast carriage services as declared by the ACCC under s 152AL(3) of the *TP Act*, for the same purpose (par 68);
>
> requests on 3 and 8 September 1999 in the same terms as the request made on 30 August 1999; and

a further request on 8 September 1999 in similar terms for the supply of an additional pay television channel (par 69).

2784 The requests made by C7 were refused, Foxtel and Telstra Multimedia commenced various legal proceedings in the Federal Court and C7 instituted access arbitrations under Pt XIC of the *TP Act* (par 71). The grounds upon which Foxtel and Telstra relied to resist C7's requests included claims that:

> cl 5.2 of the BCA conferred a '*protected contractual right*' on Foxtel within the meaning of s 152AR(4)(d) of the *TP Act*;
>
> the ACCC's declarations were invalid;
>
> the Telstra Cable had insufficient capacity to permit services to be supplied to C7; and
>
> the provision of services to C7 was not technically feasible (par 73).

2785 By September 1999, the Telstra Cable was accessible to the largest number of Australian homes (and hence subscribers) of any pay television platform (par 378(a)). An important factor for the AFL in awarding the AFL pay television rights was the number of viewers to whom the proposed licensee would be able to broadcast (par 379). In assessing Seven's offer, the AFL proceeded on the basis that the C7 channels would not be, or were unlikely to be, broadcast to members of the public connected to the Telstra Cable (par 380A). Further:

> *'If the conduct pleaded in paragraph 377 had not occurred [refusing C7's requests and resisting the supply of services to C7], and C7 had been offered the services that it was seeking pursuant to Part XIC of the TPA, then the AFL would have been likely to conclude that, by one means or another, the C7 channels would be broadcast to members of the public connected to the [Telstra] Cable'* (par 380A).

2786 By reason of these matters, the effect or likely effect of cl 5.2 of the BCA when Foxtel and Telstra Multimedia gave effect to it was that Foxtel would obtain the AFL pay television rights instead of Seven (par 381). The effect or likely effect of the failure by C7 to acquire the AFL pay television rights was to substantially lessen competition in the various markets relied on by Seven (par 382). Accordingly, Foxtel and Telstra Multimedia had engaged in conduct in contravention of s 45(2)(b)(ii) of the *TP Act* (par 383).

2787 In addition, the conduct of Foxtel and Telstra Multimedia after September 1999:

> *'in refusing to provide services to C7 pursuant to Part XIC of the [TP Act] and in resisting the provision of such services (including in the course of the arbitration) perpetuated the effect or likely effect of the conduct in September 1999, as the fact that C7 was not provided with services so as to enable it to provide channels on the [Telstra] Cable and therefore did not have access to the Foxtel subscribers, or alternatively the members of the public whose homes are connected to the [Telstra] Cable, was an important motivating factor in the AFL preferring the News bid for the AFL broadcast rights over the Seven Network bid'* (par 384).

2788 For this reason as well, the effect or likely effect of cl 5.2 of the BCA, at the times Foxtel and Telstra Multimedia gave effect to it during the period from September 1999 to 18 August 2000, was that Foxtel would obtain the AFL pay television rights (par 387).

2789 Seven pleads a similar case in relation to the NRL pay television rights (pars 389-392C).

17.3 Respondents' Admissions

2790 Sky Cable admits in its Defence that Foxtel Management, as agent for the Foxtel Partnership, refused C7's access request on the grounds of a '*protected contractual right*' and the alleged invalidity of the declarations, but says that it maintained its refusal only until the Full Federal Court gave judgment on 18 August 2000 (par 52(a)). It makes broadly similar admissions in relation to the insufficient capacity ground based on the Telstra Cable's lack of capacity to satisfy C7's request (par 52(b)).

2791 The Telstra Respondents make more or less equivalent admissions in their Defence (par 73).

17.4 Seven's Submissions

2792 Seven submits that Foxtel and Telstra Multimedia, by giving effect to cl 5.2 of the BCA and refusing C7's request for access to the Telstra Cable during the period September 1999 to August 2000, delayed C7's access to the Telstra Cable for a year. The issue of whether C7 was going to be available to Foxtel subscribers was a matter of importance both to the AFL and the NRL PEC. According to Seven, the denial of access to C7 created a perception that its prospects of getting on to the Telstra Cable were uncertain.

2793 Seven submits that if the ACCC's Interim Determination had been made prior to the award of the AFL pay television rights in December 2000 (instead of the date that the Interim Determination was actually made, 5 April 2001), Foxtel would have come under pressure to make a commercial offer to C7. Thus when Seven came to make its offer to the AFL for the pay television rights (as part of the broadcasting rights), a significant amount of the uncertainty surrounding its prospects of gaining access to Foxtel subscribers would have been removed.

2794 Seven summarises its position this way:

> *'In circumstances where an important factor for the AFL and NRL Partnership was their* ***perception*** *of C7's prospects of obtaining access to the Foxtel subscribers, or at least a significant number of them, the effect of the BCA and the insistence on Foxtel's right of exclusivity was to compel C7 to engage in time consuming Court proceedings to establish the existence of an obligation under section 152AR(3) of the [TP Act] which prejudiced C7 in relation to this perception.*
>
> *In relation to the AFL, this delay was highly prejudicial in circumstances where decisions in principle were being made to award rights, and to include Foxtel in the award of pay rights. In the case of the NRL, the delay was likewise prejudicial in circumstances where the quantum and attractiveness of C7's offer was determined by assessments as to the likely number of subscribers.*
>
> *The matters discussed above are likely to have been sufficiently causative of the ultimate award of rights such that it may properly be concluded that the effect or likely effect of clause 5.2 of the BCA was that Foxtel acquired the AFL pay rights and Fox Sports acquired the NRL pay rights'.* (Emphasis in original.)

17.5 An Important Finding

2795 Mr Gammell said in his written statement that, following Mr Mounter's departure from Seven in July 1999, he became increasingly involved in implementing Seven's pay television strategy, including negotiating wholesale and retail access issues with Foxtel. Mr Gammell acknowledged that C7's primary business was as a wholesale sports channel provider, but said this:

> *'Notwithstanding that the primary business model was to operate as a wholesale channel provider, by mid 1999 I was becoming increasingly concerned that C7 was unlikely to obtain wholesale access to Foxtel. In or about mid 1999, in consultation with others including Mr Stokes and Mr Wise,*

Seven Network developed a retail access strategy. I considered that C7 could, given its existing wholesale arrangements with Optus and Austar, potentially in the alternative to wholesale access to Foxtel, offer its sports channels on a retail basis. Accordingly, I considered that C7 should offer its sports channels directly to viewers on the [Telstra] [C]able, by seeking access to the [Telstra] [C]able under the access regime in the [TP] Act. I considered, however, that this could only be done in conjunction with a continuation of the wholesale supply to Optus and Austar. The existence of wholesale access arrangements with Optus and Austar gave C7 a revenue base to largely cover the cost of production and obtaining rights. I considered that such a revenue base was essential given the likely additional and extensive costs of establishing a retail Pay TV presence for C7'.

In cross-examination, Mr Gammell said that he was a member of a committee that had been established by Mr Stokes, in effect as an advisory committee to him as the CEO of Seven. Mr Gammell agreed that he had taken on this role at Mr Stokes' request.

2796 It will be recalled that Ms Lowes advised her colleagues at Telstra that her view, based on conversations with Mr Gammell, was that C7's efforts to secure retail access via the Telstra Cable were really designed to pressure Foxtel to take the C7 channels. The significance of Ms Lowes' understanding of Seven's position lies in Mr Gammell's responses when he was asked about his conversations with Ms Lowes. His evidence was as follows:

'[MR HUTLEY:] Now, you spoke to Ms Lowes about Seven's application for access to the cable from time to time throughout 1999; correct? --- Yes.

Do you recall telling her that Seven were not looking for separate access to the cable but merely saw it as a way to push their way into Foxtel or words to that effect? --- Something similar I would have imagined, yes.

Do you recall during conversations from time to time telling her Seven wasn't interested in retail access but saw it as part of their strategy in relation to convincing the government to alter its attitude to multi-channelling? --- Along those lines. Not quite in those words, but yes.

You see, throughout 1999 in your discussions with Ms Lowes you made it perfectly clear that the application for access which was made by Seven was a tactic to achieve possibly two strategic objects; correct? --- No.

The objects, were they not, were either a deal for the supply of C7 to Foxtel; that was one, correct? --- That's correct.

And, secondly, if that were unsuccessful, or perhaps even [if] it were successful, persuading the government to change its attitude towards multi-channelling; correct? --- That was true too.

And you told her you had no interest in running a retail business; correct? --- No.

I see. You say you wished to run a retail business to Ms Lowes? --- It wasn't our preference.

…

You certainly told Ms Lowes it was a pressure tactic to seek to get on to the Foxtel platform; correct? --- Yes.

And you certainly told Ms Lowes it was a tactic to advance your position in relation to lobbying the government for multi-channelling; correct? --- Yes'.

2797 It will be seen that Mr Gammell acknowledged that he told Ms Lowes words to the effect that Seven was not interested in retail access, but saw it as part of the twofold strategy to get on to Foxtel and to persuade the Government to alter its stance on multi-channelling. Nonetheless, he claimed that, although it was not Seven's preference to run a retail business, Seven was prepared to do so and he had told Mr Lowes that. This prompted me to ask Mr Gammell for clarification of his position:

'HIS HONOUR: Mr Gammell, how is the notion of it being a pressure tactic to achieve another objective consistent with a desire to conduct a retail Pay TV network? --- The way we regarded it, your Honour, was that we had to have more subscribers, if we could not get them via wholesale we would do it via retail, but it would not have been our preference. But if there was no other choice, you have to make do with what you can do.

Sorry, my question was how do you reconcile your agreement that you told Ms Lowes that the request for access was, I think your words were "pressure tactic" in order to achieve another objective with your statement that, nonetheless, Seven intended to operate a retail Pay TV network? --- Because, to our way of thinking, Foxtel would ultimately think it would be preferable to enter into a wholesale access agreement with us than to have a competitor on a retail access basis who would not have the same intention with their – I mean, they would be at risk of losing their customers on their cable to another retail access provider.

You are saying, are you, that it was a pressure tactic in the sense that your preferred option was to persuade Foxtel to come to the party but, if it didn't, you would nonetheless operate a retail Pay TV network? --- Yes, your Honour.

Is that what you are saying? --- Yes, your Honour'.

Mr Gammell then attempted, unconvincingly in my view, to backtrack from his evidence as

to what he had said to Ms Lowes.

2798 Mr Stokes acknowledged that he knew Mr Gammell had met with Ms Lowes around August or September 1999. However, he denied that Mr Gammell had told him what he (Mr Gammell) had conveyed to Ms Lowes about Seven's objectives. Mr Stokes also maintained that from mid-1999 until the end of 2000, he intended that C7 should run a retail pay television business if it could get access at commercial value.

2799 When taxed on this evidence, Mr Stokes agreed that he had accepted Mr North's advice that Seven should use the access application as a pressure-point to be applied to Foxtel. An example of this strategy is the use Mr Stokes made of his letter of 12 May 2000 to Mr Blomfield, in which he threatened to take the '*road of forced access ... if we are compelled to*'. Mr Stokes sent a copy of the letter to Dr Switkowski in order (as Mr Stokes said in evidence) to alert him to the issues that it raised, including the possibility that Telstra would be sued for any delay in C7 gaining access to the Foxtel platform. Mr Stokes agreed that the object was to concentrate Telstra's mind '*on endeavouring to secure Foxtel to agree to a commercial deal to take the C7 channels*'.

2800 Mr Stokes agreed that throughout his period as Executive Chairman of Seven no effort had been made to assess the feasibility of Seven starting up a retail pay television business:

> *'[MR HUTLEY:] Did you ever instruct anybody in that capacity to undertake any or produce any feasibility plans or business plans for the conduct of a retail pay television business on Foxtel? --- No.*
>
> *Cable? --- No.*
>
> *Did you ask anybody to do any preliminary work in relation to that? --- No.*
>
> *Did you make any attempt to cost the feasibility of the conduct of such a business? --- No.*
>
> *You see, Mr Stokes, when you have an intention to conduct a business, it's your practice, is it not, to direct that steps be taken by persons responsible to you to ascertain the feasibility of such a business; correct? --- Yes.*
>
> *You tell his Honour that from mid-1999 until the end of 2000 you took no such steps in relation to retail access on Foxtel? --- That is correct.*
>
> *That's because, I suggest to you, Mr Stokes, you had absolutely no intention*

of availing yourself of it? --- No.

During that period? --- Sorry, no.

Why do you say you didn't do it, Mr Stokes? --- To undertake any feasibility study, we need some basis. We had no concept of any basis on which access was going to be granted to us.

Did you understand, for example, what the costs might be of sort of managing such a business? --- Reasonably, yes.

Did you have any idea of what the costs might be for the programming for such a business? --- Yes.

Did you have any idea about what the, in effect, advertising requirements for such a business would be? --- Yes.

Did you have any idea of what the customer support aspects of such a business might be? --- Yes.

Did you ask anybody to say, "Well, taking all those things into account and making allowance for the uncertainties associated with the access regime, what is the likely feasibility of such a business"? --- No.

Why not, Mr Stokes? --- I didn't feel I needed to, Mr Hutley.

You didn't feel you needed to know whether this whole thing was a pie in the sky or had some reasonable prospects of creating a business of some worth; is that what you tell his Honour? --- No.

Why? Didn't you want to know if the whole thing was just an illusion? --- I was satisfied in my mind that it wasn't'.

2801 The significance of the absence of any planning within Seven for the conduct of a retail pay television business is reinforced by Seven's internal communications. On 30 October 2000, Ms Rothery advised Mr Gammell of the need for Seven to obtain expert advice for the forthcoming ACCC arbitration. She thought that an expert was needed to plot the '*various possible ways of getting the C7 signal to the cable*'. She also thought that information was needed on how Seven could set up a separate subscriber billing system if the ACCC would not agree to Seven using Foxtel's system.

2802 It is difficult to resist the conclusion that, if Mr Stokes and Mr Gammell had been serious about utilising access to the Telstra Cable, Seven would have addressed the issues posed by Ms Rothery very much earlier. Mr Stokes accepted that, as at May 2000, Seven

lacked the capability to utilise access to the Telstra Cable. It simply did not have the technical capacity, the equipment, the staff or the business plans to do so.

2803 As appears from the account in Chapter 10, the ACCC provided the impetus for Seven to develop a business plan that would be implemented if Seven gained retail access to pay television subscribers via the Telstra Cable. The ACCC pointed out to Mr North in late March 2001 that the absence of a business plan made it impossible for the ACCC to assess the commercial impact of C7 gaining access to the Telstra Cable. At that point, Seven finally engaged consultants to assist in the presentation of its case to the ACCC.

2804 I do not accept Mr Stokes' or Mr Gammell's evidence that they ever had any serious intention of taking advantage of retail access via the Telstra Cable, should it have become available. The absence of even the semblance of any business plan tells against their evidence on the point which, not surprisingly, was not at all convincing. In my view, what Mr Gammell told Ms Lowes was true. Seven's request for access, and the litigation it instituted to pursue that request, were simply designed to put pressure on Foxtel and on the Government in the manner Mr Gammell described so frankly to Ms Lowes.

17.6 Did Giving Effect to cl 5.2 of the BCA Have the Effect of Substantially Lessening Competition?

2805 Seven cannot succeed unless, at the time or times that Foxtel and Telstra Multimedia gave effect to cl 5.2 of the BCA, that provision was likely to have the effect of substantially lessening competition in a market. On my reading of the Statement of Claim, an essential element in Seven's case is that, had the parties to the BCA not given effect to cl 5.2, Seven would have availed itself of retail access via the Telstra Cable. Seven says that had C7 gained access to the Telstra Cable for its channels, it would have provided competition to Foxtel in the retail pay television market. Seven also says that C7's role as a direct provider of pay television services to retail customers was likely to have changed the perception of the AFL and the NRL Partnership in the bidding process and thus was likely to have increased Seven's chances of securing both sets of rights.

2806 This case breaks down, in my opinion, because Seven never had any intention of availing itself of retail access, even if the opportunity had become available to it well before December 2000. It pursued the retail access claim (which it knew would be vigorously

resisted) solely as a means of exerting pressure on Foxtel and Telstra in relation to the carriage of C7 on Foxtel and the multi-channelling issue. Had Seven been granted access to the Telstra Cable, it would not have taken advantage of its entitlement. Nothing would have changed. The conduct of the parties to the BCA, in giving effect to cl 5.2, was therefore not likely to have the effect of substantially lessening competition in any market.

2807 Seven, however, also puts its case in an alternative way. In a letter of 9 February 2005, Seven's solicitors said this to News' legal representatives:

> *'To avoid doubt, Seven's case in this regard is that if services had been made available to C7 to enable it to offer a retail service on the [Telstra] Cable, then the AFL and the NRL Partnership would have been likely to conclude that, by one means or another, the C7 channels would be broadcast to people connected to the Foxtel Cable. In those circumstances it would have been apparent to the AFL and the NRL Partnership that the C7 channels would be so broadcast. This does not depend (as your letter appears to assume) on C7 commencing or having already commenced to provide a retail service'.*

2808 This theme is taken up in Seven's Reply Submissions. Seven there says that the issue, so far as the AFL and NRL Partnership were concerned:

> *'was all about perception, because Foxtel had managed to create the perception that C7 would not be carried on the Foxtel service and would not otherwise gain access to Foxtel subscribers. That perception would have been altered in a significant respect if C7 had obtained an interim determination providing that it was entitled to obtain access. There is no suggestion that C7 would in fact have gained access prior to the disposition of rights, because this of course would have taken a further (possibly lengthy) period. Contrary to [News'] submission ... [Seven does] not concede ... and indeed it is not the case, that C7 never had any intention of obtaining retail access. However, [Seven] submit[s] that this issue, given inordinate attention by the Respondents, is irrelevant to the particular cause of action under consideration because the AFL and the NRL Partnership were dealing with the matter at a level of perception and impression'.*

2809 The Respondents appear to accept that this way of putting the case is within the scope of the Statement of Claim. The fundamental difficulty with Seven's alternative contention is that it assumes that Seven could have misled the AFL and the NRL Partnership as to its true intentions in relation to retail access. If Seven never had any intention of availing itself of retail access, it was hardly likely, in the absence of misleading conduct, that the perception of the AFL or the NRL Partnership would have been materially affected. In assessing the likely effects on competition of giving effect to a particular provision, it is not appropriate to

assume, in the counter-factual world, that a party will either misrepresent its intentions, or be successful in misleading the representee.

2810 In any event, Seven's alternative case appears to proceed on the basis that each of the AFL and the NRL Partnership was influenced by its perception that C7 would not, or might not, reach Foxtel's audience. The argument assumes that the mere fact that C7 was entitled to retail access via the Telstra Cable would be enough to alter the perception regardless of whether Seven intended to avail itself of its entitlement to access. There is no evidence to support such a heroic assumption.

2811 A further difficulty in Seven's path is that had Foxtel and Telstra Multimedia not relied on cl 5.2 of the BCA to resist C7's requests for retail access via the Telstra Cable, they certainly would have relied on other grounds to resist C7's requests for access. For example, the letter of 9 September 2000 from Foxtel's solicitors rejected Seven's access requests on at least two grounds that had nothing to do with cl 5.2 of the BCA. Telstra Multimedia adopted a similar position. The overwhelming likelihood, therefore, is that even if Foxtel and Telstra Multimedia had not given effect to cl 5.2 of the BCA, Seven would not have been able to establish an entitlement to access to the Telstra Cable any sooner.

17.7 Conclusion

2812 Seven has failed to establish that the conduct of Foxtel and Telstra Media, in giving effect to cl 5.2 of the BCA, had the effect or likely effect of substantially lessening competition in the various markets identified by Seven. Seven's case founded on s 45(2)(b)(ii) of the *TP Act*, insofar as it relates to cl 5.2 of the BCA, therefore cannot succeed.

18. SEVEN'S CAUSES OF ACTION BASED ON THE FOXTEL-OPTUS CSA

18.1 Introduction

2813 Seven pleads a number of causes of action arising out of three agreements entered into in early 2002. These agreements are:

> the **Foxtel-Optus Fox Footy Agreement** of 19 February 2002, whereby the Foxtel Partnership appointed SingTel Optus as a non-exclusive selling agent for the *Fox Footy Channel* for a term of three years ([1675]-[1676]);
>
> the **Foxtel-Optus Term Sheet** of 20 February 2002, whereby the Foxtel Partnership sub-licensed to Optus Vision two channels with the same content as the Fox Sports channels and a Fox Sports overflow channel for retail distribution to Optus' subscribers ([1688]-[1689]); and
>
> the **Foxtel-Optus CSA** of 5 March 2002, whereby the Foxtel Partnership and Optus agreed to share content ([1740]-[1741]).

2814 Seven's case rests primarily on the purpose and effect or likely effect of provisions in the Foxtel-Optus CSA. Its pleadings and submissions identify the relevant markets as the wholesale sports channel market, the AFL pay rights market, the NRL pay rights market and the retail pay television market. I have held that Seven has established the existence of only the last of these markets. Accordingly, I limit the analysis in this Chapter to Seven's case based on the purpose and effect of the provisions in relation to competition in the retail pay television market.

2815 Seven accepts that the Foxtel-Optus Fox Footy Agreement and the Foxtel-Optus Term Sheet were subsumed by the Foxtel-Optus CSA once it took effect. While Seven formally maintains its claims in respect of the first two agreements, its submissions focus on the Foxtel-Optus CSA. In these circumstances, I shall further limit my analysis to Seven's case in relation to the Foxtel-Optus CSA.

18.2 Legislation

2816 Subsections 45(2)(a)(ii) and (2)(b)(ii) of the *TP Act* have been set out earlier in this judgment ([2080]). Section 45(2) also prohibits entering into contracts which contain, or

giving effect to a provision which is, an '*exclusionary provision*'. Section 45(2), insofar as it relates to exclusionary provisions, is as follows:

> *'A corporation shall not:*
>
> *(a) make a contract or arrangement, or arrive at an understanding, if:*
>
> *(i) the proposed contract, arrangement or understanding contains an exclusionary provision; or*
>
> *(ii) ...*
>
> *(b) give effect to a provision of a contract, arrangement or understanding, ... if that provision:*
>
> *(i) is an exclusionary provision; or*
>
> *(ii) ...'*

2817 Section 45(2) of the *TP Act* must be read together with s 4D, which defines '*exclusionary provision*'. Section 4D provides as follows:

> *'(1) A provision of a contract, arrangement or understanding, or of a proposed contract, arrangement or understanding, shall be taken to be an exclusionary provision for the purposes of this Act if:*
>
> *(a) the contract or arrangement was made, or the understanding was arrived at, or the proposed contract or arrangement is to be made, or the proposed understanding is to be arrived at, between persons any 2 or more of whom are competitive with each other; and*
>
> *(b) the provision has the purpose of preventing, restricting or limiting:*
>
> *(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or*
>
> *(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;*
>
> *by all or any of the parties to the contract, arrangement or understanding or of the proposed parties to the proposed contract, arrangement or understanding or, if a party or*

proposed party is a body corporate, by a body corporate that is related to the body corporate.

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

18.3 Seven's Pleadings

2818 Seven pleads that the Foxtel-Optus CSA contains provisions ('**Foxtel-Optus CSA Provisions**') to the following effect:

'(a) Optus has the right to receive and broadcast all of Foxtel's channels over the period from 1 November 2002 to 31 December 2010.

(b) If and when Optus commences providing its programs in digital format, Optus will be obliged to receive and broadcast all of Foxtel's channels.

(c) Optus must make all of the channels which it produces (or may produce in the future) available for broadcast by Foxtel on Foxtel's cable pay television service.

(d) If Optus acquires a channel from any person other than Foxtel, and the channel is of the same or a similar genre of programming as a Foxtel channel, then Optus must place that channel on a higher tier than the Foxtel channel.

(e) If Optus acquires any new movie or sports rights to broadcast on a pay television service supplied via cable, it must arrange for the rights to be made available to Foxtel for broadcast on Foxtel's cable pay television service'.

2819 Foxtel (that is, Sky Cable and Telstra Media carrying on the Foxtel business in partnership) and Optus have given effect to the CSA Provisions, in that Foxtel has offered to its subscribers most of the channels formerly broadcast by Optus and Optus has offered to its subscribers most of the channels formerly broadcast by Foxtel (par 223).

18.3.1 Section 45(2) Effects Case

2820 The effect or likely effect of the Foxtel-Optus CSA Provisions was that there would be no product differentiation between Foxtel and Optus (par 321) because:

each platform can now obtain the other's channels (par 321(a)); and

the Foxtel-Optus CSA Provisions remove any incentive for Optus to acquire or develop channels that compete with existing Foxtel channels (par 321(b)).

Further, the effect or likely effect of the Foxtel-Optus CSA Provisions was that Foxtel and Optus would offer their retail pay television services at the same or similar prices, being higher prices than would have been charged in the absence of the Foxtel-Optus CSA (par 323).

2821 If Foxtel and Optus had not entered into and given effect to the Foxtel-Optus CSA Provisions, Optus would have continued to offer different programming from Foxtel and would have competed on price, quality and nature of programming (par 324).

2822 By reason of the matters pleaded in pars 321 to 324, the effect or likely effect of the Foxtel-Optus CSA Provisions was to substantially lessen competition in the retail pay television market (par 325). Accordingly, the Foxtel Partnership and Optus:

in entering into the Foxtel-Optus CSA, engaged in conduct in contravention of s 45(2)(a)(ii) of the *TP Act* (par 337); and

in giving effect to the Foxtel-Optus CSA Provisions, engaged in conduct in contravention of s 45(2)(b)(ii) of the *TP Act* (par 337A).

18.3.2 Section 45(2) Purpose Case

2823 The removal of product differentiation between Foxtel and Optus was a substantial purpose of the Foxtel-Optus CSA Provisions, in that a substantial purpose was to:

enable both Foxtel and Optus to obtain a greater range of programming at lower cost (par 322(a)); and

achieve that result by ensuring that Foxtel and Optus had the same range of channels and thus did not compete with each other in the acquisition of programming (par 322(b)).

2824 By reason of these matters, the purpose of the Foxtel-Optus CSA Provisions was to substantially lessen competition in the retail pay television market (par 325). Accordingly, Foxtel and Optus engaged in conduct in contravention of s 45(2)(a)(ii) and (b)(ii) of the *TP Act* (pars 337, 337A).

2825 The News, Foxtel, Telstra and Optus respondents admit, as alleged by Seven, that a substantial purpose of the Foxtel-Optus CSA was to enable both Foxtel and Optus to obtain a greater range of programming, while lowering the cost of that programming. However, they otherwise deny the allegations as to the purpose of the Foxtel-Optus CSA Provisions made by Seven in the Statement of Claim.

18.3.3 Section 4D Case

2826 At the time of entering the Foxtel-Optus CSA, Foxtel and Optus were or were likely to be in competition with each other in relation to the acquisition of programming from programming suppliers, including the Hollywood studios (par 339). But for the Foxtel-Optus CSA Provisions, Foxtel and Optus would have been or would have been likely to be in competition with each other in relation to the acquisition of programming from programming suppliers (par 340). A substantial purpose of the Foxtel-Optus CSA Provisions was to restrict or limit the acquisition by Optus and Foxtel of programming from programming suppliers (par 341).

2827 By reason of the matters pleaded in pars 338-341, the Foxtel-Optus CSA contains an exclusionary provision within the meaning of s 4D of the *TP Act* (par 342). As a result, each of Foxtel and Optus:

> in entering into the Foxtel-Optus CSA, engaged in conduct in contravention of s 45(2)(a)(i) of the *TP Act* (par 343); and
>
> in giving effect to the Foxtel-Optus CSA Provisions, engaged in conduct in contravention of s 45(2)(b)(i) of the *TP Act* (par 343A).

2828 Seven suffered loss and damage by reason of the alleged contraventions (par 344). But for the Foxtel-Optus CSA, Optus would have entered into a supply agreement with C7 to replace the C7-Optus CSA (par 344(a)) and as a consequence of the Foxtel-Optus CSA C7 has ceased to operate (par 344(b)).

18.4 Seven's Submissions

18.4.1 Section 45(2) Effects Case

2829 Seven submits that Optus acted as a competitive constraint on Foxtel prior to the execution of the Foxtel-Optus CSA. Seven argues that this can be seen, for example, from the fact that Foxtel and Telstra expressed concerns in mid-2001 about the success of Optus' marketing campaign, which had produced an increase in the number of Optus' subscribers.

2830 Seven contends that the effect or likely effect of the Foxtel-Optus CSA Provisions was to substantially lessen competition in the retail pay television market by removing:

> any significant product differentiation between Foxtel and Optus; and
>
> any significant price competition, producing higher prices than otherwise would have been charged.

2831 As to the first effect, Seven says that the very few channels not shown on both Foxtel and Optus are of '*marginal appeal*'. Moreover, the Foxtel-Optus CSA Provisions reduce, if not eliminate, any incentive for Optus to acquire content independently of Foxtel. If, for example, Optus acquired a new sports or movie channel, it would be obliged to offer it (or cause it to be offered) to Foxtel. Further, if Foxtel decided not to carry the channel, Optus could only broadcast the content on a higher tier than the equivalent content on Foxtel.

2832 As to the pricing, Seven submits that the effect of the Foxtel-Optus CSA Provisions was that price competition between Foxtel and Optus was reduced significantly. Seven argues that:

> *'It is unsurprising that Foxtel's and Optus' pay TV prices should have been so similar since the [Foxtel-Optus] CSA. By reason of the lack of product differentiation identified above ... Foxtel and Optus were providing very similar products. That must naturally give rise to price-signalling between them and ultimately price-matching. There is little reason for Foxtel and Optus to charge significantly different prices for such almost identical pay TV services'.*

2833 Seven submits that, by reason of the absence of product differentiation and price competition, the Foxtel-Optus CSA had the effect of substantially lessening competition in the retail pay television market. It relies on the evidence of Mr Williams (Foxtel's CEO) to support this contention ([1756]). It also relies on the opinions expressed by Professor Noll

and Dr Smith, to the effect that subsequent to the Foxtel-Optus CSA there were simply no mechanisms that allowed competition on either price or quality between the two retail pay television platforms.

2834 Seven accepts that, had the Foxtel-Optus CSA not been executed, Optus probably would have implemented the Manage for Cash strategy. Despite this, Seven argues that Optus would have continued to act as a competitive constraint on Foxtel, might have merged (or entered a joint venture) with Austar and would have been unlikely to close its retail pay television business.

2835 Seven's submissions on this issue depend, in part, on its contention that the evidence of Mr Lee and Mr Anderson should not be accepted in certain respects. I have explained elsewhere ([458]-[459], [460]-[464]) my reasons for accepting their evidence as their honest assessment of what would have occurred had Foxtel and Optus not entered a content supply agreement in March 2002.

2836 Seven contends, however, that even if I accept the evidence of Messrs Lee and Anderson as an honest evaluation of Optus' options both at the time and in retrospect, I should not accept their assessment as accurate. Seven identifies a number of matters that it says point to a different conclusion. The matters are the following:

> CMM had improved its financial performance since 1997, in particular since its marketing campaign commenced in September 2000;
>
> although Optus had financial problems, they were largely temporary because they were the product of high fixed content costs which would diminish over time;
>
> the closure of CMM would have been an '*extreme step*' for Optus to take;
>
> the closure of CMM had not been mentioned as an option during SingTel's pronouncements before and after it announced (on 26 March 2001) its offer to acquire Optus;
>
> despite having detailed knowledge of Optus when SingTel acquired it, SingTel did not close CMM down at the time;
>
> a merger with Austar may have prevented closure of CMM;

CMM had accumulated tax losses which required it to remain in business until 2006 in order to utilise the losses and produce a positive '*tax cash effect*' (a phrase used in the Project Alchemy board paper of 20 February 2000); and

the possibility of a sale of CMM, whether as a whole or in part, could not be excluded, in which event the retail pay television business might have continued.

18.4.2 Section 45(2) Purpose Case

2837 Seven submits that a substantial purpose of the Foxtel-Optus CSA was to remove product differentiation. This is said to be supported by:

A memorandum of 25 October 2001 sent by Mr McLachlan of PBL to Mr James Packer ([1621]);

the reference in a Project Alchemy briefing paper of 13 December 2001 to costs savings accruing to Foxtel from no longer having to compete with Optus for sporting content;

the acknowledgement by Mr Lee and Mr Anderson of Optus that they recognised at the time that one consequence of the Foxtel-Optus CSA would be that Optus would no longer source its own content from suppliers;

Dr Switkowski's evidence that he had understood Mr Chisholm's use of the expression '*rationalising the pay television industry*' to refer to the concept of a single acquirer of pay television content; and

the fact that Dr Switkowski and Mr Akhurst did not think it likely that Optus would bid against Foxtel for content once the Foxtel-Optus CSA was in place.

18.4.3 Section 4D Case

2838 Seven submits that Foxtel and Optus were in competition with each other at the time they entered into the Foxtel-Optus CSA. It says that a purpose of the CSA Provisions was to limit the acquisition by the Foxtel Partnership and Optus of programming from suppliers.

2839 Seven recognises that '*programming suppliers*' might be considered to be a broad class of persons. Nonetheless, it contends that programming suppliers can constitute '*particular persons or classes of persons*' for the purposes of s 4D(1)(b) of the *TP Act*. It

follows, according to Seven, that the Foxtel-Optus CSA Provisions are '*exclusionary provisions*' under the meaning of s 4D. Seven submits as follows:

> the Foxtel-Optus CSA was entered into between parties that were competitive with each other in relation to the acquisition of programming from programming suppliers; and
>
> the Foxtel-Optus CSA Provisions, insofar as they limited the acquisition by the Foxtel Partnership and Optus of programming from programming suppliers, had the purpose of preventing, restricting or limiting the acquisition of goods or services from a class of persons, namely programming suppliers.

18.5 Reasoning: s 45(2) Effects Case

2840 In order to determine the effect of the Foxtel-Optus CSA Provisions on competition in the retail pay television market, it is necessary to consider what would have happened had the Foxtel-Optus CSA not been entered into by the parties. The difficulty confronting Seven is that it accepts that in that situation Optus would have adopted the Manage for Cash strategy. The evidence of Mr Lee and Mr Anderson was to the effect that the Manage for Cash strategy was very likely to lead to the closure of CMM within a few years (Mr Anderson thought closure was inevitable). I have accepted that both witnesses were giving a truthful account of their assessment of CMM's position and prospects, both in early 2002 and in retrospect.

18.5.1 Objective Circumstances

2841 The truthfulness of the evidence of Mr Lee and Mr Anderson, of course, is not a complete answer to Seven's submissions. The objective circumstances relating to CMM could be such that the honestly held assessments of Messrs Lee and Anderson should not determine whether in truth there was a real chance, in March 2002, that CMM, including its retail pay television operations, could have survived as a business beyond the short winding-down period envisaged by Messrs Lee and Anderson. In assessing Seven's contentions on this issue a number of factors must be kept in mind.

2842 **First**, as I discuss in Chapter 20, on any view CMM in 2001 and 2002 was a business that had (in Mr Anderson's words in evidence) '*serious, serious problems*', of which the greatest was its retail pay television service. I have referred to CMM's substantial negative EBITDA over the period 1999 to 2001 ([1512]).

2843 It is also necessary to take into account that under the accounting standards adopted by SingTel (Singapore GAAP [Generally Accepted Accounting Principles]), CMM recorded an '*operational EBITDA*' of -$175 million for the year ended 31 March 2001 and -$145 million for the year ended 31 March 2002. Mr Lee said that Singapore and Australian accounting practices differed, in that the Singapore GAAP required Optus '*to expense customer acquisition costs at the time [they were] incurred*'. Mr Lee's uncontradicted evidence was that the Singapore GAAP more closely reflected the cash nature of the business and was more consistent with International Financial Reporting Standards than the Australian GAAP.

2844 The EBITDA for CMM contrasted starkly with the performance of Optus' Mobile Division (EBITDA of $799 million in 2001/2002) and the Optus Business Division (EBITDA of $262 million in 2001/2002). In the 2001/2002 financial year, the EBITDA margins were 14 per cent for CMM, 17 per cent for Optus Business and 33 per cent for Optus Mobile. The contrast between the divisions puts in stark perspective Seven's contention that CMM's performance had improved in 2001 and early 2002.

2845 **Secondly**, CMM's troubles had been subject to detailed analysis both by McKinsey and by Optus itself in the period leading up to the Foxtel-Optus CSA. McKinsey's discussion paper of 22 August 2001, prepared well into the period of '*improved*' performance identified by Seven, concluded that CMM faced fundamental problems and had both a weak strategic position and an unsustainable cost structure. By February 2002, McKinsey thought that only two options for CMM warranted serious consideration: Project Alchemy (which would reduce Optus essentially to a reseller of pay television content) and Manage for Cash. The latter envisaged a drastic curtailment of CMM's operations but with the prospect, according to McKinsey, of achieving '*roughly break-even steady state free cash flows in the next 3-4 years*' if certain financial objectives, including aggressive pricing improvements, could be achieved.

2846 **Thirdly**, Optus' management and McKinsey had different views about CMM's prospects under the Manage for Cash strategy. Optus' management took a '*slightly more pessimistic*' approach (to use Mr Lee's words). The management paper prepared for Optus' board meeting of 21 February 2002 was plainly sceptical about McKinsey's assessment that Manage for Cash could produce a roughly break-even outcome inside three to four years.

Management's view was that in the absence of changes to content pricing (which the paper did not suggest would occur):

> *'this model will likely see CMM trading on in a negative cash flow situation for the foreseeable future'.*

2847 Seven repeatedly relies on McKinsey's assessment in order to support its contention that CMM might have survived the drastic surgery of Manage for Cash. McKinsey's assessment was more optimistic than that of Optus' management, but even McKinsey by no means confidently asserted that the improvements in performance would be achieved. In any event, it is hardly surprising that Optus' management took a less rosy view of CMM's prospects than did McKinsey. After all, it was management that bore responsibility for making the critical decisions affecting CMM's future. The contemporaneous documentation recording management's concern as to CMM's viability is consistent with the evidence of Messrs Lee and Anderson as to the most likely outcome had Optus chosen to implement the Manage for Cash strategy. Not only did the management paper for the critical board meeting of 21 February 2002 express scepticism about the viability of CMM under Manage for Cash, but the board minutes reflected the same scepticism. In particular, the minutes recorded that Manage for Cash would reduce the cash burn to $150 million per annum (hardly a profit) and that:

> *'there was no certainty that the industry would have rationalised at economically viable prices down the road'.*

2848 **Fourthly**, it is critical to understand what the Manage for Cash strategy would have entailed. There were three fundamental features of the strategy:

> Optus was to stop '*new adds*', meaning that Optus was not to connect any new subscribers to its retail pay television platform. No attempt would be made to attract Foxtel subscribers or non-pay television subscribers to Optus.
>
> Optus was to save $25 million to $30 million per annum by reducing sales and marketing, program production and provisioning expenses. This measure involved making about 200 marketing and sales employees redundant.
>
> Optus was to raise the price of its bundled product in order to achieve an increase of $14.00 pspm in telephony ARPU.

2849 It follows that one important consequence of Optus adopting the Manage for Cash strategy would have been the imposition of severe restrictions on its expenditure on programming content. Both Mr Lee and Mr Anderson said that it would have been inconsistent with the Manage for Cash strategy for Optus to make significant commitments to the purchase of new programming, particularly since the strategy assumed that subscriber numbers would diminish rapidly.

2850 A second inevitable consequence of Manage for Cash would have been high rates of churn among subscribers. Even with a relatively vigorous marketing program, rates of churn for Optus subscribers were high. An internal Optus analysis of 1 March 2000, for example, showed '*[a]nnualised churn*' of 47 per cent for non-bundled customers, although it indicated that this rate could be reduced by up to 75 per cent for subscribers taking at least three products. Mr Anderson's view was that Manage for Cash would produce rates of churn of about 35 per cent per annum. I see no good reason to doubt the reliability of his estimate.

18.5.2 CMM Would Have Closed Down

2851 In view of the four factors I have identified, it seems to me that if Optus had adopted the Manage for Cash strategy (as Seven accepts was likely in the absence of the Foxtel-Optus CSA), the strong likelihood is that CMM would have closed down within three to four years of the Foxtel-Optus CSA coming into force in November 2002. Even if some of CMM's operations had survived, the very strong likelihood is that Optus' pay television operations would not have continued beyond that period. During the winding down period, Optus would have played an ever-diminishing role in the retail pay television market, as its subscriber base declined and as it worked off its MSGs. In particular, Optus would have had little or no impact in the markets (however defined) for the acquisition of subscription driving content, including sports programming and movies.

18.5.3 Answers to Seven's Contentions

2852 What I have said answers many of the arguments advanced by Seven. However, I add some further comments to address specific points made by Seven.

2853 As I have already explained, the financial performance of CMM in 2001 had not improved to the extent that Seven suggests. Moreover, the increase in Optus' subscriber

numbers (from about 200,000 to a peak of about 266,000) must also be placed in context. As Mr Ebeid of Optus pointed out in his statement, the increase was partly attributable to an unsustainable short-term policy of not charging subscribers telephone line rentals. In addition, during this period Optus took advantage of the fact that it was the only supplier that could bundle pay television and telephony services. That advantage, too, was bound to be short-lived, since Telstra was soon to acquire the ability to bundle Foxtel with its own telephony services. Indeed, the Foxtel-Telstra Resale Term Sheet, which enabled Telstra to bundle the Foxtel Service with Telstra telephony services, was executed on 20 February 2002, two weeks before the Foxtel-Optus CSA itself was executed. As Optus points out, the *quid pro quo* for the Foxtel-Telstra Resale Term Sheet was the Foxtel-Optus Term Sheet executed on the same day. Thereafter both Optus and Telstra could offer bundled services with similar pay television content.

2854 I do not accept Seven's submission that closing down the whole of CMM would simply have been too difficult a decision for Optus to make. There may be times in any business when apparently drastic decisions have to be made because of economic imperatives. Seven says that this litigation is the outcome of just such a decision. Mr Lee was clear as to what would have happened. I have reproduced above ([1720]) the portion of Mr Lee's statement in which he outlined what would have happened under the Manage for Cash strategy. Mr Lee acknowledged that shutting down a division is a last resort for most businesses, but continued:

> *'Even at this time [September 2001] we were hopeful that we could get an outcome other than shutdown. But if shutdown were the only possibility other than trading on as is, then I think we would be forced into that circumstance. It was not our preferred choice of action.*
>
> *It was never your preferred choice of action, and I suggest to you that you would not have done it? --- If we had no choice other than to shutdown or face $300 million of cash losses every year, we would have shut it down.*
>
> *...*
>
> *In the end you did have choices? --- In the end we had choices because we were able to negotiate outcomes with Foxtel, [and were] able to then avoid having to go down a shutdown path. But if we had not, then my view – and I think it is a view that the board would have supported – would be that, despite the pain, the write-offs, the loss of jobs and the brand damage, it would still be economically the rational decision to take to maximise shareholder value, and we would have taken that decision'.*

I accept Mr Lee's evidence.

2855 I also do not accept Seven's submission that statements made at the time of SingTel's acquisition of Optus would have made it difficult for Optus to close down CMM or CMM's retail pay television operations. SingTel's bidder's statement of 21 May 2001 recorded that:

> *'SingTel will review strategic options for the consumer and multimedia business, including the possibility of entering into strategic partnerships with other media companies and content providers. The outcome of this review will be guided by SingTel's desire to maximise shareholder value'.*

Mr Lee's evidence was that the language had been carefully chosen not to exclude a shut down of CMM, although that was not the preferred option at the time. That evidence receives support from the contrasting language used in the bidder's statement unequivocal endorsement of the value of Optus' other divisions.

2856 I have referred in Chapter 11 ([1722]-[1726]) to the evidence of Mr Lee and Mr Anderson as to whether Optus would have pursued Project Emu (a take-over of, or merger with, Austar), had Project Alchemy (a content supply agreement with Foxtel) not been achievable. Having regard to their evidence, I do not think that, as at the date of execution of the Foxtel-Optus CSA (5 March 2002), there was a real chance that Project Emu would be implemented. It remained on the agenda, but the obstacles to Optus taking over or merging with Austar were too great for the idea to have significant prospects of success.

2857 Despite Seven's submissions, there is no evidence that Optus could have sold CMM as a going concern. It had tried over time to do that and failed. Moreover, the longer the Manage for Cash strategy continued, the less the prospect (if ever there was a prospect) of selling CMM or its pay television operations.

18.5.4 Findings

2858 A number of findings follow from this analysis. Had Optus and Foxtel not entered into the Foxtel-Optus CSA:

Optus would have adopted the Manage for Cash strategy;

Optus would not have taken over Austar or merged with it;

Optus' retail pay television operations would have continued for several years but with substantial and continuing reductions in subscriber numbers;

the reduction in Optus' subscriber base would have occurred rapidly, in consequence of churn;

during the winding-down period Optus would not have been a significant purchaser of new programming content or channels (that is, content or channels other than those it took in March 2002);

Optus would have sought to increase aggressively the prices of its bundled pay television and telephony services; and

Optus would have closed its retail pay television business by 2006 and quite possibly earlier.

2859 On the basis of these findings, it is difficult to see how, in the absence of the Foxtel-Optus CSA, Optus could have imposed a significant competitive constraint on Foxtel in the retail pay television market, whether in relation to pricing, quality of product or in any other respect. Nor is it clear how Optus could have imposed a competitive constraint on any other market, for example a market (however defined) for the acquisition of sports programming.

18.5.5 Effect of the Foxtel-Optus CSA on Competition

2860 I do not understand Seven to submit that the findings which I have made are consistent with concluding that the Foxtel-Optus CSA had the effect or likely effect of substantially lessening competition in the retail pay television market. In any event, it seems to me clear that pending Optus' departure from the pay television business over a three to four year period, it would not have provided any significant constraint on Foxtel in the retail pay television market. If that is so, the Foxtel-Optus CSA did not have the effect or likely effect of substantially lessening competition in a market. Nonetheless, I should refer to the expert evidence.

2861 Professor Noll and Dr Smith were asked to assume that in the absence of the Foxtel-Optus CSA:

> *'Foxtel, Optus and Austar would have continued to offer pay television services in substantially the same manner that they did in February 2002.*

Or in the alternative, that:

Foxtel and a merger of, or joint venture between, Optus and Austar would have offered pay television services, and the merged Optus and Austar entity would have offered its pay television services via both cable and satellite across Australia'.

Neither of the assumptions upon which they were asked to express their opinions has been established by the evidence. Accordingly, the opinions expressed in their reports are of no assistance on the question of whether the Foxtel-Optus CSA had the effect or likely effect of substantially lessening competition.

2862 Professor Hay was asked to assume that if the Foxtel-Optus CSA had not been entered into:

'

- *Optus would have implemented a "manage for cash" business strategy which involved reducing cash burn by a significant amount per annum and ceasing efforts to expand Optus' pay television business.*
- *There would not have been a merger or joint venture between Optus and Austar.*
- *Optus would have closed its pay television business when the present value of its exit costs became lower than the present value of the losses expected from its continued operations (which would have occurred no later than 2008)'.*

2863 Professor Hay expressed his opinion in his report, in a summary way, as follows:

'If ... one were to assume that, without the [Foxtel-Optus] CSA, Optus would not have been a significant competitive factor in the market for pay TV services on its own, nor would it have merged with Austar to compete with Foxtel, then the [Foxtel-Optus] CSA, with the undertakings required by the ACCC, would not have substantially lessened competition in any relevant market'.

2864 Professor Hay explained his opinion in his cross-examination. He was asked whether, before he could conclude that the Foxtel-Optus CSA had not substantially lessened competition, he would not need to exclude possibilities such as take-over by or merger with a more solvent firm, or reorganisation of the firm in an insolvency administration. Professor Hay's response was as follows:

'I'm not sure that you would. It seems to me, under the assumptions I was

asked to make, comparing the alternative world, the world without the CSA, you have got to ask: given the reasons Optus was doing badly, which I think I have described as partly a sense in which – I don't want to overstate it – there may not be room for two cable-based pay TV suppliers in a country the size of Australia. ... If that is the reason Optus is failing, or at least one of the reasons, that basically their share of the market has shrunk to where basically their costs per subscriber simply don't permit them to make a profit, having them taken over by somebody else isn't going to change that. Or, put differently, had they survived in some form, I do not see them as making any significant – having any significant effect on whatever ability Foxtel may have to increase prices. If a firm is doing that badly, what it is going to do, it's going to follow the dominant firm's prices. It's not going to invest heavily in new programming initiatives, it's basically going to milk the cow. It's going to take out of the business what it can, and the way to do that is not to rock the boat. So under any of a variety of permutations, if I thought that was going to be the end result, that Optus would not be a boat rocker, then it seems to me it is safe for me to conclude that the CSA did not have any significant adverse effect on competition.

...

HIS HONOUR: Is your observation that Optus could not offer genuine price competition given its circumstances dependent upon it being a failing firm? --- Not necessarily failing in the legal sense. They were doing so badly that I think their best strategy under the circumstances was basically to simply match the pricing of Foxtel, not be really aggressive in competing. That's the way they would maximise their income until the time that they decided simply it was worth going out of the business.

You are assuming, in the absence of the CSA, that was their preferable strategy, you say, from an economic perspective, absent the CSA? --- I think the assumptions I was asked to make was that they would what I think is called manage for cash, which I take to mean get as much money out of the business [as] you can while you can and then exit. The firm adopting that strategy as a general matter will basically not be aggressive on price in a quality competition. They will take [the] prices of their dominant competitor and basically price up to that level'.

2865 Professor Hay's responses were made at a relatively general level. However, the findings I have made, in my view, establish that his opinion correctly analyses the circumstances of the present case. Given the Manage for Cash strategy, Optus would not have '*rock[ed] the boat*' on price, quality or any other aspect of its service. On the contrary, the strategy called for Optus not to engage in price competition, seek better quality programming or attempt to attract new subscribers.

2866 It follows, in my opinion, that neither the making of the Foxtel-Optus CSA, nor

giving effect to the Foxtel-Optus CSA Provisions, had the effect or likely effect of substantially lessening competition in the retail pay television market. In the absence of the Foxtel-Optus CSA, it is very likely that Optus would have closed down its pay television operations within three to four years. Pending the close-down of its pay television operations, Optus would not have provided any significant constraint on Foxtel on the price or quality of the services provided to retail pay television subscribers.

18.6 Reasoning: s 45(2) Purpose Case

2867 There is a difficulty in the way Seven presents its purpose case. The Statement of Claim pleads that removal of product differentiation between Foxtel and Optus was a substantial purpose of the Foxtel-Optus CSA Provisions and that this involved a substantial lessening of competition in the retail pay television market. However, par 322 of the Statement of Claim identifies two purposes (lowering the cost of programming and conferring greater bargaining power on Foxtel and Optus in negotiating with programming suppliers) that have nothing to do with competition in the retail pay television market. The two purposes identified in par 322 are concerned with competition in a market (however defined) for the acquisition of programming, rather than in the retail pay television market. The former is not a market on which Seven relies for its purpose case in relation to the Foxtel-Optus CSA. (Paragraph 325 of the Statement of Claim also refers to the retail television market, but this is not pressed.)

2868 Given this pleading, it is perhaps not surprising that four out of the five evidentiary matters relied on by Seven in its Closing Submissions have nothing to do with the state of competition in the retail pay television market. They are relevant only to a lessening of competition in an unpleaded market for the acquisition of certain kinds of programming. The fifth matter relied on by Seven, Mr McLachlan's memorandum of 25 October 2001, recorded arguments which Mr McLachlan apparently intended to use in a meeting to persuade Telstra to support content sharing. Mr McLachlan's arguments were founded on the proposition that content sharing would actually enhance competition between Telstra or Optus for bundled pay television and telephony services (a business from which Telstra had hitherto been excluded). The memorandum does not suggest that PBL's objective was to remove product differentiation between Foxtel and Optus and thus reduce competition in the retail pay television market.

2869 As has often happened in this case, Seven's Reply Submissions take a different tack from its Closing Submissions. The Reply Submissions argue that the purpose of the Foxtel-Optus CSA Provisions was to allow both the Foxtel and Optus platforms access to a greater amount of each other's programming content. The Reply Submissions make no reference to the evidence relied on by Seven in the Closing Submissions, and only passing reference to the impact of the Foxtel-Optus CSA on the ability of Foxtel or Optus to acquire content more cheaply.

2870 Seven's Reply Submissions argue that the purpose of a provision may be inferred from its effect. For reasons I have explained, the effects of the CSA Provisions did not include a substantial lessening of competition in the retail pay television market. But for the Foxtel-Optus CSA, Optus would have remained in the pay television business for only three to four years and, in the period leading up to the closure of its business, would not have sought, to compete actively for subscribers, whether by way of price, content or otherwise. Without the Foxtel-Optus CSA, after a period of three to four years Foxtel would have been the only pay television operator to offer content in the geographic areas in which both Foxtel and Optus operated at the time the parties entered into the Foxtel-Optus CSA. In these circumstances, the obvious inference is that none of the parties to the Optus-Foxtel CSA had the purpose of substantially lessening competition in the retail pay television market.

2871 In assessing the purpose of the parties to the Foxtel-Optus CSA, other factors must also be borne in mind. It is difficult, for example, to see how Optus' acquisition of AFL content can be attributed to the Foxtel-Optus CSA. Optus acquired the right to AFL content via the Foxtel-Optus Fox Footy Agreement of 19 February 2002, before the Foxtel-Optus CSA was executed. In any event, under the terms of the AFL-News Licence, News was obliged to offer AFL content to Optus on reasonable terms. Dr Smith agreed in her evidence that, in circumstances where Optus had access to AFL content until the end of the 2001 season, the acquisition by Optus of AFL content in 2002 was pro-competitive, because it increased Optus' chances of staying in the pay television business.

2872 Similarly, Optus acquired the Fox Sports channels via the Foxtel-Optus Term Sheet of 20 February 2002, which also pre-dated the Foxtel-Optus CSA. The Foxtel-Optus Term Sheet was closely linked to the agreement between the Foxtel partners permitting Telstra to bundle its telephony services with the Foxtel Service. Had the Foxtel-Optus CSA not been

entered into, Optus would still have acquired the Fox Sports channels as the *quid pro quo* for Telstra being able to offer bundled services. In addition, Dr Smith agreed that Telstra's newly acquired ability to bundle pay television and telephony services would have given consumers a choice of bundled services, whereas previously only Optus offered the bundled product:

> *'And that additional competition, you would expect from an economic perspective, to put pressure on each of those parties to offer more attractive and more price competitive bundles on an overall basis? --- I would think it was part of the competitive process, yes'.*

2873 So far as movie channels are concerned, Optus had relinquished its entitlement to exclusivity with Disney in 1999 as part of negotiations relating to its MSG obligations. It had also relinquished its entitlement to exclusivity with The Movie Network Channels Pty Ltd in 2000. Foxtel commenced broadcasting the Disney Channel in December 1999, but had not taken up the Movie Network channels at the time the Foxtel-Optus CSA was executed. Thus in March 2002, Foxtel already had the Disney Channel and there was no impediment to it acquiring the Movie Network channels on a non-exclusive basis.

2874 Moreover, as both Dr Smith and Professor Noll acknowledged in their evidence, product differentiation is not necessarily competition-enhancing and lack of product differentiation may indeed increase competition in a market. The cross-examination of Professor Noll included the following passage:

> *'MR ARCHIBALD: I want to ask you about differentiation between products in a market. Where there is differentiation between products in a market, Professor, the competition between those products is less intense than if there were lesser differentiation; is that correct? --- Well, it may or may not be, depending on what the effects of the differentiation are.*
>
> *Yes, I understand the difficulty with the generalisation. But is it right as a general proposition that the greater the differences between products in the market the less strongly substitutable they are one for the other? --- Usually but not always.*
>
> *...*
>
> *And is the converse true: usually the lesser the differentiation between products, the stronger the substitutability between them? --- Again, generally true; not always.*
>
> *And stronger substitution bespeaks more intense competition, doesn't it?*

--- The definition of competition is a circumstance in which two products are close substitutes'.

2875 Seven's Closing Submissions appear to assume that an agreement between retail pay television platforms to acquire similar content on an non-exclusive basis, so that the content offered by one is not materially different from the content offered by the other, necessarily involves a purpose of substantially lessening competition in the retail pay television market. Seven's Reply Submissions seem to argue that it is not merely a question of a reduction in product differentiation, but how the reduction is achieved. According to Seven, the Foxtel-Optus CSA Provisions removed Foxtel's **ability** to differentiate its content and Optus' **incentive** to differentiate its content. This is said to be '*plainly anti-competitive*'.

2876 It is not clear to me why, even if some or all of the parties to the Foxtel-Optus CSA sought to achieve a reduction in product differentiation, this **of itself** would necessarily establish the purpose of substantially lessening competition in the retail pay television market. A reduction of product differentiation, particularly in subscription driving content, might materially improve the offerings available to subscribers to each platform and, depending upon the circumstances, increase the prospect of price competition. If, for example, both retail platforms offer AFL and NRL content, they could appeal to the same groups of sporting enthusiasts, instead of to two largely discrete groups. Whether greater price competition would occur might depend upon how the content is offered to subscribers and what scope there would be for each platform to undercut the other. (Seven does not rely in its purpose case on any objective of reducing price competition between Foxtel and Optus.)

2877 In assessing the significance of a reduction in product differentiation, it is also relevant to take into account developments within the retail pay television industry. The retail pay television market in Australia has not been one in which the participants have sought to differentiate their content. In particular, Optus had not sought to differentiate its content from Foxtel. It had abandoned exclusivity in movie programming. Optus, like Foxtel, had NRL content. It had sought unsuccessfully to acquire the Fox Sports channels. While only Optus (and Austar) had AFL content prior to 2002 (through C7), that was not the consequence of any strategy Optus itself had adopted. Rather it was the product of Foxtel's desire to acquire the AFL pay television rights directly from the AFL. Even putting to one

side the content agreements entered into in late February 2002, the Foxtel-Optus CSA merely formalised a position that was very likely to come about in any event if Optus was to continue offering pay television services beyond the short term.

2878 With this background in mind, the evidence in my opinion does not support Seven's contention that the parties to the Foxtel-Optus CSA had a substantial objective of reducing the extent of content differentiation between Foxtel and Optus. Mr Lee and Mr Anderson's objectives were to stem CMM's heavy losses and to allow Optus to continue offering bundled pay television and telephony services beyond the short period contemplated by the Manage for Cash strategy. From Optus' perspective, the CSA Provisions were essential to it remaining as a participant in the retail pay television market.

2879 Dr Switkowski had three objectives in supporting Telstra Media's role as a party to the Foxtel-Optus CSA. These were to:

> broaden the content of Foxtel in order to increase its appeal to subscribers;
>
> create a single aggregator of key pay television content, particularly movies, so as to reduce the unsustainable cost of that content; and
>
> enable Telstra to bundle Foxtel with Telstra's telephony services so that it could compete more effectively with Optus in the provision of Telstra's core telephony services.

Mr Akhurst's evidence was to the same effect.

2880 The first of the objectives identified by Dr Switkowski oversimplifies the ways in which Foxtel would benefit from achieving increased penetration of the Foxtel Service among potential retail subscribers once the Foxtel-Optus CSA came into force. Nonetheless, I accept his evidence and that of Mr Akhurst as to the objectives Telstra sought to achieve.

2881 It was, no doubt, an inevitable consequence of the Foxtel-Optus CSA Provisions that Foxtel and Optus would offer largely the same content, particularly subscription-driving programs. But none of the objectives Telstra sought to achieve included a reduction in content differentiation between the two pay television platforms. Nor did any of the objectives, whatever their significance in other markets, constitute the purpose of

substantially lessening competition in **the retail pay television market**.

2882 Mr Macourt was not involved in negotiating the terms of the Foxtel-Optus CSA, although he discussed commercial issues raised by the negotiations with Mr Philip from time to time. His evidence was as follows:

> *'I was in favour of an agreement by which FOXTEL and Optus shared their content. I thought the sales of both platforms were suffering because consumers perceived that they were only receiving half the programming for their subscription. This was particularly so in movies. I thought that the agreement would lift the penetration of subscription television across the board. Whether it would lift it more for FOXTEL than Optus depended on the marketing and sales strategies of each company. I also thought it would improve FOXTEL's competitive position in negotiating with all programming suppliers particularly the Hollywood studios'.*

This evidence appears to me consistent with the objective evidence and I accept it.

2883 Mr Philip, who executed the Foxtel-Optus CSA on behalf of Sky Cable, gave this account of his objectives '*as an alternate director of FOXTEL*':

> *'(a) secure Optus as a retailer of FOXTEL services to counter the detriment that I believed might flow from admitting Telstra alone to bundle FOXTEL's services with telephony services;*
>
> *(b) increase FOXTEL's bargaining power with content suppliers, particularly the Hollywood studios;*
>
> *(c) indirectly secure Optus as a customer of Fox Sports'.*

2884 Mr Philip's explanation as to why he thought the level of competition between Foxtel and Optus would not be affected was somewhat confused. But the three objectives he identified seem to me consistent with contemporaneous documentation and the terms of the Foxtel-Optus CSA. While Mr Philip was not a reliable witness, I do not think that his objective was to bring about a reduction in product differentiation between Foxtel and Optus. From his perspective, that outcome was merely a consequence of the other objectives he sought to achieve through the Foxtel-Optus CSA.

2885 In my view, Seven has not established that any of the parties to the Foxtel-Optus CSA had the purpose alleged by Seven in the Statement of Claim. Seven has therefore not made out its case that the purpose of the Foxtel-Optus CSA Provisions was to substantially lessen

competition in the retail pay television market.

18.7 Reasoning: s 4D Case

2886 If there is one thing that this case has brought home, it is that brevity is an attribute to be applauded, not denigrated. The fact that Seven's submissions on s 4D are brief is not a cause for criticism. But in the context of this case, the brevity of the submissions suggests that Seven only faintly presses its contention that the parties to the Foxtel-Optus CSA contravened s 45(2) of the *TP Act* by entering into an agreement containing an '*exclusionary provision*' and by giving effect to the Foxtel-Optus CSA Provisions.

18.7.1 In Competition with Each Other

2887 Seven's pleaded case is that at the time of entering into the Foxtel-Optus CSA, Foxtel and Optus were or were likely to be in competition with each other '*in relation to the acquisition of programming from programming suppliers, including the Hollywood studios*'. The concept of competition implies the existence of a market. Neither the Statement of Claim nor Seven's submissions identify the market in which it says Foxtel and Optus were competing for the acquisition of '*programming*'.

2888 The market relied on by Seven is apparently concerned with the supply and acquisition of any kind of programming, not merely subscription driving content or indeed programming limited to any particular genre. It is not clear whether the market is '*in Australia*', since the Statement of Claim refers to programming provided by the Hollywood studios. The significance of this is that s 4E confines the concept of a market for the purposes of the *TP Act*, in the absence of a contrary intention, to a '*market in Australia*'.

2889 Since Seven does not define the market in respect of which Foxtel and Optus were said to be in competition, it is not easy to determine precisely why Seven says that they were '*competitive with each other*' at the time they entered the Foxtel-Optus CSA. In effect, I am invited to undertake the inquiry in a market definition vacuum.

2890 Bearing that difficulty in mind, I do not think that Seven has established that on 5 March 2002 Foxtel was or was likely to be (but for the Foxtel-Optus CSA) in competition with Optus in relation to the acquisition of programming. By that date, the choices facing

Optus were either entry into the Foxtel-Optus CSA or adoption of the Manage for Cash strategy. An integral component of the Manage for Cash strategy was that Optus would not acquire new programming. Indeed, for some time Optus had not sought to acquire exclusive programming from suppliers, but to acquire non-exclusive content from Fox Sports and Foxtel. By the time the Foxtel-Optus CSA was executed, Optus had secured access to AFL content and to the Fox Sports channels.

2891 Viewed as at 5 March 2002, Optus was neither in competition nor likely to be in competition with the Foxtel Partnership in relation to the acquisition of programming. Had the Foxtel-Optus CSA not proceeded, Optus would not have competed with the Foxtel Partnership for the acquisition of programming for its pay television platform.

18.7.2 Particular Class of Persons

2892 Although it is not necessary to decide, I doubt that '*programming suppliers, including the Hollywood studios*' constitute a '*particular class of persons*' within the meaning of s 4D(1)(b) of the *TP Act*.

2893 In *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53, the joint judgment of Gummow, Hayne and Heydon JJ held that:

> the statutory concept of a particular class of persons is not limited to competitors of the parties to the relevant contract or arrangement (at 81 [63]);
>
> a provision may have the purpose of limiting the acquisition of goods and services from a particular class of persons even though the identity of all members of the class may not be ascertainable (at 90 [87]);
>
> it is not necessary in order for s 4D to apply that the provision be '*aimed at*' a class of persons, nor that it inflict damage or harm on the class (at 83-84 [70]), following *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, at 590-591 [76]-[79], per Gummow J; and
>
> it is preferable to speak of a provision being '*directed toward*' a particular class, rather than being '*aimed at*' the class (at 84 [70]).

2894 In *Rural Press v ACCC* the publisher of the *Murray Valley Standard* agreed to withdraw its threat to distribute the newspaper in the circulation area of the *River News* in

return for the publisher of the *River News* agreeing not to intrude into the *Murray Valley Standard's* circulation area. The trial Judge found that the arrangement had a subjective purpose:

> *'of preventing or restricting or limiting the supply of services to the particular class or classes of persons, being those in the Mannum area (or in that area and extending to a [line] about 40 km north of Mannum) who could otherwise receive the information and news in the* River News *or who could otherwise advertise in the* River News *or take advantage of advertising in the* River News*'.*

2895 The joint judgment of Gummow, Hayne and Heydon JJ noted (at 89-90 [87]) that there had been little argument in *Rural Press v ACCC* as to whether there was a lack of particularity in the class of persons identified by the trial Judge, namely '*customers and potential customers of the* River News'. Nonetheless, their Honours expressed the view that the class had been adequately defined. They pointed out that even if s 4D required the identity of members of the class to be ascertained, it would have been possible to draw up a list of advertisers who had used the *River News* and that would have constituted a sufficient class for the purposes of the section.

2896 The joint judgment in *Rural Press v ACCC* 216 CLR, at 90 [88], referred to the judgment of the Full Court of this Court in *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1990) 27 FCR 460. In that case, the Full Court suggested that persons may constitute a particular class within the meaning of s 4D of the *TP Act*, if the distinguishing feature of the class '*is that its members are objects of an anti-competitive purpose*': 27 FCR, at 488, per *curiam*. The joint judgment in *Rural Press v ACCC* observed (216 CLR, at 90 [88]) that *ASX v Pont Data* had not been overruled by the High Court in *News v South Sydney*. Only Callinan J in *News v South Sydney* had criticised the decision (215 CLR, at 638-639 [217], 640-641 [228]), while McHugh and Gummow JJ, (the latter of whom had been a member of the Court in *ASX v Pont Data*) had accepted it as correct (215 CLR, at 581 [46], 589-590 [74]-[77]). The joint judgment in *Rural Press v ACCC* gave this reason for not having to resolve whether *ASX v Pont Data* had been correctly decided (216 CLR, at 90-91 [88]):

> *'In any event, to define a particular class by reference to its geographical location is not to define it by the fact of its exclusion from supply or acquisition, because it is identified at the time of the arrangement and indeed identifiable before that time'.*

2897 Gleeson CJ and Callinan J, in their concurring judgment in *Rural Press v ACCC*, clearly favoured a narrower construction of the statutory concept of a class of persons. Their Honours reasoned as follows (216 CLR, at 61-63 [5]-[12]):

> *'In applying s 4D, courts have had to consider the statutory concept of a provision (of a contract, arrangement or understanding) which has the purpose of preventing, restricting or limiting supply to or acquisition from particular persons or classes of persons. This is a compound concept involving a certain kind of purpose, having as its object particular persons or classes of persons. The particularity of the persons or classes of persons who are the objects of the purpose as defined and proscribed is essential to the concept of an exclusionary provision. The significance of a finding that a provision is an exclusionary provision within s 4D and s 45(2)(a)(i) and (b)(i) is that such a finding engages a per se legislative prohibition. It becomes unnecessary to consider whether it has the purpose or effect of substantially lessening competition in a market.*
>
> *If attention were not paid to the compound nature of an exclusionary provision, and the requirement of particularity of its object or objects, there is a danger that s 4D would be given an operation that would greatly reduce the statutory significance of lessening competition, in relation to agreements between competitors generally. Contracts, arrangements or understandings between competitors commonly involve some form of prevention, restriction or limitation of supply or acquisition of goods or services. If two hairdressers in a suburban main street were to have an understanding that one would provide services to men, and one would provide services to women, it may be unlikely that their understanding would involve a substantial lessening of competition in a market. It would be surprising if it were held, nevertheless, to contravene the Act. To the extent to which it had an anti-competitive purpose, that purpose would not be "directed toward" particular persons or classes of persons.*
>
> *...*
>
> *We agree with Gummow, Hayne and Heydon JJ that there was sufficient particularity in the present case, but we can think of other cases in which it would be absent, notwithstanding the existence of a purpose of preventing, restricting, or limiting supply or acquisition. If it were not so, the references to particular persons or classes of persons would be redundant.*
>
> *The Full Court referred to the changes that have taken place in the form of s 4D. In its original form, the proscribed purpose was of preventing, restricting or limiting supply to or acquisition from particular persons. The words "or classes of persons" were added in 1986, following some decisions that were thought to reveal an undue narrowness in the legislation it its original form. Those words were clearly intended to widen the provision, but not to change its entire character. The proscribed purpose must still be one*

> *that is directed toward particular persons or classes of persons. Parliament did not delete the word "particular" and substitute the word "any". Nor did it remove all reference to persons as objects of the proscribed purpose. The legislative history, as well as the text, tends strongly against a reading of the section which requires only that a provision of a contract, arrangement or understanding has the purpose of preventing, restricting or limiting, in any way, supply or acquisition. Supply or acquisition will always be to or from persons. Ordinary principles of construction require that the references to particular persons or classes of persons be given work to do; they are not mere drafting verbosity. A court construing a provision in an Act "must strive to give meaning to every word of the provision". A court will seek to avoid a construction of a statute that renders some of its language otiose. Here, that consideration is powerfully reinforced by the legislative history, which shows that the reference to particular persons was originally an essential feature of s 4D, and that the addition of the reference to classes was intended to expand it, not to make it superfluous.*
>
> *...*
>
> *An exclusionary provision may be directed toward particular persons or classes of persons without necessarily having a purpose of injuring or disadvantaging them. However, a purpose of the kind defined and proscribed must exist, and must be directed toward particular persons or classes of persons, for the legislative prohibition to apply'.*

Their Honours did not refer to *ASX v Pont Data* 27 FCR, at 488, but it is difficult to reconcile their reasoning with that decision.

2898 The facts of the present case differ from *Rural Press v ACCC*, in that the class of persons at whom the CSA Provisions are said to be directed is not defined by reference to geographical location. The '*class*' here is defined by reference to a limitation imposed by the CSA Provisions on the acquisition of programming: that is, the class consists of all programming suppliers, anywhere in the world, whose products and services Foxtel and Optus are prevented from attempting to acquire in competition with each other. The application of s 45(2) (read with s 4D), if otherwise satisfied, therefore appears to turn on whether the Full Federal Court's statement of principle in *ASX v Pont Data* 27 FCR at 488, is correct.

2899 It is a brave, not to say foolish, trial judge who ventures unnecessarily into dangerous waters in which swirl differing but non-binding views of members of the High Court. I shall therefore only say, without expressing a final view, that the opinion expressed by Gleeson CJ and Callinan J in *Rural Press v ACCC* appears, with respect, to have considerable force. If

that opinion represents the correct construction of s 4D, Seven has not established that making the Foxtel-Optus CSA, or giving effect to the CSA Provisions, was directed at a class of persons within the meaning of s 4D of the *TP Act*.

18.8 Conclusion

2900 Seven has not made out its case based on the purpose, or effect or likely effect, of provisions in the Foxtel-Optus CSA. In particular, I conclude that Seven has not shown that the purpose or effect of the relevant provisions was to substantially lessen competition in the retail pay television market.

19. SEVEN'S CAUSES OF ACTION BASED ON ITS FAILURE TO ACQUIRE THE NRL PAY TELEVISION RIGHTS

19.1 Causes of Action

2901 Seven pursues four causes of action (other than its claims based on anti-competitive conduct) arising out of the process by which the NRL Partnership awarded the NRL pay television rights for 2001 to 2006 to Fox Sports. It will be recalled that, at a meeting held on 13 December 2000, the NRL PEC resolved to accept an offer by Fox Sports for the NRL pay television rights and also resolved to enter into a separate names, sponsorship and internet rights agreement with Telstra. The agreement between the NRL Partnership and Fox Sports was executed on the evening of 13 December 2000, following the conclusion of the PEC meeting. The agreement between the NRL Partnership and Telstra was executed on 15 December, two days later.

2902 The four causes of action are as follows:

(i) The first is an action for breach of a duty of confidence arising from the disclosure by Mr Philip, a member of the NRL PEC, of what is said to have been confidential information. The disclosure concerned the terms of C7's offer of 5 December 2000, to acquire the NRL pay television rights. Seven claims that Mr Philip disclosed the confidential information relating to the bid to News, Foxtel, PBL, Telstra and Fox Sports, in circumstances which each of them knew breached confidentiality. Seven also says that these parties misused the confidential information to Seven's disadvantage.

(ii) The second cause of action is based on misleading representations said to have been made by the NRL Partnership in a press release issued on 14 December 2000. Seven claims that the press release falsely stated that the agreement between Fox Sports and the NRL Partnership in respect of the NRL pay television rights was worth '*almost $400 million*' and that the '*guaranteed figure from Fox Sports was higher than that of C7*'. In consequence the members of the NRL Partnership (ARL and NRLI) are said to have engaged in misleading or deceptive conduct in contravention of s 52 of the *TP Act.* Seven

seeks only declaratory relief in respect of this cause of action and does not press its pleaded claim for damages.

(iii) The third is an action against the NRL Partnership or, alternatively, NRL Ltd, based on representations to Seven that C7's offer for the NRL pay television rights would be treated in a fair and impartial manner. These representations are said to have been misleading or deceptive in contravention of s 52 of the *TP Act*, in that the NRL Partnership or the NRL had no reasonable grounds for making them and in any event departed from the representations without informing Seven.

(iv) The fourth cause of action is a claim against the NRL Partnership for breach of an agreement with Seven to treat its offer for the NRL pay television rights in a fair and impartial manner.

19.2 Legislation

2903 The provisions of the *TP Act* bearing on the causes of action addressed in this Chapter are ss 51A, 52 and 82.

2904 Section 52 of the *TP Act* provides that:

'[a] corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive'.

2905 Section 51A deals with representations as to future matters:

'(1) For the purposes of this Division, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.

(2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation'.

2906 Section 82(1) provides as follows:

> *'A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part ... V ... may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention'.*

Section 52 is in Pt V of the *TP Act.*

19.3 Was C7's Bid for the NRL Pay Television Rights Genuine?

2907 News' first answer is that Seven cannot succeed in establishing any of the four causes of action it has pleaded because C7 never engaged in a bona fide attempt to acquire the NRL pay television rights. News says that Seven engaged in a careful and deliberate strategy that was designed to ensure that C7 would never be forced to take the NRL pay television rights on the terms it had purported to offer. According to News, the true purpose of C7's participation in the bidding was to put pressure on News to abandon its bid for the AFL pay television rights. In any event, Seven was content to force News to pay as much as possible for the NRL pay television rights.

2908 News contends that Seven's strategy involved making what could be presented as a very high offer, but one which included terms that Seven knew would be unacceptable or unattractive to the NRL. This was done initially, so News argues, in order to delay the NRL bidding process until after the AFL pay television rights had been awarded. Later, however, Seven appreciated that bidding for the NRL pay television rights was likely to harm its bid for the AFL pay television rights and this realisation prompted it to bring the NRL bidding process to '*an abrupt end*'.

2909 Although News puts the genuineness of C7's bids at the forefront of its submissions, it is not necessary to deal with the issue of genuineness unless Seven otherwise makes out the elements of at least one of the four causes of action upon which it relies. I think the better approach is to consider first whether, on the evidence, Seven has made out the elements of the four causes of action which arise out of the bidding process for the NRL pay television rights or is otherwise entitled to relief, independently of the genuineness or otherwise of Seven's bids for the NRL pay television rights. If Seven does not succeed in relation to any of the causes of action, it will not be necessary to consider the genuineness of C7's bid.

19.4 Breach of Confidence Claim

19.4.1 Seven's Pleaded Case

2910 Seven pleads that during the period 16 November 2000 to 13 December 2000 it made a series of four offers to the NRL Partnership to acquire the NRL pay television rights for the 2001 to 2006 seasons. The four offers are said to have been made on 16 November 2000, 27 November 2000, 5 December 2000 and 12 December 2000 (par 475). Seven alleges that the terms of each offer, including the amounts offered were confidential. The confidentiality is said to have arisen from the nature of the bidding process, including the fact that C7's bids were expressed to be confidential and that the NRL Partnership had agreed, on 20 November 2000, to keep the bids confidential (par 476).

2911 Seven pleads that by reason of these matters the NRL Partnership owed C7 a duty of confidence in respect of the terms of the C7 offers, including the amount C7 was offering for the NRL pay television rights (par 477). Seven alleges that in breach of this duty of confidence the terms of the offer of 5 December 2000, including the proposed price, were disclosed to Foxtel, News, PBL, Telstra and Fox Sports '*by a representative of the NRL Partnership*'. In particular, it is alleged that Mr Philip disclosed:

> the consideration being offered by C7 for the NRL pay television rights, including the fact that the amount of C7's offer increased if subscriber numbers exceeded 500,000, in a fax sent to Mr Akhurst of Telstra on 9 December 2000;
>
> the terms of the offer of 5 December 2000, including the proposed consideration, at a meeting on 13 December 2000 attended by representatives of News, Foxtel, PBL and Telstra; and
>
> information to Fox Sports concerning the terms of the C7 offers (par 478).

2912 Seven pleads that the information was communicated in circumstances that made it apparent that the information was confidential and was being disclosed in breach of an obligation of confidence (par 479). Seven also alleges that the confidential information was used by Fox Sports to make a rival bid; by Foxtel, Fox Sports and Telstra to enter into the NRL Bidding Agreement; and by Mr Philip, through his dealings with Mr Akhurst, to induce Telstra to support the payment by Foxtel to Fox Sports provided for in the NRL Bidding

Agreement (that is, the agreement of 13 December 2000 entitled '*Internet and Sponsorship Rights – Fox Sports/Foxtel*') and to agree to acquire the NRL internet and naming rights (par 480). Seven alleges that without disclosure of the confidential information, Telstra would not have supported the NRL Proposal, entered into the Master Agreement or entered into the NRL Bidding Agreement (par 481).

2913 Finally, Seven pleads that by reason of these matters (pars 475 to 481), each of Mr Philip, News, Foxtel, PBL, Telstra, Fox Sports, and NRLI and ARL (as partners in the NRL Partnership) has breached an equitable obligation of confidentiality owed to C7 (par 482).

19.4.2 Seven's Submissions

19.4.2.1 CONFIDENTIALITY

2914 It is common ground that Mr Anderson (Seven's director of Sports and Olympics) conveyed C7's offer of 5 December 2000 by fax to Mr Moffett, the CEO of NRL. It will be recalled that the offer provided for a cash payment of up to $62.5 million per annum, including GST, for the NRL pay television rights, depending upon the '*total number of homes subscribing to the Pay TV services that carry the NRL Product*'. The offer also provided for '*contra*' of $4 million per annum to promote the NRL Competition on the 7 Network and its affiliates.

2915 Seven submits that the terms of the offer were confidential because:

> the terms had not been disclosed publicly at the time the offer was made;
>
> Seven expected that the bidding process would be conducted in a fashion similar to a '*sealed bid auction*';
>
> Seven's Board Meeting of 17 November 2000, which approved the bid for the NRL pay television rights, had required all Seven's directors and employees involved in the bid to enter confidentiality deeds; and
>
> the bid was conveyed in circumstances making it apparent that the contents were confidential.

2916 Seven acknowledges that the Respondents have pleaded that the information contained in C7's NRL pay television rights offers had ceased to be confidential by reason of

the public disclosure of the offers. Seven submits, however, that none of the alleged public disclosures affected the confidential quality of the offer made on 5 December 2000. In particular:

> the disclosure by C7 of its offer of 27 November 2000 to a meeting of club CEOs on 30 November 2000 was strictly limited and done in a manner that preserved confidentiality;
>
> while media reports had correctly identified the principal features of C7's offer of 27 November 2000 shortly after it had been made, the terms of the offer of 5 December 2000 were substantially different; and
>
> the evidence did not support the Respondents' allegation that Mr Stokes had authorised the disclosure to the media of the terms of the 27 November 2000 offer.

2917 Seven advances two primary reasons for its contention that the NRL Partnership received the 5 December 2000 offer in circumstances giving rise to an obligation to maintain confidentiality. First, the previous offers made by C7 were either expressed to be confidential or were the subject of assurances from the NRL Partnership that they would be treated as confidential. While Mr Anderson's facsimile communicating the 5 December 2000 offer to the NRL Partnership did not expressly claim confidentiality, Seven says that it was implicit that the offer should be treated as a confidential communication. Secondly, the parties to the bidding process understood that all bids were to be treated as confidential by the NRL Partnership.

19.4.2.2 DISCLOSURE OF CONFIDENTIAL INFORMATION

2918 Seven next submits that the evidence supports its pleaded case that Mr Philip deliberately disclosed confidential information relating to the 5 December 2000 offer. The elements of the offer that were disclosed by Mr Philip in breach of confidence are identified as the following:

> the base amount of C7's offer for the NRL pay television rights (recorded in the fax as $33 million per annum for the rights, plus $6 million production and $4 million contra, a total of $43 million);
>
> the amount of the '*contra*' (recorded in the fax as $4 million per annum); and

the fact that C7's offer, if accepted, would prevent the NRL from getting value for internet and naming rights.

Seven says that the most important element of the disclosure was the base amount of C7's offer.

2919 Seven invites me to reject Mr Philip's claim that the figures recorded in his handwritten faxes of 9 and 12 December 2000 were simply derived from a newspaper article and not from C7's offer. It submits, among many other arguments, that Mr Philip's conduct in destroying his copies of the handwritten faxes and in asking Mr Akhurst and Mr Falloon to do the same (at least in relation to the first fax) suggests that Mr Philip believed that he was unlawfully disclosing confidential information.

2920 Seven submits that the recipients of the information concerning C7's offer of 5 December 2000 knew that the information was confidential. Seven says that this was true of the recipients of the handwritten faxes and of the persons attending the '*principals*' meeting of 13 December 2000. Notwithstanding the confidentiality of the information, it was used at the meeting to formulate the bid by Fox Sports for the NRL pay television rights and the bid by Telstra for the internet and naming rights. Seven contends that the confidential information was instrumental in persuading Telstra to support the bid for the NRL pay television rights and to make its own bid for the internet and naming rights.

19.4.2.3 RELIEF CLAIMED

2921 Seven submits that it is entitled to equitable compensation for C7's loss or, alternatively, an account of profits. It claims this relief on the basis that the disclosure of the confidential information and its unauthorised use led to Fox Sports making its successful offer for the NRL pay television rights. Seven argues that the offer could only have been made once Telstra's support was assured. By reason of the disclosure of the confidential information, C7 suffered a detriment in that its prospects of winning the NRL pay television rights were diminished.

2922 Seven's claim for an account of profits rests on the proposition that News, Fox Sports, PBL and Telstra each made a profit as a direct result of the breach of the duty of confidence and their misuse of confidential information. The specific example given is that the retention

of the NRL pay television rights enabled Fox Sports to preserve its contract with Austar.

2923 The alternative claim for equitable compensation is said to be based on the assumptions incorporated in '*Scenario 3*'. Scenario 3 assumes that C7 was unsuccessful in retaining the AFL pay television rights for the period 2002 to 2006, but was successful in obtaining the NRL pay television rights for 2001 to 2006.

19.4.3 News' Submissions

2924 News accepts that Mr Philip's conduct in relation to the fax of 9 December 2000 was inappropriate. But it says that the fact that his conduct was '*silly and very stupid*' does not demonstrate that his conduct involved a breach of confidence.

19.4.3.1 CONFIDENTIALITY

2925 News submits that the first inquiry is whether the information alleged to be disclosed by Mr Philip had the necessary quality of confidentiality to attract the equitable doctrine. News invites me to find that Seven orchestrated the '*leaking*' to the press of the details of C7's written offer of 16 November 2000. It also invites me to find that Seven made a '*calculated disclosure*' to the media of the details of C7's written offer of 27 November 2000. According to News, the disclosure was made by Mr Tim Allerton, who conducted a public relations firm (City Public Relations Pty Ltd) which had a monthly retainer from ACE (Mr Stokes' private company). News says that Mr Stokes gave directions to Mr Allerton to brief selected members of the press about the offer and that Mr Gammell and Mr Francis were both '*in on the strategy*'.

2926 News points out that C7's offer of 5 December 2000 was not subject to an express reservation of confidentiality. It submits that if Seven had wished to make the offer confidential, it would and should have done so explicitly. News contends that Seven has provided no plausible reason for its failure to provide explicitly for the confidentiality of the 5 December 2000 offer. In any event, News invites me to find that Seven leaked details of that offer to a *Sydney Morning Herald* journalist, Mr Roy Masters, in the expectation that he would use the information to '*push Seven's line*'. Such a finding, News contends, is inconsistent with any assertion of confidentiality in the offer of 5 December 2000 and is therefore fatal to Seven's case based on breach of confidentiality.

19.4.3.2 ALLEGED MISUSE OF THE INFORMATION

2927 News says that, although Mr Philip's conduct surrounding his sending of the handwritten fax of 9 December 2000 was extraordinary, it must be understood in context. News submits that Mr Philip had reason to be concerned about providing information concerning C7's bid for the NRL pay television rights, even though he did not consider it to be genuinely confidential.

2928 News invites me to accept Mr Philip's evidence that it simply did not occur to him that the $33 million figure referred to in his fax as '*the C7 offer we need to beat*' was almost exactly the cash component of C7's offer, exclusive of GST. News submits that, at worst, Mr Philip inadvertently disclosed that figure, as he arrived at the figure quoted in his fax quite independently of his knowledge of the terms of C7's offer. News also submits that Mr Philip's disclosure that the C7 offer included $4 million in '*contra*', although admittedly derived in part from C7's offer, cannot be regarded as having revealed any confidential information.

2929 News disputes Seven's contention that Mr Philip disclosed confidential information at the meeting of '*principals*' on 13 December 2000. It submits that the evidence shows that Mr Philip did not provide specific information at that meeting concerning the contents of any of C7's offers.

19.4.3.3 CONSEQUENCES OF THE ALLEGED DISCLOSURE

2930 Even if Mr Philip had disclosed information without authority, News says that the disclosure did not cause any detriment to C7 by reducing its prospects of winning the NRL pay television rights. News says that it is highly unlikely that it (News) would have been placed in the position of having to exercise its first and last rights in relation to the NRL pay television rights, because Fox Sports would simply have raised its bid to the level necessary to secure the rights. Even if Telstra had not supported Fox Sports' bid, News (contrary to Mr Philip's assertion to Mr Akhurst) would have filled the gap. In any event, had it been necessary, News would have exercised its last rights to acquire the NRL pay television rights, thus preventing C7 from acquiring them.

19.4.4 PBL's Submissions

19.4.4.1 CONFIDENTIALITY

2931 PBL supports News' submission that the information contained in C7's offer of 5 December 2000 was not confidential. However, PBL puts forward additional arguments.

2932 PBL points out that Seven's submissions rely heavily on the confidentiality deeds executed by directors and employees of Seven in late November and early December 2000. PBL submits that Seven's argument should not be accepted because:

> the existence of the confidentiality deeds was not communicated to anyone outside Seven; and
>
> in any event, whether Seven considered the bid to be confidential is not relevant to determining whether the circumstances of the bid gave it the necessary quality of confidentiality.

2933 PBL submits that even assuming the terms of C7's offers of 16 and 27 November 2000 were confidential prior to 30 November 2000, they ceased to be confidential by that time. This follows from Seven's conduct on and after that date in actively and intentionally leaking the terms of the offers to journalists and making them known to the NRL clubs. Moreover, Mr Stokes had conceded in his evidence that '*nothing from 1 December was confidential*' because the details of the latest offer then current had been revealed in an article by Mr Roy Masters published in the *Sydney Morning Herald.*

2934 PBL further contends that Seven did nothing after 1 December 2000 to establish confidence in relation to its subsequent offers or to restrain public disclosure. In particular, the offer of 5 December 2000, and the letters varying that offer were not expressed to be confidential. In any event, the terms of the 5 December offer, as amended, had also been published in an article by Mr Masters in the *Sydney Morning Herald*, on 7 December 2000.

2935 PBL further submits that the evidence does not show that Mr Falloon (of PBL) had or should have had any understanding that C7's bids for the NRL pay television rights were to be regarded as confidential. PBL had not been privy to the communications between the NRL and Seven. Even if Mr Philip's fax of 9 December 2000 did contain confidential information and was copied to Mr Falloon, he (Mr Falloon) had no reason to conclude that

the information was in fact confidential.

19.4.4.2 CONSEQUENCES OF THE ALLEGED DISCLOSURE

2936 Finally, PBL submits that C7 suffered no detriment as the result of any alleged breach of confidence. Even if Telstra had not supported Fox Sports' bid, News would still have exercised its last right of refusal in relation to the NRL pay television rights.

19.4.5 ARL's Submissions

2937 ARL adopts the submissions of News and PBL. It makes three additional submissions, although the first appears to overlap with News' submissions.

19.4.5.1 CONFIDENTIALITY

2938 First, ARL says that, irrespective of whether earlier C7 proposals contained confidential information, ARL owed no obligation of confidence to C7 at the time of C7's offer of 5 December 2000, by reason of circumstances occurring before that date. In particular, shortly before 1 December 2000, Mr Stokes had directed and authorised the briefing of media representatives in relation to C7's proposal of 27 November 2000 and thereafter C7 did nothing to establish a new relation of confidence with the NRL Partnership.

2939 ARL points out that the pleaded obligation of confidence is not said to arise in contract, but in equity. It submits that the authorities establish that an equitable obligation of confidence arises only where it is unconscionable for the recipient of information to publish or use it. ARL contends that it cannot be unreasonable or unconscionable to disclose to third parties so-called '*confidential information*' when the party asserting confidentiality has disclosed that information to the world, especially where the disclosure is surreptitious.

2940 ARL further says that C7's '*sealed auction*' submission carries no weight in the light of C7's deliberate and surreptitious disclosure of the earlier bids. In any event, C7's submission overlooks the NRL Partnership's express rejection of any limitation on the way the sale of the NRL pay television rights was to proceed.

19.4.5.2 MR PHILIP NOT A REPRESENTATIVE OF THE NRL PARTNERSHIP

2941 ARL argues that even if an equitable obligation of confidence still existed at the time

of the NRL Partnership's receipt of C7's offer of 5 December 2000, there was no breach of that obligation by ARL. This is so because any disclosure by Mr Philip of the terms of the offer was not as a representative of the NRL Partnership or of ARL.

2942 ARL submits that Mr Philip, when he sent the fax of 9 December 2000 to Mr Akhurst or attended the meeting of 13 December 2000, was not acting in the ordinary course of the NRL Partnership's business or with the authority of the NRL Partnership. ARL points out that, under the Partnership Agreement, the NRL PEC has exclusive non-delegable powers in relation to contracts concerning '*Key Revenue Rights*'. Mr Philip was one of three NRLI directors on the NRL PEC, and held other positions with News, Fox Sports and NRLI. But he was not an office holder of ARL.

2943 According to ARL, when Mr Philip sent his fax to Mr Akhurst, he was acting on behalf of News or Fox Sports, not the NRL Partnership. Moreover, ARL points out that there is no pleaded case that ARL was in any way involved in the meeting of 13 December at which Mr Philip is said to have divulged confidential information. If Mr Philip did divulge such information, it was in his capacity as a director or agent of News or Fox Sports.

19.4.5.3 CONSEQUENCES OF THE ALLEGED DISCLOSURE

2944 Thirdly, ARL submits that for what it says are reasons additional to those given by PBL, Seven did not suffer any loss or damage by reason of any breach of confidence by ARL.

2945 ARL contends that in order to make out '*Scenario 3*' of Professor McFadden's analysis, Seven must prove that, but for the breach of confidence, C7 would have acquired the NRL pay television rights. Seven fails on this issue, so ARL argues, because there is no evidence to show that, but for the disclosure, C7's proposal would have been '*clearly and indisputably superior*' to any offer from Fox Sports ultimately considered by the NRL PEC.

2946 ARL further argues that even if Seven overcomes this barrier, it has not shown that the C7 offer would have been accepted by the NRL PEC. This is so because the proposal was not capable of acceptance or was unacceptable to the NRL PEC (as News submits). In any event, Mr Philip would not have voted in favour of C7's proposal being accepted.

19.4.6 NRL's Submissions

2947 I do not think it necessary to outline separately NRL's submissions. They traverse essentially the same ground as the other submissions.

19.4.7 Confidential Information: Principles

2948 In their customary understated fashion, the authors of the latest edition of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, 2002), at [41-010], suggest that the many questions concerning the law of confidential information:

> *'largely lack satisfactory answers; this is because the courts, faced with a rush of litigation, much of it interlocutory, have spoken quickly and with many tongues'.*

Despite this assessment of the current state of the law, the parties were in substantial agreement as to the principles to be applied in this case. Certainly there is no occasion to consider potentially controversial questions such as whether confidential information can be regarded as property, or whether detriment to the plaintiff is an essential element of an action based on an alleged breach of confidence: cf *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, at 281-282, per Lord Goff; *Equity: Doctrines and Remedies* (4th ed), at [41-050], [41-080]ff.

2949 Actions based on breach of confidence, generally speaking, fall into two broad classes. The first is where a person is under a contractual obligation, express or implied, not to use or publish certain information. The second class invokes the equitable jurisdiction to restrain or grant other relief in respect of breaches of confidence: *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167, at 190-191, per Fullagar J. Seven makes no claim founded on contract. Therefore it is only the equitable principles relating to confidential information that are relevant to this case.

2950 The equitable jurisdiction to deal with cases of breach of confidence is said to be ancient: see *Coco v AN Clark (Engineers) Ltd* (1968) 1A IPR 587, at 590, where Megarry J traced its origins at least to the time of the *Statute of Uses 1535*. The fundamental notion underlying the intervention of equity in relation to confidential information is that the circumstances:

> *'are such that the conscience of a recipient or possessor of information is so affected as to make it "unconscionable" on his part to publish or use the information'.*

Deta Nominees v Viscount Plastic [1979] VR, at 191. The initial question to be addressed is whether the information has been imparted in confidence so as to bind the conscience of the defendant (or respondent) in a particular way: *Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87, at 101, per Gummow J.

2951 In *Coco v Clark,* Megarry J considered (1A IPR, at 590) that three elements are normally required if, independently of contract, a case of breach of confidence is to succeed:

> *'First, the information itself ... must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it'.*

Although there is doubt as to whether detriment is always essential, Megarry J's formulation has been cited with approval in Australia: *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, at 51, per Mason J; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, at 222 [30], per Gleeson CJ.

2952 In *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, at 443, Gummow J regarded it as settled that a plaintiff or applicant must satisfy four criteria to make out a case in equity for the protection of allegedly confidential information:

> *'The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information'.*

Although his Honour dissented as to the result, the majority did not disagree with this formulation.

2953 There is a somewhat imprecise quality to the elements of a claim based on breach of

confidentiality articulated in these statements. This is perhaps not surprising, given the infinite range of circumstances in which the principles might be invoked. As Gleeson CJ observed in *ABC v Lenah Game* 208 CLR, at 227 [45], the difficulty in any given case is to determine what a '*properly formed and instructed conscience*' has to say about the particular circumstances. The circumstances include the nature of the allegedly confidential information and the manner in which it was communicated to the defendant.

2954 There is a factual dispute in this case as to whether Seven '*leaked*' details of C7's bids for the NRL pay television rights to the media in late November and early December 2000. Mr Sumption accepted that if Seven leaked details of the bid of 5 December 2000, its breach of confidentiality claim was bound to fail. That concession is clearly right, since it could hardly be said in those circumstances that the details of the bid were confidential. As Megarry J observed in *Coco v Clark* 1A IPR, at 590:

> *'there can be no breach of confidence in revealing to others something which is already common knowledge'.*

A fortiori, there can be no breach of confidence when the person complaining has made the information common knowledge.

2955 Mr Sumption also accepted that if Seven leaked details of the two bids by C7 predating its bid of 5 December 2000, but not the third bid, a reasonable bystander would not so readily conclude that the third bid was confidential. The reference to a '*reasonable bystander*' may have been to Megarry J's suggestion in *Coco v Clark* 1A IPR, at 591, that the '*reasonable man*' test can be pressed into service when determining whether information has been communicated in circumstances importing an obligation of confidence. Not everyone approves of this '*infiltration into equity of the "reasonable man" as the exemplar of equitable standards of conduct*': *Equity: Doctrines and Remedies* (4th ed), at [41-020]. Perhaps the better way of putting the point is that it is very difficult to regard information as being confidential, or having been communicated to the recipient in circumstances importing an obligation of confidence, if the information is very similar in character to that which the communicator has previously chosen for its own purposes to place in the public domain: cf *Lennon v News Group Newspapers Ltd* [1978] FSR 573.

19.4.8 Was the Information Confidential?

19.4.8.1 FINDINGS OF FACT

2956 The first issue is whether the information identified by Seven as confidential had the necessary quality of confidentiality to attract the intervention of equity. The information comprises three key elements of C7's bid for the NRL pay television rights, which was communicated to the NRL PEC through Mr Moffett, under cover of C7's letter of 5 December 2000. To determine whether this information was confidential it is necessary to make findings about the public release of information concerning C7's first two bids for the NRL pay television rights. It is also necessary to make findings about the circumstances surrounding the communication of C7's third bid to the NRL PEC.

2957 News invites me to find that Seven '*orchestrated*' leaks to the media of the contents of the first C7 offer of 16 November 2000. There is evidence which points in this direction. Mr Masters' article in the *Sydney Morning Herald* of 20 November 2000 can be read as suggesting that Seven disclosed the terms of C7's bid to the NRL clubs. Mr Masters was regarded by Seven's public affairs representative, Mr Francis, as being '*on our C7 rugby league payroll*' and as Seven's '*old faithful warhorse*'. Moreover, Mr Stokes admitted that very shortly after the Seven board meeting of 17 November 2000, at which C7's first bid was approved, he telephoned Mr Hill (a director of both ARL and NRL Ltd) '*to tell him we were making an offer*'.

2958 In his email of 23 November 2000, Mr Francis informed Mr Stokes, among others, that Seven had been careful not to leave its fingerprints on any story in the press in the previous ten days. As Mr Stokes accepted, Mr Francis is likely to have known of the terms of C7's first offer for the NRL pay television rights. Mr Stokes agreed that he understood at the time that Mr Francis was briefing the press on a basis that was not attributable to Seven. While no doubt Mr Francis was briefing the press on AFL-related matters at the time, there is no particular reason to interpret his '*fingerprints'* comment as limited to briefings on those matters.

2959 I think that the likelihood is that Mr Francis, on behalf of Seven, gave information to selected reporters about aspects of C7's first bid for the NRL pay television rights. I am reinforced in that conclusion by the findings I make later concerning the leaking of the

contents of C7's second bid. However, I am not satisfied that the leaks were such as to divulge the substance of C7's bid. The articles in the News publications did not accurately disclose the terms of the bid and Mr Masters' article carries the extent of disclosure no further. Mr Stokes' admission in relation to his conversation with Mr Hill does not establish that he disclosed the substance of the bid at that point.

2960 The details of C7's second bid of 27 November 2000 were revealed to the CEOs of the NRL clubs at the meeting on 30 November 2000. There were obvious commercial advantages to this course and an equally obvious risk that confidentiality would not be respected by all those present at the meeting. However, the disclosure by Seven was on the basis that the CEOs and the clubs maintained confidentiality. As the minutes record, the confidential nature of the offer was stressed to all those attending the meeting. In my view, this disclosure did not, of itself, result in the terms of the offer made to the NRL PEC ceasing to be confidential.

2961 At 4.50 pm on 30 November 2000, Mr Ray Hadley disclosed on Radio 2UE the substance of important elements of C7's second bid. Mr Hadley's on-air presentation suggests that it may have been one of the club CEOs who had leaked the contents of the bid, presumably immediately after the meeting of 30 November. Mr Francis' email of 30 November 2000 provides some support for this view. However, on 1 December 2000 several articles appeared which provided yet more details of C7's bid. In particular, the article by Mr Masters (*Sydney Morning Herald*) on that day correctly sets out the key terms, including the '*three-tiered*' pricing arrangement. The article in the *Australian Financial Review* also accurately reported the tiered pricing arrangement.

2962 Mr Allerton's email of 1 December 2000 to Mr Stokes makes it clear that he had '*briefed*' Mr Hadley, as well as Mr Masters and Mr Collins, all of whom '*pushed our line*'. The coverage was said to be '*great*' and Mr Allerton was clearly pleased Seven did '*not have any fingerprints on it*'. The email evinces no concern that further confidential information about C7's bid, beyond that revealed by Mr Hadley, had been reported in the media.

2963 As I have recorded, Mr Stokes was in China on 30 November 2000, the day of the CEOs' meeting, and on the following day, 1 December 2000. He spoke to Mr Allerton by telephone for three minutes in the afternoon (AEST) on 30 November 2000 (apparently

before Mr Hadley's program) and for thirteen minutes on the following day, after the press reports had appeared. Mr Stokes was questioned about these communications and somewhat reluctantly conceded that he had asked Mr Allerton to brief the press, although he characterised it as a '*defensive reply*'. The relevant passage is as follows:

> *'Look, on 30 November 2000 you told him to brief the press in relation to the offer to get your line across; correct?---That's not what I would call it. I don't recall it.*
>
> *You don't deny that, do you, Mr Stokes?---I don't deny?*
>
> *Deny that that was what you did; namely, get him to brief the press about your offer; correct?---I probably did, yes, Mr Hutley.*
>
> *Right. What you probably did, Mr Stokes, was ask him to disclose to the world the offer that Seven had made to the NRL; correct?---No.*
>
> *Yes, Mr Stokes. You asked him to brief the press about the Seven offer, didn't you?---I – yes, I may well have done. Yes, I did, yes.*
>
> *Because it was essential to your plans to have publicised that offer to ensure that support would be forthcoming from the clubs in relation to the details of that offer; correct?---No.*
>
> *Then why did you ask Mr Allerton to brief the press about the offer, Mr Stokes?---Without being aware of what was in the press at that day that I spoke to him, I can't recall, Mr Hutley. I think it may have been a defensive reply that we were making at the time'.*

2964 Seven points out that Mr Stokes admitted only to instructing Mr Allerton to brief the press about C7's offer, not to instructing him to divulge the key terms of the offer. Seven submits that Mr Allerton could have made a '*defensive reply*' without revealing the terms of the bid. It relies on Mr Francis' email of 30 November 2000, in which he referred to keeping within '*the relative confines of commercial confidentiality*' and to the confidentiality of the bid having been '*blown by the verbal club presidents*'.

2965 I think that the likelihood is that, whoever was the immediate source for Mr Hadley's report on the radio, Mr Allerton or Mr Francis provided Mr Masters and other journalists with details of C7's offer of 27 November 2000 for the NRL pay television rights. Mr Masters was clearly provided with full details of the bid. A number of matters support these conclusions:

Mr Hadley did not reveal all details of C7's bid, while Mr Masters in effect did. Even if a club official was Mr Hadley's source, there is no particular reason to think that the official would have leaked to other journalists detailed information about the bid.

It is clear that Seven's representatives were in close contact with Mr Masters, who was regarded as firmly within Seven's camp. There were obvious advantages to Seven providing details of the bid to a sympathetic journalist, who would then be very well equipped to convey Seven's side of the story to the public.

Mr Francis' email of 30 November 2000, although referring to the '*relative confines of commercial confidentiality*', accepted that confidentiality had been blown by '*the verbal club presidents*'. This can be interpreted as Mr Francis regarding any confidentiality previously attaching to the bid as having been superseded.

Mr Allerton's email of 1 December 2000 did not express any concern or disappointment that Mr Masters and Mr Collins had revealed even more details about C7's bid than had Mr Hadley. On the contrary, the tone of that email and that of Mr Francis' email of 4 December 2000 was one of self-satisfaction.

In his evidence, Mr Stokes seemed reluctant to admit that he had asked Mr Allerton to brief the press about C7's offer. Moreover, he had an obvious motive to cause the details of C7's offer to be released, particularly if aspects of the bid had already been disclosed by one commentator. I do not accept that any instruction by Mr Stokes to Mr Allerton or Mr Francis required them to maintain the confidentiality of C7's bid.

Mr Francis was available to be called as a witness (indeed he was in court from time to time), but Seven chose not to do so. Therefore I was deprived of the opportunity to hear from Mr Francis precisely what was conveyed to Mr Masters and the other journalists by or on behalf of Seven. Mr Francis' absence from the witness box makes it easier for me to draw the inference, that is otherwise available on the evidence, that he or Mr Allerton at the very least disclosed to Mr Masters the full details of C7's bid.

> Much the same applies to Mr Allerton, who was also not called to give evidence. Mr Allerton, through City Public Relations Pty Ltd, had a monthly retainer from ACE. Part of his brief was to give journalists background information in the interests of Seven. The invoices for Mr Allerton's work at this time were directed to Seven. He is plainly within Seven's camp.
>
> Mr Allerton and City Public Relations Pty Ltd produced only a few documents relevant to the issues under consideration in response to subpoenas, apparently because the computer system in operation at the time had been disposed of. I draw no adverse inference from the disposal of the computer system, but the disposal eliminates the possibility that Mr Allerton or City Public Relations Pty Ltd retained records which would support Seven's position.

2966 I think it likely that Seven, through Mr Stokes, Mr Gammell, Mr Francis and Mr Allerton, realised prior to the CEOs' meeting that there was a significant risk that one of the club representatives would subsequently divulge information concerning C7's bid for the NRL pay television rights. It is unclear whether a plan was developed in advance to deal with that eventuality. However, when it became apparent that some information had been or was about to be leaked by a club official, Mr Stokes gave authority to Mr Allerton and Mr Francis to make available to Mr Masters and other journalists the complete contents of C7's bid. This was to be done as part of Seven's efforts to influence favourable media coverage of C7's bid and to create pressure on Fox Sports to offer considerably more to the NRL PEC if it wished to secure the NRL pay television rights.

2967 On balance, I think that the initial leak to Mr Hadley on 30 November came from a club official. However, I find that Mr Allerton or Mr Francis, with Mr Stokes' approval, provided full details of C7's bid to Mr Masters and other journalists. The material was duly published, as Mr Stokes, Mr Allerton and Mr Francis intended.

2968 In these circumstances, it is clear that, once Mr Masters' article was published, the contents of C7's second bid for the NRL pay television rights were no longer confidential. Mr Stokes recognised as much:

> *'Right. Now, you knew that it was Seven's position that from 1 December 2000 it was the position of Seven, which you were a party to, that nothing about the NRL offer was confidential; that's correct, isn't it? --- I accept that nothing from 1 December was confidential. It had all been covered in that,*

certainly in that article, yes.

And you would agree with me that Seven did nothing to establish any new relationship of confidence between it and the NRL, did it? --- Not that I am aware of, Mr Hutley'.

2969 The second answer given by Mr Stokes in this passage appears to acknowledge the fact that C7's letter of 5 December 2000, containing its third offer for the NRL pay television rights, did not state that the offer was to be treated as confidential. The absence of any reservation of confidentiality contrasts with C7's second offer of 27 November 2000 in which Mr Anderson said:

'We still believe confidentiality to be in the best interests of both parties'.

Mr Stokes agreed that he had been aware of the contents of the 5 December 2000 offer, but denied knowing that the letter made no reference at all to confidentiality.

2970 Whether or not Mr Stokes realised that the letter made no claim to confidentiality, Seven adduced no evidence suggesting that the omission was an oversight or had been remedied by a subsequent communication to the NRL PEC. Seven's submissions do not offer any convincing reason, nor indeed do they refer to any reason grounded in the evidence, for failing to claim confidentiality for the third offer. Given the disclosure of C7's second offer in the media, it might have been expected that, if Seven wished to preserve confidentiality, it would have taken some pains to advert expressly in its letter of offer to its desire to preserve confidentiality.

2971 I infer that the absence of any reference to confidentiality in C7's third letter of offer was not accidental. This inference is stronger because C7's letters of 6 and 7 December 2000, which clarified elements of C7's bid, were also not expressed to be confidential. The absence of any such claim probably reflected a perception by Mr Gammell and others within Seven that, in view of the publication of the details of C7's second offer and in view of Seven's interest in maintaining a public debate about the merits of the competing offers, there was no particular point in maintaining confidentiality at this stage of the negotiations.

2972 In any event, important aspects of C7's third offer soon found their way into the press. Mr Masters' article in the *Sydney Morning Herald* of 7 December 2000 reported that C7 had

removed certain demands from its bid, but that it insisted on retaining the '*discount*' of $1 million for each additional game televised by Nine. According to Mr Masters, an '*insider*' had described the clause '*as insurance against "an act of bastardry" by Packer*'. The article did not refer to the fact that Seven's offer had been reduced in certain respects, but asserted that the '*floor price*' (that would apply if Nine stripped C7 of more NRL games) was higher than the Fox Sports bid.

2973 I infer that Mr Allerton or Mr Francis, or possibly someone else from Seven, provided to Mr Masters such information relating to C7's third bid that was thought to be helpful in pushing Seven's case in the media. I am assisted in reaching this conclusion by Mr Masters' reference to an '*insider*' and by the absence of Mr Allerton and Mr Francis from the witness box.

19.4.8.2 CONCLUSIONS ON CONFIDENTIALITY

2974 On the basis of these findings, the conclusion is inevitable that the contents of C7's offer of 5 December 2000 for the NRL pay television rights, as communicated to the NRL PEC, lacked the quality of confidentiality required to attract the protection of equity. In any event, the information was not communicated to the NRL PEC in circumstances imparting an obligation of confidentiality on the members, including Mr Philip.

2975 C7 did not treat its second bid for the NRL pay television rights as confidential. Accepting that the initial leak to Mr Hadley came from one of the club officials, Seven was not compelled to counter the leak by itself leaking the full contents of its bid to other journalists. As Seven's own submissions recognise, it was not essential for C7, if it wished to make a '*defensive reply'*, to divulge full details of its bid to Mr Masters and others. If Seven was genuinely concerned about maintaining the confidentiality of its current and future bids it could (and presumably would) have explained publicly that the leak had occurred without its authority. No doubt that course may have created a risk of implicitly confirming the accuracy of the leak, depending on the way the complaint was framed. But taking such a position would have demonstrated Seven's concern to preserve the confidentiality of the bidding process.

2976 Seven relies on the differences between C7's second and third offers to support its argument that the disclosure of the terms of the second bid did not detract from the

confidential character of the third bid. This argument may have carried some weight if C7 had expressly reserved confidentiality for the third bid and the subsequent written clarification of its terms. Even that conclusion is doubtful given Seven's clandestine disclosure of the terms of the second bid, at least without Seven '*coming clean*' about its conduct and explaining to the NRL PEC why its third bid was nonetheless to be regarded as confidential.

2977 Be that as it may, Seven deliberately chose to communicate its third offer of 5 December 2000 without claiming confidentiality for its terms. It followed the same course in relation to the clarifications of the bid in the letters of 6 and 7 December 2000. In short, Seven chose to communicate its final offer without attempting to clothe it with confidentiality. Members of the NRL PEC were entitled to conclude that C7 was no longer concerned about the confidentiality of its bid.

2978 Seven also relies on the various expressions of confidentiality by C7 and Mr Moffett on behalf of the NRL PEC prior to 5 December 2000. But those expressions were generally directed to particular communications and, in any event, were plainly overtaken by Seven's conduct in publicly disclosing the terms of C7's second bid. Similarly, it is difficult to see the relevance of Seven obtaining signed confidentiality undertakings from executives in mid-November 2000, in the light of its subsequent conduct.

2979 Seven further says that the bidding process was supposed to be similar to that of a sealed auction where rivals do not know each other's bids and the highest bid wins. This submission is not supported by the evidence. The NRL PEC made it clear to Seven that the bidding process would be conducted entirely at its discretion. In any event, any assumptions about the bidding process had been overtaken by the events which occurred before C7 made the third offer on 5 December 2000.

2980 The conclusions expressed thus far have been reached independently of Seven's disclosure to Mr Masters of aspects of its final bid. In my opinion, this would be enough, of itself, to deny the quality of confidentiality to the contents of that bid. At the very least, it reinforces the conclusions I have reached.

2981 Finally, I note that Seven supports its contentions by referring to Mr Macourt's

evidence that he felt constrained at the Fox Sports board meeting of 5 December 2000 not to confirm the accuracy of the press reports that had appeared concerning the competing bids. It is not clear whether Mr Macourt appreciated the circumstances of the disclosures as I have found them to be. In any event, his view at the time cannot alter the significance of the findings of fact I have made.

2982 It follows that Seven's case in breach of confidentiality does not clear the first hurdle.

19.4.9 Disclosure of Information Relating to C7's bid

2983 Given that Seven's breach of confidentiality claim fails at the threshold, it is not necessary to consider whether Mr Philip disclosed the allegedly confidential information to Mr Akhurst or anyone else. Since the information was not clothed with the necessary quality of confidentiality, it is not to the point that Mr Philip may in fact have disclosed it in his fax of 9 December 2000 to Mr Akhurst or, indeed, in some other communication. Nor is it to the point that Mr Philip may even have believed that the information he was disclosing was confidential. Nonetheless, in view of Mr Philip's denial that he intended to communicate to Mr Akhurst the substance of C7's bid of 5 December 2000, I think it is appropriate to record a finding on that factual issue.

2984 I have already recounted much of the evidence relating to this question in Chapter 9. It will be recalled that Mr Philip admitted that he asked Mr Akhurst to destroy the latter's copy of the fax of 9 December 2000 and I have found that Mr Philip made a similar request to Mr Falloon. Mr Philip made these requests in order to erase what otherwise would have been a paper trail. I have recorded Mr Philip's extraordinary admissions in his third written statement, to the effect that a number of representations in the fax were outright lies and that he had made them in order to persuade Telstra to support a revised bid by Fox Sports for the NRL pay television rights.

2985 In his cross-examination, Mr Philip agreed that the admissions in his third written statement amounted to saying that he had:

> *'intentionally misled Telstra in order to persuade them to commit an extra $13 million to $14 million to fund the bid that [he] believed would go through anyway'.*

The purpose of this deception, according to Mr Philip, was to save News from having to contribute at least $10 million from its own pocket to a revised Fox Sports bid. Mr Philip reluctantly agreed that if his evidence was right, and if Telstra was influenced by his statements to support the increased bid, then it was possible that he had succeeded in defrauding Telstra.

2986 Mr Philip's admissions do not inspire confidence in his truthfulness. On his own account, he was prepared to tell lies in an attempt to persuade Telstra to contribute funds that otherwise Mr Philip's employer would have had to contribute to the project. Whether or not this amounted to '*fraud*', it was disgraceful conduct. Nonetheless, Mr Philip's admissions of dishonest conduct do not necessarily mean that he was not telling the truth in the witness box. Indeed, News submits that Mr Philips' willingness to make admissions against his own interests supports the conclusion that his evidence in the proceedings, at least on this point, was truthful and should be accepted.

2987 I focus here on Mr Philip's claim that his fax to Mr Akhurst was not intended to disclose the terms of C7's offer of 5 December 2000 to the NRL Partnership. Mr Philip's explanation for setting out in the fax the terms of the '*C7 offer we need to beat*' was given in par 142 of his first written statement:

> *'I did not in paragraph 1* [of the fax of 9 December] *disclose the financial figure which appeared from the C7 offer of 5 December 2000 which was $36.5 million. In my fax to Bruce Akhurst the $39 million consists of the $34-$35 million for the rights and $4 million contra (see paragraph 6 of my fax). I did not treat the $6 million as part of the bid from the NRL's point of view. The $6 million was my estimate of the cost to be incurred by Fox Sports in producing the NRL coverage but which I wanted to count as a contribution by Fox Sports in my argument that Telstra's contribution of $10 million was less than the contribution which was being made by the Fox Sports shareholders. In describing the C7 offer in the way that I did I assumed that C7's production costs would be the same as Fox Sports (that is, $6 million) and that C7 would offer the same level of contra as the Fox Sports offer. I then chose a figure of $33 million for the rights so that, when added to the $4 million and the $6 million, it was $2 million less than the proposed Fox Sports bid'.*

2988 It must be said that Mr Philip's evidence on this issue was by no means easy to follow. He claimed that the critical figure in his mind, at the time he wrote the fax, was $39 million per annum. This figure, he said, was derived from Mr Masters' article in the *Sydney Morning Herald* of 1 December 2000. The article had referred to C7's '*three-tiered deal*',

the lowest tier of which required $25 million to be paid to the NRL Partnership and $14 million to the clubs. According to Mr Philip, he felt that Fox Sports had to '*measure up*' to the expectations in the public mind created by the press articles appearing on and after 1 December 2000.

2989 Mr Philip acknowledged that C7's second offer of 27 November 2000 was actually for $39 million cash plus $4 million contra. He accepted that the explanation given in his first written statement implied that an offer by Fox Sports of $39 million, inclusive of contra, could be publicly presented '*as being in the same ballpark*' as C7's offer of $39 million **plus** contra. He reached the figure of $33 million cash per annum for the rights, recorded in par 1 of the fax, simply by deducting an arbitrary $2 million from what he regarded as a publicly defensible bid by Fox Sports (that is, $35 million cash plus $4 million in contra).

2990 Mr Philip agreed in cross-examination that his practice, when analysing offers for pay television rights, was to assess monetary bids exclusive of GST. He acknowledged that there was not a single figure in the fax to Mr Akhurst that was inclusive of GST. He also acknowledged that the figure of $33 million per annum appearing in par 1 of the fax was almost exactly equivalent to C7's minimum cash offer in its bid of 5 December 2000 ($36.5 million), when presented exclusive of GST.

2991 After Mr Philip gave the evidence to which I have referred, the following exchange took place:

> *'HIS HONOUR: Mr Philip, I just want to understand this, and I'm having a little difficulty. The figure that appears in paragraph 1? --- Yes.*
>
> *Was intended to be understood by the reader of this fax, that is the Telstra recipient? --- Yes.*
>
> *As 33 million exclusive of GST; that's what you intended, as I understand your evidence?---I don't think I turned my mind to the question of GST inclusive or exclusive, but I think because my habit was always to talk in numbers exclusive of GST that that's a reasonable conclusion for the recipient to draw.*
>
> *All right. At the time you drafted this fax you knew that the C7 cash component of the offer taken at the lowest level was 36.5 million inclusive of GST; am I right about that? --- Yes.*
>
> *The 33 million figure was therefore almost precisely 36.5 million exclusive of*

GST? --- I accept ---

It is 180,000 out? --- I accept that. In relation to how I recall preparing this document, to me that's happenstance.

All right. I'm just trying to understand what you are saying. Had you intended to record the C7 cash component offer at the lowest level exclusive of GST, may I take it that it would have been recorded as 33 million? There's no other figure, is there, in here that says, for example, 25.1 million or 6.23 million? It would have been recorded, wouldn't it, as 33 million ?--- I don't know. If I approached it that way, a lot of things might have been different. I can't answer that question, I'm sorry.

All right. You can't answer that. But your evidence is that the $33 million figure, it is a pure coincidence that it just happens to be very close to the actual C7 cash component offer exclusive of GST? --- Yes, it is.

Is that what you are intending to convey? --- Yes, it is. That's my evidence. Because my recollection is I made up the 33 in a way ---

That is so, even though you knew the precise offer that had been made by C7? --- I accept that I knew it, but that wasn't – I wasn't thinking about that at the time.

And is it your evidence that, having written this fax, it did not occur to you that the $33 million figure happened to be almost exactly the GST exclusive figure offered by C7 in cash? --- To be honest, that has not occurred to me until I have read recent press reports about arguments raised in this case'.

2992 On his own evidence, Mr Philip had a powerful motive to reveal to Mr Akhurst of Telstra the contents of C7's bid of 5 December 2000. Similarly, on his own evidence, he was concerned, at the very least, that he was at risk of being accused of revealing confidential information to Telstra. Hence his desire, ineffectually carried out, to erase the paper trail. Mr Philip's fax of 9 December 2000 actually purported to describe the key terms of C7's offer. And in substance it did precisely that.

2993 News appears to concede that, if the terms of C7's bid were confidential, Mr Philip '*inadvertently communicated the information to Mr Akhurst*'. I do not accept Mr Philip's evidence that the disclosure was inadvertent. His explanation as to how he arrived at the figures in par 1 of the fax is implausible and appeared to be implausible when he was giving his explanation in the witness box. His assertion that it never occurred to him that the figure of $33 million per annum coincided with the terms of C7's 5 December bid (on a GST-exclusive basis) defies credulity.

2994 If I had not found that the information disclosed by Mr Philip lacked the quality of confidentiality, I would have found that Mr Philip deliberately disclosed to Mr Akhurst, in his 9 December 2000 fax, that C7's lowest tier bid for the NRL pay television rights was approximately $36.5 million inclusive of GST. I would also have found that Mr Philip disclosed to Mr Akhurst that the contra component of C7's third bid amounted to $4 million. Further, I would have found, as Mr Philip accepted, that par 8 of the fax disclosed the fact that C7's bid had terms in it that prevented the NRL Partnership obtaining any value for the internet naming rights.

19.5 Press Release Claim

19.5.1 Seven's Pleaded Case

2995 Seven's pleaded case concerns the press release issued by or on behalf of the NRL Partnership on 14 December 2000, announcing that it had accepted an offer by Fox Sports for the NRL pay television rights (par 483). Seven alleges that two statements in the press release were misleading and deceptive in contravention of s 52 of the *TP Act*, namely statements that

> the total value of the contract with Fox Sports was '*almost $400 million*'; and
>
> the '*guaranteed figure*' from Fox Sports was higher than that offered by C7 (par 483)

2996 The first statement is said to have been misleading or deceptive because the total value of the contract with Fox Sports was $252 million inclusive of GST (par 484(a)). The second statement is said to have been misleading and deceptive because it could only be true on the basis of unrealistic assumptions (pars 484(b), 500).

2997 Seven pleads that it relied on the representations, as did the clubs participating in the NRL Competition (pars 486-487). Seven further says that had the representations not been made it would have attempted to induce the clubs to require the NRL Partnership to reconsider its decision (par 487(b)). Finally, Seven alleges that, by reason of the making of the representations, it lost the opportunity to acquire the NRL pay television rights (par 488).

19.5.2 Seven's Submissions

2998 Seven submits that the basis for the $400 million figure in the press release was false on '*any objective assessment of the value of [the] contract*'. Seven acknowledges that the figure appears to be a calculation derived in part from a document entitled '*Review of C7 and Fox Sports Pay TV Offers*' prepared within the NRL Partnership for presentation to a meeting of club CEOs and in part from other documents. However, Seven contends that the calculation reflected unrealistic assumptions about the number of Fox Sports subscribers and an attribution of value to the NRL Partnership for production costs when the NRL Partnership would not have incurred those costs in any event.

2999 Seven submits that the '*guaranteed figure*' representation conveyed to the ordinary reader that, on realistic assumptions, the NRL Partnership was certain to receive more revenue from Fox Sports under the NRL-Fox Sports Pay Rights Agreement than it would have received from C7 had it accepted C7's offer. On that reading, the representation was false. This conclusion is said to follow from the proper interpretation of C7's final offer of 12 December 2000 (comprising the offer of 5 December 2000 subject to amendments in the letters of 7 and 12 December 2000). Seven says that the amount payable under C7's tiered offer depended not on the number of subscribers taking the C7 service itself, but upon the total number of homes connected to pay television platforms that carried the C7 channels broadcasting NRL content. On this basis, so Seven contends, it was wholly unrealistic to assume (as Seven says the NRL Partnership did) that platforms carrying the C7 channels would have fewer than 500,000 subscribers. Similarly, Seven says that it was unrealistic for the NRL Partnership to assume that Nine would broadcast three NRL matches per week live on free-to-air television.

3000 Seven summarises its position as follows:

> *'to the knowledge of the NRL Partnership and the NRL, the most realistic assumptions upon which to consider C7's bid, therefore, were that the relevant subscriber numbers would be between 500,000 and 1 million and that Nine would take only two games per week. As Mr Macourt conceded, on the basis of these assumptions, the C7 bid was more than $50 million greater than the Fox Sports offer (and, therefore, the same amount greater than the value of the Fox Sports/NRL pay rights agreement which reflected the terms of that offer)'.*

3001 In its Closing and Reply Submissions Seven maintained its claim to damages by

reason of misleading or deceptive conduct in making false representations in the press release. This claim, however, was abandoned when Seven filed its Case Summary. The only relief pressed by reason of the alleged contravention of s 52 of the *TP Act* is:

> *'a declaration that, in issuing the NRL press release, each of NRLI and ARL (as the NRL Partnership), or the NRL, engaged in conduct in contravention of s 52 of the [TP Act]'.*

3002 Seven puts its claim for declaratory relief on the basis that the Court, in the public interest, should mark its disapproval of conduct in breach of s 52 of the *TP Act.* Seven submits that there is a strong public interest element in the subject of the press release because the announcement was eagerly awaited and was of great importance to the NRL Competition, the clubs, fans and the game. A declaration would also '*go some way towards preventing conduct of the [same] kind ... being repeated*'.

19.5.3 NRL Ltd's Submissions

3003 NRL Ltd submits that neither representation in the media release of 14 December 2000 has been shown to be false. News adopts NRL Ltd's submissions on behalf of its subsidiary, NRLI.

3004 NRL Ltd argues that the language of the media release should be understood as conveying an '*element of broad approximation*' when it referred to the '*total value of the deal [being] almost $400 million*'. In any event, it says that Seven has failed to identify all the elements in Fox Sports' bid that were advantageous to the NRL Partnership and accordingly has failed to allocate an appropriate value to each component. NRL Ltd illustrates this point by reference to what it says is the value of '*in-programme promotion*' to be provided by Fox Sports. It points out that Mr Stokes, in a letter to the AFL, assessed '*in-programme promotion*' to the AFL as having been worth $30 to $40 million over a period of time. Once this and other advantages of the Fox Sports bid are taken into account, it was not inaccurate to describe the '*total value*' of the deal as amounting to nearly $400 million.

3005 NRL Ltd submits that the '*guaranteed figure*' representation must be understood as referring to the '*worst case scenario*'. The worst case would include Nine taking extra free-to-air NRL games. If Nine exercised its entitlement to the full, C7's bid would involve a licence fee of $25 million, which would be less than the Fox Sports fee payable in the same

circumstances. Thus:

> *'the bottom line guaranteed figure of Fox Sports was higher than that of the bottom line guaranteed figure of C7'.*

3006 NRL Ltd then submits that even if Seven succeeds in establishing that the media release contained misleading and deceptive representations the Court, in the exercise of its discretion, should decline to grant declaratory relief. NRL Ltd says that, having regard to the fact that the media release was issued five years before the trial commenced, a declaration would lack any utility. It points out that, in the interim, the NRL Partnership has disposed of the NRL pay television rights for the next licence period, expiring in 2011. Any possibility of similar conduct in the future is so remote in time as to deprive the declaration of any practical significance.

19.5.4 Reasoning

3007 Seven's submissions do not identify the source of the Court's jurisdiction to make declarations. There is no dispute, however, that the Court has jurisdiction to make a declaration that a party has acted in a misleading or deceptive manner, in contravention of s 52 of the *TP Act.* This is so even if no other relief is sought by or is available to the applicant: *Federal Court of Australia Act 1976* (Cth), s 21(1),(2); *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (No 2)* (1993) 41 FCR 89, at 97-98, per Sheppard J; at 108-112, per Hill J. Equally, Seven does not dispute that the declaratory remedy is discretionary, in the sense that I am not obliged to make a declaration even if Seven establishes that the two impugned representations in the media release of 14 December 2000 were misleading or deceptive.

3008 It seems to me that there is some force in NRL Ltd's submission concerning the meaning of the representations conveyed by the press release. However, the short answer to Seven's claim for declaratory relief is that, even if it establishes that the media release of 14 December 2000 contained misleading or deceptive representations, I would refuse, in the exercise of my discretion, to grant purely declaratory relief.

3009 There are circumstances in which an applicant, which either does not seek or fails in its claim for other relief, nonetheless will succeed in obtaining a declaration that the respondent has engaged in misleading or deceptive conduct. *Tobacco Institute v AFCO*

(No 2) was just such a case. The Full Federal Court dissolved injunctions granted by the trial Judge (*Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc (*1992) 38 FCR 1), but made a declaration that a portion of an advertisement concerning the effects of passive smoking, which had been published seven years earlier, had been misleading or deceptive contrary to the provisions of s 52 of the *TP Act.* The Full Court took this course notwithstanding that AFCO had not sought declaratory relief at first instance and had applied to amend its claim for relief only after the Full Court delivered its first judgment.

3010 Sheppard J, with whom Foster J agreed, pointed out (41 FCR, at 100) that the question whether the advertisement was misleading or deceptive had been the central issue at the trial which had '*lasted for many months*'. All four Judges dealing with the issue had firmly rejected the Tobacco Institute's contention that the advertisement was not misleading or deceptive. According to Sheppard J:

> *[t]hat being the case, it would seem quite undesirable to me that, in a matter involving as it does the public interest – really the public health and well-being of the nation – the court having reached its conclusion should not formally indicate the result of the litigation by an appropriate declaration of right'.*

3011 Until very late in these proceedings, Seven sought damages in respect of the allegedly misleading or deceptive representation in the media release of 14 December 2000. It did not ultimately press that claim (so I infer) because it recognised that the evidence did not establish the elements of reliance and causation necessary to make out a claim for damages under s 82 of the *TP Act.* In other words, Seven failed to prove the elements essential to demonstrating that it had suffered loss or damage by reason of the allegedly misleading or deceptive conduct. Unlike the applicant in *Tobacco Institute v AFCO (No 2),* Seven did not litigate this cause of action in the interests of the wider community, but in its own interests. There is, of course, no reason why Seven should not act in its own interests, but its motivation needs to be borne in mind when considering whether it is in the public interest (as Seven claims) that purely declaratory relief should now be granted.

3012 The forensic reality is that when Seven abandoned its claim for damages in respect of this cause of action, it sought to salvage something by pressing its claim for a declaration. In support of its position, Seven invoked the public interest in the Court expressing its

disapproval of the NRL Partnership's conduct in issuing a media release containing misleading representations. No doubt it can always be said that there may be some value, however small, in the Court expressing its disapproval of conduct which contravenes s 52 of the *TP Act.* But, in my view, that does not foreclose the question of whether the Court, as a matter of discretion, should grant a declaration without the applicant pressing any claim for other relief.

3013 The media release was published two years before these proceedings were commenced and more than six years before delivery of this judgment. Few people would remember an advertisement which was part of a public relations battle fought long ago and which has well and truly been overtaken by events, not least the award in 2005 of the NRL pay television rights for the period 2007 to 2011. No evidence was led to establish that anyone reading the advertisement suffered any financial loss or significant detriment. It is true, as Mr Sheahan submitted, that the media release was issued to the public at large. But given the lapse of time, the absence (so far as the evidence goes) of any apparent adverse effect on the clubs or those interested in the NRL and the reallocation of the NRL pay television rights in 2005, it is hard to see how a declaration issued by the Court at this stage could have any significant practical utility.

3014 I mention two other points. First, the media release representations played only a minor part in these proceedings. Had Seven not incorporated its claim for declaratory relief into the multitude of causes of action pleaded in the statement of claim, it is difficult to believe that Seven would have been sufficiently troubled by the media release to bring proceedings for a declaration based solely on account of the contents of that document. Seven, after all, was far from helpless in any public relations contest. Secondly, Seven maintains other claims for relief against the NRL Partnership founded on alleged contraventions of s 52 of the *TP Act.* The denial of declaratory relief in respect of the media release does not affect the pursuit of claims which do have practical utility.

3015 A third point, although I would have reached my conclusion in any event, is that I do not regard it as in the public interest that a party, especially an applicant in mega-litigation, should be able to insist on the Court resolving every factual issue it chooses to present, no matter how devoid of practical significance that issue may be. There is a strong public interest in the limited resources of the Court being directed to the resolution of disputes that

truly matter. Perhaps it is time courts recognised this point more robustly.

3016 In my view, there would be little or no utility in granting declaratory relief to Seven in respect of any misleading or deceptive conduct involved in the issue of the media release of 14 December 2000. Therefore, on the assumption that Seven could establish the misleading and deceptive character of the representations of the media release, I would decline in the exercise of my discretion to make a declaration to that effect.

19.6 Fair Process Claim

19.6.1 Seven's Pleaded Case

3017 Seven's pleaded case on the so-called fair process representation was modified in the course of final submissions. I was informed that Seven did not press certain allegations against the NRL Partnership or NRL Ltd. The following takes into account what I was told.

3018 Seven pleads that the NRL Partnership or, alternatively, NRL Ltd, represented to C7 that C7's offer '*would be treated in a fair and impartial manner*' ("*the fair process representation*") (par 497). The representation is said to have been made by representatives of the NRL Partnership or of NRL Ltd to representatives of C7 in the course of seven separate conversations or meetings held between October 2000 and 4 December 2000 (pars 490-496). Seven alleges that each representation was made by or on behalf of the NRL Partnership or NRL Ltd (pars 490-496, 496A-496C).

3019 Seven pleads that, at the time the fair process representation was made, neither the NRL Partnership nor NRL Ltd had reasonable grounds for making the representation and to that end it relies on the deeming effect of s 51A of the *TP Act* (par 498). Alternatively, Seven alleges that, subsequent to the making of the fair process representation, the NRL Partnership (or alternatively NRL Ltd) engaged in conduct inconsistent with the representation. It is said that the NRL Partnership did so in circumstances where C7 was, to the knowledge of the NRL Partnership and NRL Ltd, relying on the representation (pars 499, 501). In particular, Seven says that the NRL Partnership accepted the Fox Sports offer for the NRL pay television rights which it knew to be inferior to that of C7 (par 500). In departing from the fair process representation without informing C7, the NRL Partnership's conduct amounted to misleading and deceptive conduct in contravention of s 52 of the *TP Act* (par 502).

3020 Both Seven and C7 are said to have relied on the conduct (that is, the making of the fair process representation) to their detriment (par 504). In particular:

> if the fair process representation had not been made, C7 would not have bid for the NRL pay television rights (par 504(a));
>
> if C7 had known that there were no reasonable grounds for the representation, or that the NRL Partnership intended to depart from the representation, C7 would have informed the clubs of the true position and they would have forced the NRL Partnership to adhere to the fair process representation (par 504(d)); or
>
> alternatively, if C7 had been informed of the departure from the fair process representation it would have immediately withdrawn from the bidding (par 504(e)).

3021 Seven alleges that, by reason of the matters pleaded, each of the NRL Partners (NRLI and ARL), or alternatively NRL Ltd, has engaged in misleading and deceptive conduct in contravention of s 52 of the *TP Act* (par 505). C7 and Seven Network are alleged to have suffered loss and damage as a result of the contravention (par 506). The loss or damage is said to include the loss of the benefits they had been induced to expect if they went to the trouble and expense of participating in the bidding process. Those benefits comprised the valuable opportunity of participating in a bidding process for the NRL pay television rights which accorded with the fair process representation (par 506A).

19.6.2 Seven's Submissions

19.6.2.1 MAKING OF THE REPRESENTATION

3022 Seven identifies in its submissions seven particular statements which, individually or collectively, support the pleaded fair process representation:

(i) In August or September 2000, Mr Moffett assured Mr Stokes that '*the NRL*' would act with total propriety at all times and that confidentiality would be observed.

(ii) In late October or early November 2000, Mr Love told Mr Stokes that the best bid would win the NRL pay television rights and that C7's offer would be

treated fairly.

(iii) On 13 November 2000, at a meeting with Mr Moffett and Mr Gallop, Mr Anderson asked whether it was worth C7 making a bid in circumstances where the NRL was '*pretty much owned by News*'. Mr Moffett replied that he had independent decision-making responsibility and a '*responsibility to get the best possible deal for rugby league*'.

(iv) In about mid-November 2000, Mr Love or Mr Politis told Mr Gammell at a meeting at the Quay Apartments that they represented the independent and impartial face of the NRL and would ensure that there would be a proper process and a fair deal.

(v) At a meeting held at NRL Ltd's offices at Fox Studios on or about 21 November 2000, Mr Moffett told Mr Wood that the News bloc on the NRL PEC was balanced by other members who would make a rational decision as to which bid would be accepted.

(vi) At a meeting at his home on 25 November 2000 with Mr Hill (a director of ARL and NRL Ltd) and Mr Politis, Mr Stokes was told by Mr Hill that members of the NRL PEC would withdraw from a meeting if there was a conflict of interest in relation to a particular decision.

(vii) Statements were made to Mr Gammell by Mr Moffett or Mr Gallop at a meeting held on 4 December 2000 that Seven submits should be interpreted as supporting the pleaded representation.

3023 Seven contends that the evidence of Mr Stokes, Mr Gammell and Mr Wood supporting the making of the statements should be accepted, not least because none of the persons said to have made the statements was called by the Respondents to rebut the evidence of Seven's witnesses. NRL Ltd filed statements made by Messrs Gallop and Moffett and ARL filed statements by Messrs Love, Hill and Politis, but none of these persons gave evidence.

19.6.2.2 LACK OF REASONABLE GROUNDS

3024 Seven characterises the fair process representation as a representation as to a future matter, namely the manner in which C7's bid for the NRL pay television rights would be

treated. Accordingly, so it argues, the presumption in s 51A of the *TP Act* applies and, in the absence of evidence to the contrary, the representation must be deemed to have been made without reasonable grounds and thus to have been misleading or deceptive. According to Seven, the Respondents adduced no evidence to the contrary.

19.6.2.3 DEPARTURE FROM THE FAIR PROCESS REPRESENTATION

3025 Seven submits that the departure from the fair process representation occurred when the NRL PEC, on 13 December 2000, accepted Fox Sports' inferior offer over the superior offer of C7. Seven summarises its submission as follows:

> *'In essence, C7's bid could only have been assessed as worth less than that of Fox Sports if:*
>
> *(a) C7 was carried on platforms having fewer than 500,000 subscribers in total; or*
>
> *(b) C7 was carried on platforms having between 500,000 and 1 million total subscribers* and *Nine took three or more free-to-air matches every week.*
>
> *Those were highly unrealistic assumptions adopted only to allow the NRL [Partnership] unfairly to favour the Fox Sports bid over the C7 bid. From this it follows that accepting Fox Sports' bid over C7's was conduct inconsistent with the representation that the bidding process would be fair and impartial'.*

3026 Seven points to other matters suggesting that the NRL PEC's acceptance of Fox Sports' offer over C7's bid was not based on a fair and impartial comparison of the two. It relies, for example, on the fact that C7 was not even informed about the NRL PEC's meeting of 13 December 2000 at which the decision was made, while Fox Sports was permitted to make a presentation to the same meeting. Moreover, the News appointees in the NRL PEC participated in the decision without declaring any conflict of interest.

19.6.2.4 RELIANCE

3027 Seven submits that the evidence establishes that C7 relied on the fair process representation to make its bids for the NRL pay television rights and to reassure itself that its bid would be treated fairly. Mr Stokes and Mr Gammell, for example, each gave evidence that he would have taken the steps open to him to ensure a fair and impartial bidding process

if he had been aware that the representation was false. These steps would have included informing the NRL clubs of the situation and of what they stood to gain from C7's offer.

19.6.2.5 RELIEF

3028 Seven submits that it is entitled both to declaratory relief and to damages under s 82 of the *TP Act.*

3029 Seven argues that, as a result of the contraventions of s 52 of the *TP Act,* it has lost the benefit of the fair and impartial process it had been induced to expect by the fair process representation. It says that it is entitled to be compensated for the loss of opportunity to participate in a bidding process for the NRL pay television rights which accorded with that representation. Given the superiority of C7's offer over that of Fox Sports, the compensation should be assessed on the basis that its superior offer would have been accepted. This approach is said to be consistent with the decision of the High Court in *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388. The assessment of the value of Seven's damages claim rests on '*Scenario 3*': that is, the loss of the opportunity to acquire the NRL pay television rights and to obtain a profit from their use or sale.

3030 Seven recognises that its claim for damages based on its loss of opportunity to acquire the NRL pay television rights cannot succeed if News would have validly exercised its last right to match C7's offer conferred by the NRL-News Pay Rights Agreement of 14 May 1998**.** However, it submits that News would not have exercised its last right, for two principal reasons:

> News' position was that C7's offer for the NRL pay television rights was too high to match without support from Foxtel and Telstra; and
>
> had News matched C7's offer, its licence fees would have been those payable on the highest subscriber tier (since Fox Sports would have been carried on Foxtel and Austar and would have had in excess of one million subscribers).

3031 Finally, Seven submits that, even if News had chosen to exercise its last right, it could not lawfully have done so. News could not have exercised the last right until after 13 December 2000, by which time C7 would have lost the AFL pay television rights. The exercise of the last right therefore would have had the anti-competitive consequences

addressed elsewhere in Seven's submissions.

19.6.3 News' Submissions

19.6.3.1 MAKING OF THE REPRESENTATION

3032 News invites me to reject Mr Stokes' evidence concerning the three statements made to him that are said to support the fair process representation. News submits that the evidence relating to the other four conversations relied on by Seven either should be rejected or be found insufficient to support the making of the fair process representation. In support of its submissions, News points to written communications from the NRL Partnership which it says were quite inconsistent with the alleged representation.

3033 In any event, so News argues, assuming the statements were made as alleged, they were not made on behalf of NRL Ltd or the NRL Partnership.

19.6.3.2 DEPARTURE FROM THE FAIR PROCESS REPRESENTATION

3034 News criticises Seven for the vague formulation of the fair process representation and for what it says is the failure to give specific content to the representation. It says that the only way to give substance to the representation is by analysing the bases on which Seven contends that the NRL Partnership departed from the fair process representation. Following that approach News identifies three '*imputations*' in the representation:

> the bid that was worth the most would win;
>
> a decision would not be made on 13 December 2000 following Fox Sports' presentation and would have a further opportunity to make a fresh offer; and
>
> the News representatives on the NRL PEC would not participate in the decision.

3035 As to these matters News says the following:

> There was nothing in any of the alleged statements that conveyed a representation that the NRL Partnership would necessarily select the bid that, objectively, was worth the most. The evidence suggests that sporting

organisations take other factors than money into account when awarding rights. Any representations that were made could not be construed as denying the NRL PEC the right to exercise its judgment as to what was in the interests of the NRL Partnership.

C7 had ample opportunity to make the bid that it wanted and to amend its proposals prior to 13 December 2000. It was never held out to C7 that it would receive a further opportunity after that date.

It was made plain to Seven that the News representatives would participate in the decision and Messrs Gammell, Wood and Anderson understood this to be the case.

3036 In any event, the NRL Partnership had reasonable and rational grounds to choose the Fox Sports offer over C7's bid. For example, C7 never addressed fully the '*fundamental issues*' with its bid that had been raised by Mr Moffett in his letter of 20 November 2000 in response to C7's first offer. C7's final offer of 5 December 2000 (as subsequently amended) was in a form which C7 knew would be unacceptable to the NRL Partnership because it would be unable to offer the same rights to Optus on the same terms (as the NRL Partnership was obliged to do).

3037 News submits, further, that a mere departure from the fair process representation cannot be misleading or deceptive conduct for the purposes of s 52 of the *TP Act*. C7 could only have been misled by the representation in the first place (assuming it had been made) or by a failure to correct it before departing from its terms.

19.6.3.3 RELIANCE

3038 News submits that its analysis of the making of the fair process representation also disposes of Seven's claim that C7 relied on the representation. News says that Seven's arguments simply overlook the fact that the NRL Partnership declined to give the assurances C7 sought concerning the decision-making process. In any event, Mr Stokes' evidence shows that he placed no reliance on the fair process representation (assuming it was made).

19.6.3.4 RELIEF

3039 News submits that Seven's damages case is flawed insofar as it claims to have lost the

chance of having its bid accepted as the superior offer or lost the valuable opportunity of participating in a fair process. The flaw identified by News is that the loss identified by Seven is attributable to the NRL Partnership's **departure** from the fair process representation. It was not caused by the representation itself. According to News, the departure from the representation was not misleading or deceptive. In any event, Seven failed to address the issue of what C7 would have done if the representation had not been made.

3040 News points out that Seven does not persist with its pleaded claim that, if the fair process representation had not been made, it simply would not have engaged in the bidding process. Rather, Seven submits that C7 would have taken steps to ensure that the process was fair and impartial. However, News contends that the only rational conclusion from the evidence is that Seven would have declined to bid for the NRL pay television rights. Thus the only damage that could have been suffered by Seven was '*the trouble and expense of participating in the NRL bidding process*'. However, as News notes, that claim appears to be no longer pressed.

19.6.4 ARL's Submissions

3041 ARL adopts the submissions of News. In addition, it makes supplementary submissions.

3042 ARL contends that there is no basis for concluding that any statements made by Messrs Love, Politis and Hill were made on behalf of the NRL Partnership or NRL Ltd. ARL submits, on the contrary, that the Seven representatives were well aware that Messrs Love, Politis and Hill could not have been speaking on behalf of News or the News appointees to the NRL PEC.

3043 ARL submits that Seven is incorrect in suggesting that Fox Sports' offer was known by the NRL Partnership to be inferior. According to ARL, there was nothing unrealistic about assuming that the lowest payment tier in C7's offer would apply, or that Nine would take additional NRL matches on its free-to-air channel. Moreover, ARL contends that Seven is precluded from relying on a number of additional matters it claims demonstrate that the acceptance of Fox Sports' offer was not based on a fair and impartial comparison of the two competing bids. The reason given by ARL is that the matters relied on by Seven fall outside

the scope of the pleadings.

3044 ARL also says that if, contrary to its submissions, the Court finds that the fair process representation was made on behalf of the NRL Partnership, evidence was adduced suggesting that the NRL Partnership had reasonable grounds for making the representation. The adducing of that evidence means that s 51A(2) of the *TP Act*, as a matter of construction, does not operate to deem the representation to have been made without reasonable grounds. According to ARL, the onus of establishing lack of reasonable grounds rests with Seven and has not been discharged by it.

3045 Finally, ARL criticises Seven's damages case on the ground that it converts a lost opportunity of participating in a fair bidding process into a certainty that its offer would have been accepted. ARL also argues that there is no evidence as to what the NRL clubs would have done had Seven informed them of the departure from the fair process representation.

19.6.5 Reasoning

19.6.5.1 REPRESENTATION AS A CONSTRUCT

3046 It seems to me that there is force in the Respondents' criticism of the way in which Seven seeks to construct a single fair process representation out of seven discrete conversations. The fair process representation is said to emerge from interchanges between different people that took place in different words and in different contexts. In order to accommodate the differences, Seven formulates a representation in general terms (that C7's offer would be treated in a fair and impartial manner). Yet on Seven's own case, the representation so formulated does not correspond precisely with the language used in any of the conversations.

3047 Seven then, in substance, interprets the representation it has formulated to give rise to what News aptly enough describes as '*imputations*'. These are employed to support Seven's submission that the NRL PEC departed from the representation by deciding to accept Fox Sports' offer. It is not easy to see, for example, why the various statements on which Seven relies constituted a representation that the News representatives on the NRL PEC would not participate in the decision to award the NRL pay television rights, or would declare a conflict of interest if they did (as Seven's submissions appear to suggest). Even the responses Mr

Gammell claimed were made to his query concerning a potential conflict of interest did not go that far. No doubt an undeclared conflict of interest on the part of a decision-maker might indicate that the decision-making process is not being carried out in a '*fair and impartial manner*', depending on what that expression, read in context, means. But the expression is Seven's. It was not used by the alleged representators.

3048 I am doubtful whether, even if the conversations alleged by Seven took place in precisely the terms it pleads, the fair process representation would be made out. However, in view of other findings I make it is not necessary finally to resolve this question. Instead I shall address two interconnected factual questions critical to Seven's case on the fair process representation:

> Did Messrs Moffett, Gallop, Love, Politis and Hill make the statements attributed to them by Seven's witnesses?
>
> Assuming the fair process representation was made, did Seven rely on it?

19.6.5.2 WERE THE ALLEGED STATEMENTS MADE?

3049 In assessing the evidence concerning the seven statements relied on by Seven, three matters must be borne in mind. The first is that not one of the statements is supported by contemporaneous documentation. The evidence supporting the making of the statements consists exclusively of evidence of oral exchanges, unaided by notes made at or near the time the conversation allegedly occurred. Moreover, there is not a single example of any of the seven alleged statements being confirmed or recorded in contemporaneous correspondence prepared by or on behalf of C7 or Seven Network. Secondly, there is no evidence that anyone at Seven complained that the conduct of the NRL PEC departed from representations made earlier on behalf of the NRL Partnership. Thirdly, it is very difficult to reconcile the evidence given by Mr Stokes and Mr Gammell, in particular, with the correspondence passing between Seven and the NRL PEC (or NRL Ltd acting on behalf of the NRL PEC).

3050 It is convenient to commence with the correspondence:

> Mr Wood's fax of 7 November 2000 to Mr Moffett acknowledged their telephone conversation in which Mr Moffett had said that the process '*was solely at [the NRL PEC's] discretion*'. Mr Wood asserted in the fax, however,

that Mr Moffett had stated that the NRL PEC would act independently in the best interests of the NRL and the clubs when assessing offers for the pay television rights. (The conversation between Mr Wood and Mr Moffett is not one of those relied on by Seven.)

Mr Wood's assertion was immediately met with a firm rebuff from Mr Moffett in his letter of 8 November 2000:

> *'we are under no obligation to engage with you in any tender process in respect of those rights, to respond to any proposal, or to refrain from conducting our affairs as we see fit'*.

C7's first offer for the rights (16 November 2000) made no reference to the expected fairness of the bidding process. However, on 17 November 2000, Mr Anderson recorded in a fax to Mr Moffett that Seven expected '*impartiality to be an important part of the process*' and that it also expected that those directors with a conflict of interest would not participate in the decision-making.

Once again this assertion provoked a firm response. On 20 November, Mr Moffett placed on record that:

> *'we are not concerned about any conflict of interest issues in the consideration of your offer'*.

3051 In making findings about the seven statements allegedly made by or on behalf of the NRL Partnership, it is also necessary to take account of concessions made (not necessarily reluctantly) by Seven's witnesses in cross-examination:

Mr Wood accepted that he was specifically told by Mr Moffett in their telephone conversation of 6 November 2000 '*that the process and timetable are matters solely for us*'. Mr Wood also accepted that he had passed on the substance of this conversation to Mr Gammell. Mr Moffett's unequivocal statement in the conversation is hardly consistent with the fair process representation.

Mr Stokes admitted that he had read the relevant portions of Mr Moffett's letter of 8 November 2000 **and accepted what had been said there.**

Mr Anderson acknowledged that from the time he read Mr Moffett's letter he

understood that C7's bid would have to proceed on the basis laid down in the letter and that he was content for C7 to do so.

Mr Stokes initially gave evidence that, from the time C7's letter of 17 November 2000 was dispatched, he believed that the News nominees on the NRL PEC would not participate in the decision to award the NRL pay television rights. He claimed to have maintained this belief until the rights were actually awarded. Yet later in his evidence Mr Stokes agreed that he had always expected that:

> *'each of the owners of the NRL rights would take an active part in the process leading to the disposition of the rights'.*

He also agreed that this was a matter totally '*for the rugby league partners*'. His later evidence is not easy to reconcile with his earlier evidence.

Mr Gammell was in no doubt about the participation of the News representatives in any decision made by the NRL PEC:

> *'You see, you knew full well that the News Limited representatives proposed to participate in any vote on the disposition of rights in which they had an interest, didn't you? --- Yes.*
>
> *You were never in any doubt that News Limited was going to take that course; correct? --- That they were going to vote, that's correct'.*

Mr Wood's own evidence made it clear that he had been told by Mr Moffett on 21 November 2000 that the News appointees would participate in the decision.

19.6.5.3 REPRESENTATIONS ALLEGEDLY MADE TO MR STOKES

3052 In addition to the matters to which I have referred, there are serious difficulties in the path of Seven's contention that I should accept Mr Stokes' account of the three conversations in which he says representations were made to him.

3053 First, in relation to the conversation with Mr Moffett said to have occurred in August or September 2000:

> Mr Stokes was heavily engaged with the Olympics in September. He

conceded that at least until the end of September he was confident that Seven would reacquire the AFL pay television rights.

In the light of that confidence, he admitted that at least until the end of September 2000 he had not been concerned about the possibility of Seven acquiring the NRL pay television rights. While he subsequently sought to retreat from this admission, his retreat was unconvincing. It is therefore unlikely that he commenced a conversation at this time by stating that Seven wished to make a very serious offer to buy the NRL pay television rights.

According to Mr Stokes, he told Mr Moffett that Seven would get back to him with an offer. No offer was in fact made by Seven until 13 November 2000.

Despite Mr Stokes saying that he regarded Mr Moffett's assurance as important, the minutes of the strategy group meeting of 28 August 2000 and 4 September 2000 make no mention of the assurance. Nor was the assurance mentioned in any correspondence with the NRL. Specifically, it was not mentioned in the letter Mr Wood sent to Mr Moffett on 19 October 2000 making inquiries about the NRL pay television rights. While I do not regard as decisive the fact that Mr Stokes himself did not make notes at the time, the absence of any reference to the assurance in the correspondence is telling.

Mr Stokes gave evidence that he told Messrs Anderson and Wood '*in general terms*' about Mr Moffett's assurance and that he '*probably*' told Mr Gammell about it. None of the three gave evidence supporting Mr Stokes' recollection. It is true, as Seven submits, that Mr Stokes' evidence as to who he told arose in cross-examination. But there was nothing to prevent Seven adducing evidence from Messrs Anderson, Wood and Gammell on the point or, if necessary, seeking leave to do so.

It is odd, to say the least, that Mr Moffett should have assured Mr Stokes that the NRL Partnership would act with total propriety and preserve confidentiality and then, in the same conversation, apparently divulge to Mr Stokes the substance of News' then current offer.

3054 Secondly, in relation to Mr Stokes' claim that Mr Love had told him that the best bid would win the NRL pay television rights and that any offer from C7 would be treated fairly:

Mr Stokes said that he made the telephone call to Mr Love, whom he did not know, because Mr Anderson had told him that Mr Love was '*the head of the NRL*'. Mr Stokes also claimed in both his statement and oral evidence that Mr Love confirmed at the outset of the conversation that he was in charge of the NRL. In fact, Mr Love was chairman of directors of ARL and a member of the NRL PEC. It is unlikely that Mr Love would have mis-stated his own position.

Mr Stokes gave inconsistent evidence as to whether he got the idea of splitting the consideration for the rights between the NRL PEC and the clubs from the NRL. His account in his written statement implies that Mr Love made the suggestion. His oral evidence is consistent with that implication. Later, however, Mr Stokes attributed the idea to Mr Anderson and Mr Gammell, denying that he had had a discussion on the topic with anybody from the NRL. Nonetheless he subsequently asserted that his written statement was correct and that his earlier oral evidence was incorrect.

Mr Stokes said that Mr Anderson was with him when he made the call to Mr Love and that Mr Anderson had told him that Mr Love was the head of the NRL. Mr Anderson's evidence was that it was likely that he had told Mr Stokes of the positions Mr Love in fact occupied. Mr Anderson did not give evidence corroborating Mr Stokes' account of the conversation.

3055 Thirdly, in relation to the conversation between Mr Stokes and Messrs Hill and Politis, said to have taken place on 25 November 2000, it is significant that in the witness box Mr Stokes, although able to recall aspects of the conversation, could not remember the contents insofar as they related to conflicts of interest on the NRL PEC. His cross-examination includes the following passage:

> *'You had no recollection of the detail of what appears in paragraph 17 of your statement ... do you? --- Not without referring to it, no.*
>
> *You know that that paragraph purports to set out a conversation of some length? --- Yes.*
>
> *Correct? --- Yes.*
>
> *In fact, you know that it covers two and a bit pages of purported conversation; do you see that? --- Yes.*

You know that that attributes pretty specific things to various individuals; correct? --- Yes.

You have no recollection of that as you sit here today at all, correct, beyond that which you have told his Honour? --- That is correct'.

3056 It is also significant, in my view, that Mr Stokes ultimately conceded that he knew that the owners of the NRL pay television rights would actively participate in the process leading to their disposition. Seven submits that this concession can be understood as consistent with Mr Stokes' evidence that he believed the News nominees would not participate in the decision. In fact, Mr Stokes said in his evidence that he did not expect the News nominees to play any part in the decision. In my view, Mr Stokes' concession does not sit easily with his account of the conversation with Messrs Hill and Politis.

3057 I am far from satisfied on the balance of probabilities that the conversations recounted by Mr Stokes, insofar as they are relied on by Seven to support the fair process representation, took place. It is possible that Mr Stokes had conversations with the people he identifies at about the times he recalls. But I am not persuaded that any conversations that took place included the assurances or representations on which Seven relies. Mr Stokes' evidence on these issues was sketchy, inconsistent, unconvincing and, in many respects, quite implausible. It was unsupported by documentary evidence and, indeed, at odds with contemporaneous records.

3058 In reaching this conclusion, I have taken into account the fact that none of the other parties to the alleged conversations was called to give evidence. As I have explained elsewhere, while this is a consideration that must be given due weight, the failure to call these witnesses does not compel me to accept Mr Stokes' account of the conversations.

19.6.6 Four Additional Alleged Representations

3059 Seven relies on four conversations to which Mr Stokes was not a party to support the fair process representation. The first of these is the conversation that took place on 13 November 2000 at which Mr Moffett is alleged to have assured Mr Anderson that he had responsibility to '*get the best possible deal for Rugby League*'. Mr Anderson accepted in his cross-examination that he understood Mr Moffett to be conveying no more than that he was

charged with the responsibility for obtaining offers for the rights and that the ultimate decision would be one for the NRL Partnership. Given that this meeting occurred soon after Mr Moffett's letter of 8 November 2000, Mr Anderson's evidence is not surprising. That evidence is consistent with the fact that Mr Anderson, in his letter to Mr Moffett sent very soon after the meeting, made no mention of any assurance given at the meeting. Indeed, Mr Moffett's response to that letter reiterated that an extension of time for making an offer would be granted '*on the same basis as stated in my letter of 8 November*'. Accordingly, I cannot accept that anything was said at the meeting of 13 November 2000 that supports the fair process representation.

3060 The second of the four additional conversations, according to Seven, took place in Sydney in mid-November or early December 2000, when either Mr Love or Mr Politis told Mr Gammell that the NRL would follow a fair and independent process. Mr Gammell and Mr Anderson (who was also at the meeting) gave conflicting evidence on important points.

3061 One such point was the date of the meeting. Mr Gammell was in Perth from 17 November to 3 December 2000. In his third statement, Mr Gammell placed the meeting on 14 or 15 November 2000, **before** C7 made its first offer on 16 November 2000. In his cross-examination, Mr Gammell said he was certain that the meeting had taken place before 30 November 2000 which, if correct, means it could not have occurred after 16 November 2000 (since Mr Gammell was not in Sydney). Mr Anderson, however, said that the meeting took place **after** C7's second offer was made to the NRL Partnership on 27 November 2000. He accepted that it was possible that the meeting had occurred on 4 December 2000, after Mr Gammell's return to Sydney.

3062 The differences as to the date of the meeting are not merely trivial, for two reasons. First, Mr Gammell and Mr Anderson gave conflicting accounts of what was discussed at the meeting. According to Mr Anderson, Mr Love had before him a copy of C7's offer and discussion took place concerning C7's '*subscriber based offer*'. Mr Gammell, on the other hand, denied that the offer had been discussed at all and, indeed, it could not have been had the meeting taken place in mid-November 2000. Secondly, if the meeting was held after 27 November 2000, any representation could not have influenced the making of the first two offers by C7 for the NRL pay television rights. Although it is not critical to my finding as to the contents of this conversation, I think that Mr Anderson is more likely to be correct in his

recollection as to the timing of the meeting. The date of 4 December 2000 is supported by emails of 1 December 2000 which refer to a forthcoming meeting with the NRL, involving both Mr Gammell and Mr Anderson.

3063 Mr Gammell conceded that certain aspects of his recollection as to what was said at the meeting may have been faulty. Mr Anderson's account of the meeting did not include the statements attributed by Mr Gammell to Mr Politis or Mr Love. Having regard to these matters, to the evidence to which I have referred and to the absence of any contemporaneous record of this conversation, I am not prepared to accept Mr Gammell's account of the statements made by Mr Politis or Mr Love at least, insofar as those statements are relied on by Seven to support the making of the fair process representation.

3064 The third of the four conversations is said to have taken place between 21 November and 5 December 2000, in the course of which Mr Moffett told Mr Wood that the News bloc was balanced by other members who would make a rational decision. (Contrary to Seven's Closing Submissions, Mr Wood's account did not refer to any conflict of interest.) Even if Mr Wood's account of the conversation is accepted, I do not think the comment supports the fair process representation.

3065 The final conversation on which Seven relies occurred on 4 December 2000. It is difficult to understand how Mr Gammell's account of what was said by Mr Moffett or Mr Gallop supports the making of the fair process representation. After all, on Mr Gammell's own account, Mr Moffett or Mr Gammell said that they and no-one else would decide what was in the best interests of the NRL and that they would work out how the media rights would be sold.

19.6.7 Authority

3066 Although it is not necessary to do so, I shall briefly address the question of whether any statements made by Messrs Love, Politis or Hill were made on behalf of the NRL Partnership or NRL Ltd. Two matters should be borne in mind. First, Seven's pleaded case does not allege that any of the statements was made on behalf of ARL, otherwise than in ARL's capacity as a member of the NRL Partnership. Secondly, the question of authority has to be considered on the assumption, contrary to my findings, that the statements allegedly made by Messrs Love, Politis and Hill were in fact made.

3067 ARL relies on three circumstances to support its contention that any statements made by the three men were not made on behalf of the NRL Partnership or NRL Ltd:

> First, ARL says that C7's purpose was to create division between ARL and News appointees on the NRL PEC. The inference is that C7 perceived an advantage in creating a division between two '*independent camps*'.
>
> Secondly, both Mr Stokes and Mr Gammell knew the structure and decision-making process of the NRL Partnership.
>
> Thirdly, Mr Gammell admitted inviting Messrs Love and Politis to the Quay Apartments meeting because they were ARL, not News, appointees on the NRL PEC. Mr Gammell also accepted that nothing said by Messrs Love and Politis at the meeting was said on behalf of a News company or the News appointees to the NRL PEC.

3068 ARL submits that C7's representatives were intent on ascertaining how ARL or its representatives would act as one of the partners in the NRL Partnership. They were not concerned to ascertain how the NRL Partnership or the NRL PEC would act. Thus if, for example, Mr Love told Mr Stokes that the best bid would win, he was merely expressing a view as to how ARL representatives on the NRL PEC would view the bids and was not making any commitment on behalf of the NRL Partnership. Similarly, anything said by Messrs Politis or Hill to Mr Stokes at his home on 25 November 2000 could only have been said on behalf of interests independent of News.

3069 Seven points out that Mr Love was a director of ARL and a member of the NRL PEC and probably had a power of attorney from ARL to do things and execute documents on its behalf (as contemplated by the NRL Partnership Agreement). Seven also points out that, on Mr Stokes' account, Mr Love had confirmed that he was in charge of '*the NRL*'. It follows, so Seven argues, that Mr Love had the express or implied authority of the NRL partners (ARL and NRLI) to make the statements he did. Alternatively, Seven contends that Mr Love had the apparent authority of the NRL partners to make the statements to Seven.

3070 Seven advances similar contentions in relation to Mr Politis, except that there is no suggestion that Mr Politis purported to be in charge of or to represent '*the NRL*'. Seven also says that Mr Politis, by participating in a meeting with Mr Hill and Mr Stokes, represented to

Mr Stokes that Mr Hill had authority to make statements about the NRL pay television rights bidding process on behalf of the NRL Partnership. It argues that Mr Hill had express or implied authority as a director of ARL and NRL Ltd to make the statements he did on behalf of the NRL Partnership.

3071 The general structure of the NRL Partnership and the role and composition of the NRL PEC have been addressed elsewhere ([252]ff). The NRL Partnership Agreement provided that the partners (ARL and NRLI) agreed to conduct the '*Business*' (that is, the business of owning and operating the NRL Competition) (cl 3.1). Each partner held an equal interest in the NRL Partnership (cll 6.2, 6.3). Each partner was to appoint three members of the NRL PEC, the decisions of which were binding on the partners (cl 5.1). The Chairman of the NRL PEC was to be nominated by each partner in alternate years, but was not to have a casting vote (cl 5.5).

3072 The NRL PEC was to:

> *'have sole power and authority to give all approvals and to make all decisions and determinations by the Partners under this Agreement'* (cl 5.7).

The NRL PEC could delegate its powers (cl 5.7). However, certain powers were '*exclusive and non-delegable*' (cl 5.8). These included decisions with respect to:

> *'the entry into, amendment or termination of any contracts in relation to Key Revenue Rights'* (cl 5.8(d)).

The expression '*Key Revenue Rights*' was defined to mean '*all media, sponsorship and merchandising rights … in relation to the NRL Competition*' (cl 1.1).

3073 Seven's submissions do not address the specific provisions of the NRL Partnership Agreement, in particular the clauses governing the composition, voting procedures and the exclusive power and authority of the NRL PEC. In the light of these provisions, it is difficult to see how Messrs Love or Politis, let alone Mr Hill (who was not a member of the NRL PEC), could have had actual authority to make representations on behalf of the NRL Partnership as to the decision-making process to be used in connection with the allocation of the NRL pay television rights. Any decision with respect to the NRL pay television rights was entrusted exclusively to the NRL PEC, the members of which were appointed equally by

each partner. The structure of the NRL PEC recognised that there might well be disagreements between the partners as to such decisions and that these would need to be resolved within the decision-making processes of the NRL PEC laid down in the NRL Partnership Agreement.

3074 It is equally difficult to see how statements made by Messrs Love, Politis or Hill can be said to have been made with the ostensible authority of the **NRL Partnership,** as distinct from that of ARL. A representation by a person that he or she has authority to bind another does not of itself create ostensible authority. The relevant principle is stated in *Crabtree Vickers Pty Ltd v Australian Direct Mail Advertising and Addressing Co Pty Ltd* (1975) 133 CLR 72, at 78, per Gibbs, Mason and Jacobs JJ:

> *'There are circumstances where the actual representation of authority may be made by the agent but in such cases it will be found that the relevant representation is made by the principal (or by the person to whom the principal has given actual authority) either by a previous course of dealing or by putting the agent in a position or by allowing him to act in a position from which it can be inferred that his actual representation of authority in himself is in fact correct. It is therefore always necessary to look at the conduct of the principal (or the person to whom he has actually delegated authority)'.*

If an officer is equipped with a certain title, status and facilities by a company, that officer's representations may be sheeted home to the company: *Pacific Carriers Ltd v BMP Paribas* (2004) 218 CLR 451, at 467 [38], per *curiam.*

3075 No doubt Mr Moffett and Mr Gallop were clothed with authority to make representations on behalf of the NRL Partnership. But the NRL Partnership does not appear to have done anything that could be regarded as clothing the three directors of ARL to speak on its behalf.

3076 This conclusion is reinforced by the understanding of Mr Stokes and Mr Gammell of the structure of the NRL Partnership. By 20 November 2000, when Mr Gammell saw the letter from Mr Moffett to Mr Anderson responding to C7's first offer, he knew and understood the structure of the NRL Partnership and the NRL PEC. He was also well aware of the potential for C7 to create a division between the NRL partners and, indeed, formulated the proposal for the sharing of revenue with the clubs partly in order to generate just such a division. Before the meeting at his home on 25 November 2000, Mr Stokes had been told by

Mr Gammell that the NRL was controlled by a board which included three News representative and three people '*independent of News*'. Although Mr Gammell's knowledge was more detailed than that of Mr Stokes, neither Mr Gammell nor Mr Stokes suffered from any misapprehension as to the relationship between the NRL Partnership and ARL nominees on the NRL PEC.

3077 If any representations made to Seven by Messrs Love or Politis were made without the authority (actual or ostensible) of the NRL Partnership, the same conclusion would seem to follow in relation to the authority of NRL. Neither Mr Love nor Mr Politis was a director of NRL. Seven's submissions do not explain why NRL should be understood to have clothed Mr Love and Mr Politis with authority to make representations to Seven on NRL's behalf.

3078 Mr Hill was a director of NRL Ltd. However, the only representation he is alleged to have made concerned the procedures of the NRL PEC when its members faced a conflict of interest. Mr Hill was not a member of the NRL PEC, and ARL was not represented on that body. Again, Seven's submissions do not explain why any statement made by Mr Hill to Seven on the question of the procedure of the NRL PEC should be regarded as having been made on behalf of NRL Ltd.

19.6.8 Reliance

3079 The findings I have made are inconsistent with Seven's case that C7 acted in reliance on the fair process representation in making its bids and in its assumption that the bids would be assessed '*fairly*'. It would not be useful to address at length the question of reliance on the basis, contrary to my findings, that the representations alleged by Seven were actually made by or on behalf of the NRL Partnership or NRL Ltd. It is enough to say that, even on that basis, Seven would have considerable difficulty establishing that it relied on the fair process representation in the manner for which it contends.

3080 One difficulty is presented by contemporaneous documentation indicating clearly that at least one of C7's principal objectives in the bidding process was to '*ramp*' the price that Fox Sports would have to pay for the NRL pay television rights. That objective, which was supported by a vigorous public relations campaign, would have prompted C7 to bid for the NRL pay television rights regardless of any representation made by the NRL Partnership as to the fairness of the bidding process.

3081 Another obstacle is presented by Mr Stokes' evidence concerning the nature and source of his beliefs as to the bidding process. He agreed in cross-examination that Seven:

> *'accepted that the owners of the NRL rights could act as they pleased in relation to the process of disposing of those rights'.*

Mr Stokes also said that he expected that the owners of the rights would '*comply with normal corporate governance given all the stakeholders … on whose behalf they were dealing*'. The following exchange then took place:

> *'What did you understand to be the manner which conformed to normal corporate governance given the stakeholders involved? --- That they would have a process in place – I didn't have to be aware of the process, but there would be a process in place which took into account gaining the highest possible value for what they were selling, for the rights they were selling.*
>
> *…*
>
> *You assumed that the owners of the rights would act in the manner you've described because that conformed to your expectations from your business experience generally; correct? --- Yes.*
>
> *And that's what it derived from; correct? --- Yes.*
>
> *That's all it derived from; correct? --- Yes'.*

3082 Mr Stokes gave this evidence after the luncheon adjournment on the thirteenth day of the trial. Seven submits that the passage should be understood in the context of an answer Mr Stokes had given before lunch, in response to a question from me. In that earlier evidence, Mr Stokes had referred to one of the three conversations he had recounted as contributing to his understanding on the question of corporate governance. But the subsequent questioning was, in my view, clear in its import and the answers admit of no ambiguity.

3083 As was said in the joint judgment of Gaudron, Gummow and Hayne JJ in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, at 128 [57]:

> *'it is now well established that the question presented by s 82 of the [TP Act] is not what was the [sole] cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was* a *cause of the loss or damage sustained'.*

Even so, it is not easy to see how Seven could have established that it relied upon the fair

process representation to make its offers to the NRL Partnership or that the representation '*caused*' any loss or damage C7 may have sustained as the result of its bids not having been treated '*fairly*'.

19.7 Fair Process Contract Claim

3084 Seven claims that the bidding contract was made in the course of the telephone conversations in which the fair process representation was made. The contract is said to have included a term requiring the NRL Partnership to treat Seven's offer for the NRL pay television rights in a fair and impartial manner. As the claim based on the fair process representation fails on the facts, so the fair process contract claim must fail.

20. SEVEN-OPTUS CAUSES OF ACTION

20.1 Pleadings

20.1.1 Seven's Pleaded Causes of Action

3085 Seven pleads no fewer than eight causes of action against Optus arising out of Optus' discussions with Foxtel Management and the Foxtel partners relating to the supply, *inter alia*, of the Fox Sports channels to the Optus platform and Optus' entry into the Foxtel-Optus Term Sheet of 20 February 2002. In the summary of the pleaded causes of action set out below I do not distinguish between the Optus parties, except where it is essential for clarity:

(i) Optus' conduct breached what has been described as the '*Exclusivity Clause*' (cl 8A of the C7-Optus CSA), which had been inserted by the First Variation Agreement of 28 September 2001 and which had been retained (in respect of a different period) by the Second Variation Agreement formally entered into in January 2002 (pars 586-590, 595-611). The terms of the Exclusivity Clause have already been set out ([1601]).

(ii) By reason of the same conduct, SingTel Optus breached cl 2 of the CWO Deed Poll, by which it guaranteed Optus Vision's obligations under the C7-Optus CSA. Accordingly, Seven is entitled to be indemnified by SingTel Optus for any loss and damage suffered by it (pars 612-616).

(iii) Optus' purported termination of the C7-Optus CSA on 28 March 2002 was both ineffective and constituted a repudiation of the agreement. This was so because Optus, by ceasing to perform the C7-Optus CSA, had committed a fundamental breach of the agreement, thus entitling Seven to terminate it. Seven accepted Optus' repudiation and validly terminated the C7-Optus CSA on 6 May 2002. Seven is therefore entitled to claim damages for Optus' breach of the C7-Optus CSA (pars 617-624).

(iv) SingTel Optus induced Optus Vision to breach the Exclusivity Clause, opening the way to a claim by Seven for exemplary and aggravated damages against SingTel Optus (pars 625-628).

(v) Prior to entry into the First and Second Variation Agreements, Optus represented to Seven that Optus would not enter into discussions or negotiations with persons other than C7 of the kind prohibited by the Exclusivity Clause. The representations were made either falsely or without reasonable grounds and amounted to misleading or deceptive conduct, in contravention of s 52 of the *TP Act.* In reliance on the representations, Seven refrained from insisting on the execution of a term sheet to replace the C7-Optus CSA and thus suffered loss and damage (pars 632-638, 644-645, 648-649). Optus admits making a statement to the effect of the pleaded representations, but denies the other allegations made by Seven relating to the representations.

(vi) Optus made representations to Seven about the state of their negotiations concerning the Fox Sports channels, without revealing the true state of the negotiations or Optus' intention to continue negotiations in order to obtain the Fox Sports channels (pars 629-631, 639-643, 646-649). Of the four representations pleaded by Seven (par 631), Optus admits making three statements to that effect, but otherwise denies the allegations.

(vii) Optus Vision was knowingly concerned in SingTel Optus' contraventions of the *TP Act,* and *vice versa.* Each therefore bears accessorial liability for the contraventions of the other (pars 650-651).

(viii) The representation by Optus made prior to the entry into the Second Variation Agreement, to the effect that Optus would comply with the Exclusivity Clause, was intentionally misleading. The making of the representation therefore constituted the tort of deceit (pars 652-655).

3086 Seven alleges that SingTel Optus' actions in inducing a breach of the Exclusivity Clause and the actions constituting the tort of deceit were engaged in with '*conscious and contumelious disregard*' for the provisions of the Exclusivity Clause (pars 656-657). This allegation supports Seven's claim for exemplary and aggravated damages.

20.1.2 Optus' Cross-Claim

3087 Optus has been no less assiduous and indeed imaginative than Seven in formulating contentions in its Cross-Claim. Optus' major allegations are summarised below. Paragraph references are to the Cross-Claim.

(i) Prior to Optus entering the First Variation Agreement, Seven represented to it that the C7-Optus CSA could not be terminated until the beginning of the 2002 AFL season and that the terms of the AFL-Seven Licence supported that interpretation. Seven also represented to Optus that it believed the truth of the statements it made about the termination date. The representations were false. Optus in fact had the right to terminate the C7-Optus CSA at the end of the 2001 AFL season since, by that time, Seven no longer had '*the pay television rights to AFL games*' within the meaning of cl 16.2(a) of the C7-Optus CSA. Moreover, Seven did not believe the representations it made to Optus (pars 19-20). Seven's conduct was misleading or deceptive, in contravention of s 52 of the *TP Act* (pars 22-26). Since Optus relied on the representations when entering the First and Second Variation Agreements, it is entitled to have them, or the Exclusivity Clause, set aside (pars 27-28).

(ii) Seven breached the C7-Optus CSA by failing, upon request, to provide Optus with a copy of the AFL-Seven Licence. As a consequence of this breach, Optus could not ascertain for itself when its right to terminate the C7-Optus CSA arose and, accordingly, decided to enter into the First and Second Variation Agreements. Optus therefore suffered loss and damage equivalent to any judgment to which Seven would otherwise be entitled (pars 29-35).

(iii) Seven engaged in the practice of '*exclusive dealing*' in contravention of s 47(1) of the *TP Act.* It did so by supplying sports channels to Optus Vision on condition that Optus Vision would not acquire sports programming (other than the supply of AFL match broadcasts and NRL match broadcasts) from any person, including Foxtel or Fox Sports, other than Seven (par 37). For the purposes of this contention, Optus pleads that Seven was a competitor of Foxtel and Fox Sports in the retail television market or the wholesale sports

channel market (par 39). It also says that Seven's conduct had the purpose or was likely to have the effect of substantially lessening competition in the relevant markets (par 40).

(iv) The Exclusivity Clause was an '*exclusionary provision*' within the meaning of s 4D(1) of the *TP Act.* Thus by entering the First and Second Variation Agreements, Seven made a contract or arrangement containing an exclusionary provision contrary to s 45(2)(a)(i) of the *TP Act* (pars 45-46). The Exclusivity Clause was an '*exclusionary provision*' because:

> Optus was competitive with Seven in one or other of the relevant markets;
>
> the contract or arrangement was between persons who were competitive with each other; and
>
> cl 8A had the purpose of preventing, restricting or limiting Optus Vision from acquiring sports channels from persons other than C7 (pars 42-44A).

Alternatively, by virtue of the C7-Optus CSA, as amended by the First and Second Variation Agreements, Seven made a contact or arrangement, a provision of which had the purpose or was likely to have the effect of substantially lessening competition, contrary to s 45(2)(a)(ii) of the *TP Act* (par 47).

(v) The Exclusivity Clause constituted an unreasonable restraint of trade under the general law and was therefore unenforceable by Seven (par 57).

(vi) Seven is estopped from asserting, or has waived, any right to relief in relation to the entry into and the negotiation of the Foxtel-Optus Term Sheet and the Foxtel-Optus CSA. This is said to flow from the fact that Seven's officers knew that Optus had negotiated with Foxtel in December 2001 and early 2002, yet took no steps to enforce the Exclusivity Clause until 19 August 2004 when it amended the Statement of Claim (par 48).

(vii) Seven breached its obligations under cll 3A.2 and 36 of the C7-Optus CSA to use reasonable endeavours to procure that Optus was offered Fox Sports programming on terms no less favourable than those accorded to any other person in respect of the supply of Fox Sports (pars 54-56).

(viii) The Exclusivity Clause is void for uncertainty. Alternatively, it should be construed so as not to preclude Optus from having discussions and negotiations with Foxtel about content sharing or from entering into content sharing agreements (par 58).

3088 Optus seeks declaratory relief, damages and other relief, including orders setting aside the First and Second Variation Agreements or, alternatively, the Exclusivity Clause.

20.2 Optus' Misleading Conduct Case against Seven

3089 It is convenient to consider first Optus' claim that it was induced to enter the First and Second Variation Agreements by reason of Seven's misleading and deceptive conduct. If this claim is made out and Optus is entitled to the relief it seeks, Seven's claims for breach of the Exclusivity Clause cannot succeed.

20.2.1 Optus' Case and Seven's Response

3090 Optus' case, as presented in its submissions, starts with the proposition that early in 2001 it had formed the view that the C7-Optus CSA could be terminated by Optus after the last game of the 2001 season. Mr Wood's letter of 1 May 2001, together with his letter of 13 August 2001, made unambiguous representations to Optus that Seven had the AFL pay television rights until at least the commencement of the 2002 AFL season. The letters also constituted representations as to a future matter, namely the state of affairs that would subsist in relation to Optus' right of termination until the first day of the 2002 season. Thus Optus is entitled to rely on s 51A of the *TP Act*, which applies to representations with respect to a future matter.

3091 Optus says that the representations made by Seven were false and, insofar as they were with respect to a future matter, that Seven had no reasonable grounds for making them. Thus the representations amounted to misleading or deceptive conduct. That conduct was instrumental in causing Optus' legal advisers to change their position and to advise Optus

that, in the absence of Optus having access to the terms of the AFL-Seven Licence, Mr Wood's assertion as to the termination date appeared credible.

3092 Because Seven disputes whether Optus' submissions are covered by the pleadings, I set out below the four representations pleaded by Optus in par 19 of its Cross-Claim (I omit two other pleaded representations that seem to have played no part in the submissions):

> *'(a) The [C7-Optus CSA] could not be terminated by Optus until, and the right to terminate would only arise at, the beginning of the 2002 AFL season;*
>
> *(b) Under its contractual arrangements with the AFL, Seven retained and would retain the AFL rights until the first day of the 2002 AFL season with the consequence that Optus' right to terminate the [C7-Optus CSA] would only arise at that time;*
>
> *...*
>
> *(e) The wording of the [AFL-Seven Licence] supported each of the representations in clauses (a)-[(b)] above;*
>
> *(f) Seven Network and C7, or alternatively Shane Wood, believed that each of the representations in clauses (a)-(e) above were true and reflected their views without qualification'.*

3093 Optus pleads the falsity of the representations identified in par 19 as follows:

> *'(a) At the end of the 2001 AFL season, Optus had the right to terminate the [C7-Optus CSA] because:*
>
> *(i) Seven no longer had "the pay television rights to AFL games" for the purposes of clause 16.2(a) of the [C7-Optus CSA];*
>
> *(ii) Further or in the alternative, Seven had lost "the pay television rights to AFL games" for the purposes of clause 16.2(a) of the [C7-Optus CSA].*
>
> *(b) Under the terms of the [AFL-Seven Licence], Seven did not have the pay television rights to AFL games at any time after the end of the 2001 AFL season;*
>
> *(c) Under the terms of the [AFL-Seven Licence], Seven did not have the pay television rights to show AFL games until the commencement of the 2002 AFL season;*
>
> *...*

> *(e) Seven Network and C7, or alternatively Shane Wood, did not believe that each of the representations in clauses (a)-(e) of paragraph 19 ... were true and those representations did not reflect their views without qualification'.*

3094 Optus seeks an order pursuant to s 87 of the *TP Act* setting aside the First and Second Variation Agreements, or declaring the Exclusivity Clause unenforceable. These orders would have the effect, so Optus contends, of restoring the C7-Optus CSA during the period October 2001 to February 2002. Optus says that it in fact paid the full fees required under the C7-Optus CSA for that period, by reason of the top up payment of $5.75 million, plus GST, made on 20 March 2002.

3095 Optus also seeks damages on the basis that, had the misleading conduct not occurred, Optus would have terminated the C7-Optus CSA or indicated its intention of doing so. The parties would have negotiated an extension until the end of February 2002, but on terms not including the Exclusivity Clause or a top up arrangement. Optus says that it is entitled to damages amounting to $6.325 million, being the top up payment of $5.75 million, plus GST.

3096 Seven submits that none of the statements made by Mr Wood conveyed the representations alleged by Optus, as the statements did no more than convey that there was a reasonable basis for the views expressed. Moreover, Seven says that any representations made on its behalf concerned existing contractual rights, not future matters. According to Seven, the representations:

> *'contain no element of prediction, forecast or projection as to future matters. Although they contain a conclusion that Optus could exercise its right of termination at a future point in time, this was no more than a consequence of the meaning given to the contractual rights in question'.*

3097 Seven disputes that the evidence supports the factual findings necessary to make out a case of misleading and deceptive conduct against it. Whatever representations were made, Seven submits that they have not been shown to be misleading or deceptive.

20.2.2 Letter of 1 May 2001

3098 It is convenient to set out again the material terms of Mr Wood's letter of 1 May 2001, upon which Optus places most reliance:

> *'Under its present arrangements with the AFL, Seven has the right to broadcast on Pay and FTA the AFL Spectacles until at least the commencement of the 2002 Season (being approximately February 2002). For this reason until the first day of the 2002 AFL Season Seven will still have, and will not have lost, the AFL rights, and accordingly Optus' right of termination under clause 16.2(a) will only arise on the first day of the 2002 AFL season'.*

20.2.3 Significance of a Representation as to a Matter of Law

3099 On one view, the representation made by Mr Wood in his letter concerned a matter of law, namely the date Optus was entitled to exercise its right to terminate the C7-Optus CSA. At common law, a false representation may not be actionable unless the representation is of fact, rather than a representation as to the law or an expression of opinion: *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, at 108 [329], per Malcolm AJA; at 148 [431], per McPherson AJA; *Inn Leisure Industries Pty Ltd v D F McCloy Pty Ltd (No 1)* (1991) 28 FCR 151, at 165 per French J. However, under s 52 of the *TP Act*, the making of a representation of law or an expression of opinion may amount to misleading or deceptive conduct, depending upon the circumstances: *SWF Hoists and Industrial Equipment Pty Ltd v State Government Insurance Commission* [1990] ATPR 41-045, at 51,608, per von Doussa J; *Inn Leisure Industries v McCloy*, 28 FCR at 166, per French J.

3100 In determining what representation is conveyed by particular communications, '*[m]uch will depend on the context and the circumstances*': *Heydon v NRMA* 51 NSWLR, at 108 [330], per Malcolm AJA. As French J said in *Inn Leisure Industries*, 28 FCR at 167*:*

> *'A representation of law may be made in different ways which send different messages to the recipient. It may do no more than convey what is, on the face of it, the untutored opinion of the representor. As such it would be unlikely, if wrong, to constitute misleading or deceptive conduct. If the represented opinion were not in fact held by the representor, then that would be a misrepresentation of fact and able to be characterised as misleading or deceptive conduct. ... Expert advice as to the law may convey the representation that it is based upon an underlying body of knowledge, experience or expertise possessed by the person proffering it or to which that person has access. The situations in which advice, expert or otherwise, as to the law may be misleading or deceptive for the purposes of s 52 will depend upon the context and circumstances in which it is proffered and the representations implied or expressed that accompany it'.*

20.2.4 What Representations Were Conveyed?

3101 In determining what representations, if any, were conveyed by Mr Wood's letters, the context must be considered. On 30 January 2001, three months before Mr Wood sent his letter, Optus had asked C7 whether it agreed that the right to terminate available under cl 16.2 of the C7-Optus CSA could arise only from the end of the 2001 AFL season. Mr Wood's letter was a belated response to that query. When he sent the letter, Mr Wood could not have known of the content of Optus' legal advice or indeed whether Optus had obtained advice. But the terms of his letter show that Mr Wood fully appreciated that the timing of Optus' right to terminate the C7-Optus CSA depended on the terms of the AFL-Seven Licence. As Mr Wood realised, the right to terminate arose under the C7-Optus CSA when C7 or a related body '*does not have, or loses, the pay television rights to AFL games for any reason*' (cl 16.2(a)). Whether Seven no longer had, or had lost, the rights depended on the effect of the AFL-Seven Licence, since it governed the duration of Seven's pay television rights to AFL games.

3102 Curiously enough, by 1 May 2001 Optus had not asked Seven for a copy of the AFL-Seven Licence in order to ascertain its terms. Indeed, Optus did not request a copy from Seven until 28 August 2001, after Mr Wood had sent the letter of 13 August 2001 which, in effect, repeated the representations contained in the earlier letter.

3103 As Mr Wise and Mr Wood must have known and as will become clear, the strategy of pushing for 28 February 2002 as the earliest date on which Optus could exercise its right to terminate the C7-Optus CSA was doomed to failure if Optus had, or gained access to, a copy of the AFL-Seven Licence. Both Mr Wood and Mr Wise knew that Optus had not requested a copy from Seven and that it was hardly likely that the AFL would provide a copy to Optus directly. When Optus belatedly sought a copy from Seven, its response was simply to ignore the request. There was no expression of surprise from Seven that Optus had not already sought or obtained a copy of the AFL-Seven Licence. I infer (and it does not seem to be disputed) that at the time Mr Wood sent the letters both he and Mr Wise must have realised that Optus did not have a copy of the AFL-Seven Licence.

3104 Seven's submissions acknowledge that it is important to take into account the fact that Seven's conduct was directed at Optus specifically. It accepts that an assessment of the character of its conduct will be influenced by what Mr Wood knew of Optus' position and

the nature of the dealings that had taken place between Seven and Optus: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, at 604-605 [36]-[37], per Gleeson CJ, Hayne and Heydon JJ. However, Seven submits that the factors that should be taken into account include Optus' commercial sophistication; its knowledge that the representations concerned contracts which raise questions of interpretation on which reasonable minds might differ; and its appreciation that Seven had an interest in pressing for a later termination date, while Optus itself preferred an earlier date. I agree that these are matters to take into account in determining what representations were conveyed by Mr Wood's letters. But they do not necessarily negate the case Optus seeks to make.

3105 It is important to bear in mind that without a copy of the AFL-Seven Licence, Optus lacked the critical document it needed to make an informed judgment about the timing of its right to terminate the C7-Optus CSA. As I have explained, Mr Wood and Mr Wise were aware of the disadvantage under which Optus laboured throughout 2001.

3106 Above all, however, it is necessary to pay careful attention to what Mr Wood said, particularly in his letter of 1 May 2001. He asserted that under Seven's '*present arrangements with the AFL*' it had the right to broadcast '*the AFL Spectacles*' until at least the commencement of the 2002 season in about February 2002. It was on the basis of this assertion that Mr Wood was able to say that Optus' right of termination under cl 16.2(a) of the C7-Optus CSA would arise only on the first day of the 2002 season.

3107 The letter explicitly (and correctly) linked the timing of the exercise of Optus' right to terminate the C7-Optus CSA under cl 16.2(a) to the terms of the AFL-Seven Licence. Mr Wood's letter used language derived from the agreements with Seven, the terms of which were known to him but (as he appreciated) were not known to Optus. The very foundation for Mr Wood's statement that Optus' right to terminate arose only on the first day of the 2002 season was his assertion that Seven, under the AFL-Seven Licence, had the right to broadcast AFL games on pay television until at least the commencement of the 2002 AFL season.

3108 In these circumstances, it seems to me that Mr Wood's letter of 1 May 2001 conveyed representations to Mr Keely and Optus that:

the wording of the AFL-Seven Licence, when read with the terms of cl 16.2(a) of the C7-Optus CSA, could reasonably be understood to be consistent with Mr Wood's assertion that Optus' right to terminate the C7-Optus CSA would not arise until the beginning of the 2002 AFL season; and

Mr Wood and senior management of C7 believed that there was at least a reasonable basis for the assertion as to the time at which Optus could exercise its right to terminate the C7-Optus CSA.

3109 Mr Wood's letter of 13 August 2001 to Mr Ebeid reiterated the assertion that the C7-Optus CSA could not be terminated by Optus until the beginning of the 2002 season. In my opinion, when read with the letter of 1 May 2001, it conveyed the same representations.

3110 Paragraph 19(e) of Optus' Cross-Claim pleads a representation by Seven that the wording of the AFL-Seven Licence supported Mr Wood's assertion as to when Optus could exercise its right to terminate the C7-Optus CSA. The first of the two representations I have found were made by Seven does not precisely correspond to the language used in par 19(e) of the Cross-Claim. It is, however, to the same effect and I think is embraced by the pleading. Certainly there is no injustice to Seven in reading the pleading this way.

3111 Similarly, it seems to me that the second of the representations I have found were made by Seven is in substance covered by par 19(f) of the Cross-Claim. It is not clear what, if anything, the words '*and reflected their views without qualification*' add to the pleading. Again, there is no injustice to Seven in reading the Cross-Claim as embracing the second representation. Seven's submissions proceed on the basis that it must meet a case that Mr Wood and others within Seven did not believe that there was a reasonable basis for the statement that Optus' right to terminate the C7-Optus CSA arose only at the start of the 2002 AFL season. Seven therefore attempts to meet the case that arises on the findings I have made.

20.2.5 Representation with Respect to a Future Matter?

3112 The fact that a statement carries a representation as to the maker's state of mind does not mean that the representation cannot also be '*with respect to any future matter*' within the meaning of s 51A(1) of the *TP Act*: *Ting v Blanche* (1993) 118 ALR 543, at 552-553, per Hill J; *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511, at 514-516, per Heerey J; at

520, per Sundberg J. Thus the fact that Mr Wood's letter of 1 May 2001 conveyed a representation as to his and C7's state of mind does not necessarily mean that it did not also convey a representation with respect to a future matter.

3113 However, it is still necessary to determine whether the representation can be said to be '*with respect to any future matter*' for the purposes of s 51A(1) of the *TP Act*. That expression is not defined in the *TP Act* and applying it to the circumstances of a particular case can involve a difficult process of characterisation. This is illustrated by the difference in opinion between members of the Full Federal Court in *Sykes v Reserve Bank*. The majority in that case considered that the Reserve Bank had made a representation with respect to a future matter, namely the release date of a new $5 note. Emmett J, in dissent, took the view that the Bank had merely expressed its expectation as to the timing of the release and was not making a prediction. For that reason, so his Honour held, the Bank could not be said to have made a representation as to a future matter.

3114 There is no doubt that Mr Wood's letter of 1 May 2001, in one sense, referred to something that was to happen in the future, namely the date on which Optus would become entitled to exercise its right to terminate the C7-Optus CSA by reason of Seven's loss of the AFL rights. But the statement in the letter about that date was an inevitable consequence of the assertions made by Mr Wood as to the factual and legal position at the date of the letter. The letter gave a particular operation to cl 16.2(a) of the C7-Optus CSA which was based on the effect of the AFL-Seven Licence. That in turn depended on an agreement already in existence and on events that had already occurred (that is, the award of the AFL pay television rights for 2002 and beyond to a party other than Seven). If what Mr Wood said about the effect of the AFL-Seven Licence was correct, the consequences for the exercise of Optus' right to terminate could be stated with certainty at the date of the letter. In other words, as Seven submits, the letter contained no element of prediction, forecast or projection. Whether the statements in Mr Wood's letter were right or wrong could have been ascertained on the date the letter was written.

3115 For these reasons, in my view, Mr Wood's letter of 1 May 2001 cannot be said to have made a representation with respect to a future matter. The same is true of his letter of 13 August 2001. There is therefore no occasion to consider the application of s 51A of the *TP Act* to the representations contained in the letters.

20.2.6 Were the Representations Misleading or Deceptive?

20.2.6.1 FIRST REPRESENTATION

3116 Seven's submissions anticipate a finding to the effect that it had represented that there was a reasonable basis for the statements made in Mr Wood's letters about the parties' contractual rights, specifically the date Optus' right to terminate could be exercised. Seven contends that not only was there a reasonable basis for the statements, but that they were correct. According to Seven, on its true construction, cl 16.2(a) of the C7-Optus CSA conferred a right of termination on Optus that could not be exercised until the commencement of the 2002 season.

3117 This is a bold claim. I suspect that its forensic purpose is not to demonstrate that the suggested construction of cl 16.2(a) is correct or even likely to be correct, but to pass muster as a barely arguable proposition. If it is arguable, the first of the two representations made by Seven was not misleading or deceptive. And if Seven's construction argument is reasonably arguable, it would make it more likely that Seven's executives believed at the time the letters were sent that the argument was indeed plausible and thus that the second representation was not misleading or deceptive.

3118 Seven's construction argument is not easy to follow. Seven points out, correctly, that the expression '*pay television rights to AFL games*' in cl 16.2(a) of the C7-Optus CSA is not a defined expression. Seven submits that the expression must encompass those rights necessary to enable C7 to comply with its obligation, imposed by cl 4.4 of the C7-Optus CSA, to include certain content on the C7 channels. Seven then says that the effect of the AFL-Seven Licence and the AFL Copyright Agreement (the terms of which have been summarised at [826]-[832]) was that Seven had the right to broadcast AFL games from the 1993-2001 seasons in perpetuity (albeit on a non-exclusive basis after the expiry of the AFL-Seven Licence). Finally, Seven says that it follows that C7 had the rights necessary for it to comply with the requirements of cl 4.4 of the C7-Optus CSA until the start of the 2002 Ansett Cup (the pre-season competition), at which point C7 had to broadcast replays of that competition (cl 4.4(b)(i)). However, Seven does not explain why the conclusion follows.

3119 There is no evidence that anyone within Seven put forward, or even thought of, this argument in the course of discussions about Optus' right of termination under the C7-Optus

CSA. This is not perhaps surprising because it seems to me that the argument, insofar as it can be understood, lacks a plausible foundation. The fact that C7 had a non-exclusive right in perpetuity to broadcast games played during the period 1993-2001 hardly assists in determining precisely when Seven can be said no longer to have, or to have lost, the pay television rights to AFL games. Similarly, it is not easy to see why the terms of cl 4.4 of the C7-Optus CSA lead to or support the conclusion that Seven had the AFL pay television rights until the start of the Ansett Cup competition in 2002.

3120 The C7-Optus CSA provided for the supply to Optus, on a non-exclusive basis, of the '*Seven Service*'. The minimum AFL content of the Seven Service was determined by cl 4.4. The critical obligations imposed on C7 were to supply a minimum number of exclusively live AFL games (cl 4.4(d)(i)) and a higher minimum combined number of exclusively live, non-exclusive live and delayed broadcasts of AFL games. (The expression '*delayed broadcast*' was not defined. However, the C7-Optus CSA distinguished that expression from '*replayed AFL games*'. This suggests that a delayed broadcast is one that commences after the match itself but before the conclusion of the live match or at least within a very short time thereafter.) Clause 4.4 used the expression '*in each AFL season*', or very similar expressions, on four separate occasions to specify the minimum obligations of C7 with respect to the broadcasting of AFL games on the C7 channels.

3121 Clause 16.2(b) of the C7-Optus CSA expressly recognised that Seven's AFL pay television rights had been granted by a separate agreement with the AFL. Clause 16.2 implicitly recognised that whether Seven '*does not have, or loses*' the rights would be determined by the terms of that agreement – that is, the AFL-Seven Licence. No one reading cl 16.2 of the C7-Optus CSA on its own could be sure whether the time at which Seven no longer had the AFL pay television rights would coincide with the end of an AFL season. Whether that would or would not be the case would depend on the terms of the AFL-Seven Licence.

3122 The AFL-Seven Licence expressly granted Seven the exclusive right to '*broadcast live and delayed coverage [of AFL matches] by way of pay television*' for specified '*AFL Seasons*', the last of which was the 2001 AFL Season (cl 3(a)). The definition of '*AFL Season*' made it clear that the '*AFL Seaso*n' ended with the last finals match. The rights fees were specified '*insofar as they relate to and confer rights in respect*' of each AFL Season.

3123 It seems to me to make perfectly good sense as a matter of ordinary language to speak of Seven no longer having the AFL pay television rights after the end of the 2001 AFL season. Its rights were granted in respect of matches played in that season. Once the season ended, there were simply no further matches in respect of which Seven had pay television rights. Clause 16.2(a) of the C7-Optus CSA was plainly intended to confer on Optus a right to terminate which could be exercised as soon as the 2001 AFL season ended. That was the point at which C7's existing rights expired (cl 16.2(b)) and beyond which it would no longer have the rights to broadcast any new AFL matches on its pay television channels. In essence, the only rights C7 had thereafter were to replay old matches and those rights continued in perpetuity.

3124 Sometimes agreements mean more or less what they say. I do not think it was ever reasonably arguable that on the proper construction of cl 16.2(a), when read with the AFL-Optus Licence, Seven had the AFL pay television rights beyond the end of the 2001 AFL season. In any event, it was not reasonably arguable that Seven had the rights until the start of the 2002 AFL season. Thus in my opinion the first representation made by Seven to Optus in Mr Wood's letters constituted misleading or deceptive conduct for the purposes of s 52 of the *TP Act*.

20.2.6.2 SECOND REPRESENTATION

3125 So far as the second representation (relating to the state of mind of Mr Wood and the senior management of Seven) is concerned, there is no evidence that Seven obtained legal advice to the effect that there was a plausible argument supporting the contention that Optus' right to terminate the C7-Optus CSA did not arise until February 2002. The absence of such advice does not necessarily mean, however, that the senior executives of Seven did not believe, on the basis of their own reading of the contracts or other material, that there was such an argument. The issue was explored in evidence with three witnesses: Mr Wood, the signatory to the letters; Mr Wise, to whom Mr Wood reported; and Mr Stokes.

3126 In one of his written statements, Mr Wood stated that C7 held the right to broadcast AFL matches '*until the end of the 2001 AFL season*'. In his cross-examination, Mr Wood confirmed that this statement reflected his state of mind throughout 2000 and 2001. At no stage in his evidence did Mr Wood suggest that the negotiating position he put to Optus concerning its right to terminate the C7-Optus CSA reflected his belief that the position was

correct or arguably correct. Mr Wood gave cogent reasons why it was advantageous for C7 to put to Optus that it could not terminate the C7-Optus CSA until February 2002. But he did not say that he believed that the contention he was advancing was arguable, whether on the basis of the contractual documentation with which he was familiar or on some other basis.

3127 The assertions made in Mr Wood's letters of 1 May and 13 August 2001 concerning the date Optus' right of termination could be exercised did not reflect his personal views. Mr Wood believed that C7's rights continued only until the end of the 2001 season and, so I infer, that Optus' right of termination arose at that time. Mr Wood did not believe that there was an arguable case that Optus' right of termination did not arise until February 2002.

3128 This does not necessarily mean that Mr Wood was dishonest in his dealings with Optus. He may have been told by Mr Wise what negotiating strategy to adopt and, if so, he may have thought that this circumstance warranted putting the position he did concerning the termination date, regardless of his personal views. This possibility, however, does not detract from the finding I have made as to his state of mind.

3129 Mr Wise knew that Mr Wood was representing to Optus that Optus could not terminate the C7-Optus CSA until February 2002 and indeed authorised Mr Wood to do so. Mr Wise accepted that the representation was important because it improved Seven's bargaining position in relation to any arrangement with Optus extending or continuing the operation of the C7-Optus CSA. But Mr Wise in his evidence maintained that the termination date was a '*grey*' area, which was not defined in the contract. It was therefore in order for Seven to assert to Optus that it could not terminate the C7-Optus CSA until February 2002.

3130 Mr Wise was confronted with the minutes of a meeting of the board of i7 held on 25 July 2001, which recorded a statement by him that the C7-Optus CSA '*lapse[d] at the end of the 2001 AFL Season*'. After initially acknowledging that the minutes accurately recorded what he had said, Mr Wise sought to withdraw the concession. He fell back on the familiar claims by some of Seven's witnesses that the minutes were inaccurate and did not record what he conveyed at the meeting.

3131 I have explained my reservations about the reliability of aspects of Mr Wise's

evidence. I do not accept that the minutes of the i7 board meeting were inaccurate. I find that Mr Wise expressed the view recorded there. That was in fact his view when Mr Wood made the representations to Optus. Mr Wise did not believe that there was a plausible argument for '*push[ing] out*' the termination date under the C7-Optus CSA until February 2002. Rather he sought a negotiating advantage for Seven, knowing that Optus did not have access to the contractual documentation that would enable it to check Seven's assertions on that issue.

3132 Two other matters support this finding. First, in an email sent by Mr Wise to Mr Stokes and others on 20 May 2001, Mr Wise said that C7's product '*fundamentally changes at the end of September*'. Mr Bannon did not ask Mr Wise about this email, but Mr Meagher did. Mr Wise agreed that the comment was a reference, in part, to the fact that C7, without AFL content, would lose a subscription driving product at the end of September 2001. While Mr Wise was not addressing specifically the question of a termination date, the view expressed by him just three weeks after Mr Wood's letter of 1 May 2001 was consistent with the view expressed by him at the meeting of 25 July 2001. Secondly, as Mr Wise admitted, he had participated in misleading the AFL in November 2000. Misleading Optus was not entirely foreign to his method of operation when negotiating for a favourable outcome for Seven.

3133 Mr Stokes knew that the representations concerning the termination date were being made to Optus in the context of negotiations concerning the First and Second Variation Agreements. He accepted that the representations did not reflect his view, which (he said) was that the right of termination arose at the end of 2001. However, Mr Stokes said that Mr Wise had told him of another interpretation that he had '*expressed and ... was negotiating on*'.

3134 I accept that Mr Wise told Mr Stokes of the negotiating position that he proposed Seven should adopt. I do not accept (and indeed Mr Stokes did not specifically say) that Mr Wise had suggested to Mr Stokes that the February 2002 termination date was reasonably arguable. I find that Mr Stokes did not believe that Seven's representations on the termination date were reasonably arguable.

3135 It follows that the second representation made by Seven to Optus was also misleading

or deceptive and thus Seven contravened s 52 of the *TP Act*.

20.2.7 Relief

20.2.7.1 OPTUS' CLAIMS

3136 The conclusion that Seven engaged in misleading or deceptive conduct in contravention of s 52 of the *TP Act*, in the lead-up to Optus executing the First and Second Variation Agreements, does not necessarily mean that Optus is entitled to any relief under the *TP Act*. Optus' submissions do not analyse in any depth how the remedial provisions of ss 82 and 87 of the *TP Act* apply to the circumstances of the present case. Nonetheless, Optus relies on each of these provisions to support its claim for relief, apparently leaving it to the Court to work out the details.

3137 Optus says that the first relief to which it is entitled is an order pursuant to s 87 of the *TP Act* setting aside in whole or in part the First and Second Variation Agreements or an order declaring the Exclusivity Clause unenforceable. Optus does not descend to the detail of nominating the subsections of s 87 on which it relies. Presumably, however, it relies on s 87(1A), (2)(a), (b) and (ba) of the *TP Act*. Those provisions are as follows:

> *'(1A) Without limiting the generality of section 80, the Court may:*
>
> *(a) on the application of a person who has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in contravention of Part ... V ... ; or*
>
> *(b) ...*
>
> *make such order or orders as the Court thinks appropriate against the person who engaged in the conduct or a person who was involved in the contravention (including all or any of the orders mentioned in subsection (2)) if the Court considers that the order or orders concerned will:*
>
> *(c) compensate the person who made the application, or the person or any of the persons on whose behalf the application was made, in whole or in part for the loss or damage; or*
>
> *(d) prevent or reduce the loss or damage suffered, or likely to be suffered, by such a person.*
>
> *...*

(2) The orders referred to in subsection … (1A) are:

(a) an order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct or a person who was involved in the contravention constituted by the conduct, or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void ab initio *or at all times on and after such date before the date on which the order is made as is specified in the order;*

(b) an order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date before the date on which the order is made as is so specified;

(ba) an order refusing to enforce any or all of the provisions of such a contract;

…'

3138 According to Optus, an order setting aside the First and Second Variation Agreements would restore the C7-Optus CSA for the period October 2001 to February 2002. As I have noted, Optus finished up paying the full amount due under the C7-Optus CSA for that four month period, since it had to top up the reduced payments under the First and Second Variation Agreements as the result of not entering into a three year deal with Seven.

3139 Optus also claims damages, presumably under s 82(1) of the *TP Act*. It asks for a finding that, but for Seven's misleading conduct, Optus would have terminated the C7-Optus CSA, or indicated its intention of doing so. In this situation, the parties would have agreed to extend the agreement until the end of February 2002 on terms which reflected the reduced licence fee and did not include the Exclusivity Clause.

20.2.7.2 SECTIONS 82 AND 87 OF THE *TP ACT*

3140 The somewhat complicated history of s 87 of the *TP Act* was explained by the Full Federal Court in *Mayne Nickless Ltd v Multigroup Distribution Services Pty Ltd* (2001) 114 FCR 108, at 119-121 [34]-[42]. Section 87(1A) confers powers to make certain orders subject to a number of conditions (cf *Mayne Nickless* 114 FCR, at 122 [49]). These are as follows:

the orders are sought by a person who has suffered or is likely to have suffered loss or damage by conduct of another person that contravened (relevantly) Pt V of the *TP Act*;

the Court thinks that any of the orders sought will:

- compensate the applicant in whole or in part for the loss or damage; or
- prevent or reduce the loss or damage suffered, or likely to be suffered by the applicant; and

the Court thinks it appropriate to make the order against the person who engaged in the contravening conduct.

3141 The orders that can be made by the Court include declaring the whole or any part of the contract between the applicant and the contravening party to be void, either *ab initio* or from a specified date (s 87(2)(a)); an order varying the contract in such manner as is specified in the order (s 87(2)(b)); and an order refusing to enforce any or all of the provisions of the contract (s 87(2)(ba)). An application may be made for an order under s 87(1A), including orders under s 87(2), in relation to a contravention of Pt V of the *TP Act* even if a proceeding has not been instituted under any other provision of the *TP Act* in relation to that contravention: s 87(1C).

3142 Section 82 of the *TP Act* provides a cause of action to those who have suffered loss or damage by conduct contravening, *inter alia*, s 52 of the *TP Act*: *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, at 125-126 [50], per Gaudron, Gummow and Hayne JJ. In that case, their Honours quoted with approval the five discrete elements of s 82 identified by Gummow J in *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, at 526-527 [95]:

> *'First, it identifies the legal norms for contravention of which the action under the section is given. Secondly, it identifies those by and against whom that action lies. Thirdly, the section specifies the injury for which the action lies as the suffering of loss or damage. Fourthly, it stipulates a causal requirement that the plaintiff's injury must be sustained "by" the contravention. Finally, the measure of compensation is "the amount of" the loss or damage sustained'.*

Their Honours went on to point out (196 CLR, at 126 [50]) that:

> *'If the causal link between injury and contravention is established, the measure of the compensation for which the section provides, and to which the person bringing the action is entitled, is the amount of the loss or damage sustained, not some lesser amount'.*

They reiterated (196 CLR, at 128 [57]) the well established proposition that:

> *'[T]he question presented by s 82 of the Act is not what was the (sole) cause of the loss or damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was* a *cause of the loss or damage sustained'.*

3143 Section 82 is concerned only with the position of a person who has suffered loss or damage and only such a person may recover damages under the section. Section 87(1A), however, is concerned not only with cases where loss or damage has been suffered, but with cases where it is likely to be suffered: *I & L Securities v HTW Valuers* 210 CLR, at 125 [45].

3144 The onus of establishing that an applicant has suffered loss or damage as a result of misleading conduct lies on the applicant. In a case where the loss or damage arises because of a contractual commitment said to have been induced by misleading conduct, the onus is on the claimant to establish that he or she was induced to enter the contract by the misleading conduct: *Gould v Vaggelas* (1985) 157 CLR 215, at 237-238, per Wilson J. However, if a material representation is made which is calculated to induce the representee to enter the contract and the representee does so, there is a '*fair inference of fact that [the representee] was induced to do so by the representation*': *Gould v Vaggelas* 157 CLR, at 236, per Wilson J.

3145 Similar principles apply to a claimant who seeks to establish that he or she is likely to suffer loss or damage by the misleading conduct for the purposes of satisfying s 87(1A) of the *TP Act*: *Marks v GIO* 196 CLR, at 504 [20], per Gaudron J. It appears that in the expression '*likely to suffer*' in s 87(1A) of the *TP Act* the word '*likely*' means '*real chance or possibility*' rather than '*more likely than not*': *Marks v GIO* 196 CLR, at 504-505 [22], per Gaudron J; *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, at 364, per Mason P (with whom Priestly JA agreed).

3146 It is important to appreciate that the fact that a person has been induced by misleading conduct to enter a contract does not of itself establish that the person has suffered or is likely

to suffer loss or damage. This may be the case even if the person does not obtain benefits from the contract that he or she was led to believe would be present. Examples of such cases include *Marks v GIO* and *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1. The general principle was stated by McHugh, Hayne and Callinan JJ in *Marks v GIO* 196 CLR, at 514 [48]:

> *'A party that is misled suffers no prejudice or disadvantage unless it is shown that that party could have acted in some other way (or refrained from acting in some way) which would have been of greater benefit or less detriment to it than the course in fact adopted'*.

3147 It follows from what I have said that the application of ss 82 and 87 in the present case depends on two related factual questions:

> Was Optus induced to enter into the First and Second Variation Agreements, or, to agree to the Exclusivity Clause, by Seven's misleading conduct?
>
> If so, did Optus suffer loss or damage by that conduct, or is it likely to suffer loss or damage by that conduct?

20.2.7.3 RELIANCE

3148 The representation that Optus could not terminate the C7-Optus CSA until the commencement of the 2002 season was a key element in Seven's negotiating strategy that led to the First Variation Agreement. Mr Wood agreed that the representation improved Seven's bargaining position, since Seven was able to argue that it could simply rely on the terms of the C7-Optus CSA and had no particular need to enter into an interim agreement. Mr Wood also agreed that if Seven had acknowledged in December 2001 that the C7-Optus CSA was terminable at the end of December, Seven would have been placed in a weaker negotiating position in relation to the Second Variation Agreement. The representation that Optus could not exercise its right of termination until 28 February 2002 was integrally related to the two representations I have found were made by Seven in Mr Wood's letters.

3149 Mr Wise accepted that, prior to December 2001, Seven had '*leverage*' to push for an exclusivity arrangement because Optus could not be sure as to when its right to terminate the C7-Optus CSA arose. Mr Wise agreed that, as the end of February 2002 approached, Seven had lost the ability to capitalise on the uncertainty in negotiating for a further exclusivity period. He also agreed that Seven's position as to the termination date was commercially

important in relation to discussions about the interim arrangements. It was the key, as far as he was concerned, to extending the operation of the C7-Optus CSA at least until the end of February 2002.

3150 Optus' initial legal advice was that its right to terminate the C7-Optus CSA could be exercised at the end of the 2001 season. Mr Keely's evidence (which I accept) was that Mr Wood's letter of 1 May 2001, insofar as it asserted a termination date of February 2002, had not been anticipated by Optus. The advice by Optus' solicitors, which was expressly based on the assumption that Seven's rights under the AFL-Seven Licence were as Mr Wood had suggested, was that Mr Wood's position looked to be credible, but would depend upon verification by reference to the terms of the AFL-Seven Licence. This advice caused alarm within Optus because of the possibility that Optus would have a liability to pay $16 million pursuant to the C7-Optus CSA, over and above its approved budget, for the period from October 2001 to February 2002.

3151 Both Mr Keely and Mr Ebeid gave evidence, which I also accept, that Optus considered that it effectively had no choice, in the light of the legal advice and its inability to obtain the AFL-Seven Licence, to assume that Seven's position as to the termination date might be correct. Optus in fact acted on this basis, notwithstanding Mr Ebeid's unsuccessful attempt to convince Mr Wood that Optus had legal advice that the termination date was the end of the 2001 season. No doubt Mr Ebeid's attempt was unsuccessful because Mr Wood realised that it was unlikely that Optus had received any such advice.

3152 Mr Ebeid's evidence was that, had he known that Optus had a right to terminate at the end of the 2001 season, he would not have recommended that Optus enter the First Variation Agreement. Instead he would have proposed that Optus renegotiate a fresh arrangement. Mr Ebeid's recommendation may not have turned out to be important, given the intervention of the SingTel Optus Executive Group in September 2001. But it is clear that the uncertainty about the termination (from Optus' point of view) played a part in the inclusion of the Exclusivity Clause in the First Variation Agreement and, subsequently, in the Second Variation Agreement. Mr Ebeid attempted to limit the scope of the Exclusivity Clause, but failed to persuade Mr Wood. Clearly, the uncertainty as to the termination date enhanced Seven's bargaining position on this issue and correspondingly diminished Optus' bargaining position.

3153 Seven's representation as to the termination date played a significant part in Optus' agreement to enter the First and Second Variation Agreements on the terms on which it did. In particular, it played a significant part in Optus' agreement to the Exclusivity Clause in its final form. Seven's representation carried weight only because Mr Wood made the two additional representations in his letters of 1 May and 13 August 2001. Had Optus known either that Mr Wise and Mr Wood did not believe that Seven's position was reasonably arguable, or that the AFL-Seven Licence could not reasonably be understood as supporting Optus' position, Seven would have lost a key bargaining chip in its negotiations with Optus.

20.2.7.4 COUNTER-FACTUAL WORLD

3154 The parties are in apparent agreement that the question of loss or damage or likely loss or damage is to be determined by reference to what Optus would have done had Seven not engaged in the misleading conduct which (as I have found) induced Optus to enter the First and Second Variation Agreements on the terms it did. On the findings I have made, the specific question is what Optus would have done if, prior to executing each of the First and Second Variation Agreements, it knew that:

> the wording of the AFL-Seven Licence could not reasonably be understood as consistent with Mr Wood's assertions that Optus could only exercise its right to terminate the C7-Optus CSA at the end of February 2002; or
>
> C7's senior management did not believe that there was at least a reasonable basis for Mr Wood's assertion.

In the terminology employed by the parties, this involves consideration of the '*counter-factual world*'.

3155 The parties' apparent agreement as to the relevant question does not extend to the answer to that question. Seven submits that, in the absence of any misleading conduct by C7, Optus' position would not have been materially different. Optus would have entered into a short term content supply arrangement with C7, including the Exclusivity Clause. Optus, by contrast, submits that, in the absence of the misleading conduct, it would have agreed on some form of interim arrangement but without an Exclusivity Clause. Moreover, Optus asserts, without elaboration, that any interim arrangement would have been on terms incorporating a reduced licence fee. It is this assertion which underpins Optus' claim that it

sustained loss or damage for the purposes of s 82 of the *TP Act* and that the loss or damage is equivalent to the top up payment made by it to Seven in March 2002.

3156 Sometimes it is not at all difficult to ascertain what would have happened had one party not engaged in misleading or deceptive conduct. In other cases the assessment of the '*counter-factual*' is less clear cut. The present case involves some degree of uncertainty since, in the absence of Seven's misleading conduct, the parties would have been negotiating on a different hypothesis as to the date on which Optus became entitled to exercise its rights to terminate the C7-Optus CSA. There is therefore necessarily an element of evaluation and judgment in making a finding as to the likely outcome of the hypothetical negotiations.

3157 The starting point must be the position in early September 2001. At that point, Mr Wood and Mr Ebeid had reached what in substance was an agreement in principle for a three year deal for the supply of C7 channels to Optus Vision. The agreement was not final because it was subject to approval by each corporation's decision-makers. Despite Mr Ebeid's obvious enthusiasm for consummating the agreement, Mr Anderson immediately warned that there was no chance of it being '*wrapped up quickly*' because the proposal would '*run into the CMM review*'.

3158 It was the CMM review that created a new reality within which negotiations had to take place (and would have had to take place in the counter-factual world). On 17 September 2001, the SingTel Optus Executive Group resolved to see whether it was possible to '*roll*' the C7-Optus CSA for a further three months '*and to seek to maintain our options on a more favourable future contract until after that time*'. These were Mr Ebeid's instructions for his negotiations with Mr Wood from that point.

3159 If there had been no misleading conduct by Seven, Optus would not have been labouring under the belief that the earliest termination date available to it was probably 28 February 2002. Any statement by Seven to that effect would have lacked credibility in the absence of the misleading representations that were made by Mr Wood. At the stage the SingTel Optus Executive Group intervened, the following would then have been the likely state of affairs:

Optus Vision would have wished to terminate the C7-Optus CSA as soon as it

was entitled to do so;

Optus would have appreciated that it was entitled to terminate the C7-Optus CSA at the end of September 2001;

Seven would not have retained its significant negotiating advantage over Optus by reason of Optus' uncertainty as to the earliest termination date;

Optus would have wished to preserve its options pending review of CMM, knowing that to do so it needed continuity of sports channels and that Fox Sports was unlikely to be available (because of Telstra's veto);

Optus would have appreciated that, depending on the outcome of the CMM review, it might be required to negotiate a content supply agreement with C7 for a period of years once any interim arrangement expired;

it would have been in C7's interests to accommodate Optus, but to do so at a price and in a manner that gave Optus Vision an incentive to enter a longer term arrangement in due course; and

C7 would have wanted a broad Exclusivity Clause, while Optus would have resisted a clause that prevented it undertaking discussions or negotiations with alternative content suppliers during the term of any interim arrangement.

3160 In these circumstances, the most likely outcome would have been the following:

the parties would have negotiated an interim arrangement (whether by way of amendments to the C7-Optus CSA or a separate agreement) on much the same financial and content supply terms as were in fact embodied in the First Variation Agreement;

Optus would not have agreed to an Exclusivity Clause in the wide language proposed by C7, but would have accepted a more restricted version along the lines suggested by Mr Ebeid to Mr Wood on 27 September 2001; and

C7 would have accepted the more restricted version of the Exclusivity Clause.

3161 In reaching these conclusions, I have borne in mind that in September 2001 Mr Ebeid was reluctant to commit Optus to an Exclusivity Clause drafted in broad terms. There were sound reasons for Optus to preserve the opportunity at least to discuss or negotiate possible

arrangements with an alternative content supplier, even though the chances of Fox Sports becoming available were thought to be slim. Not the least of these was the existence of Project Alchemy (whereby Optus would effectively become a reseller of Foxtel content) as a live option within Optus.

3162 The negotiating tactic that Mr Wood employed to good effect was to assert to Optus that if it did not agree to what became the First Variation Agreement, including the Exclusivity Clause drafted by C7, the C7-Optus CSA would simply continue in force until the end of February 2002. In that case, Optus would have had to incur the higher level of fees for the succeeding four months, a commitment that was not provided for in Optus' budget. The tactic was effective largely because Optus was operating under the misapprehension, induced in part by C7's misleading conduct, that it could not safely terminate the C7-Optus CSA until February 2002. Optus was therefore to some extent in the position of a contractual supplicant seeking a concession from C7. Mr Ebeid yielded on the Exclusivity Clause because he saw that there was little choice.

3163 No doubt in the counter-factual world Mr Wood would have argued for the broader version of the Exclusivity Clause, essentially for the reasons he gave in his exchange with Mr Ebeid. It is true that C7 would not have been totally bereft of bargaining power, since Optus needed to maintain continuity of sporting content in order to preserve Optus' options. But C7 was also vulnerable and needed an agreement. As Mr Stokes accepted in cross-examination, an ongoing sports deal with Optus was essential to C7's business after its loss of the AFL pay television rights. Absent its misleading conduct, C7 would have lacked the key negotiating advantage it exploited so effectively in late September 2001. In my view, that would have made the difference so far as the form of the Exclusivity Clause is concerned.

3164 In the counter-factual world, the parties would have had to negotiate the precise financial and content supply terms of the interim arrangement. There is a possibility that, as Optus submits, it would not have agreed to make a '*top up*' payment if it did not ultimately enter into a three year deal with C7. Alternatively, it is possible that Optus would have insisted on a reduced payment rather than a complete top up. But given the parties' respective objectives and Optus' need to secure continuity of sporting content (whether or not at precisely the same levels provided for in the First and Second Variation Agreements), I

am not satisfied that the outcome on the top up payment would have been as Optus suggests. In my opinion, Optus' submissions do not identify any convincing reason why the negotiations would have produced the outcome for which it contends.

3165 In the counter-factual world, the likelihood is that the parties would have renegotiated a further short extension of the First Variation Agreement after its expiry, on much the same terms. This would have happened in about December 2001, at about the time Mr Stokes and Mr Anderson in fact agreed to the extension. A further short extension would have suited the interests of both C7 and Optus Vision at that time.

3166 On the findings I have made, Optus would not have contravened any Exclusivity Clause incorporated in Variation Agreements. Any discussions or negotiations with Foxtel, Fox Sports or another party would not have contravened a more narrowly drafted provision. While entry into an agreement such as the Foxtel-Optus Term Sheet (which in fact was executed on 20 February 2002) would have contravened a narrower Exclusivity Clause, there would have been no reason for Optus to enter into any such formal arrangement until the expiry of any interim arrangement with C7. Optus' entry into the Foxtel-Optus Term Sheet a few days before the Second Variation Agreement expired was preceded by legal advice that recognised that Optus was already in breach of the Exclusivity Clause in the C7-Optus CSA. That would not have been Optus' position had a more restrictive Exclusivity Clause been in place. There is no reason to think that Optus would have breached such an Exclusivity Clause by prematurely entering an agreement when there was no commercial imperative to do so.

3167 I add two comments. First, the form of any interim arrangement made between C7 and Optus in the counter-factual world may have been different from the form taken by the First and Second Variation Agreements. These agreements amended the C7-Optus CSA, which continued in force subject to the amendments. Optus is likely to have terminated the C7-Optus CSA in late September 2001, when it became entitled to do so. Whether the interim arrangements following the termination would have taken the form of amendments to a revived C7-Optus CSA or would have been incorporated in an entirely fresh agreement is not a matter of substance.

3168 Secondly, in making findings I have paid close attention to the events that actually

occurred, especially between September 2001 and February 2002. I have borne in mind the evidence of witnesses as to what they might have done in the counter-factual world. Sometimes evidence of that kind is helpful, even though it is given with knowledge of the issues in the case and with the benefit of hindsight. I have found, for example, the evidence of Mr Lee and Mr Anderson of Optus to be important in assessing what course Optus would have taken had it not entered into the Foxtel-Optus CSA. In the present context, however, I have not found the hypothetical evidence particularly helpful.

20.2.7.5 APPLICATION OF S 87(1A) OF THE *TP ACT*

3169 On the findings I have made, Optus is a person who is likely to suffer loss or damage by conduct of C7 in contravention of s 52 of the *TP Act*. This is so because Optus was induced to enter the First and Second Variation Agreements containing the Exclusivity Clause by the misleading conduct I have identified. Optus is being sued for damages for breach of a provision to which it would not have agreed but for C7's misleading conduct. The proceedings against Optus based on the Exclusivity Clause expose it to loss or damage. I would reach this conclusion whether the word '*likely*' is given the meaning of '*real chance or possibility*' or '*more likely than not*'.

3170 It follows that Optus satisfies s 87(1A)(a) of the *TP Act*. The Court therefore may make such order as it thinks appropriate against C7 provided it considers (relevantly) that the order will prevent or reduce the loss or damage likely to be suffered by Optus. In my view, it is clear enough that an order that has the effect of relieving Optus from any liability in damages to C7 by reason of Optus' breach of the Exclusivity Clause would prevent the loss or damage likely to be suffered by it.

3171 Section 87(1A) confers a discretion on the Court. The fact that Optus satisfies the statutory prerequisites does not mean that Optus is entitled to an order under s 87(1A), much less that it is entitled to a particular order under s 87(2). In *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, Lockhart J said this (at 564):

> *'In granting a remedy under s 87, the court is not restricted by the limitations under the general law of a party's right to rescind for breach of contract or misrepresentation. Nevertheless, in exercising its discretion under s 87, the court will consider the conduct of the parties after they had knowledge of the misleading quality of the conduct ... On this approach the court must consider all the circumstances before it in the exercise of its discretion'.*

3172 Seven does not submit that, if the statutory prerequisites are satisfied, the Court should decline to exercise its discretion in favouring Optus. In any event, even though Optus breached the Exclusivity Clause (assuming it to be valid and enforceable), I think that in the circumstances I have found it should be granted relief. Optus simply would not have been in the position in which it found itself after September 2001 had C7 not engaged in the misleading conduct that induced Optus to agree to the Variation Agreements containing the Exclusivity Clause. No other remedy is available to Optus to overcome the effect of C7's misleading conduct.

3173 This leaves the question of the form of any relief. As Mason P observed in *Akron Securities v Iliffe* 41 NSWLR, at 367, there may be a range of arguably appropriate remedies available under s 87(1) or (1A), when read with s 87(2). And as his Honour remarked (at 366):

> *'There is no point in having a remedial smorgasbord if the table is not scanned at least briefly to see what is best on offer'.*

3174 A brief scan of the s 87(2) smorgasbord suggests that I should select the least intrusive order that achieves the protection to which Optus is entitled. A declaration of voidness is unnecessary in the present context and may create other difficulties: *Trade Practices Commission v Milreis Pty Ltd* (1977) 29 FLR 144, at 160-161, per Brennan J. In my view, it is appropriate to make an order pursuant to s 87(2)(ba) of the *TP Act* refusing to enforce the Exclusivity Clause. Alternatively, it may be enough simply to dismiss Seven's damages claim against Optus: cf *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2006] NSWCA 238, at [8]-[9], per Hodgson JA; at [104], per Basten JA.

20.2.7.6 DAMAGES CLAIM

3175 On the findings I have made, Optus has not suffered any loss or damage entitling it to damages under s 82 of the *TP Act*. In particular, I am not satisfied that in the counter-factual world Optus would have avoided the top up payment it in fact made to C7 in March 2002. Optus' claim for damages under s 82 of the *TP* Act therefore fails.

20.3 Seven's Misleading Conduct Claims against Optus

20.3.1 Seven's Case

3176 Seven's submissions do not explain what its misleading conduct case against Optus, insofar as the case relies on s 52 of the *TP Act,* adds to its contractual claim based on breaches of the Exclusivity Clause by Optus. Seven may be acting on the footing that its misleading conduct case can succeed even if its contract claim fails, for example because the Exclusivity Clause is set aside or rendered unenforceable under s 87(1A) of the *TP Act*. Nor does Seven address the relationship between Optus' case based on misleading and deceptive conduct and its own misleading conduct case. Nonetheless, I propose to consider Seven's claims under s 52 of the *TP Act* since they may be available notwithstanding Optus' success in its misleading conduct claim.

3177 Seven pleads that Optus made a number of false representations in the lead-up to the execution of the First and Second Variation Agreements. It also alleges that Optus engaged in misleading or deceptive conduct by failing to reveal certain information to Seven. However, as I follow the submissions, Seven ultimately relies on three matters as constituting misleading or deceptive conduct by Optus, in contravention of s 52 of the *TP Act*:

> a representation substantially to the effect of the Exclusivity Clause made in Optus' letter of 28 September 2001, by which it agreed to the terms of the First Variation Agreement;
>
> Mr Anderson's request to Mr Stokes on 18 December 2001 seeking an extension of the First Variation Agreement for a further period of two months, without him disclosing to Mr Stokes the fact that discussions had already taken place between Optus and Foxtel relating to the possible supply of the Fox Sports channels to Optus; and
>
> a representation in Optus' letter of 25 January 2002, similar to that made in its letter of 28 September 2001.

3178 So far as the conversation of 18 December 2001 is concerned, Seven contends that Optus engaged in misleading and deceptive conduct:

> *'(a) by failing to inform [Seven] that they had been negotiating with Foxtel for the supply of the Fox Sports channels to Optus and for a wider content sharing arrangement between Foxtel and Optus; intended to*

continue those negotiations; and intended to procure a further extension of time under the Second Variation Agreement to do this;

(b) in circumstances where they had represented to [Seven] that they had broken off negotiations for the supply of the Fox Sports channels; they were happy with the 7 September 2001 term sheet, although it required board approval; Mr Anderson was pushing the case for Optus to stay in pay television, but needed to finalise his submission to the board on this; and Optus would comply with the exclusivity clause'.

This conduct, according to Seven, concealed the fact that Optus' purpose in entering the Second Variation Agreement was to gain time to negotiate for the supply of the Fox Sports channels to Optus and thus prejudice Seven's position in securing execution of the 7 September term sheet.

20.3.2 Representation of 28 September 2001

20.3.2.1 INTERPRETING SEVEN'S SUBMISSIONS

3179 Seven's Closing Submissions assume rather than demonstrate that Optus' letter of 28 September 2001 from Mr Ebeid to Mr Wood constituted a representation that, if Seven entered into the First Variation Agreement, Optus would comply with the Exclusivity Clause. On that assumption, Seven submits that the representation was false because at all times Optus' senior officers intended to negotiate, if possible, an arrangement for the supply of the Fox Sports channels.

3180 To that extent, Seven's submissions seem to develop a case pleaded in the Statement of Claim (par 638(a)). However, the submissions do not attempt to develop the pleaded case insofar as the Statement of Claim invokes s 51A of the *TP Act* (pars 632, 637). The question presented by Seven's submissions is whether, assuming that its initial assumption is correct, it has established that Optus' representation as to its future conduct was false when made because Optus never intended to comply with the Exclusivity Clause. The question presented by the submissions (despite the pleadings) is **not** whether Optus had reasonable grounds for making a representation as to a future matter, namely that it would not engage in discussion or negotiations of the kind identified in the Exclusivity Clause.

3181 In a sense, the way Seven has chosen to present its case attempts to resurrect the law as it was prior to the enactment of s 51A of the *TP Act.* The general principle articulated in

the authorities prior to the enactment of s 51A was that:

> *'a promise of future conduct was not actionable under s 52 unless it implied a representation as to an existing or past fact'.*

Wright v TNT Management Pty Ltd (1989) 15 NSWLR 679, at 688, per McHugh JA (dissenting), citing *Bill Acceptance Corporation Ltd v GWA Ltd* (1983) 50 ALR 242, at 246-247, per Lockhart J. Thus the mere fact that a representation as to future conduct did not come to pass did not establish that the representation was misleading or deceptive when made, although it may have been evidence that the representor did not genuinely believe at the time of the representation that the future conduct would take place: *Bill Acceptance* 50 ALR, at 250, per Lockhart J; *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82, at 88, per *curiam.* The significance of the fact that the representor did not genuinely believe that the future conduct would take place depended on the nature of the representation. If the representor conveyed that he or she had a particular state of mind or belief, the absence of such a state of mind or belief could constitute misleading or deceptive conduct: *Global Sportsman* 2 FCR, at 88 per *curiam*.

3182 It is this situation to which s 51A of the *TP Act* is directed. Section 51A(1) provides that where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading. There is now a body of authority identifying when a promise amounts to a representation with respect to a future matter for the purposes of s 51A(1) of the *TP Act.* In particular, the cases have considered whether contractual promises, or promises made in contractual negotiations, can be characterised as representations with respect to a future matter: *Futuretronics International Pty Ltd v Gadzhis* [1992] 2 VR 217, at 235-241, per Ormiston J; *Concrete Constructions Group Ltd v Litevale Pty Ltd* (2002) 170 FLR 290 (S Ct NSW), at 343-349 [154]-[173], per Mason P; *Frontier Touring Co Pty Ltd v Rodgers* (2005) 223 ALR 422 (S Ct NSW), at 442-443 [27]-[29], per Barrett J.

3183 The High Court, however, has yet to have the last word on this issue. In *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640, the Court observed (at 649 [13]) that:

> *'Before the enactment of s 51A in 1986, there was ... authority that a breach*

> *of promise relating to the future could not be a breach of s 52 unless a misrepresentation of existing fact was made, for example, that the promisor had the capacity or intention to perform the promise. Since the enactment of s 51A, there has been authority that a breach of promise may contravene s 52 in its operation with s 51A if there is an implied representation by the promisor of an intention or capacity to perform the promise, and there are no reasonable grounds for making that representation. However, in some future cases of the present type, where the breach of contract is found in the failure by a professional adviser who has made a representation about future matters (for example, rental levels) to qualify it by a statement about their uncertainty, it may be necessary to give close attention to the question how the breach of contract falls, if at all, within the language of s 51A(1) and (2)'.*

3184 The way in which Seven presents its argument is curious. It submits that the letter of 28 September 2001 should be understood as conveying a representation, in effect, with respect to a future matter, namely that Optus would not act inconsistently with the terms of the Exclusivity Clause. The point of putting the case that way would seem to be to take advantage of s 51A of the *TP Act* in order to establish that the representation was misleading, as indeed the pleadings suggest. Yet, as I have noted, the written submissions do not rely on s 51A for this purpose and do not attempt to make out a case that Optus had no reasonable grounds for making the representation with respect to a future matter. Instead they assert that Optus never intended to comply with the Exclusivity Clause. This assertion seems to be designed to establish the falsity of a representation that Seven has not specifically alleged, namely that the letter of 28 September conveyed a representation that Optus then had an intention not to act inconsistently with the terms of the Exclusivity Clause.

3185 The lack of clarity, if not confusion, in Seven's submissions creates a difficulty in how to approach them. I do not think it appropriate to consider the possible application of s 51A of the *TP Act* when Seven, in its submissions, does not ask me to take that course and has not explained how, in light of the facts, s 51A is satisfied. Because Seven has not invoked s 51A, Optus has not had the opportunity to respond to whatever arguments Seven might have put forward on that issue. In my view, this case is large and complex enough without having to reconstruct Seven's arguments so that they are internally consistent.

3186 The most sensible approach, it seems to me, is to consider first whether Optus' letter of 28 September 2001 conveyed a representation that would be falsified if indeed Optus never intended to comply with the Exclusivity Clause. The threshold question would then be whether Optus' letter represented that Optus had the intention, as at 28 September 2001, of

acting consistently with the requirements of the Exclusivity Clause during the period 27 September 2001 to 31 December 2001. If that representation was conveyed, it would have been misleading or deceptive for the purposes of s 52 of the *TP Act* if (as Seven submits) Optus never intended to comply with the Exclusivity Clause.

20.3.2.2 MAKING OF THE REPRESENTATION

3187 The Exclusivity Clause was inserted in the First Variation Agreement at Mr Wood's insistence. The origins of the Exclusivity Clause lay in the negotiations between Mr Ebeid and Mr Wood. By 19 September 2001, an agreement '*in principle*' had been reached between them. Mr Ebeid reported on that date that the agreement in principle included a guarantee that Optus would not negotiate with any other sports provider during the three month period of the interim arrangement. Mr Ebeid acknowledged in evidence that he had told Mr Wood that Optus was not buying time simply to get a better deal for Fox Sports and that Optus did not intend to use the arrangement for that purpose.

3188 Mr Ebeid's '*without prejudice*' letter of 20 September 2001 included a term whereby Optus agreed not to enter into an agreement with any other sports channel provider. In response, Mr Wood drafted what became the Exclusivity Clause in broader terms than Mr Ebeid had proposed. The new draft clause prohibited Optus or its related companies not only from **entering any agreement** relating to the supply of sports channels, but from initiating or participating in **discussions or negotiations** in relation to the supply of sports channels.

3189 When Mr Ebeid protested on 27 September 2001 about the breadth of the Exclusivity Clause, Mr Wood stuck to his position. He justified his insistence on the broader version on the ground that Mr Ebeid had told him that Optus had ceased its negotiations with Fox Sports (which was in fact true). Mr Wood also pointed out to Mr Ebeid that on the narrower wording Optus would be free to negotiate a deal with Fox Sports during the period of the interim arrangement and simply defer executing the formal documentation until 1 January 2002 (which was also true).

3190 In my view, some care should be taken before construing a contractual undertaking or promise as importing a representation as to the state of mind of the person giving the undertaking or making the promise. In *Concrete Constructions* 170 FLR, at 349, Mason P observed that there are policy reasons for restraint when a court is asked to infer the making

of, or reliance upon, a representation as to capacity to perform express contractual promises. Similar policy reasons suggest that restraint should be exercised when determining whether a contractual promise to do or refrain from doing something in the future carries with it a representation as to the existing state of mind or intention of the representor.

3191 In the end, however, every case must turn on its facts. In this case, the critical point is that in the course of the negotiations that produced the Exclusivity Clause in its final form, Mr Ebeid gave Mr Wood an assurance that Optus was no longer negotiating with Fox Sports. Moreover, Mr Wood put to Mr Ebeid C7's concerns about the possibility of Optus negotiating or engaging in discussions during the three month period covered by the First Variation Agreement. I infer that Mr Ebeid understood Mr Wood's concerns and ultimately assented to allay them by agreeing to incorporate the Exclusivity Clause into the First Variation Agreement. I have already explained why I think that Mr Ebeid assented. For present purposes, I am concerned with the course of dealings that in fact took place between Seven and Optus.

3192 It is true that Seven does not rely on these circumstances, of themselves, as constituting a representation by Optus that it did not intend to engage in negotiations or discussions concerning the supply of sports channels during the period covered by the First Variation Agreement. Nonetheless, the significance for Seven's s 52 case of Optus' acceptance of the Exclusivity Clause in the form drafted by Mr Wood must be assessed in the context of the dealings between Mr Wood and Mr Ebeid. Seven put its specific concerns about the possibility that Optus would negotiate with third parties and Optus, by agreeing to the Exclusivity Clause, allayed Seven's concerns. The letter of 28 September 2001 therefore can be understood as conveying a representation that Optus did not intend to act inconsistently with the terms of the Exclusivity Clause.

20.3.2.3 WAS THE REPRESENTATION FALSE?

3193 Seven advances, in substance, only one basis for the contention that the representation contained in Optus' letter of 28 September 2001 was misleading or deceptive for the purposes of s 52 of the *TP Act.* To establish its contention Seven must show, on the balance of probabilities, that the senior officers of Optus intended, on 28 September 2001, to negotiate with Foxtel or some other party for the supply of the Fox Sports channels notwithstanding the terms of the Exclusivity Clause. In determining this factual issue, it is

important to bear certain matters in mind:

> Seven accepts that by 28 September 2001, Optus had ceased negotiating for the supply of the Fox Sports channels;
>
> the first pleaded breach of the Exclusivity Clause was the discussion at the meeting of 3 December 2001 between Messrs Anderson and O'Sullivan and Messrs Murdoch and Packer, more than two months after the signing of the First Variation Agreement;
>
> Mr Ebeid gave unchallenged evidence (indeed it was led from him in cross-examination) that in September he had no intention of negotiating for the supply of Fox Sports channels to Optus;
>
> Mr Fletcher gave unchallenged evidence that he did not become aware of the terms of the Exclusivity Clause until 13 or 14 February 2002; and
>
> it was not put to Mr Fletcher that he intended at the relevant time to negotiate with Foxtel concerning Fox Sports regardless of the Exclusivity Clause.

3194 Mr Anderson was closely questioned by Mr Karkar QC on behalf of Seven about his state of mind when he signed the First Variation Agreement. In response to a double barrelled question, Mr Anderson denied that at that time he knew full well of cl 8A and its effect, yet had no intention of complying with it. In answer to a later question, Mr Anderson denied that on 28 September 2001 he '*fully intended to continue to seek the acquisition of Fox Sports for Optus*'.

3195 I have considered Mr Anderson's evidence in the context of the established facts. These include Mr Anderson's role as a signatory to the First Variation Agreement; the dinner at Tetsuya's on 9 October; the subsequent emails to which Mr Anderson was a party; and Mr Anderson's conversation with Mr Rupert Murdoch on 11 October 2001. I have also taken into account the references in emails sent by Mr Anderson in mid-2001 and at other times relating to sporting content. I accept Mr Anderson's evidence that as at 28 September 2001 he gave little thought to the Exclusivity Clause and had not formed a view at that time that Optus should continue to negotiate with Foxtel for the supply of the Fox Sports channels. His evidence that there were many other substantial matters claiming his attention at the time and that he gave little attention then to the question of sports content on the Optus platform

rang true. I also accept his evidence that his relatively brief discussion with Mr Murdoch on 11 October 2001 did not descend to particularity in the provision of sports channels to Optus.

3196 It may be that in September and October 2001, Mr Anderson distinguished in his own mind between discussions relating to the restructuring of the pay television industry and discussions relating specifically to the supply of the Fox Sports channels to Optus. His evidence can be read as suggesting that he made that distinction at some point, at least in the period following the execution of the First Variation Agreement. For that reason he may not have understood discussions on restructuring of the pay television industry to have been caught by the Exclusivity Clause. But this point was not developed in cross-examination, for example, with a view to showing that Mr Anderson might perhaps have been reckless in failing to ascertain whether cl 8A, as a matter of construction, inhibited discussions about the broader question of restructuring of the pay television industry. The thrust of the cross-examination was that Mr Anderson was not to be believed when he denied that on 28 September he had no intention of complying with the Exclusivity Clause. In my view, that attack on his credit did not succeed.

3197 Seven invited me to draw inferences adverse to Optus from its failure to call Mr O'Sullivan (who participated in the meeting at Tetsuya's). But as Optus pointed out, Seven's pleadings did not identify the meeting at Tetsuya's as having any particular significance on this issue. Indeed, the cross-examination of Mr Anderson on his state of mind after the meeting at Tetsuya's was initially said to be relevant because it went to Seven's claim for aggravated damages. It was apparently only as forensic afterthought that the questions were supported by reference to the claim that Optus always intended to negotiate with Foxtel.

3198 In any event, Mr O'Sullivan's absence from the witness box does not provide a satisfactory basis for me to take a different view of Mr Anderson's credibility. In the light of Mr Anderson's evidence and the other matters to which I have referred, I am not prepared to infer from Mr O'Sullivan's participation in the meeting at Tetsuya's that he intended on 28 September 2001 that Optus should continue to negotiate with Foxtel for the supply of Fox Sports to Optus, regardless of the terms of the Exclusivity Clause. I am not satisfied on the balance of probabilities that the senior officers of Optus intended, on 28 September 2001, to negotiate with Foxtel or any other party for the supply of sports channels to Optus notwithstanding the terms of the Exclusivity Clause. It follows that Seven has not shown

that the representation made by Optus on 28 September 2001 was misleading or deceptive.

20.3.3 Failure to Disclose: 18 December 2001

20.3.3.1 WAS THE FAILURE TO DISCLOSE MISLEADING CONDUCT?

3199 I have already indicated that I prefer Mr Anderson's account of the conversation of 18 December 2001 to that of Mr Stokes, to the extent that they are in conflict. Mr Anderson insisted that he had explained two options to Mr Stokes: the first was for Optus to get out of the pay television **content** business; the second was to go with '*another player*', a reference to Austar. Mr Stokes agreed in his cross-examination that Mr Anderson had referred to getting out of the pay television content business.

3200 Mr Stokes claimed that Mr Anderson had said in the conversation that he was pushing for the three year deal with Optus. Mr Anderson's denial that he said this is supported by the contents of the contemporaneous emails (or, more accurately, the absence in them of any reference to such a remark). Mr Stokes, somewhat implausibly, adamantly refused to concede that the absence of any contemporaneous record of such a remark by Mr Anderson, suggested that his (Mr Stokes') recollection after some years might be wrong.

3201 A further difficulty with Mr Stokes' account is that in one of his written statements he said that, if he had known that Mr Anderson had met with Messrs Murdoch, Packer and Chisholm in early December 2001 and that Mr Anderson had communicated with the Foxtel partners since mid-2001, he would not have agreed to the Second Variation Agreement. In his cross-examination, Mr Stokes acknowledged that, prior to the conversation with Mr Anderson, Mr Wise had recommended that the extension sought by Optus be granted and that he (Mr Stokes) was minded to grant the request that he knew Mr Anderson would make. More particularly, Mr Stokes agreed that he had read the article in *The Australian* of 4 December 2001 which reported, among other things, that Mr Anderson had met with Messrs Packer and Murdoch and that Optus was '*focusing on ways to share programming with Foxtel*'.

3202 I do not accept Mr Stokes' explanation that he regarded the article as '*rumour and speculation*', especially given that he made no inquiries as to the truth of the matters reported in the article. Clearly enough, Mr Stokes knew perfectly well on 18 December 2001 that Mr

Anderson had spoken recently to at least two of the Foxtel partners about proposals for program sharing.

3203 Mr Anderson's evidence, which I accept, was that he was intending to be '*upfront with Mr Stokes*' in the brief conversation they had. The two options he put to Mr Stokes were those that Optus was considering. One of those options (getting out of the pay television content business) appeared unlikely to Mr Anderson because of Telstra's unfavourable attitude to the proposal at the time. However, that option implied that Optus would have to acquire content from another supplier. Mr Anderson quite reasonably (and correctly) assumed that Mr Stokes would have known that discussions about that very topic, in the context of industry reorganisation or rationalisation, had already taken place between Optus and News and PBL, if not Telstra.

3204 The question that must be addressed is explained by Black CJ in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, at 32:

> *'Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. To speak of "mere silence" or of a duty of disclosure can divert attention from that primary question. Although "mere silence" is a convenient way of describing some fact situations, there is in truth no such thing as "mere silence" because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed'.*

See also *Demagogue v Ramensky* 39 FCR, at 40-41, per Gummow J; *Henjo Investments v Collins Marrickville* 39 FCR, at 555, per Lockhart J.

3205 In the circumstances prevailing at 18 December 2001, it was not misleading or deceptive for Mr Anderson not to tell Mr Stokes specifically that Optus had been discussing content sharing with Foxtel and that it intended to continue pursuing that course. What Mr Anderson told Mr Stokes in their conversation was accurate. Mr Anderson's reference to Optus getting out of the pay television content business was calculated to alert Mr Stokes to Optus' intention to pursue content sharing as an option. In any event, Mr Anderson correctly believed that Mr Stokes would have been well aware that the discussions with the Foxtel

partners had taken place. It was also reasonable for Mr Anderson to believe that, if Mr Stokes had concerns about the continuation of those discussions, he would have raised them with Mr Anderson. Nor did Mr Anderson mis-state Optus' reasons for seeking an extension of the interim arrangement.

3206 In short, Mr Anderson's conduct, including his failure to inform Mr Stokes of the discussions with Foxtel, cannot be characterised as misleading or deceptive for the purposes of s 52 of the *TP Act.*

20.3.3.2 RELIANCE

3207 I should add that, if it were necessary to do so, I would find that nothing said by Mr Anderson in the conversation with Mr Stokes, other than the bare request to extend the interim arrangement, induced Mr Stokes to agree to the extension of the First Variation Agreement. Mr Stokes had his own reasons for agreeing to Mr Anderson's request. They are what influenced him to agree on Seven's behalf to the Second Variation Agreement.

20.3.4 Representation of 25 January 2002

3208 Seven relies on Optus' letter of 25 January 2002 in much the same way as it relies on the letter of 28 September 2001. Seven says that the January letter, which records the Second Variation Agreement, should be understood as a representation that Optus would act consistently with the constraints imposed by the Exclusivity Clause. That representation is said to have been false because, at the time the letter was sent, Optus intended to pursue its negotiations with Foxtel, whether in the context of a content supply agreement or otherwise.

3209 Just as Seven does not invoke s 51A of the *TP Act* in relation to the letter of 28 September, so it does not invoke s 51A in its submissions relating to the January letter. Despite its pleadings, Seven does not rely on the letter conveying a representation as to a future matter so as to obtain the benefit of s 51A. For reasons I have given, the most appropriate way to approach Seven's submissions is to consider whether the letter of 25 January 2002 conveyed a representation that Optus intended to act consistently with the requirements of the Exclusivity Clause.

3210 Mr Wood prepared a document designed to record the terms of the extension of the

First Variation Agreement. Mr Stokes and Mr Anderson had already agreed on 18 December 2001 that the First Variation Agreement should be extended on the same terms. The letter of 25 January 2002, although taking the form of a letter from Optus to C7, was intended to be a contractual document. When executed as a deed on 31 January 2002 (or perhaps when signed by Mr Ebeid on 25 January 2002), the letter recorded the terms of the Second Variation Agreement already agreed between Mr Stokes and Mr Anderson (as the Statement of Claim appears to acknowledge (par 596)).

3211 Neither the sending of the letter on 25 January 2002, nor its subsequent execution as a deed, was preceded by any assurances as to what Optus was or was not doing in relation to the supply of content for its platform. On the contrary, Seven was fully aware at the time that Optus had been dealing with Foxtel for the supply of content. Mr Stokes had known of the existence of dealings since reading the article in *The Australian* on 4 December 2001. Mr Gammell's '*doomsday scenario*' email of 23 January 2002 recorded his understanding that Foxtel had become active in trying to persuade Optus to take Foxtel's programming and that Mr Anderson had been pushing hard for the Foxtel offering.

3212 In these circumstances, Optus' sending of the letter of 25 January 2002 conveyed no more than a representation that it was prepared to execute an agreement extending the First Variation Agreement and containing cl 8A, which it did six days later. If the letter is assessed on the date Optus executed it as a deed, it conveyed no more than Optus' contractual commitments, including a commitment not to act in contravention of cl 8A.

3213 If by 25 January 2002 Optus' conduct in December 2001 and January 2002 had breached the Exclusivity Clause, it would already have been exposed to the possibility of an action for breach of contract by Seven. Similarly, a contravention by Optus between the sending of the letter on 25 January 2002 (or its execution as a deed on 31 January) and 28 February 2002 would have exposed Optus to an action for breach of contract. But, in my opinion, the letter cannot be read as conveying a representation that Optus' intention at the time was to cease the discussions it had already undertaken and to desist from such discussions for the succeeding month or so.

3214 If it matters, I would also find that the letter of 25 January 2002 conveyed no representation by Optus as to any future matter. In the circumstances prevailing in late

January, the letter conveyed Optus' intention to enter a contract, no more and no less.

20.3.4.1 RELIANCE

3215 If it were necessary to do so, I would also find that nothing in the letter of 25 January 2002 induced C7 to enter the Second Variation Agreement. That decision was made on 18 December 2001 by Mr Stokes. The letter of 25 January merely recorded the terms of the Second Variation Agreement. Not surprisingly, there was no evidence that anyone at Seven relied on the letter as a representation.

20.3.5 Conclusion

3216 It follows from what I have said that Seven's claim against Optus based on misleading or deceptive conduct in contravention of s 52 of the *TP Act* fails.

20.4 Seven's Claims in Contract

3217 By reason of my conclusion that Optus has established its misleading conduct case against Seven, the latter cannot make out its claims for relief based on Optus' contraventions of the Exclusivity Clause. It is therefore unnecessary to deal with Seven's contractual claims and Optus' defences to those claims. Nonetheless I shall address the issues on liability identified in the parties' submissions.

20.4.1 Did Optus Breach the Exclusivity Clause?

20.4.1.1 SEVEN'S SUBMISSIONS

3218 Assuming, contrary to my holding, that the Exclusivity Clause was valid and enforceable, Seven submits that the evidence establishes that, in December 2001 and throughout January and February 2002, Optus breached its obligations under the Exclusivity Clause. In particular, Optus breached the First Variation Agreement by participating in the meetings with the Foxtel partners on 3, 6 and 10 December 2001. These constituted discussions or negotiations with parties other than C7 for the supply, or incorporation into the Optus pay television platform, of the Fox Sports channels. Similarly, Optus breached the Second Variation Agreement by the discussions with Foxtel that took place in January and February 2002 in relation to the supply of content including Fox Sports channels. Optus also breached the Exclusivity Clause by entering the Foxtel-Optus Term Sheet on 20 February

2002.

20.4.1.2 OPTUS' SUBMISSIONS

3219 Optus submits that, assuming the Exclusivity Clause is valid and enforceable, it should be construed:

> *'as limited to discussions which were calculated to reach agreement or resolve issues in relation to the provision of a sports channel and to exclude general discussions or statements of position or intention or requirements'.*

According to Optus, the December 2001 discussions:

> *'were unexpected, they were not initiated by Optus, they were initiated against a background of intransigent opposition by Telstra to Optus obtaining Foxtel content such that Optus entertained a healthy scepticism as to the point of any meetings, a scepticism fostered by the fact that Mr Chisholm did not appear to be representing Telstra unequivocally and it was apparent that Telstra approached the meetings with no real belief that there was anything to be gained. Against that background, the meetings did not constitute discussions or negotiations in the sense described above'.*

3220 Optus acknowledges that the discussions centred around the achievement of a content sharing agreement between Foxtel and Optus. However, Optus invites me to accept Mr Fletcher's evidence that there was '*no specific discussion of the supply or sub-licensing to Optus of the Fox Sports Channels*'. Optus maintains that the December discussions should be characterised as '*exploratory in nature only*'. They were entered into for the purpose of determining whether it was worthwhile participating in negotiations which might lead to an agreement. Moreover, the subject matter of the discussions was not sports content, but '*industry rationalisation*'.

3221 If the Exclusivity Clause is enforceable and is to be construed as prohibiting a dealing with Fox Sports, Optus accepts that the entry into the Foxtel-Optus Term Sheet on 20 February 2002 was in breach of the Exclusivity Clause.

20.4.1.3 REASONING

3222 It is convenient to reproduce again the terms of the Exclusivity Clause, which was in operation during the period 27 September 2001 to 28 February 2002. The Exclusivity Clause provided as follows:

> *'(a) Vision must not, and must procure that its related bodies corporate do not, solicit, encourage, initiate or participate in discussions or negotiations with; or make any offers to any person other than C7 or its related bodies corporate; or enter into any contract, arrangement or understanding (including an option) with any person other than C7 and its related bodies corporate; and*
>
> *(b) Vision must, and must procure that its related bodies corporate, immediately cease any existing negotiations or discussions with; decline any offer made to it; and terminate any offers made by it to any person other than C7 or its related bodies corporate,*
>
> *in relation to the supply sub-licensing or other incorporation into the Optus pay television platform of any sports channel, except that the restrictions in this clause 8A will not apply to the supply of AFL match and NRL match broadcasts for the 2002 season or any future season, provided that AFL match and/or NRL match broadcasts do not, in accordance with the Term Sheet, appear in a more favourable tier than the C7 Channel'.*

3223 The effect of the Exclusivity Clause, subject to the qualification for AFL and NRL match broadcasts, was to prevent Optus Vision from:

> making any offers to;
>
> entering into any contract, arrangement or understanding with; or
>
> soliciting, encouraging, initiating or participating in discussions or negotiations with,

any person other than C7, in relation to the supply, sub-licensing or other incorporation into the Optus pay television platform of any sports channel. In addition, Optus Vision was required to immediately cease any existing negotiations or discussions with, and decline or terminate any offers made by, any person other than C7 in relation to the same matters.

3224 Optus does not dispute that the discussions that took place on 3, 6 and 10 December 2001, in which Optus was involved, centred around the achievement of a content sharing agreement. Nor does it suggest that the exception in the Exclusivity Clause relating to AFL and NRL match broadcasts covers the discussions that occurred. Its point appears to be that the interchanges (to use a neutral term) did not reach the level of '*discussions or negotiations*' within the meaning of the Exclusivity Clause.

3225 The Exclusivity Clause was expressed in very broad terms. It prohibited Optus

Vision, not merely from initiating discussions or negotiations in relation to the supply of any sports channel, but from encouraging or participating in such discussions or negotiations. Moreover, in distinguishing between negotiations and discussions, but extending the prohibition to both, the Exclusivity Clause was clearly intended to prohibit conversations between Optus and possible content suppliers that fell short of '*negotiations*', yet could properly be described as '*discussions*'.

3226 No doubt conversations would have to go beyond a threshold in order to be caught by the Exclusivity Clause. An unsolicited telephone call to Mr Anderson from Foxtel, for example, raising the possibility of Foxtel supplying a sports channel to Optus would not involve a contravention if Mr Anderson merely listened to what was said and indicated that he could not take the matter further during the exclusivity period.

3227 But what happened here went well beyond any threshold. Mr Anderson's own reports on the conversations with Messrs Murdoch, Packer and Chisholm on 3 December 2001 show that Mr Anderson engaged in discussions concerning the supply of the Foxtel Service, which obviously included sports channels, to Optus. Mr Anderson was not merely a passive recipient of unsolicited information. He put forward, albeit in general terms, the conditions upon which Optus would insist if it were to take the Foxtel Service as suggested by Messrs Murdoch and Packer. The discussion with Mr Chisholm required Mr Anderson to fly, presumably willingly, to Mr Chisholm's farm. Those discussions produced an agreement to set up a working party to explore the '*Foxtel option*'.

3228 Optus refers to handwritten notes prepared by Mr Fletcher of the meetings of 6 and 10 December 2001. The notes are said to show that there was no mention of Fox Sports or sporting content. However, it is clear that the discussions involved the supply of content, including sporting content, by Foxtel to Optus.

3229 Mr Fletcher's notes of the meeting of 6 December 2001 refer to '*exploratory discussions*' and the need for confidentiality. They record that the purpose was to explore content distribution through Optus. A proposal under consideration apparently involved Optus stopping production and getting Foxtel programming. Reference was made to '*value drivers*' which included movies, but (so I infer) would have included sports programming.

3230 The notes of the 10 December 2001 meeting indicate that the issues discussed included Optus' MSGs, the point identified by Mr Anderson in his discussions on 3 December 2001. They also indicate that the content to be supplied was discussed. While the notes apparently make no specific reference to sports channels, the proposed '*redistri[butions] deal*' was obviously to include sporting channels.

3231 It is true that the discussions in early December 2001, as Mr Anderson said in his evidence, took place in the context of a proposal for industry restructuring. It would also seem to be true that, as Mr Fletcher said, the meeting of 10 December 2001 concluded with the Optus participants forming the view that '*there were very substantial hurdles to be overcome*'. But none of this alters the fact that Optus was willingly engaged in discussions (if not negotiations) '*in relation to the supply ... or other incorporation into the Optus pay television platform of any sports channel*'. There is no basis, either in the language of the Exclusivity Clause or the circumstances in which it came to be included in the C7-Optus CSA, to read it so as to prohibit only discussions specifically limited to the supply of sports channels.

3232 It follows that if, contrary to my holding, the Exclusivity Clause were valid and enforceable, Optus breached it by engaging in the discussions of 3, 6 and 10 December 2001. Optus concedes (on the same assumption as to validity and enforceability) that it breached the Exclusivity Clause by entering the Foxtel-Optus Term Sheet on 20 February 2002. Thus, Optus breached the C7-Optus CSA as amended by both the First and Second Variation Agreements.

20.4.2 CWO Deed Poll

3233 If Optus Vision breached the Exclusivity Clause, there would seem to be no dispute that SingTel Optus would be liable to indemnify C7 for any loss it sustained in consequence of the breaches. So much follows from cl 2 of the CWO Deed Poll.

20.4.3 Was Seven Entitled to Accept Optus' Repudiation of the C7-Optus CSA?

3234 Seven submits that at the time SingTel Optus purported to exercise its right to terminate the C7-Optus CSA (28 March 2002), Optus Vision was in breach of an essential term of the C7-Optus CSA, namely the Exclusivity Clause (assuming it to be valid and

enforceable). Seven says that:

> the Exclusivity Clause was an essential term of the agreement because it was co-extensive with the period (under the First and Second Variation Agreements) during which Optus' right to terminate was reserved and because at the time the Variation Agreements were made, the parties had negotiated a replacement agreement for the C7-Optus CSA;
>
> at the time of Optus' purported termination, Seven was unaware of the breaches;
>
> at the time of the purported termination C7 was continuing to suffer harm from Optus' breaches, as Optus was refusing to enter a replacement agreement with C7 on the strength of the negotiations to secure Fox Sports; and
>
> following its purported termination Optus (as is admitted) had ceased to perform the agreement and conducted itself as if the agreement was at an end.

3235 According to Seven, the consequence is that it was entitled to accept Optus' repudiation of the C7-Optus CSA, which it did on 6 May 2002. This is said to enable Seven to sue for loss of the benefit of the C7-Optus CSA.

3236 The parties' submissions on this aspect of the case can fairly be described as perfunctory, particularly bearing in mind the uncertainties of the law in this area: see J W Carter, *Breach of Contract* (2nd ed, Law Book Co Ltd, 1991), at [756]. It is by no means clear, for example, that the Exclusivity Clause should be regarded as an essential term of the C7-Optus CSA (as distinct from the First and Second Variation Agreements). Optus chose not to address Seven's assertion that it should be so regarded.

3237 It will be recalled that the First and Second Variation Agreements took the form of amendments to the C7-Optus CSA. The Exclusivity Clause might well satisfy the test of essentiality laid down in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, at 641-642, per Jordan CJ, if the relevant contract is taken to be the First or Second Variation Agreement (the High Court allowed an appeal but no doubt was cast on Jordan CJ's formulation: *Luna Park (NSW) Pty Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286). The test may be considerably more difficult to satisfy if the relevant contract

is (as Seven's submissions suggest) the C7-Optus CSA itself. As the parties have chosen not to debate this question, I shall not do so.

3238 Seven does not explain clearly why Optus' breach of the Exclusivity Clause, even if it be assumed to be an essential term of the C7-Optus CSA, should have prevented Optus exercising its apparently independent contractual right to terminate the C7-Optus CSA. That right was available to Optus, not as a consequence of any breach of contract or repudiatory conduct by Seven, but by reason of Seven's loss of the AFL pay television rights. It is true that, in some circumstances, a party which has repudiated its obligations under a contract will not be able to terminate the contract by reason of what otherwise would be a fundamental breach by the other party. However, that is not always the case. In particular, it is not necessarily the case where the party in breach of an essential term of the agreement exercises an independent contractual right to terminate the agreement before the innocent party accepts the breach as a repudiation of the agreement.

3239 In *Roadshow Entertainment Pty Ltd v (ACN 053 006 269) Pty Ltd* (1997) 42 NSWLR 462, the Court summarised the principles as follows (at 481):

> *'A party in breach of non-essential terms who has not repudiated may rescind for fundamental breach ... A party in breach of an essential but independent term may also rescind for fundamental breach'.*

The Court referred with approval to observations of Kerr LJ in *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277, at 285:

> *'the mere commission of a repudiatory breach by either party does not bring the contract to an end. It merely provides the other party with a right of election to treat the contract as terminated if it wishes to do so. If and so long as it does not do so, all obligations under the contract remain alive'.*

3240 Seven was aware that Optus had breached the Exclusivity Clause (assuming it to be valid and enforceable) well before Optus exercised its contractual right under cl 16.2(a) to terminate the C7-Optus CSA. Seven took no action to accept Optus' repudiation of the agreement (if that is what it was). Indeed the terms of the Exclusivity Clause were spent before Optus exercised its right on 28 March 2002, as provided for in the March Variation Agreement. Seven does not suggest that Optus' right to terminate the C7-Optus CSA under cl 16.2(a) was expressed to be dependent on Optus' compliance with the Exclusivity Clause

during the period October 2001 to February 2002. It is difficult to see why the two should be regarded as inter-dependent in some way. As both parties knew at the time they entered the First and Second Variation Agreements, Optus intended to terminate the C7-Optus CSA no later than the commencement of the 2002 AFL season, subject to any agreed extension, such as that provided for in the March Variation Agreement.

3241 In my view, the validity of Optus' exercise on 28 March 2002 of its right to terminate the C7-Optus CSA was not affected by any antecedent breach by Optus of the Exclusivity Clause. But Optus' termination of the C7-Optus CSA did not affect any accrued rights of the parties (cl 16.4), including any accrued right for breach of the Exclusivity Clause.

20.4.4 Did SingTel Optus Induce a Breach of Contract by Optus Vision?

20.4.4.1 SEVEN'S SUBMISSIONS

3242 Seven identifies the conduct of SingTel Optus which induced Optus Vision to breach the Exclusivity Clause as the following:

> SingTel Optus itself negotiated with Foxtel for the supply of the Fox Sports channels to Optus Vision, thereby causing Optus Vision to be in breach of its obligation under the Exclusivity Clause to procure that SingTel Optus not engage in such negotiations;
>
> SingTel Optus caused Optus Vision to participate in the same negotiations; and
>
> SingTel Optus caused Optus Vision to enter into the Foxtel-Optus Term Sheet.

3243 Seven accepts that it must prove that SingTel Optus engaged in the conduct identified intending to induce the breaches by Optus Vision. Seven submits that to establish SingTel Optus' intention, it is sufficient to demonstrate, as is obvious, that SingTel Optus knew not only of the First and Second Variation Agreements, but of the Exclusivity Clause.

20.4.4.2 REASONING

3244 The only significance of Seven's contention that SingTel Optus induced Optus Vision to breach the C7-Optus CSA is that, if correct, it opens the way for Seven to claim exemplary

or aggravated damages. This is because exemplary damages cannot be awarded for breach of contract: *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157, at 191 [142]-[143], per Hill and Finkelstein JJ. In my view, as I explain below, even if Optus Vision breached the Exclusivity Clause and even if SingTel Optus committed the tort of inducing breach of contract, Seven is not entitled to exemplary or aggravated damages.

3245 I note that different views have been expressed as to whether one company within a group subject to common management commits the tort of inducing breach of contract by causing or encouraging another company within the group to breach its contract with a third party. In *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2001] NSWSC 886, Barrett J (at [96]) expressed the view that:

> *'there is a distinct air of unreality about the proposition that one wholly-owned subsidiary within and subject to the framework of authority acts intentionally to cause another wholly-owned subsidiary within and subject to the same framework of authority to behave in a certain way when both are actuated by and subject to the common authority'.*

This view has been followed: *Foxeden Pty Ltd v IOOF Building Society Ltd* [2003] VSC 356, at [328]-[330], per Habersberger J. However, a contrary view was expressed by Young CJ in Eq, although it was not necessary to decide the point: *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2002] NSWCA 74, at [94]-[98].

3246 In the absence of detailed argument on the issues of principle, it is preferable for me not to express an opinion about the conflict.

20.4.5 Is Seven Entitled to Exemplary or Aggravated Damages?

20.4.5.1 SEVEN'S SUBMISSIONS

3247 Seven submits that exemplary damages, which are punitive in character, are available for the torts of inducing breach of contract and deceit in cases of '*conscious wrongdoing in contumelious disregard of another's rights*': *Gray v Motor Accident Commission* (1998) 196 CLR 1, at 7 [14], per Gleeson CJ, McHugh, Gummow and Hayne JJ, citing *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, at 77, per Knox CJ. Seven says this is precisely such a case, since Optus fully intended to disregard the Exclusivity Clause and indeed sought legal advice about the consequences of doing so. Exemplary damages are needed having regard to

the benefits derived by Optus from its cynical conduct and the need to deter Optus from similar conduct in the future.

3248 Seven also submits that it is entitled to aggravated damages for the tort of inducing breach of contract. Seven recognises that aggravated damages are compensatory, rather than punitive in character. Nevertheless, they may be awarded to compensate an applicant whose injury is aggravated by conduct which is '*high-handed, malicious, insulting or oppressive*': *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, at 71, per Brennan J, citing *Broome v Cassell & Co Ltd* [1972] AC 1027, at 1085, per Lord Reid.

20.4.5.2 REASONING

3249 In an authoritative (so far as I am concerned) review of the authorities, Hill and Finkelstein JJ in *Hospitality Group v ARU* summarised the circumstances in which a court will award exemplary damages for inducing breach of contract (110 FCR, at 190 [140]-[141]):

> *'this head of damage is punitive in character, designed to punish a wrongdoer who has been involved in conscious wrongdoing in contumelious disregard of another's rights, and to deter him from engaging in that conduct again ... But as was explained by Windeyer J in* Uren v John Fairfax & Sons Pty Ltd *(1966) 117 CLR 118 at 153, "[e]xemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of a defendant". Accordingly, an award of this type will be "unusual and rare" .... As Mahoney P cautioned in* Trend Management v Borg *(1996) 40 NSWLR 500, at 509 ..."if exemplary damages are to perform the function which the Australian law has assigned to them, it is important that the seriousness of the conduct involved be not diluted."*
>
> *So, to be damnified by punitive damages, the defendant's conduct must be "outrageous" ... or must be conduct "which shocks the tribunal of fact, representing the community" ... or his behaviour must be "in a humiliating manner and in wanton or reckless disregard" of the plaintiff's welfare ...'*
> (Other citations omitted.)

Their Honours went on to observe (110 FCR, at 194 [153]) that:

> *'[t]he award of exemplary damages is, as the cases show, an extraordinary remedy. When awarded, it gives a windfall to the plaintiff. In the case of the economic torts, in which intention is an element and damages are "at large", a defendant must be guilty of something bordering on the malicious before the remedy will be granted'.*

3250 I have rejected Seven's contention that Optus never intended to comply with the Exclusivity Clause. This finding removes one plank of Seven's argument that exemplary damages should be awarded against Optus in the present case.

3251 It is true that, as Seven submits, Mr Anderson knew that Optus was in breach of the Exclusivity Clause (assuming it to be valid and enforceable) when it entered into the Foxtel-Optus Term Sheet on 20 February 2002. It is also true that Optus obtained and acted on legal advice that C7 was unlikely to suffer any compensable loss if Optus entered into that agreement. Seven characterises Optus' actions in obtaining and acting on that advice as cynical.

3252 Although Optus knowingly breached the Exclusivity Clause, in my opinion, its conduct fell a long way short of being so outrageous as to warrant damnification by an award of punitive damages. The entry into the Foxtel-Optus Term Sheet occurred just a few days before Optus became entitled to terminate the C7-Optus CSA by reason of C7's loss of the AFL pay television rights. It was hardly praiseworthy conduct for Optus knowingly to breach the Exclusivity Clause. But equally, it was hardly conduct that would shock a tribunal of fact (certainly not a tribunal that has listened to and read the evidence in this case, including evidence as to Seven's own commercial conduct). Nor can Optus' conduct, whether in holding discussions or negotiations with Foxtel or in entering into the Foxtel-Optus Term Sheet, be regarded as bordering on the '*malicious*'. Optus had genuine commercial reasons for taking the course it did. Its conduct was not malicious, in the sense of intending to inflict gratuitous harm on Seven.

3253 As was recognised in *Hospitality Group v ARU*, there is a difference between conduct warranting disapproval and conduct justifying an award of aggravated damages. To make such an award in this case would come close to holding that every deliberate breach of contract by one company within a group will render the holding company liable to exemplary damages, at least if both companies are under common management. This is not the law.

3254 Similarly, there is no basis for an award of aggravated damages in this case. Aggravated damages are compensatory in nature: *New South Wales v Ibbett* (2006) 231 ALR 485, at 492 [33], per *curiam.* Such an award depends upon showing that the injury to the

innocent party has been aggravated by conduct which is insulting or reprehensible: *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118, at 151, per Windeyer J. The injury to Seven does not answer that description.

20.5 Deceit Claim

3255 Seven submits that SingTel Optus and Optus Vision committed the tort of deceit by representing, on 25 January 2002, that if Seven entered the Second Variation Agreement, Optus Vision would comply with the Exclusivity Clause. Seven says that Optus knew that the representation was false, by reason of the prior breaches of the Exclusivity Clause. These breaches, it contends, were known to Mr Anderson, a director of both SingTel Optus and Optus Vision. Seven says that it relied on the deliberately false representations when it entered the Second Variation Agreement and suffered loss as a result.

3256 Seven's cause of action in deceit is concerned only with the representation said to be contained in the letter of 25 January 2002, that if Seven entered into the Second Variation Agreement Optus would act in accordance with the terms of the Exclusivity Clause. The findings I have already made in relation to the letter are fatal to Seven's claim founded on Optus' alleged deceit. The claim therefore fails.

20.6 Optus' Defences

3257 Just as it is unnecessary to consider Seven's claims based on Optus' breach of the Exclusivity Clause, it is unnecessary to consider Optus' multitude of defences to those claims. Nonetheless, I address Optus' arguments although not always in detail.

20.6.1 Did Seven Breach the C7-Optus CSA by Failing to Supply the AFL-Seven Licence on Request?

20.6.1.1 OPTUS' SUBMISSIONS

3258 Optus submits that Seven's failure to supply the AFL-Seven Licence on request breached cl 21(a) of the C7-Optus CSA, which required each party '*to use reasonable efforts to do all things necessary or desirable to give full effect to this agreement*'. Optus says that it was plainly '*necessary or desirable to give full effect*' to Optus' right to terminate under the C7-Optus CSA that Seven should make available on request the underlying contract that determined whether Seven had lost the AFL pay television rights. In other words:

> *'[f]ull effect could not be given to Optus' undoubted right to terminate if Optus was not to know (but had to rely on [Seven] for) the information on the basis of which [Seven] said that the right had not accrued'.*

3259 Optus submits that if it had received the terms of the AFL-Seven Licence, the position effectively would have been as if Seven had never made the representations as to the date Optus' right to terminate the C7-Optus CSA arose. The damages for breach of contract are said to be the same as those recoverable under s 82 of the *TP Act* in respect of Seven's misleading and deceptive conduct.

20.6.1.2 REASONING

3260 There is a threshold issue as to whether the expression '*necessary or desirable to give full effect to this agreement*' is apt to have required Seven to supply Optus with a copy of the AFL-Seven Licence for the purpose of enabling Optus to verify the date on which it could exercise its right of termination under cl 16.2(a) of the C7-Optus CSA: cf *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, at 607-608, per Mason J, quoted with approval by the High Court in *Park v Brothers* (2005) 222 ALR 421, at 431-432 [38].

3261 I would be inclined to resolve the question of construction in favour of Optus, in the sense that I think there might be circumstances in which cl 21(a) of the C7-Optus CSA could have obliged Seven to provide Optus with a copy of the AFL-Seven Licence. In construing cl 21(a), it is appropriate to take account of the understanding of the parties at the time they entered the C7-Optus CSA, particularly their knowledge that ascertaining the date on which Optus could terminate the C7-Optus CSA would require reference to the terms of the AFL-Seven Licence: cf *Park v Brothers* 222 ALR, at 432 [39] per *curiam*. At the time the parties entered the C7-Optus CSA, as between Seven and Optus only Seven had or was entitled to have a copy of the AFL-Seven Licence. There is no dispute that Seven at all material times had a copy of the AFL-Seven Licence.

3262 The critical question, however, is whether Optus' letter of 28 August 2001 to Seven requesting a copy of the AFL-Seven Licence enlivened an obligation on Seven, pursuant to cl 21(a) of the C7-Optus CSA, to accede to the request. Optus' letter of 28 August 2001 merely stated that resolution of the question of the termination date would be '*greatly*

assisted if you would provide us with a copy of the [AFL-Seven Licence]'. The letter made no reference to cl 21(a) of the C7-Optus CSA and made no suggestion that Seven was obliged to accede to the request. The tone of the letter was that of a polite request, accompanied by assurances of confidentiality, but with no hint that the request was made pursuant to the C7-Optus CSA or that there might be legal consequences if Seven failed to respond. When no reply was received, Optus did not trouble to follow up the request.

3263 No doubt politeness is a virtue. No doubt, too, as Mr Stokes recognised, it was less than polite for Seven simply to ignore Optus' request. But the question is whether Seven failed to '*use reasonable efforts*' to do what was necessary or desirable to give full effect to the C7-Optus CSA, given that its attention was never drawn to the obligation Optus now asserts arose under the terms of the C7-Optus CSA.

3264 Optus sought legal advice before sending its letter. Whether the absence of any reference in the letter to Seven being obliged to accede to the request was the product of that advice was not made clear in the evidence. Whatever the explanation for the form of the letter, Optus never suggested that it was entitled to make the request under the C7-Optus CSA, nor that Seven was obliged to comply with the request. In a commercial arrangement of this kind, what is '*reasonable*' must depend on the circumstances. They will determine whether a polite request is just that or is intended to have contractual consequences.

3265 In the circumstances I have described, I do not think that Seven failed to '*use reasonable efforts*' to do what was desirable to give full effect to the C7-Optus CSA. It may well have been different if Optus had made it clear that it was relying on cl 21(a) or some other contractual provision in making its request. But a mere request for assistance, without any hint that contractual consequences would follow, was not apt to enliven cl 21(a) of the C7-Optus CSA.

20.6.2 Is the Exclusivity Clause Void for Uncertainty?

20.6.2.1 OPTUS' SUBMISSIONS

3266 Optus submits that the first part of the Exclusivity Clause does not admit of a definite meaning because it is difficult to determine when a party is participating in '*negotiations*' or '*discussions*' about the supply of a sports channel, as distinct (for example) from merely

listening, seeking information on the topic or talking to a regulator about content sharing.

3267 Optus also submits that the exception provided for in the Exclusivity Clause, relating to the supply of AFL and NRL match broadcasts for the 2002 season or any future season, is uncertain. Would cl 8A, for example, prevent Optus from discussing with Fox Sports the supply of a sports channel consisting of AFL and NRL coverage? Yet another problem, so Optus contends, is the uncertain relationship between cl 3A.2 and cl 8A of the C7-Optus CSA. Clause 3A.2 provided that Seven would use '*reasonable endeavours*' to procure the supply of Fox Sports to Optus Vision on terms no less favourable than those accorded to any other person.

20.6.2.2 REASONING

3268 As a general principle, in order for an agreement to be binding it must be sufficiently certain in all of its essentials. If an agreement lacks certainty it is said to be void unless the uncertain portions can be severed, in which case the balance of the agreement is enforceable: *Cheshire and Fifoot's Law of Contract* (8th Aust ed, LexisNexis Butterworths, 2002), at [6.1]. However, the traditional doctrine is that:

> *'courts should be astute to adopt a construction which will preserve the validity of the contract. Moreover, [holding a contract to be void for uncertainty] is a draconian solution – one which is best calculated to frustrate the expectations of the parties…'*

(*Meehan v Jones* (1982) 149 CLR 571, at 589, per Mason J.)

3269 The approach to be taken to a claim that an agreement is too uncertain to be enforced is stated by Barwick CJ (with whom McTiernan, Kitto and Windeyer JJ agreed) in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, at 436-437:

> *'a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides is its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it … So long as the language employed by the parties, to use Lord Wright's words in* Scammell (G) & Nephew Ltd v Ouston *[[1941] AC 251] is not "so obscure and so incapable of any definite or precise meaning that the Court is unable to*

> *attribute to the parties any particular contractual intention", the contract cannot be held to be void or uncertain or meaningless. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved'.*

3270 Optus' submissions amount to no more than an assertion that cl 8A of the C7-Optus CSA may present difficulties of construction when it has to be applied to particular factual situations. It may be true, as Optus suggests, that the words '*discussions*' and '*negotiations*' are not easy to apply to the many and varied situations that might arise for consideration. But these are ordinary English words perfectly capable of being construed in context in a manner with which the Courts are familiar. I have already applied the language of the Exclusivity Clause to the circumstances of this case. Similarly, any arguable conflict between cl 3A.2 and cl 8A of the C7-Optus CSA must be resolved according to orthodox principles of interpretation.

3271 There is no substance in Optus' contention that cl 8A of the C7-Optus CSA is void for uncertainty.

20.6.3 Is the Exclusivity Clause Unenforceable as a Common Law Restraint of Trade?

3272 There would seem to be something distinctly odd about a very large telecommunications corporation, with revenues in the billions of dollars, seeking to have a provision to which it has freely, if perhaps reluctantly, agreed held unenforceable as a common law restraint of trade. Nonetheless the common law doctrine of restraint of trade survives the enactment of the *TP Act,* and it does so despite the overlap between that doctrine and the competition provisions of that legislation: see *TP Act,* s 4M; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126, at 140-141 [31]-[33], per Gleeson CJ, Gummow, Kirby and Hayne JJ. Thus Optus is entitled to rely on common law principles if they render the Exclusivity Clause unenforceable.

20.6.3.1 OPTUS' SUBMISSIONS

3273 Optus submits that the Exclusivity Clause constituted a common law restraint of trade, in that it required Optus to give up a pre-existing freedom to contract with competitors of C7, including Fox Sports. The restraint is therefore invalid unless it is assessed to be

reasonable in the interests of both parties. According to Optus, the authorities establish that a provision which merely protects a party against competition, as distinct from protecting it against some hazard or prejudice to which it might be exposed by a transaction, cannot be reasonable.

3274 Optus submits that Seven had no legitimate interest to protect the restraint of trade. Seven wished to preserve its bargaining position, which rested on the dilemma faced by Optus. If Optus chose not to exercise the right of termination it risked affirming the C7-Optus CSA; if it did exercise the right of termination it faced a programming gap. Optus says that if it had terminated the C7-Optus CSA, Seven would have continued to supply Optus until the end of February 2002. Further, Optus argues that Seven is hardly in a position to insist on the benefit of the uncertainty relating to the date of termination when it had insisted that the right to terminate did not arise until February 2002, at the earliest.

3275 Optus submits that, in any event, the Exclusivity Clause was unreasonable, both in relation to Optus Vision and in the public interest, for a number of reasons:

> Optus received no financial benefit from entering into the First and Second Variation Agreements;
>
> the insertion of the Exclusivity Clause into the C7-Optus CSA was '*antithetical*' to one of the express objects of the agreement, namely the acquisition of Fox Sports channels by Optus;
>
> it was unreasonable (assuming this to be the proper construction of the Exclusivity Clause) to forbid Optus from engaging in negotiations for a fresh content supply agreement that offered '*massive financial relief*' to Optus; and
>
> it was unreasonable (if this was the proper construction of the Exclusivity Clause) to prevent Optus engaging in discussions with regulators, with a view to securing Foxtel content.

20.6.3.2 PRINCIPLES

3276 There was no dispute between the parties as to the relevant principles to apply:

> The *prima facie* position is that all restraints of trade are contrary to public policy and are therefore unenforceable. However, a restraint may be enforced

if the enforcing party shows that circumstances exist which make the restraint reasonably necessary for the protection of the parties concerned and reasonable in the interests of the public: *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, at 565, per Lord Macnaghten; *Lindner v Murdock's Garage* (1950) 83 CLR 628, at 633, per Latham CJ; *Buckley v Tutty* (1971) 125 CLR 353, at 376, 379-380, per *curiam.*

In general, a contractual term is a restraint of trade only where a party to the contract gives up some freedom which it otherwise would have had: *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, at 298, per Lord Reid; *Hospitality Group* v *ARU* 110 FCR, at 180-181 [87], per Hill and Finkelstein JJ; cf *Peters v Petersville* 205 CLR, at 137-138 [22], per Gleeson CJ, Gummow, Kirby and Hayne JJ. Whether there is a restraint for the purposes of the doctrine is to be answered by having regard to the practical workings of the restraint, not merely its legal form: *Peters v Petersville* 205 CLR, at 134-135 [14], per Gleeson CJ, Gummow, Kirby and Hayne JJ.

The test of whether a contractual or other restraint is reasonable between the parties is whether the restraint exceeds what is necessary for the reasonable protection of the party in whose favour the restraint operates: *Buckley v Tutty* 125 CLR, at 376, per *curiam*. Reasonableness is assessed by ascertaining the legitimate interests of the party seeking to enforce the restraint and determining whether the restraint is more than adequate for the purpose of protecting those interests: *Esso Petroleum* [1968] AC at 301, per Lord Reid; *Bridge v Deacons* [1984] AC 705, at 714, per Lord Fraser; *Queensland Co-operative Milling Association v Pamag Pty Ltd* (1973) 133 CLR 260, at 267-268, per Walsh J; at 279, per Stephen J.

The onus of showing that the restraint goes no further than is reasonably necessary to protect the interests of the person in whose favour the restraint operates lies on that party: *Buckley v Tutty* 125 CLR at 377, per *curiam*.

The notion of reasonableness involves a balancing of competing considerations. The more onerous the restraint, the more difficult it is for the parties seeking to enforce the restraint to satisfy a court that it was, in all the

> circumstances, no more than was reasonably necessary for the protection of that parties' interests: *Adamson v New South Wales Rugby League Ltd* (1991) 31 FCR 242, at 266, per Wilcox J; see also at 247-248, per Sheppard J.
>
> There is an overlap between the criteeria of reasonableness in the interests of the parties and reasonableness in the interests of the public. Nonetheless, in order to justify a restraint of trade, both tests must be satisfied: *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Ltd* (1973) 133 CLR 288, at 307, per Walsh J.
>
> The time at which the reasonableness of the restraint is to be assessed is the date of the agreement imposing it: *Lindner v Murdock's Garage* 83 CLR, at 653, per Kitto J; *Amoco v Rocca* 133 CLR, at 318, per Gibbs J. However, the Court may take into account future events that could have been foreseen: *Lindner v Murdock's Garage* 83 CLR, at 653.

3277 As I have noted, the language of cl 8A is very broad indeed and was plainly intended to prevent Optus Vision from engaging in any discussions with a channel supplier (other than C7) that might at any time lead to the supply of sports channels to the Optus platform. However, the restraint imposed by cl 8A was subject to two important qualifications:

> under the First Variation Agreement, the restraint operated only for a period of three months (27 September 2001 to 31 December 2001), while under the Second Variation Agreement, the restraint was in effect for a period of only two months (1 January 2002 to 28 February 2002); and
>
> cl 8A made an exception for negotiations and discussions in relation to the supply of AFL match and NRL match broadcasts for the 2002 and any later season, provided that those broadcasts did not appear on a more favourable tier than the C7 channels.

20.6.3.3 PRE-EXISTING FREEDOM

3278 Optus correctly submits that cl 8A restrained it from exercising a pre-existing freedom to negotiate and contract with competitors of C7. Under the C7-Optus CSA, absent the Exclusivity Clause, Optus was free to negotiate with other channel suppliers. Indeed cl 3A.2 explicitly recognised that Optus wished to acquire the Fox Sports channels for its platform. In fact, Optus actively negotiated with Fox Sports from July to early September

2001, but the negotiations ended because of Telstra's opposition to the proposal for the supply of the Fox Sports channels to Optus. The terms of cl 8A clearly prevented Optus from engaging in negotiations or even discussions with alternative channel suppliers for the periods during which the First and Second Variation Agreements were in force. Seven does not dispute this conclusion.

20.6.3.4 LEGITIMATE INTEREST TO PROTECT?

3279 Optus contends that cl 8A was, in effect, a bare covenant by a purchaser of pay television channels not to deal with competitors of C7. As such, so Optus argues, cl 8A was designed merely to protect C7 from competition and cannot be regarded as reasonable in the interests of the parties or in the public interest.

3280 Optus relies on the decision of the Privy Council in *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181. In that case the appellants held a brewer's licence, but had never brewed liquor other than sake. The respondents brewed only beer. The appellants and the respondents were the only brewers in Vancouver. The appellants purported to sell the goodwill of their licence, except insofar as it related to the manufacture of sake, to the respondents. The sale price was $15,000. The appellants covenanted that for a period of fifteen years they would not manufacture or sell beer.

3281 Lord Macmillan pointed out ([1934] AC, at 190) that the restraint was not necessary to render a sale effectual in the interests of both parties, since nothing had been sold other than the appellants' liberty to brew beer. His Lordship observed that no case had ever upheld a '*bare covenant not to compete*':

> *'The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective'.*

3282 As Optus correctly submits, *Vancouver Malt v Vancouver Breweries* has been referred to with approval in Australia: *Peters American Delicacy Co Ltd v Patricia's Chocolates and Candies Pty Ltd* (1947) 77 CLR 574 at 592, per Dixon J (dissenting); *Quadramain Pty Ltd v Sevastopol Investments Pty Ltd* (1976) 133 CLR 390, at 419-420, per Jacobs J (dissenting, with the agreement of Murphy J). In *ICT Pty Ltd v Sea Containers Ltd*

(1995) 39 NSWLR 640, the New South Wales Court of Appeal held invalid a provision in an agreement for the sale of ferries by a shipbuilder to a ferry operator, whereby the shipbuilder agreed not to sell ferries to any service operating within a radius of 100 nautical miles of the ports served by the ferry operator. The Court cited (39 NSWLR, at 671) *Vancouver Malt v Vancouver Breweries* with approval when rejecting the '*general proposition*' put forward by the trial Judge that a business investment, as such, may constitute an interest entitled to protection.

3283 The Court in *ICT v Sea Containers* noted that the validity of contractual constraints initially arose for consideration by the Courts in connection with contracts for the sale of goodwill and contracts of service. However, restraints had later been upheld in a variety of situations (39 NSWLR, at 671):

> *'Manufacturers and suppliers may protect their sources of supply ... Suppliers may protect their distribution outlets and customer base ... A sporting association may impose restraints on its players to protect its clubs and enhance the quality of its competitions ... Professional associations may impose restraints to maintain ethical standards*'. (Citations omitted.)

3284 The Court in *ICT v Sea Containers* also pointed out that the ferry operator had not invested or agreed to invest in the shipbuilding business and that the ferries it had purchased had become its property by the sale transactions. The Court held (39 NSWLR, at 672) that a purchaser of capital equipment is not entitled to protection against competition from a later purchaser of similar equipment. A purchaser is entitled to contract for a first call on the supplier's equipment (as the ferry operator in fact had done in *ICT v Sea Containers*). But the limitation imposed on the shipbuilder was a '*bare restraint*'. Given the modest consideration received by the shipbuilder and the '*tenuous interest (if any) entitled to protection*', the restraint was held to be unreasonable (39 NSWLR, at 673).

3285 In the present case, C7 and Optus were parties to an agreement by which C7 supplied a sports channel to Optus. The authorities recognise that, depending on the circumstances, a covenant which protects a supplier of goods or services against competition in relation to the supply of those goods or services to a particular purchase may be upheld, notwithstanding the restraint of trade doctrine: *Queensland Co-operative v Pamag* 133 CLR, at 268, per Walsh J; at 278, per Stephen J. Thus *Queensland Co-operative v Pamag* itself upheld an agreement by a bakery, which had borrowed funds from a flour miller, to purchase all its requirements

of flour from the miller for the period of the loan.

3286 Heydon J has observed extra-judicially that Walsh J's view in *Queensland Co-operative v Pamag* 133 CLR, at 268, that the miller had an interest in selling as large a quantity of goods as possible:

> *'pushed the notion of "legitimate interest" to or beyond, the point at which it has distinct content, and it tended to dilute greatly the principle that a trader is not entitled to be protected against mere competition'.*

J D Heydon, *The Restraint of Trade Doctrine* (2nd ed, Butterworths, 1999), at 177. However, Heydon J acknowledges that the approach of Stephen J, in particular, finds support in the judgments in *Peters American Delicacy v Patricia's Chocolates*. In that case, the majority upheld a provision requiring a retailer to buy all its ice cream requirements from a manufacturer for a period of five years, provided the manufacturer adhered to specified prices for the ice cream products: 77 CLR, at 581, per Latham CJ; at 582, per Rich J; at 599, per Williams J.

3287 In the present case, it was Optus that decided to negotiate a short term arrangement with C7. Optus wished to keep its options open pending its review of CMM and to defer making a decision about the three year arrangement it had been discussing with C7. Optus also wanted to avoid the potential problem that its conduct might affirm the C7-Optus CSA and thus cause it to lose the right of termination available to it by reason of C7's loss of the AFL pay television rights. As I have already explained, from Optus' point of view, continuity of sports content on its platform was important in preserving its options and in improving its bargaining position vis-à-vis C7.

3288 In these circumstances, C7 had a '*legitimate interest*' in seeking to prevent its major '*customer*' from exploiting a short term interim arrangement requested by it to improve its bargaining position in relation to securing long term sporting content. Indeed Mr Ebeid, in his fax to Mr Wood of 27 September 2001, explicitly recognised that C7 had a legitimate interest in preventing Optus from entering an agreement with another channel supplier during the exclusivity period. His complaint was that C7's proposed Exclusivity Clause went further and prevented even negotiations or discussions with a third party. Mr Wood justified the more sweeping restraint on the ground that otherwise Optus could use the three month period to conclude a deal with a third party, and simply defer signing it until the New Year.

3289 The same analysis applies to C7's interest in incorporating the Exclusivity Clause in the Second Variation Agreement and thus maintaining it as part of the C7-Optus CSA for the period 1 January to 28 February 2002.

20.6.3.5 WAS THE EXCLUSIVITY CLAUSE REASONABLE?

3290 It seems to me that Seven has discharged the burden of showing that the Exclusivity Clause was reasonably necessary for the protection of the interests of the parties to the First and Second Variation Agreements and reasonable in the interests of the public. Three considerations are of particular importance.

3291 First, the restraint imposed by the Exclusivity Clause, although widely expressed, was put in place for short periods. It was to continue only for the term of each of the Variation Agreements. The initial period during which the exclusivity was to operate was only three months. That period was extended for a further period of two months by the Second Variation Agreement. I was not referred to any case in which a restraint intended to operate for such short periods has been held to be void under the common law restraint of trade doctrine: cf J D Heydon, *The Restraint of Trade Doctrine* (2nd ed), at 180-182.

3292 Secondly, C7 and Optus negotiated on an '*equal footing*': *Amoco v Rocca* 133 CLR, at 320, per Gibbs J. Whatever issues might arise about Seven's conduct in attempting to persuade Optus that its right to terminate the C7-Optus CSA was not exercisable until the start of the 2002 AFL season, this is far from a case of a powerful supplier imposing an onerous restraint on a hapless and helpless customer.

3293 Thirdly, cl 8A provided an exception for discussions in negotiations relating to the supply of AFL match and NRL match broadcasts for the 2002 season or any future season. Thus Optus was not prevented from engaging in such discussions or negotiations with Fox Sports or any other party, provided that the resultant term sheet did not allow those broadcasts to appear on a more favourable tier than the C7 channel.

3294 Optus points in its submissions to several matters that it says suggest that the Exclusivity Clause was unreasonable. In my view, none of them, individually or collectively, alters the view I have expressed.

20.6.4 Is the Exclusivity Clause Unenforceable by Reason of the TP Act*?*

20.6.4.1 OPTUS' SUBMISSIONS

3295 Optus submits that the Exclusivity Clause is caught by s 47(2) of the *TP Act*, which defines conduct amounting to '*exclusive dealing*'. Optus says that under the C7-Optus CSA, as modified by the First and Second Variation Agreements:

> Seven was supplying services in the form of the C7 channels to Optus; and
>
> Seven was providing a discount for the supply of those channels on condition that Optus would not enter into an arrangement for the supply of sports channels from Fox Sports, a competitor of C7.

3296 Optus acknowledges that the prohibition in s 47(1) on the practice of '*exclusive dealing*' only applies where the conduct '*has the purpose or has or is likely to have the effect, of substantially lessening competition*' (s 47(10)). However, it submits that Seven's purpose in requiring the insertion of the Exclusivity Clause was '*nakedly anti-competitive*', in that Seven wanted to avoid competition from Fox Sports for the supply of sports channels to Optus Vision. While cl 8A operated for only five months, Seven intended it to operate for a longer period and to lead to a new three year deal.

3297 Optus explains its position in relation to the sports channel supply market as follows:

> *'The purpose (and likely effect) of the Exclusivity Clauses was to prevent one of the three acquirers in this market (Optus) from acquiring channels from one of the two major channel suppliers (Fox Sports). The range of transactions possible in this market is limited by the small number of buyers and sellers. The Exclusivity Clauses substantially lessened competition in this market by making it possible for Optus, one of the three buyers, to acquire channels from only one of the sellers'.*

3298 So far as the retail pay television market is concerned, Optus says this:

> *'[Seven's] case is that in order to offer a viable pay television service in Australia, it is necessary to offer attractive Australian sports programming as a subscription driver. By preventing Optus from obtaining essential sports programming from Fox Sports, the Exclusivity Clauses had the purpose (and likely effect) that Optus' ability to overcome its incapacity to constrain Foxtel in the retail market would be impeded in a real and substantial way'.*

3299 Optus also relies on s 45(2)(a)(i) of the *TP Act*, which prohibits a corporation from

making a contract containing an '*exclusionary provision*'. It puts forward several alternative arguments as to why the definition of '*exclusionary provision*' is satisfied, in particular the requirement that a contract be made between persons who are '*competitive with each other*' (*TP Act*, s 4D(1)(a)). Optus contends that the Exclusivity Clause had the purpose of preventing, restricting or limiting the acquisition of sports channels by Optus Vision from '*particular persons*' (Fox Sports) or '*classes of persons*' (sports channel suppliers other than C7) and thus satisfies the language of s 4D of the *TP Act*.

3300 Finally, Optus contends that Seven's purpose in entering the First and Second Variation Agreements was to substantially lessen competition. Thus, so it argues, Seven breached s 45(2)(a)(ii) of the *TP Act*.

3301 Optus submits that by reason of the contraventions of the *TP Act*, cl 8A of the C7-Optus CSA, as inserted by the First and Second Variation Agreements, is void and unenforceable.

20.6.4.2 EXCLUSIVE DEALING

3302 In my view, Optus cannot establish that s 47(10) of the *TP Act* is satisfied. In Chapter 12, I have found against the existence of the wholesale sports channel market (upon which Optus relies for the purposes only of this argument).

3303 None of the experts was asked whether the Exclusivity Clause, which was to operate for two successive periods totalling five months, was likely to substantially lessen competition in the retail pay television market (which I have found did exist at the material times). Nor do Optus' submissions explain why the restraint imposed by the Exclusivity Clause for such a short period had the effect or likely effect of impeding Optus in its efforts (such as they were) to constrain Foxtel in the retail pay television market. Indeed the submissions run directly counter to the arguments advanced by Optus on other aspects of the case.

3304 For similar reasons, Optus cannot successfully invoke s 45(2)(a)(ii) of the *TP Act*. The Exclusivity Clause has not been shown to have had the purpose of substantially lessening competition in the retail pay television market.

20.6.4.3 EXCLUSIONARY PROVISION

3305 In my opinion, there is no substance to Optus' case insofar as it is based on cl 8A amounting to an '*exclusionary provision*' for the purposes of ss 4D and 45(2)(a)(i) of the *TP Act*. The findings I have made elsewhere in this judgment would preclude any such case succeeding.

20.6.5 Did Seven Breach cl 3A.2?

3306 Optus says that Seven breached its obligation under cl 3A.2 of the C7-Optus CSA to use its reasonable endeavours to procure that Optus Vision is offered Fox Sports on terms no less favourable than those accorded to any other person. Optus relies on the fact that Seven produced no documents in response to a notice to produce seeking any documents evidencing steps taken by Seven to comply with cl 3A.2. It also relies on the fact that Mr Stokes had become aware by 4 December 2001 that Foxtel and Optus were engaging in content sharing discussions. Optus submits that Seven should thereupon have consented to such discussions taking place, so as to relieve Optus from the threat of any non-compliance with cl 8A of the C7-Optus CSA. Any conflict between cl 3A.2 and cl 8A should be resolved in favour of the former.

3307 The evidence does not support Optus' contentions. Before December 2001, Telstra refused to countenance the supply of Fox Sports to Optus. There was nothing Seven could have done to alter this state of affairs. Nor was Seven asked by Optus to do anything in or after December 2001. Seven could not reasonably have been expected to volunteer its consent to discussions reported in the media, when its consent was not sought. In any event, even if Seven was under some obligation to consent to a course without being asked, the absence of consent made no difference to Optus' conduct.

20.6.6 Waiver, Estoppel and the Like

3308 Optus submits that Seven's knowledge of its content sharing discussions with Foxtel and Fox Sports, taken together with the March Variation Agreement and the associated programming agreements, constituted a waiver of any claim to damages Seven may have had for breach of the Exclusivity Clause. It is not necessary to examine the submission in detail as it is without substance: cf *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, at 421-422, [113], per Finn and Sundberg JJ.

3309 The most remarkable aspect of the rather curious submissions from both parties on this topic is Seven's contention that it was not in any event bound by the March Variation Agreement. It asserts that Seven Network did not execute the March Variation Agreement, apparently choosing to ignore the fact that one copy of the Agreement appears to be executed on behalf of C7. (A little judicial detective work, based on the evidence, suggests that the Agreement was signed on behalf of C7 by two directors, Mr Lewis and Ms Howard.) Seven also attempts to sidestep Mr Wise's written confirmation that the documents provided to him by Optus were in the form agreed between the parties, by asserting that there was an understanding that the Agreement would not be binding until '*the boards of Seven and C7 execute[d] them*'. If anything, this submission is even more baseless than Optus'.

21. FURTHER CAUSES OF ACTION

3310 In this Chapter, I deal with Seven's causes of action based on:

> Foxtel Cable's alleged contravention of the anti-siphoning regime created by the *BS Act*; and
>
> alleged contraventions by News, Foxtel, PBL, Telstra, Nine and Fox Sports of s 45D of the *TP Act*; and
>
> alleged contraventions by Foxtel, Fox Sports and Optus of s 45(2) of the *TP Act*, by reason of the Optus-NRL Licence containing an '*exclusionary provision*' within the meaning of s 4D of the *TP Act*.

3311 Seven also pleads causes of action founded on ss 45DA and 151AK of the *TP Act*, but it does not press these claims.

21.1 Breach of the Anti-Siphoning Regime

21.1.1 Relief Claimed

3312 Seven pleads a case based on an alleged breach by Foxtel Cable of a condition of its subscription broadcasting licence. Foxtel Cable is said to have breached cl 10(1)(e) of Pt 6 of Sch 2 to the *BS Act* which, as I have explained in Chapter 4, is a key element in the statutory anti-siphoning regime.

3313 For convenience, I set out again the condition that cl 10(1)(e) imposes on subscription television licensees:

> *'the licensee will not acquire the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under subsection 115(1) unless:*
>
> *(i) a national broadcaster has the right to televise the event on any of its broadcasting services; or*
>
> *(ii) the television broadcasting services of commercial television broadcasting licensees ... who have the right to televise the event cover a total of more than 50% of the Australian population'.*

3314 Seven originally sought damages from Foxtel Cable as the result of the latter's alleged breaches of the anti-siphoning regime. As I followed its original damages case, Seven alleged that, in some way, breaches of the anti-siphoning regime enabled Foxtel to obtain the AFL pay television rights and Fox Sports to obtain the NRL pay television rights, thereby contributing to C7's demise.

3315 This rather far-fetched claim appears to have been abandoned by Seven. It now seeks only declaratory relief in respect of Foxtel Cable's alleged breach of cl 10(1)(e), as follows:

> *'A declaration that in acquiring the rights to broadcast the Foxtel exclusive matches at a time when no national broadcaster and no commercial television licensee has the right to broadcast the matches within the meaning of clause 10(1)(e) of Schedule 2 to the [BS Act], as described in paragraphs 510 to 522 [of the Statement of Claim], Foxtel Cable Television has breached a condition of its subscription television broadcasting licences.*
>
> *A declaration that in acquiring the rights to broadcast the Fox Sports exclusive matches at a time when no national broadcaster and no commercial television licensee has the right to broadcast the matches within the meaning of clause 10(1)(e) of Schedule 2 to the [BS Act], as described in paragraphs 510 to 518 and 523 to 525 [of the Statement of Claim], Foxtel Cable Television has breached a condition of its subscription television broadcasting licences'.*

3316 At one point, Seven relied on its claim that Foxtel Cable had breached the anti-siphoning regime in support of its contention that the pleaded AFL and NRL pay rights markets existed at the relevant times. It has not, however, persisted with that claim. As explained in Chapter 12, Seven does not rely on any alleged contravention of the statutory anti-siphoning regime in support of its arguments on market definition.

3317 Since Seven neither claims damages in respect of any contravention of the anti-siphoning regime nor relies on any alleged contravention to bolster its market definition case, it is not entirely clear what utility there would be in purely declaratory relief. It may be that, despite the changes to the regulatory regime that were introduced after December 2000 and despite the apparent lack of interest by the regulator in these matters, declarations would vindicate the public interest in the enforcement of the statutory regime: cf *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd* (1997) 73 FCR 429, at 430-431, per *curiam* ([318]). In any event, I am prepared to approach Seven's claim that Foxtel Cable contravened the anti-siphoning regime on the basis that there may be utility in granting only

declaratory relief, should a contravention be made out.

3318 I am also prepared to assume, without deciding, that Seven has a 'special interest in the subject matter of the action' to give it standing to seek declaratory relief: Shop Distributive & Allied Employees Association v Minister for Industrial Affairs (SA) (1995) 183 CLR 552, at 558, per curiam; Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247, at 256 [21]-[23]; 266-268 [42]-[52] per Gaudron, Gummow and Kirby JJ (with whom Hayne J agreed).

21.1.2 Seven's Pleadings

3319 Seven pleads that pursuant to the Foxtel Put, the News-AFL Licence and the News-Foxtel Licence:

> three matches in each round of the AFL Competition were designated '*Foxtel exclusive matches*'; and
>
> for each Foxtel exclusive match broadcast by a free-to-air broadcaster earlier than 14 days after the day on which it was played, the AFL was to pay to Foxtel an amount of $500,000 per match (par 519).

3320 Complementary provisions in the Nine Put, the News-AFL Licence and the News-Nine Licence obliged Nine to pay $500,000 to the AFL for each of the Foxtel exclusive matches broadcast by Nine earlier than 14 days after the day on which it was played (par 520). Similar provisions in the Ten Put, the News-AFL Licence and the News-Ten Licence applied to Ten (par 521).

3321 Further, News and Nine were each party to an understanding, the substance of which was that Nine would not exercise any right it had to broadcast any of the Foxtel exclusive matches (par 520A). The particulars to par 520A state that the:

> *'understanding is implicit in the fact that, pursuant to the Nine Put, the News/AFL Licence and the News/Nine Licence, Nine must pay $500,000 for each Foxtel exclusive match which is broadcast by Nine earlier than 14 days after the day on which it is played'.*

A similar understanding is said to have existed between News and Ten (par 521A).

3322 By reason of the matters pleaded in pars 519 to 521A:

> *'at the time that Foxtel Cable … acquire[d] the right to broadcast the Foxtel exclusive matches, no national broadcaster and no commercial television licensee ha[d] the right to broadcast the matches within the meaning of clause 10(1)(e) of [Sch 2 to the* BS Act*]'* (par 522).

3323 A similar case is pleaded in relation to the '*Fox Sports exclusive matches*' (pars 523-525).

3324 By reason of the loss of the AFL and NRL pay television rights and the effect of that loss, C7 suffered special damage as a result of Foxtel Cable's breaches of its subscription television licences (par 528).

21.1.3 Reasoning

21.1.3.1 SEVEN'S CASE

3325 There is no doubt that considerable thought and ingenuity went into the formulation of provisions incorporated into the various licence and put agreements, although there were precedents such as the 1998 NRL free-to-air licence. The legal ingenuity, which was largely Mr Philip's contribution to the endeavour, was enlisted in order to ensure that Foxtel and Fox Sports achieved reasonable commercial certainty in the scope and content of their respective pay television rights without breaching the statutory anti-siphoning regime.

3326 On one view, the incorporation into the agreements of a right to televise an event subject to an obligation to make a very large payment might have been designed to subvert the objective of the anti-siphoning regime as identified by the Court in *Foxtel v Nine Network*. The Court said (73 FCR, at 431) that the anti-siphoning provisions:

> *'encourage the free-to-air transmission of declared events by removing any incentive for a subscription service to "lock away" the exclusive rights; if it does so, it loses its own right to televise the event'.*

That this is the statutory objective does not necessarily mean, however, that the techniques adopted in the present case involved a contravention of cl 10(1)(e) of Pt 6 of Sch 2 to the *BS Act*.

3327 Seven's written submissions do not make clear the precise time at which Foxtel Cable

is said to have acquired the rights to broadcast the Foxtel exclusive matches. The Statement of Claim merely pleads that Foxtel sub-licensed the AFL pay television rights to Foxtel Cable (par 512), without specifying when this occurred.

3328 As best I can make out, Seven's case appears to be that Foxtel Cable acquired the rights to the Foxtel exclusive matches shortly after the execution of the last of the Foxtel Put (14 December 2000), the AFL-News Licence (19 December 2000) and the News-Foxtel Licence (about 25 January 2001). At that time, Foxtel Cable (in the language of cl 10(1)(e)) acquired the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under s 115(1) of the *BS Act*. The '*event*' comprised the three Foxtel exclusive matches, which were included within the anti-siphoning list. Seven says that if Foxtel Cable acquired its right to televise the AFL exclusive matches at a time when no free-to-air broadcaster had the right to televise the event, Foxtel was in breach of cl 10(1)(e).

3329 Seven's case makes the assumption that it is irrelevant that the three Foxtel exclusive matches to be shown on pay television could not be precisely identified until Nine and Ten had made their selection of five free-to-air matches in each round. (Pursuant to cl 6 of each of the Nine Put and Ten Put, these selections had to be made by Nine and Ten six weeks in advance of each round of matches.) Although the assumption is disputed by News, I proceed on the basis that it is also correct.

3330 Seven seems to accept that:

> the AFL-News Licence granted News the free-to-air television rights to **all** AFL matches (subject to Seven's last right of refusal);
>
> the News-Nine Licence and the News-Ten Licence granted Nine and Ten, between them, the free-to-air television rights to **all** AFL matches; and
>
> these licences were in place at the time Foxtel Cable acquired its rights to the Foxtel exclusive matches from Foxtel.

3331 Seven says that the relevant question is whether '*in respect of the acquisition by Foxtel Cable ... of the rights to televise AFL matches on ... Foxtel*', free-to-air broadcasters had the '*right*' to televise those matches within the meaning of the *BS Act*. Seven submits that where the relevant right (by which Seven means the right of the free-to-air broadcasters):

'(a) is subject to an understanding or agreement that it will not be exercised; and/or

(b) is subject to the payment of a financial penalty which is so disproportionate to the value of the live broadcast right to FTA that it has the effect of preventing the exercise of the "right",

then the relevant commercial television broadcasting licensee or licensees are subject to a sufficient fetter that they do not have the "right to televise the event" within the meaning of the [BS Act]'.

21.1.3.2 AN UNDERSTANDING AS ALLEGED?

3332 In the particulars to the Statement of Claim, Seven states that the understanding upon which it relies is implicit in the fact that Nine and Ten had to pay $500,000 for each Foxtel exclusive match broadcast within 14 days of the day on which the match was played. In its Closing Submissions, Seven does not base its case simply on the terms of the various licences, but relies on a number of documents to establish the existence of the pleaded understanding.

3333 In my view, these documents do not establish that there was an understanding that neither Nine nor Ten would exercise their respective contractual rights to broadcast live the Foxtel exclusive matches upon payment of a fee of $500,000 per match. The understanding so far as Nine was concerned was that embodied in the AFL-News Licence and the Nine Put: that is, that if Nine exercised its rights in respect of any of these matches it would pay $500,000. In my opinion, the position was the same in relation to Ten.

3334 None of the Respondents' witnesses was specifically asked about the understanding alleged by Seven. In particular, none was asked whether it was understood that neither Nine nor Ten would exercise its contractual right to broadcast Foxtel exclusive matches upon payment of $500,000 per match, even if there were sound commercial reasons for them to do so. An exchange with Mr Philip took place as follows:

'[MR SUMPTION:] But you do accept that each of [the proposed sub-licensees] appreciated that they were participating in a broader arrangement negotiated by News involving a share-out of rights between three identifiable parties? --- I wouldn't use the word "share", but they – I think it's obvious that they knew of each other's existence, and it's obvious from the mechanics of the agreements that other entities other than themselves were taking other rights from News'.

3335 In this exchange, Mr Philip did not adopt the word '*share*' and the matter was not pursued further. It is one thing to show that there were multilateral arrangements in place, notwithstanding Mr Philip's heroic attempts to create the impression of a series of independent bilateral agreements. It is another to establish that the multilateral arrangements encompassed the particular understanding on which Seven relies in its case that Foxtel Cable contravened the anti-siphoning regime.

3336 No doubt Foxtel expected that neither Nine nor Ten would choose to exercise its right to broadcast live any of the Foxtel exclusive matches. That expectation, which turned out to be justified, would have been based on the knowledge that if either chose to exercise its contractual right, it would have to pay the very large fee stipulated by the News-Nine Licence or the News-Ten Licence. The fact that they had that expectation does not demonstrate that there was an understanding that neither Nine nor Ten would exercise their respective contractual rights, even if commercial circumstances warranted them in paying the specified fee. In my view, the evidence does not establish the existence of an understanding in the terms alleged by Seven.

21.1.3.3 A DISPROPORTIONATE PENALTY?

3337 The second limb of Seven's argument depends on the so-called '*financial penalty*' of $500,000 for broadcasting a Foxtel exclusive match being:

> *'so disproportionate to the value of the live broadcast rights ... that it has the effect of preventing the exercise of the "right"'.*

The assumption underlying this contention is that a '*disproportionate*' payment that must be which a party must make if it exercises a right to televise a sporting event live, in effect negates the existence of that party's '*right to televise the event*' within the meaning of cl 10(1)(e) of Pt 6 of Sch 2 to the *BS Act*. Again, I proceed on the basis that this assumption is correct, although it is not necessarily free from difficulty.

3338 Seven's submissions do not make it clear how the proportionality of what it describes as the '*penalty*' for broadcasting the Foxtel exclusive matches is to be assessed. As News points out, there may be aspects of free-to-air broadcasting that make the rights to matches very valuable for reasons that are not easy to quantify precisely in monetary terms. In particular, the value of a given match or series of matches may not merely be reflected in a

mathematical calculation derived from the general contractual arrangements entered into for the AFL free-to-air or pay television rights.

3339 Seven points out that the figure of $500,000 for each Foxtel exclusive match was first mooted by Mr Philip in his memorandum to Mr Frykberg of 29 August 2000. Mr Philip chose that figure, so his memorandum suggests, because it was '*unlikely*' that the free-to-air television operators would broadcast the Foxtel exclusive matches if they had to pay the fee.

3340 Until December 2000, the proposal for News to acquire the broadcasting rights contemplated that Foxtel would take a sub-licence of the AFL pay television rights for $17.5 million per annum (plus adjustments) for three matches per week. Nine was to pay $20 million for three free-to-air AFL matches per week and Ten $23 million for two free-to-air AFL matches per week plus the finals. Seven says that the figure of $500,000 per Foxtel exclusive match compares with $265,151 per regular season AFL pay television match ($17.5 million divided by 66 regular season AFL pay television matches). Following this logic, the figure of $500,000 per match can be compared with $363,636 per regular season AFL free-to-air television match ($40 million, after making an allowance for finals matches, divided by 110 regular season AFL free-to-air matches).

3341 By the time the various put agreements and licence agreements came into force, Foxtel had agreed to pay $30 million per annum (plus adjustments) for the pay television rights to three AFL matches each week of the regular season. The value of each Foxtel exclusive match, assessed on a purely mathematical calculation, was therefore $454,545 ($30 million divided by 66 regular AFL season matches). This figure is only marginally (less than 10 per cent) lower than the figure of $500,000 per Foxtel exclusive match specified in the News-Nine Licence and the News-Ten Licence.

3342 On this material, I cannot conclude that the fee provided by the News-Nine Licence and the News-Ten Licence for each Foxtel exclusive match constituted a '*penalty*' so disproportionate that it effectively prevented Nine and Ten from exercising their contractual rights to broadcast any or all of the Foxtel exclusive matches. The fee of $500,000 per match may have discouraged Nine and Ten from exercising their contractual rights in respect of the Foxtel exclusive matches, but it did not '*prevent*' them from doing so as Seven alleges.

21.1.3.4 ADDITIONAL COMMENTS

3343 I add these comments. The structure and detail of any statutory anti-siphoning regime are, of course, matters for Parliament. So, too, are the merits of the policies underlying any such regime.

3344 The current regime appears to involve a mixture of objectives. At one level, the aim is presumably to ensure (or at least encourage) the live broadcasting of certain popular sporting events on free-to-air television, rather than have live coverage reserved exclusively for pay television subscribers. At another level, the regime may be designed to provide a form of programming protectionism in favour of free-to-air television operators and against the interests of pay television platforms. To the extent that the statutory regime serves the latter purpose, the form of the current regime may reflect successful lobbying of successive Governments by free-to-air television operators, rather than broader public policy objectives.

3345 Whatever the objectives of the current anti-siphoning regime, the time may have arrived for a review of its practical operation. This case reveals the techniques that have been employed for allocating '*marquee*' sporting rights between free-to-air television operators and pay television platforms. It appears that these techniques are now widely used and indeed have been used for some time within the industry. If the techniques are thought to achieve a satisfactory accommodation of the competing interests, including those of free-to-air viewers, there will presumably be no need for change. If, on the other hand, the ability, in practice, of free-to-air television operators and pay television platforms to agree in advance on a carve-up of marquee sports rights is thought to be inconsistent with the objectives of the regime, a review would no doubt suggest legislative amendments.

21.2 Seven's Case under s 45D of the *TP Act*

21.2.1 Legislation

3346 Section 45D of the *TP Act* relevantly provides as follows:

> *'(1) In the circumstances specified in subsection (3) ... a person must not, in concert with a second person, engage in conduct:*
>
> *(a) that hinders or prevents:*
>
> *(i) ...*

> *(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and*
>
> *(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.*
>
> *(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.*
>
> *(3) Subsection (1) applies if the fourth person is a corporation'.*

3347 Section 4F of the *TP Act* (which defines the term '*purpose*') does not apply to s 45D(1). However, s 45D(2) provides that a person is taken to engage in conduct for a purpose mentioned in s 45D(1) if the person engages in conduct for purposes that include that purpose.

3348 Section 4(2) of the *TP Act* provides that a reference to '*engaging in conduct*':

> *'shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding …'*

21.2.2 Seven's Pleading

3349 Seven pleads, in relation to each of the Master Agreement and the other agreements identified in the Statement of Claim, that:

> *'the entering into and giving effect to those contracts, arrangements or understandings was conducted by News, PBL, Telstra, Foxtel, Nine and Fox Sports in concert with each other'* (par 393).

3350 Seven repeats a number of pleaded allegations including the following:

> the parties to the Master Agreement gave effect to the Master Agreement Provision by entering into the Acquisition Agreements (par 224);
>
> the Master Agreement Provision had or was likely to have the effect of substantially lessening competition in the various pleaded markets (par 225); and

each of the other provisions pleaded by Seven had or was likely to have the effect of substantially lessening competition in those markets (par 228).

3351 By reason of these matters, the conduct pleaded in par 393, in respect of each of the contracts, arrangements or understandings, had the effect or likely effect of substantially lessening competition, as pleaded earlier in the Statement of Claim (par 394).

3352 Seven also repeats its allegations concerning the purpose of the Master Agreement Provision (par 396).

3353 By reason of the matters pleaded in pars 393 to 396, the conduct pleaded in par 393:

'(a) hinder[ed] or prevent[ed] providers of pay television services from acquiring sports channels from C7; and

(b) [was] engaged in for the purpose (or alternatively for purposes including the purpose), and would have or be likely to have the effect, of:

(1) causing substantial loss or damage to the business of C7; and

(2) causing a substantial lessening of competition in the retail pay television market, or alternatively [other pleaded markets].

Particulars

The effect of the conduct on C7 is that C7 has been unable to supply pay television channels to Optus, Austar or Foxtel and was compelled to cease operations, and is thus hindered or prevented from supplying sports channels to pay television service providers, including Optus, Austar and Foxtel'.

21.2.3 Seven's Submissions

3354 Seven's Closing Submissions present Seven's case in the following steps:

the first and second persons for the purposes of s 45D(1) of the *TP Act* are any two of News, PBL, Telstra, Foxtel, Nine and Fox Sports;

the third person is any retail provider of pay television services, including Foxtel, Optus and Austar;

the fourth person is C7;

the parties to the Master Agreement gave effect to the '*overarching*

agreement' to carry out the AFL Proposal and NRL Proposal;

the relevant conduct in concert was the agreement to carry out both the AFL and NRL Proposals and to do so by entering into the Acquisition Agreements;

the immediate effect of the News-Foxtel Licence was that Foxtel acquired the AFL pay television rights and C7 did not;

as the supply of the AFL content was a '*central obligation*' of the C7-Optus CSA and the C7-Austar CSA, Optus and Austar were hindered or prevented from acquiring the C7 channels with which C7 had agreed to provide them; and

the impact on C7 was delayed for 12 months, but its business was nonetheless damaged in consequence of the conduct in concert.

21.2.4 Reasoning

21.2.4.1 ANY PRACTICAL SIGNIFICANCE?

3355 Seven in its Reply Submissions dismisses out of hand News' contention that it is difficult to see how Seven's s 45D claim can have any practical significance in this litigation. Seven points out that liability under s 45D of the *TP Act* does not depend on a finding that the alleged contravener had the purpose, or the relevant conduct had the effect or likely effect, of substantially lessening competition in a market. While that proposition is correct, it does not in my view overcome the problem identified by News having regard to the findings I have made.

3356 Seven has chosen to plead its s 45D case by incorporating allegations about the purpose or effect or likely effect of the pleaded provisions including the Master Agreement Provision. Those allegations are framed in terms of a purpose or effect of substantially lessening competition in specified markets. The alleged contraventions are said to have come about by virtue of the understanding whereby Foxtel and Fox Sports were to acquire the AFL pay television rights and the NRL pay television rights respectively, to the exclusion of C7. The understanding is said to have been entered into for the substantial purpose of killing C7.

3357 I have made findings of fact adverse to Seven in relation to both its case on purpose and on the alleged effect of substantially lessening of competition in the various pleaded

markets. I have rejected Seven's claim that each of those parties entered into the Master Agreement having the purpose of killing C7. I have also rejected Seven's claim that the effect or likely effect of the various provisions pleaded by Seven was the substantial lessening of competition in any of the markets identified by Seven. The factual foundation for Seven's pleaded case under s 45D of the *TP Act* is therefore wanting.

21.2.4.2 HINDERING OR PREVENTING

3358 A further difficulty facing Seven, in my view, is that its case is inconsistent with the holding of a majority of the High Court in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 (Brennan, Dawson and Toohey JJ; Mason CJ and Deane J dissenting). In that case, a group of milk vendors in New South Wales, each with a regional monopoly, acted in concert to withhold supplies of milk from Jewel, which conducted a supermarket chain in New South Wales. The purpose and likely effect of the conduct was to damage Jewel and to force it to cease purchasing milk from Victorian suppliers. Jewel claimed relief against the milk vendors by reason of their alleged contravention of s 45D(1)(b) of the *TP Act*. Section 45D at that time was in a different form, but Seven does not suggest that the drafting changes to s 45D effected in 1996 by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), Sch 17, are material to the present question.

3359 Jewel succeeded before the Full Federal Court, which, as Mason CJ explained in the High Court, analysed Jewel's case this way (172 CLR, at 36-37):

> each of the New South Wales milk vendors was a '*first person*';
>
> each other milk vendor was a '*second person*';
>
> customers of Jewel's supermarkets were '*third persons*'; and
>
> Jewel was the '*fourth person*'.

3360 The High Court, by majority, allowed the appeal of the milk vendors. Their Honours held that conduct which prevents a fourth person (Jewel) from acquiring supplies, does not constitute conduct which hinders or prevents third persons (Jewel's customers) from acquiring goods or services from the fourth person (Jewel).

3361 Brennan J, with whom Dawson J agreed, identified the question (172 CLR, at 46), as whether:

> *'the withholding of goods from a corporation whose business is the purchase and resale of goods amounts to conduct which hinders or prevents the acquisition by the corporation's customers of the goods withheld'.*

Brennan J accepted that, since the target's customers are unable to obtain the goods withheld from the target, there is a sense in which acquisition of those goods can be said to be hindered or prevented by conduct which consists merely in the hindering or preventing of supplies to the target. However, his Honour noted (172 CLR, at 47) that s 45D(1):

> *'proscribes conduct which hinders or prevents **supply to** a target corporation ("a fourth person") or which hinders or prevents **acquisition from** a target corporation; it does not proscribe conduct which hinders or prevents **acquisition or supply** by a target corporation. True it is that supply and acquisition are reciprocal activities but, as s. 45D(1) is expressed to relate only to supply to and acquisition from a target corporation, it distinguishes between those activities and the activities which are reciprocal to them. To give effect to that distinction, it is necessary to exclude from the net of s. 45D(1) conduct which impedes an activity mentioned in the sub-section (supply to or acquisition from a target corporation) **merely** by impeding the reciprocal activity which the sub-section does not mention (acquisition or supply by a target corporation). I would construe s. 45D(1) as requiring proof of conduct other than mere hindering or preventing of the supply of goods by the target corporation before it can be said that acquisition of those goods and services from the target corporation is hindered or prevented'.* (Emphasis in original.)

3362 Brennan J explained (172 CLR, at 47) the result as follows:

> *'In this case the [milk vendors] took no steps to hinder the acquisition by Jewel's customers of whatever goods Jewel had available for sale; the [milk vendors] simply failed to supply Jewel with New South Wales milk which Jewel could have supplied to the customers who sought it. For the reason stated, this did not amount to conduct which, in the sense in which s. 45D(1) uses the terms, hindered or prevented Jewel's customers from acquiring New South Wales milk – or any other milk, for that matter – from Jewel: there was simply no New South Wales milk available for acquisition'.*

See, too, 172 CLR, at 53, per Dawson J; at 57-58, per Toohey J.

3363 Seven seeks to distinguish *Devenish v Jewel* on two grounds:

> first, the goods or services which C7 was prevented from acquiring (the AFL pay television rights) were different from the products which C7's customers were unable to acquire (the C7 channels); and

secondly, the consequences of the conduct carried out in concert by the parties to the Master Agreement was not merely a refusal to supply a product, but the destruction of C7.

3364 In my opinion, the first ground rests on a distinction without a difference. It is hard to see why the ratio of *Devenish v Jewel* should be confined to the case where there is identity between the goods or services withheld from the target corporation (or which the target is prevented from acquiring) and the goods or services the target's customers are thereby prevented from acquiring. Particularly is this so where the target (C7) claims that the services that its customers cannot acquire (C7's channels) are unavailable precisely because the parties acting in concert have prevented the target from acquiring an ingredient (AFL sporting content) that it says is essential to the supply of the services (the channels) to the target's customers.

3365 The second ground also seems to me to rest on a distinction without a difference. Seven's case is that the AFL pay television rights were central to C7's very survival, not least because the loss of the AFL pay television rights exposed it to the loss of the benefits of the C7-Optus CSA and of the C7-Austar CSA. The reasoning of the majority in *Devenish v Jewel* does not suggest that the result in that case would have been different if the goods withheld from Jewel had been essential to its very survival as a supermarket chain. Had the goods been essential to Jewel's survival, it would presumably have sustained even greater loss or damage to its business than was occasioned or threatened by the conduct of the milk vendors. But the reasoning of the majority would still have prevented Jewel from gaining redress pursuant to s 45D(1) of the *TP Act*. Whether Jewel might have had a cause of action under any other provision of the *TP Act* is a separate question.

21.2.5 Conclusion

3366 For each of the reasons I have identified, Seven has not made out its cause of action based on s 45D of the *TP Act*.

21.3 Optus-NRL Licence

21.3.1 The Issue

3367 Seven pleads a cause of action founded on cl 9 of the Optus-NRL Licence. As has

been explained in Chapter 9, the Optus-NRL Licence set out the basis on which Fox Sports, with Foxtel's consent (required under the Umbrella Agreement), supplied Optus with the '*NRL on Optus*' channel during the 2001 season. Clause 9 of the Optus-NRL Licence provided as follows:

> *'The Channel can only be used by Optus as part of its Australian cable and satellite subscription television services for residential premises outside the Austar territory ... and may not be sublicensed, altered or re-branded by Optus'.*

Seven alleges that cl 9 was an '*exclusionary provision*' within the meaning of s 4D of the *TP Act*. Section 4D has been reproduced in Chapter 18, but I again reproduce s 4D(2) in this Chapter. Other relevant statutory provisions include ss 4F and 45(2) of the *TP Act* ([2080], [2084]).

21.3.2 Seven's Pleading

3368 There is no dispute about the existence of the Optus-NRL Licence, nor that cl 9 was a term of the Optus-NRL Licence (pars 367-368). Seven alleges that:

> in the absence of cl 9 of the Optus-NRL Licence, Optus would have been likely to sub-license the '*NRL on Optus*' channel to C7 to be included as part of the C7 channels supplied to Optus (par 369);
>
> cl 9 had the purpose of preventing Optus from acting on that intention (par 370);
>
> Foxtel and Optus were or would have been likely, but for cl 9, to have been in competition with each other for the acquisition of channels for broadcast on their pay television services (par 371); and
>
> cl 9 had the purpose of preventing the acquisition by Optus of channels incorporating NRL programming from C7 in 2001 (par 372).

3369 By reason of these matters, Foxtel (that is, Sky Cable and Telstra Media), Fox Sports and Optus entered into an agreement containing an '*exclusionary provision*' within the meaning of s 4D of the *TP Act*, in contravention of s 45(2)(a)(i) of the *TP Act* (par 373). Alternatively, the parties gave effect to an agreement containing an exclusionary provision, in contravention of s 45(2)(b)(i) of the *TP Act* (par 374).

3370 The relief sought by Seven includes declarations that in entering into the Optus-NRL Licence or in giving effect to cl 9, each of Foxtel, Fox Sports and Optus has engaged in conduct in contravention of s 45(2)(a)(i) and (b)(i) of the *TP Act*.

21.3.3 Seven's Submissions

3371 Seven submits that the substantial purpose of cl 9 of the Optus-NRL Licence was to prevent Optus acquiring C7 channels incorporating NRL programming. This objective was to be achieved by preventing Optus from sub-licensing NRL programming to C7. The protection of the Fox Sports brand was, at most, an incidental purpose of the parties to the Optus-NRL Licence.

3372 Seven contends that whether an exclusionary provision has the purpose of preventing, restricting or limiting the supply or acquisition of goods or services must be determined by reference to the subjective purpose of the parties to the contract. The relevant purpose need not be common to all parties. In this case, so Seven argues, cl 9 was inserted into the Optus-NRL Licence at the behest of Fox Sports. This was the culmination of a strategy driven by Mr Philip, a fact that was evident from documentation prepared from September 2000 onwards. Consequently, Fox Sports' subjective purpose was to prevent Optus from incorporating NRL coverage on non-Optus owned channels such as C7, as Optus had done in the past.

3373 Seven submits that at the time of entry into the Optus-NRL Licence, Foxtel and Optus were in competition in relation to the acquisition of pay television sports channels. Seven argues that it is not necessary for all parties to a contract containing an exclusionary provision to be competitive with each other, so long as at least two of the parties are competitive in this way. It is therefore irrelevant that Fox Sports was not in competition with Foxtel or Optus.

3374 The Statement of Claim does not expressly plead that the contraventions of s 45(2)(a)(i) and (b)(i) by the parties to the Optus-NRL Licence caused Seven loss or damage. Seven's Closing Submissions make no reference to any loss or damage said to flow from the contraventions. Nor is any mention made of how an award of damages, presumably pursuant to s 82 of the *TP Act*, might be calculated.

3375 In these circumstances, it is hardly surprising that News and PBL argue in their

written submissions that Seven has failed to identify any loss or damage attributable to the alleged contraventions. It follows, so they contend, that Seven cannot be awarded any damages. Perhaps out of an abundance of caution, News' written submissions also provide reasons why a damages claim would fail in any event.

3376 Not for the first time, Seven's Reply submissions raise a new issue. On this occasion, the new claim is that, by reason of the alleged contraventions, Seven lost a valuable opportunity:

> to continue to provide Optus with C7 channels that incorporated NRL programming during the period 2002 to 2006; and
>
> to bid for the AFL pay television rights and the NRL pay television rights for a term commencing in 2007, in circumstances where C7 had the benefit of an operating business.

3377 The belated identification of Seven's damages claim founded in cl 9 of the Optus-NRL Licence naturally prompted a reply from Mr Hutley in his oral submissions. He submitted that Seven's damages claim was misconceived.

21.3.4 Reasoning

21.3.4.1 DAMAGES

3378 It is convenient to commence with Seven's claims that it is entitled to damages by reason of cl 9 of the Optus-NRL Licence constituting an '*exclusionary provision*' for the purposes of s 45(2) of the *TP Act*. If Seven's damages claim lacks substance, the only other relief sought by Seven are the declarations set out earlier.

3379 I must confess to considerable difficulty in following Seven's damages claim, insofar as it is founded on cl 9 of the Optus-NRL Licence. Seven's Reply Submissions start with the proposition, apparently central to its damages case based on cl 9 of the Optus-NRL Licence, that but for Optus' unlawful conduct in relation to C7 (misleading or deceptive conduct, deceit and breach of contract), Optus would at some point in late 2001 or early 2002 have entered a new content supply agreement with C7 in place of the C7-Optus CSA. As I read Seven's Reply Submissions, they make Seven's damages claim based on cl 9 of the Optus-NRL Licence dependent on the success of its other causes of action against Optus.

3380 In Chapter 20, I have rejected Seven's case against Optus founded on misleading or deceptive conduct, deceit and breach of contract. It would seem to follow, given the way Seven presents its damages claim, that it cannot establish any loss or damage flowing from any contravention of s 45(2) of the *TP Act* by reason of the inclusion of cl 9 in the Optus-NRL Licence. In any event, it is difficult to see what loss or damage, whether in the form of a lost opportunity or otherwise, could be said to have been suffered by Seven '*by*' the conduct of the parties to the Optus-NRL Licence responsible for the inclusion of cl 9, assuming that their conduct contravened s 45(2) of the *TP Act*, (*TP Act*, s 82(1)). Clause 9 of the Optus-NRL Licence must be placed in the context of a much larger canvas.

3381 The Optus-NRL Licence was executed on or about 25 January 2001. During the preceding three years, C7 had not held the NRL pay television rights and, indeed, had never held the NRL pay television rights. From 1998 to 2000, Optus held the non-exclusive NRL pay television rights by way of a sub-licence from News pursuant to the Optus Pay TV Programming Agreement.

3382 Under cl 4.5 of the C7-Optus CSA, C7 was obliged, while Optus held NRL pay television rights, to include NRL programming in the C7 channels at no additional cost to Optus, unless Optus elected otherwise. Although Optus was obliged to bear the costs of production of NRL matches for broadcast on its platform, C7 derived no additional revenue from supplying the NRL coverage to Optus through its channels. In consequence, as News points out, C7 simply had a sub-licence from Optus to incorporate NRL programming into the C7 channels supplied to Optus (but not to any other pay television operator, such as Austar).

3383 Clause 9 of the Optus-NRL Licence prevented Optus from sub-licensing, altering or rebranding the '*NRL on Optus*' channel which was to be provided for the 2001 NRL season (February to the end of September 2001). During this period, the C7 channels continued to be supplied to Optus. The channels included '*marquee*' sports content because C7 retained the AFL pay television rights notwithstanding the events of December 2000, until the end of the 2001 AFL season.

3384 In the absence of cl 9 of the Optus-NRL Licence, the likelihood is that the previous arrangement between Optus and C7 in relation to NRL coverage would have continued for

the term of the Optus-NRL Licence. Seven submits that, but for the parties to the Optus-NRL Licence agreeing to the insertion of cl 9 and giving effect to its terms, C7 would have been in a position to make a valuable contribution to Optus, enabling Optus to broadcast a '*consolidated sports offering including one premium sport namely, the NRL*'. Hence, so it argues, Optus would have been more likely to enter a new content supply agreement with C7.

3385 Seven seems to accept that C7 derived no revenue from the placement of NRL programming in the channels supplied to Optus; that C7 had premium sporting content on its own channels in 2001 in the form of AFL programming; that the Optus-NRL Licence lasted only for the 2001 NRL season; and that there were many factors that contributed to Optus terminating the C7-Optus CSA and not replacing it with any further content supply agreement with C7. Seven does not point to any evidence suggesting that, had Optus retained the ability to incorporate NRL programming into the C7 channels during the 2001 season, that would have made the slightest difference to the course of events. In particular, Seven does not identify any evidence supporting its contention that C7, in those circumstances, would have had better prospects of securing a further content supply agreement from Optus.

3386 No such proposition was put to any of Optus' witnesses. More importantly, the events leading to Optus' decision to terminate the C7-Optus CSA and enter into the Foxtel-Optus Term Sheet and the subsequent Foxtel-Optus CSA do not provide any basis for thinking that removing cl 9 from the Optus-NRL Licence would have increased C7's chances of securing a further content supply agreement from Optus. These events came about because of CMM's poor financial performance, the resolution of the disputes among the Foxtel partners and C7's loss of the AFL pay television rights. They were not influenced by Optus' inability to place NRL programming on branded C7 channels during the 2001 NRL season.

3387 The suggestion that cl 9 of the Optus-NRL Licence denied C7 the opportunity to bid for the AFL or NRL pay television rights for 2007 and beyond as an operating business, in my opinion, is fanciful.

21.3.4.2 CLAIM FOR DECLARATORY RELIEF

3388 In resisting Seven's claim for declaratory relief in relation to cl 9 of the Optus-NRL Licence, the Respondents, as is customary in this case, advance many arguments. Not all

appear to be particularly compelling. It is necessary, however, only to consider their submission that Seven has not established that Foxtel and Optus were '*competitive with each other*' within the meaning of s 4D(1) of the *TP Act*.

3389 The resolution of this issue turns on s 4D(2) of the *TP Act* which provides, relevantly, as follows:

> *'A person shall be deemed to be competitive with another person for the purposes of subsection (1) if, and only if, the first-mentioned person ... is, or is likely to be, or, but for the provision of any contract ... would be, or would be likely to be, in competition with the other person ... in relation to the supply or acquisition of all or any of the goods or services to which the relevant provision of the contract ... relates'.*

3390 It appears to be common ground that the time for assessing whether a person is or is likely to be in competition with another person, for the purposes of s 4D(2), is the time at which the relevant contract is entered into: *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2000) 186 ALR 731, at 757 [133], per Sackville J, and cases cited there (reversed on other grounds: *Australian Competition and Consumer Commission v Visy Paper Pty Ltd* (2001) 112 FCR 37; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1). As Seven points out, s 4D(2) speaks not only of persons who are in competition with each other, but of those who are **likely to be in competition** with each other. In this context, as I have explained elsewhere ([2231]-[2233]), '*likely*' means a '*real chance or possibility*'.

3391 Seven identifies the critical question to be whether, as at 25 January 2001 (the date of the execution of the Optus-NRL Licence), there was a real chance or possibility that Foxtel and Optus would be in competition for the acquisition of channels incorporating NRL programming. Seven propose an affirmative answer to this question. Seven acknowledges that by 25 January 2001, Foxtel had secured the Fox Sports channels containing NRL content until 2006. However, Seven argues that, at the expiration of that period, Foxtel and Optus again would be '*likely to be*' in competition for the acquisition of a channel with NRL programming.

3392 PBL relies on the closing words of s 4D(2) to support a narrow construction of the '*services*' in respect of which competition or likely competition must exist. Those words

refer to two or more persons who are, or are likely to be, in competition:

> *'in relation to the supply or acquisition of all or any of the ... services to which the relevant provision of the contract ... relates'.*

3393 PBL argues that the only services to which cl 9 of the Optus-NRL Licence relate are either the 2001 '*NRL on Optus*' channel itself, or the NRL content included in that channel for the 2001 season. PBL says that Foxtel and Optus could not have been in competition (or likely to be in competition) for these services simply because Foxtel had already acquired them before 25 January 2001.

3394 In my view, PBL's submissions take too narrow a view of the expression '*services to which the relevant provision of the contract ... relates*'. As Seven points out, PBL effectively contends that an agreement for the supply of goods or services '*relates*' only to the particular goods or services which are the subject matter of the agreement. If this interpretation is correct, s 4D would have little room for operation, since the particular goods or services will usually be within the exclusive control of the supplier **before** the parties enter into the supply agreement.

3395 There is, however, another obstacle confronting Seven's argument. Seven maintains that there was a real chance or possibility, as at 25 January 2001, that Foxtel and Optus would compete for the acquisition of channels incorporating NRL content. Seven does not explain what form that competition would or might take.

3396 If Seven means that there was a real chance or possibility that Foxtel and Optus would compete for the **exclusive** right to take a sports channel with NRL content, that had not happened prior to January 2001. The reason is that the arrangements in relation to the supply of NRL content to Foxtel and Optus were governed by the 1998 Super League settlement. At the time the Optus-NRL Licence came into effect, there was no reason to think that there was anything more than the remotest prospect of Optus competing with Foxtel for the exclusive right to take NRL sports channels.

3397 If Seven means that there was a real chance or possibility, some years down the track, that Foxtel and Optus might each seek **non-exclusive** access to NRL sports channels, that prospect would not put them in competition for the channels. If one obtained non-exclusive

access to the channels in, say, 2006 or beyond, that would not preclude or inhibit the other from gaining similar non-exclusive access.

3398 In any event, as at 25 January 2001, as I have found in Chapter 18, Optus' future as a retail pay television provider was very doubtful. The only realistic possibilities open to Optus were to negotiate a content supply agreement with Foxtel (which eventuated) or implement a Manage for Cash strategy in relation to CMM. In neither case was there a real chance or possibility that Optus would compete with Foxtel for the acquisition of an NRL sports channel or, indeed, for any other pay television sports channel.

21.3.5 Conclusion

3399 In my view, Seven has not established its claim either for damages or declarations in relation to cl 9 of the Optus-NRL Licence.

22. NEXT STAGE

3400 In Chapter 2, I foreshadowed the orders I propose to make in these proceedings. Since Seven has failed to make out any of the causes of action on which it relies, the proceedings will be dismissed. The orders I make today will include directing Optus to bring in Short Minutes of Order in relation to the disposition of its Cross-Claim. However, I do not intend to make final orders at this stage.

3401 The issue of costs looms large in this case. It is therefore necessary to provide a timetable for the filing of any evidence and (brief) submissions on that topic.

3402 As I have explained, I also propose to give the parties an opportunity to make brief submissions as to whether I should address any issues relating to relief, including the assessment of damages. No such issues arise on the conclusions I have reached, but they may arise if an appeal is successful. I have not attempted in this judgment, for example, to assess the damages that would be awarded to Seven if, contrary to my conclusions, it had succeeded in establishing one or more in the many causes of action upon which it has relied. The major reason for not doing so is that there are a very large number of possible combinations and permutations and I simply do not know where to begin.

3403 In giving the parties the opportunity to make submissions as to the issues that might be addressed in a supplementary judgment, I make no commitment to follow any particular path, even if all the parties agree. This case has consumed a vast amount of Court time and public resources. Nonetheless, I intend to take into account what the parties choose to put forward (if anything).

3404 I propose to make the following directions:

1. Optus, on or before 24 August 2007, file and serve draft Short Minutes of Order disposing of the Cross-Claim.

2. The Respondents file and serve, on or before 24 August 2007, any evidence upon which they rely in relation to costs.

3. The Respondents file and serve, on or before 24 August 2007, written submissions as to costs.

4. Seven file and serve, on or before 7 September 2007, any evidence in reply on the question of costs.

5. Seven file and serve, on or before 7 September 2007, written submissions on costs.

6. The written submissions on costs of each group of Respondents not exceed ten double-spaced pages in length.

7. Seven's written submissions on costs not exceed 15 double-spaced pages in length.

8. Seven file and serve, on or before 24 August 2007, written submissions as to whether any further findings should be made in relation to damages or other relief ('*further findings*') and, if so, what issues and evidence would need to be addressed.

9. The Respondents file and serve, on or before 7 September 2007, written submissions as to whether any further findings should be made and, if so, what issues and evidence would need to be addressed.

10. Seven's submissions as to any further findings should not exceed 15 double-spaced pages in length.

11. The written submissions of each group of respondents as to any further findings should not exceed ten double-spaced pages in length.

12. The proceedings be adjourned until 17 September 2007, at 10.15 am.

ANNEXURES

ANNEXURE A

TABLE A.1: Anti-Siphoning List

ANNEXURE B

Lists of Abbreviations

TABLE B.1: The Parties

TABLE B.2: Other Abbreviations

TABLE B.3: Agreements

ANNEXURE C

TABLE C.1: Witness List

SEVEN

Lay Witnesses

Expert Witnesses

NEWS

Lay Witnesses

Expert Witnesses

TELSTRA

Lay Witnesses

PBL

Expert Witnesses

OPTUS

Lay Witnesses

ANNEXURE A

TABLE A.1: Anti-Siphoning List

Sport/Event	On list expiring 31 December 2005	On list starting 1 January 2006 and expiring 31 December 2010
Horse Racing		
Melbourne Cup.	Yes	Yes
Australian Rules Football		
Each match in the Australian Football League Premiership Competition, including the Finals Series.	Yes	Yes
Each Australian Football League State of Origin match.		
Rugby League		
Each match in the National Rugby League Premiership competition including the finals series.	Yes	Yes
Each match in the Rugby League State of Origin Series.	Yes	
Each Rugby League international 'Test' matches involving the senior Australian representative team, whether played in Australia or overseas.	Yes	Yes
Any other match involving the senior Australian representative team whether played in Australia or overseas (only listed on the anti-siphoning list from 11 May 2004).	Yes	Yes
Rugby Union		
Each Rugby Union International '*Test*	Yes	Yes

match' involving the senior Australian representative team whether played in Australia or overseas.	Yes	Yes
Each match in the Rugby World Cup tournament.	Yes	-
Each match in the Hong Kong Sevens Tournament		
Cricket		
Each '*Test*' cricket match involving the senior Australian representative team, whether played in Australia or overseas.	Yes	-
Each '*Test*' cricket match involving the senior Australian representative team played in Australia or the United Kingdom.	-	Yes
Each one day cricket match (including World Series Cricket matches), involving the senior Australian representative team, whether played in Australia or overseas.	Yes	-
Each one day cricket match involving the senior Australian representative team played in Australia or the United Kingdom, or as part of a series in which at least one match of the series is played in Australia.	-	Yes
Each World Cup one day cricket match.	Yes	Yes
Soccer		
Each finals match in the Ericsson Cup competition organised by the National Soccer League.	Yes	-
The English Football Association Cup final.	Yes	Yes
Each match in the Federation of International Football Associations World Cup tournament.	Yes	Yes

Tennis		
Each match in the Australian Open tennis tournament.	Yes	Yes
Each match in the Wimbledon (the Lawn Tennis championships) tournament.	Yes	Yes
Each match in the French Open tennis tournament.	Yes	Yes
Each match in the men's and women's singles quarter-finals, semi-finals and finals of the French Open tennis tournament.	Yes	
Each match in the United States Open tennis tournament.	Yes	
Each match in the men's and women's singles quarter-finals, semi-finals and finals of the United States Open tennis tournament.	Yes	Yes
Each match in the Australian Men's Hardcourt Championships tennis tournament …	Yes	-
Each match in the Australian Women's Hardcourt Championships tennis tournament …	Yes	
Each match in the (New South Wales) Peters International tennis tournament (now known as the Adidas International Tennis Tournament).	Yes	-
Each match in each tie in the Davis Cup tournament when an Australian Representative team is involved.	Yes	Yes
Netball		
Each international netball match involving the Australian representative team, whether played in Australia or overseas.	Y	Yes
Basketball		
Each match in the Australian National Basketball League playoffs.	Yes	-

Golf		
Each round of the Australian Masters tournament.	Yes	Yes
Each round of the Australian Open tournament.	Yes	Yes
Each round of the United States Masters tournament.	Yes	Yes
Each round of the United States Open tournament.	Yes	-
Each round of the United states Professional golf Association Championship tournament.	Yes	-
Each round of the British Open tournament.	Yes	Yes
Motor sport		
Each race in the Federation Internationale de l'Automobile formula 1 World championship (Grand Prix).	Yes	-
Each race in the Federation Internationale de l'Automobile Formula 1 World Championship (Grand Prix) held in Australia.	-	Yes
Each race in the International Federation of Motorcycling World 500cc Motorcycle championship…	Yes	-
Each race in the International Federation of Motorcycling world 500cc Motorcycle Championship … held in Australia.	-	Yes
Each race in the Australian Touring Car championship …	Yes	Yes
Each Bathurst 1000 race.	Yes	Yes
Each race in the Australian IndyCar grand Prix …	Yes	Yes
Olympic Games		
Each event held as part of the Olympic Games.	-	Yes

Commonwealth Games Each event held as part of the Commonwealth Games.	-	Yes

ANNEXURE B

LISTS OF ABBREVIATIONS

The abbreviations recorded in the following lists appear in bold in the judgment when the abbreviations are first used.

TABLE B.1: The Parties

Abbreviation	Full Name of Party	First reference
AFL	Australian Football League Ltd (formerly the Eleventh Respondent)	Ch 2 [83]
ARL	Australian Rugby Football League Ltd (Twelfth Respondent)	Ch 2 [110]
Austar	Austar Entertainment Pty Ltd and/or Austar United Communications Ltd	Ch 2 [85]
Austar Entertainment	Austar Entertainment Pty Ltd (Eighteenth Respondent)	Ch 2 [85]
Austar United	Austar United Communications Ltd (Seventeenth Respondent)	Ch 2 [85]
C7	C7 Pty Ltd (Second Applicant; Second Cross-Respondent)	Ch 1 [4]
Foxtel Cable	Foxtel Cable Television Pty Ltd (Fifteenth Respondent)	Ch 2 [150]
Foxtel Management	Foxtel Management Pty Ltd (Fourth Respondent)	Ch 2 [104]

Fox Sports	Premier Media Group Pty Ltd (Ninth Respondent)	Ch 3 [242]
News	News Ltd (First Respondent)	Ch 2 [79]
News Pay TV	News Pay TV Pty Ltd (Twentieth Respondent)	Ch 3 [195]
Nine	Nine Network Australia Pty Ltd (Eighth Respondent)	Ch 2 [80]
NRL	National Rugby League	Ch 2 [84]
NRLI	National Rugby League Investments Pty Ltd (Thirteenth Respondent)	Ch 2 [110]
NRL Ltd	National Rugby League Ltd (Fourteenth Respondent)	Ch 3 [203]
Optus	Optus Vision Pty Ltd and/or SingTel Optus Pty Ltd	Ch 1 [14]
Optus Vision	Optus Vision Pty Ltd (Sixteenth Respondent; First Cross-Claimant)	Ch 1 [14]
PBL	Publishing and Broadcasting Ltd (Seventh Respondent)	Ch 2 [79]
PBL Pay TV	PBL Pay TV Pty Ltd (Twenty-First Respondent)	Ch 3 [215]
Mr Philip	Ian Huntly Philip (Nineteenth Respondent)	Ch 2 [111]
Seven	Seven Network Ltd and/or C7 Pty Ltd	Ch 1 [4]

Seven Network	Seven Network Ltd (First Applicant; First Cross-Respondent)	Ch 1 [10]
SingTel Optus	SingTel Optus Pty Ltd (Twenty-Second Respondent; Second Cross-Claimant)	Ch 1 [14]
Sky Cable	Sky Cable Pty Ltd (Second Respondent)	Ch 2 [80]
Ten	Network Ten Pty Ltd (formerly the Tenth Respondent)	Ch 2 [84]
Telstra	Telstra Corporation Ltd (Fifth Respondent)	Ch 2 [79]
Telstra Media	Telstra Media Pty Ltd (Third Respondent)	Ch 2 [80]
Telstra Multimedia	Telstra Multimedia Pty Ltd (Sixth Respondent)	Ch 2 [80]

TABLE B.2 Other Abbreviations

Abbreviation	Full Meaning	First paragraph reference
7 Network	The free-to-air television broadcasting network known as the Seven Network.	Ch 3 [180]
ABA	Australian Broadcasting Authority.	Ch 4 [304]

ABC	Australian Broadcasting Corporation.	Ch 4 [345]
ACCC	Australian Competition and Consumer Commission.	Ch 1 [52]
ACE	Australian Capital Equity Pty Ltd.	Ch 3 [192]
Acquisition Agreements	The Foxtel Put, Nine Put, Ten Put, News-AFL Licence, News-Foxtel Licence, News-Nine Licence, News-Ten Licence, NRL Bidding Agreement and the Fox Sports-NRL Pay Rights Agreement.	Ch 13 [2115]
AFL free-to-air television rights	The rights to broadcast AFL matches as part of a free-to-air television service.	Ch 13 [2109]
AFL pay television rights	The rights to broadcast AFL matches as part of a subscription television service.	Ch 13 [2109]
AFL pay rights market	A market in Australia for the acquisition and supply of pay television rights to broadcast AFL matches.	Ch 12 [1804]
AFL Proposal	News' proposal pleaded in par 99 of the Statement of Claim.	Ch 13 [2110]
AGS	Australian Government Solicitor.	Ch 7 [629]
Application	Fifth Further Amended Application filed 22 June 2006.	Ch 2 [76]
ARPU	Average Revenue Per User.	Ch 11 [1528]

Australis	Australis Media Ltd.	Ch 6 [492]
CEO	Chief Executive Officer.	Ch 3 [192]
CMM	Consumer and Multimedia Division of SingTel Optus.	Ch 3 [270]
Commercial Broadcasters	7 Network, Nine Network, Ten Network and their regional affiliates.	Ch 4 [346]
Consortium Respondents	Alleged parties to the Master Agreement: News, PBL, Telstra and Foxtel.	Ch 2 [91]
Cross-Claim	Second Further Amended Cross-Claim, filed 9 February 2006, by Optus against Seven.	Ch 2 [121]
EBIT	Earnings before Interest and Tax.	Ch 7 [605]
EBITDA	Earnings before Interest, Tax, Depreciation and Amortisation.	Ch 11 [1512]
Fair Process Representation	The alleged representation, made by NRL Partnership and NRLI to Seven, that C7's bid for the NRL pay rights would be treated in a fair and impartial manner.	Ch 2 [112]
Foxtel	Used variously to refer to the Foxtel Partnership, the Foxtel partners, the Foxtel Platform or the Foxtel Service.	Ch 2 [81]
Foxtel partners	Sky Cable and Telstra Media	Ch 2 [83]

Foxtel Partnership	The partnership comprising Sky Cable and Telstra Media conducting a retail pay television business under the name '*Foxtel*'.	Ch 2 [103]
i7	i7 Ltd.	Ch 3 [192]
Liberty Sports	Liberty Sports Australia Pty Ltd.	Ch 6 [495]
McKinsey	McKinsey & Company.	Ch 11 [1562]
MCN	MultiChannel Network Pty Ltd.	Ch 3 [251]
MDS	Multipoint Distribution Service.	Ch 6 [496]
MSG	Minimum Subscriber Guarantee.	Ch 3 [267]
National Broadcasters	ABC and SBS.	Ch 4 [345]
Nine Network	Free-to-air television broadcasting network known as the Nine Network**.**	Ch 3 [216]
NPV	Net Present Value.	Ch 7 [594]
NRL	National Rugby League	Ch 2 [84]
NRL Competition	National Rugby League Competition.	Ch 3 [200]

NRL Partnership	The partnership between ARL and NRLI relating to the conduct of the NRL Competition.	Ch 2 [84]
NRL Pay Television Rights	The rights to broadcast NRL matches as part of a subscription television service.	Ch 13 [2109]
NRL Pay Rights Market	A market in Australia for the acquisition and supply of pay television rights to broadcast NRL matches.	Ch 12 [1804]
NRL PEC	NRL Partnership Executive Committee.	Ch 2 [111]
NRL Proposal	Fox Sports' proposal pleaded in par 99 of the Statement of Claim.	Ch 13 [2111]
Optus Cable	Optus' hybrid fibre coaxial cable network.	Ch 3 [262]
Optus Vision Media	Optus Vision Media Pty Ltd.	Ch 6 [506]
Pay TV Management	Pay TV Management Pty Ltd.	Ch 3 [198]
Premier Sports Australia	Premier Sports Australia Pty Ltd.	Ch 6 [495]
Pspm	Per Subscriber Per Month.	Ch 4 [359]
Respondents	All respondents to the proceedings, other than those against whom the proceedings were discontinued.	Ch 1 [5]
SBS	Special Broadcasting Service.	Ch 4 [345]

SingTel	Singapore Telecommunications Ltd.	Ch 3 [269]
SportsVision	SportsVision Australia Pty Ltd.	Ch 6 [507]
SSNIP	Small but Significant Non-transitory Increase in Price.	Ch 12 [1778]
Statement of Claim	Fifth Further Amended Statement of Claim filed 22 June 2006.	Ch 2 [76]
TAB	TAB Ltd.	Ch 12 [1857]
Tallglen	Tallglen Pty Ltd.	Ch 3 [260]
TARBS	TARBS World Television Australia Pty Ltd.	Ch 6 [561]
Telstra Cable	Telstra Multimedia's hybrid fibre coaxial cable network.	Ch 2 [86]
Ten Network	Free-to-air television broadcasting network known as the Ten Network.	Ch 3 [280]
TNCL	The News Corporation Ltd.	Ch 3 [79]
XYZ	XYZnetworks Pty Ltd.	Ch 12 [1976]

TABLE B.3 Agreements

Abbreviation	Full name of Agreement / Date of Agreement	First Mention
AFL Copyright Agreement	'AFL Copyright Agreement', 15 November 1996.	Ch 8 [832]
AFL-News Licence	'News/AFL – Pay TV and Other Rights Term Sheet', 19 December 2000.	Ch 3 [197]
AFL-Seven Licence	Consolidated licence agreement between AFL and Seven covering both the AFL-Seven Original Licence and the AFL-Seven Licence Extension.	Ch 8 [826]
AFL-Seven Licence Extension	'AFL Licence Extension Agreement', 15 November 1996.	Ch 3 [182]
AFL-Seven Original Licence	'*Agreement*', 8 November 1993, relating to AFL broadcasting rights.	Ch 3 [182]
BCA	'Broadband Co-operation Agreement', 14 April 1997.	Ch 2 [97]
BSD Side Agreement	'Foxtel/Australis Restructure – BSD Side Agreement', 25 July 1997.	Ch 3 [233]
C7-Austar CSA	'Heads of Agreement', 5 March 1999	Ch 3 [188]
C7-Optus CSA	'Channel Production and Supply	Ch 2 [115]

	Agreement', 30 June 1998.	
CWO Deed Poll	'*Optus Guarantor*', 10 September 2001.	Ch 3 [269]
Exclusivity Clause	Clause 8A of the C7-Optus CSA, inserted by the First Variation Agreement, 28 September 2001.	Ch 2 [115]
First and Last Deed	'*Deed*', 3 September 1997.	Ch 3 [197]
First Variation Agreement	'*Variation Agreement*' varying the C7-Optus CSA, 28 September 2001.	Ch 2 [115]
Fox Sports-Austar CSA	'Fox Sports Supply to Austar – Agreement', 3 September 1998.	Ch 3 [247]
Fox Sports-Austar Interim Licence	'Interim Arrangement', 13 May 1998.	Ch 6 [544]
Fox Sports-Foxtel Supply Agreement	'*Term Sheet*', 20 February 2002.	Ch 3 [246]
Fox Sports-NRL Pay Rights Agreement	'*Australian Subscription Television Rights - National Rugby League to Sports Investments Australia Pty Limited*', 13 December 2000. The name shown here is the name given to the agreement in the Pleadings, but note that this agreement is also referred to in the judgment as the **NRL-Fox Sports Licence** (see below)	Ch 13 [2115]
Fox Sports-NRL Pay Rights Agreement	Provisions of the Fox Sports-NRL Pay Rights Agreement pleaded in par 133 of	Ch 13 [2115]

Provisions	the Statement of Claim. These provisions is also referred to in the judgment as the **NRL-Fox Sports Licence Provisions** (see below).	
Fox Sports Option Deed	'Fox Sports Option Deed', 3 December 1998.	Ch 3 [244]
Foxtel-Austar Term Sheet	'Foxtel/Austar – Term Sheet', 2 May 1998.	Ch 6 [540]
Foxtel-Optus CSA	'Content Supply Agreement', 5 March 2002.	Ch 2 [103]
Foxtel-Optus CSA Provisions	Provisions of the Foxtel-Optus CSA pleaded in par 222 of the Statement of Claim	C 18 [2918]
Foxtel-Optus Fox Footy Agreement	'Fox Footy Channel Arrangement', 19 February 2002.	Ch 11 [1675]
Foxtel-Optus Term Sheet	'*Term Sheet*', 20 February 2002.	Ch 2 [116]
Foxtel Partnership Agreement	'Deed of Amendment and Restatement Amending and Restating the Foxtel Partnership Agreement dated 14 April 1997', 3 December 1998.	Ch 3 [225]
Foxtel Pay TV Rights Programming Agreement	'Foxtel Pay TV Rights Programming Agreement', 14 May 1998.	Ch 9 [1164]
Foxtel Put	'Pay Television – News/Foxtel', 14	Ch 13 [2115]

	December 2000.	
Foxtel Put Provision	A provision of the Foxtel Put pleaded in par 105 of the Statement of Claim.	Ch 13 [2115]
Foxtel-Telstra Resale Term Sheet	'Foxtel/Telstra Resale Term Sheet', 20 February 2002.	Ch 11 [1694]
Implementation Deed	'*Implementation Deed*', 21 November 2002.	Ch 6 [515]
Management Agreement	'Management Agreement', 14 April 1997.	Ch 3 [229]
March Variation Agreement	'Variation Agreement', 4 March 2002.	Ch 11 [1739]
Master Agreement	An arrangement made at a teleconference on 13 December 2000, pleaded in par 100 of the Statement of Claim.	Ch 2 [84]
Master Agreement Provision	A provision of the Master Agreement pleaded in par 102 of the Statement of Claim.	Ch 2 [88]
Merger Agreement	A series of agreements between News, ARL, NRL Partnership and Optus resolving the Super League dispute, 14 May 1998.	Ch 3 [255]
News-AFL Licence	'News/AFL – Pay TV and Other Rights Term Sheet', 19 December 2000.	Ch 13 [2115]

News-AFL Licence Provision	A provision of the News-AFL Licence pleaded in par 111 of the Statement of Claim.	Ch 13 [2115]
News-Foxtel Licence	'Pay Television – News/Foxtel' 25 January 2001.	Ch 13 [2115]
News-Foxtel Licence Provision	A provision of the News-Foxtel Licence pleaded in par 117 of the Statement of Claim.	Ch 13 [2115]
News-Nine Licence	'AFL Free To Air Term Sheet – News/Nine', on or about 25 January 2001.	Ch 13 [2115]
News-Nine Licence Provision	A provision of the News-Nine Licence pleaded in par 121 of the Statement of Claim.	Ch 13 [2115]
News-Ten Licence	'AFL Free To Air Term Sheet – News/Ten, on or about 25 January 2001.	Ch 13 [2115]
News-Ten Licence Provision	A provision of the News-Ten Licence pleaded in par 125 of the Statement of Claim.	Ch 13 [2115]
Nine Put	'AFL Free to Air Term Sheet – News/Nine' on or about 14 December	Ch 13 [2115]

	2000.	
Nine Put Provision	A provision of the Nine Put pleaded in par 107 of the Statement of Claim.	Ch 13 [2115]
NRL Agreements	A series of agreements annexed to the Merger Agreement, 14 May 1998.	Ch 6 [58]
NRL Bidding Agreement	'Internet and Sponsorship Rights – Fox Sports/Foxtel', 13 December 2000.	Ch 13 [2115]
NRL Bidding Agreement Provisions	Provisions of the NRL Bidding Agreement pleaded in par 130 of the Statement of Claim.	Ch 13 [2115]
NRL-Fox Sports Licence	'*Australian Subscription Television Rights - National Rugby League to Sports Investments Australia Pty Limited*', 13 December 2000. This agreement is also referred to in the judgment as the **Fox Sports-NRL Pay Rights Agreement** (see above) on the basis that it was given that name in the Pleadings.	Ch 9 [1377]
NRL-Fox Sports Licence Provisions	Provisions of the NRL-Fox Sports Licence pleaded in par 133 of the Statement of Claim. These provisions are also referred to as the **Fox Sports-NRL Pay Rights Agreement Provisions** (see above).	Ch 13 [2102]
NRL Free-to-Air	'NRLP Australian Free-to-Air Television Rights Licence Agreement',	Ch 9 [1161]

Licence	14 May 1998.	
NRL Naming Rights Sponsor Agreement	'NRL Naming Rights Sponsor Agreement', 13 December 2000	Ch 9 [1380]
NRL-News Pay Rights Agreement	'*Australian Pay Television Rights – NRL to News*' (Annexure J to the Merger Agreement), 14 May 1998.	Ch 3 [196]
NRL Partnership Agreement	'Partnership Agreement – NRL Partnership', 14 May 1998.	Ch 3 [253]
NRL Services Agreement	'*NRL Services Agreement*' (Annexure D to the Merger Agreement), 14 May 1998.	Ch 3 [256]
Optus-NRL Licence	The 'Optus/NRL Licence Agreement', 25 January 2001.	Ch 9 [1414]
Optus Partners Funding Deed	'Optus/Partners Funding Deed', 15 May 1998.	Ch 9 [1168]
Optus Pay TV Programming Agreement	Agreement by which News sub-licensed the NRL pay television rights to Optus Vision, 14 May 1998.	Ch 9 [1164]
Optus Vision Heads of Agreement	'*Main Heads of Agreement*', 30 December 1994.	Ch 6 [498]
Optus Vision Shareholders Agreement	Optus Vision Joint Venture: Optus Vision Shareholders Agreement', 19 May 1995.	Ch 6 [505]
PDJV Agreement	'Programming Distribution Joint Venture Agreement', 14 July 1995.	Ch 6 [512]

Program Rights Agreement	'Program Rights Agreement', 14 April 1997.	Ch 6 [525]
Program Rights Deed	'*Program Rights Deed'*, 3 December 1998.	Ch 6 [556]
Rights Sub-Licence Agreement	Pleaded in par 239 of the Statement of Claim.	Ch 13 [2116]
Rights Sub-Licence Agreement Provision	A provision of the Rights Sub-Licence Agreement pleaded in par 239 of the Statement of Claim.	Ch 13 [2116]
Second Variation Agreement	'*Variation Agreement*' amending the C7-Optus CSA, 25 January 2002.	Ch 2 [115]
Tallglen Agreement	'Sports Programming Licence Agreement', 19 May 1995.	Ch 6 [508]
Ten Put	'AFL Free to Air Term Sheet – News/Ten', 14 December 2000.	Ch 13 [2115]
Ten Put Provision	A provision of the Ten Put pleaded in par 109 of the Statement of Claim.	Ch 13 [2115]
TNC Heads of Agreement	'Heads of Agreement between The News Corporation Limited, Telstra Corporation Limited, the Joint Venture between The News Corporation Limited and Telstra Corporation Limited, Australis Media Holdings Pty Limited and Galaxy Network International Pty Limited', 9 March 1995.	Ch 6 [501]

Umbrella Agreement	'Umbrella Agreement as amended and restated on 14 April 1997', 9 March 1995, amended and restated, 14 April 1997.	Ch 3 [226]

ANNEXURE C

TABLE C.1: Witness List

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
Seven				
LAY WITNESSES				
K Stokes	9	26 September 2005	Examination in Chief by Mr J C Sheahan SC	778–781
	9–16	26–29 September 2005 5–6 October 2005 10–11 October 2005	Cross-Examination by Mr N C Hutley SC	781–1470
	17–18	12, 17 October 2005	Cross-Examination by Mr A J Meagher SC	1472–1569
	18	17 October 2005	Cross-Examination by Mr I G A Archibald QC	1569–1605
	18–19	17–18 October 2005	Cross-Examination by Mr J E Marshall SC	1607–1669
	19	18 October 2005	Cross-Examination by Mr A Sullivan QC	1669–1674
	19	18 October 2005	Cross-Examination by Mr T F Bathurst QC (for the AFL)	1674–1733
	20–21	19–20 October 2005	Cross-Examination by Mr A J L Bannon SC	1737–1911
	21–22	20–21 October 2005	Re-Examination by Mr J C Sheahan SC	1911–1976
	42	1 December 2005	Further Cross-Examination by Mr A J L Bannon SC	3621–3638
	42	1 December 2005	Further Re-Examination by Mr J C Sheahan SC	3639–3640

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
P Gammell	23	26 October 2005	Examination in Chief by Mr J C Sheahan SC	1987–1991
	23–27	26–28 31 October 2005 1 November 2005	Cross-Examination by Mr N C Hutley SC	1991–2327
	27	1 November 2005	Cross-Examination by Mr A J Meagher SC	2327–2356
	27–28	1–2 November 2005	Cross-Examination by Mr I G A Archibald QC	2356–2403
	28	2 November 2005	Cross-Examination by Mr J E Marshall SC	2403–2420
	28	2 November 2005	Cross-Examination by Mr T F Bathurst QC	2420–2451
	28–29	2–3 November 2005	Cross-Examination by Mr A J L Bannon SC	2452–2509
	29	3 November 2005	Further Cross-Examination by Mr N C Hutley SC	2509–2517
	29	3 November 2005	Re-Examination by Mr J C Sheahan SC	2517–2531

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
S Wood	30	14 November 2005	Examination in Chief by Mr J C Sheahan SC	2616–2618
	30–33	14–17 November 2005	Cross-Examination by Mr N C Hutley SC	2618–2881
	35	21 November 2005	Further Cross-Examination by Mr N C Hutley SC	2994–3000
	35	21 November 2005	Cross-Examination by Mr A J Meagher SC	3000–3046
	35–36	21–22 November 2005	Cross-Examination by Mr T D Castle	3046–3092
	36	22 November 2005	Cross-Examination by Mr J E Marshall SC	3092–3127
	36–37	22–23 November 2005	Cross-Examination by Mr A J L Bannon SC	3128–3170
	37	23 November 2005	Re-Examination by Mr J C Sheahan SC	3170–3187
S Wise	37	23 November 2005	Examination in Chief by Mr J C Sheahan SC	3188–3191
	37–39	23–24, 28 November 2005	Cross-Examination by Mr A J Meagher SC	3191–3346
	39	28 November 2005	Cross-Examination by Mr A J L Bannon SC	3346–3387
	40	29 November 2005	Re-Examination by Mr J C Sheahan SC	3406–3409

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
H Anderson	40	29 November 2005	Examination in Chief by Mr J C Sheahan SC	3412–3417
	40–41	29–30 November 2005	Cross-Examination by Mr P R Whitford SC	3417–3548
	41	30 November 2005	Cross-Examination by Mr A J Meagher SC	3548–3565
	42	1 December 2005	Cross-Examination by Mr S W Climpson	3570–3577
	42	1 December 2005	Cross-Examination by Mr J E Marshall SC	3577–3583
	42	1 December 2005	Re-Examination by Mr J C Sheahan SC	3584–3597
	42	1 December 2005	Further Cross-Examination by Mr J E Marshall SC	3598–3601
EXPERT WITNESSES				
Professor R Noll	88	8 May 2006	Examination in Chief by Mr J C Sheahan SC	6995–7028
	88–89	8–9 May 2006	Cross-Examination by Mr I G A Archibald QC	7028–7119
	89–90	9–10 May 2006	Cross-Examination by Mr A J L Bannon SC	7119–7195
	90	20 May 2006	Re-Examination by Mr J C Sheahan SC	7195–7203
Dr R Smith	90	10 May 2006	Examination in Chief by Mr J C Sheahan SC	7203–7208
	90–92	10–11, 15 May 2006	Cross-Examination by Mr N C Hutley SC	7208–7388
	92	15 May 2006	Cross-Examination by Mr A J L Bannon SC	7388–7405
	92	15 May 2006	Re-Examination by Mr J C Sheahan SC	7405–7406

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
Professor D McFadden	99	29 May 2006	Examination in Chief by Mr J H Karkar QC	7854–7871
	99–101	29–31 May 2006	Cross-Examination by Mr A J Meagher SC	7871–8052
	102	1 June 2006	Cross-Examination by Mr J E Marshall SC	8053–8079
	102	1 June 2006	Cross-Examination by Mr A J L Bannon SC	8079–8095
K Traill*	105	7 June 2006	Affidavit of Mr K Traill, exhibiting his Expert Report dated 24 May 2005	8096
News				
LAY WITNESSES				
P Macourt	43	5 December 2005	Examination in Chief by Mr N C Hutley SC	3657–3659
	43–46	5–8 December 2005	Cross-Examination by Mr J Sumption QC	3659–3988
	46	8 December 2005	Re-Examination by Mr N C Hutley SC	3988–3993
I Philip	47	12 December 2005	Examination in Chief by Mr N C Hutley SC	3995–3996
	47–50	12–15 December 2005	Cross-Examination by Mr J Sumption QC	3996–4246
	50	15 December 2005	Re-Examination by Mr N C Hutley SC	4246–4247
T Mockridge	51	6 February 2006	Examination in Chief by Mr N C Hutley SC	4296–4297
	51–52	6–7 February 2006	Cross-Examination by Mr J C Sheahan SC	4297–4458

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
K Williams	53	8 February 2006	Examination in Chief by Mr N C Hutley SC	4463–4464
	53–54	8–9 February 2006	Cross-Examination by Mr J C Sheahan SC	4464–4600
	54	9 February 2006	Re-Examination by Mr N C Hutley SC	4600–4611
J Marquard	54	9 February 2006	Examination in Chief by Mr N C Hutley SC	4611–4612
	54–55	9, 13 February 2006	Cross-Examination by Mr J C Sheahan SC	4612–4687
	55	13 February 2006	Re-Examination by Mr N C Hutley SC	4687–4689
D Malone	56	14 February 2006	Examination in Chief by Mr N C Hutley SC	4714–4715
	56	14 February 2006	Cross-Examination by Mr J C Sheahan SC	4715–4772
	56–57	14–15 February 2006	Cross-Examination by Mr J A Halley	4777–4822
	57	15 February 2006	Re-Examination by Mr N C Hutley SC	4822–4834
G Burns	57	15 February 2006	Examination in Chief by Mr P R Whitford SC	4834–4835
	57–58	15–16 February 2006	Cross-Examination by Mr J A Halley	4835–4880
	58	16 February 2006	Re-Examination by Mr P R Whitford SC	4881–4883
P Campbell	58	16 February 2006	Examination in Chief by Mr N C Hutley SC	4887–4890
	58	16 February 2006	Cross-Examination by Mr J C Sheahan SC	4890–4967
	59	20 February	Cross-Examination by Mr J A Halley	4970–4997

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
P Delany	59	20 February 2006	Examination in Chief by Mr P R Whitford SC	5003–5004
	59	20 February 2006	Cross-Examination by Mr J A Halley	5004–5067
	59	20 February 2006	Re-Examination by Mr P R Whitford SC	5067–5069
A Boyd	60	21 February 2006	Examination in Chief by Mr P R Whitford SC	5081–5082
	60	21 February 2006	Cross-Examination by Mr J C Sheahan SC	5082–5162
M Medcraf	61	22 February 2006	Examination in Chief by Mr P R Whitford SC	5166–5167
	61	22 February 2006	Cross-Examination by Mr J A Halley	5167–5193
S Sos	61	22 February 2006	Examination in Chief by Mr P R Whitford SC	5194–5195
	61	22 February 2006	Cross-Examination by Mr J A Halley	5195–5211
A Oakes	62	23 February 2006	Examination in Chief by Mr P R Whitford SC	5216
	62	23 February 2006	Cross-Examination by Mr J A Halley	5216–5237
	62	23 February 2006	Re-Examination by Mr P R Whitford SC	5237
R Crowley	64	06 March 2006	Examination in Chief by Mr P R Whitford SC	5299–5300
	64	06 March 2006	Cross-Examination by Mr J A Halley	5300–5335
I Frykberg	65	07 March 2006	Examination in Chief by Mr P R Whitford SC	5337–5338
		07 March 2006	Cross-Examination by Mr J C Sheahan SC	5338–5397
		07 March 2006	Re-Examination by Mr P R Whitford SC	5397–5398

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
G Checkley*	105	7 June 2006	Affidavit of Mr G Checkley, exhibiting his Witness Statement dated 22 October 2004	8260
M Love*	105	7 June 2006	Affidavit of Mr M Love, exhibiting his Witness Statement dated 10 May 2005	8260
G Maine*	105	7 June 2006	Affidavit of Mr G Maine, exhibiting his Witness Statement dated 27 September 2004	8260
M Ruberto*	105	7 June 2006	Affidavit of Mr M Ruberto, exhibiting his Witness Statement dated 15 October 2004	8260
S Ward*	105	7 June 2006	Affidavit of Mr S Ward	8261
EXPERT WITNESSES				
Professor F Fisher	93	16 May 2005	Examination in Chief by Mr N C Hutley SC	7433–7443
	93–95	16–18 May 2005	Cross-Examination by Mr J C Sheahan SC	7443–7618
	95	18 May 2005	Re-Examination by Mr N C Hutley SC	7618–7619
Professor P Williams	95	18 May 2005	Examination in Chief by Mr N C Hutley SC	7619–7623
	95–96	18, 22 May 2005	Cross-Examination by Mr J C Sheahan SC	7624–7747
T Potter	103	5 June 2006	Examination in Chief by Mr A J Meagher SC	8156–8160
	103–104	5–6 June 2006	Cross-Examination by Mr J A Halley	8160–8221
	104	6 June 2006	Re-Examination by Mr A J Meagher SC	8221–8222
W McDonald	105	7 June 2006	Examination in Chief by Mr N C Hutley SC	8229–8230
			Cross-Examination by Mr J C Sheahan SC	8230–8249

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
A Daniel	105	7 June 2006	Examination in Chief by Mr N C Hutley SC	8250–8251
		7 June 2006	Cross-Examination by Mr J C Sheahan SC	8251–8259
		7 June 2006	Re-Examination by Mr N C Hutley SC	8259–8260
Telstra				
LAY WITNESSES				
Z Switkowski	66	20 March 2006	Examination in Chief by Mr I G A Archibald QC	5409–5411
	66–69	20–23 March 2006	Cross-Examination by Mr J C Sheahan SC	5411–5569, 5618–5693
	69	23 March 2006	Re-Examination by Mr I G A Archibald QC	5692–5695
B Akhurst	68	22 March 2006	Examination in Chief by Mr I G A Archibald QC	5570–5572
	68–70, 72	22–23, 27, 29 March 2006	Cross-Examination by Mr J C Sheahan SC	5572–5617, 5696–5825, 5921–6022
G Sutton	71	28 March 2006	Examination in Chief by Mr I G A Archibald QC	5875–5876
	71	28 March 2006	Cross-Examination by Mr J C Sheahan SC	5876–5913
	71	28 March 2006	Re-Examination by Mr I G A Archibald QC	5913
PBL				
EXPERT WITNESSES				
Professor G Hay	97	23 May 2006	Examination in Chief by Mr A J Meagher SC	7749–7751
		23 May 2006	Cross-Examination by Mr J C Sheahan SC	7751–7789
Professor S Gray	103	05 June 2006	Examination in Chief by Mr A J Meagher SC	8104–8106
		05 June 2006	Cross-Examination by Mr J A Halley	8106–8136

Witness	Days Evidence Given	Dates Evidence Given	Nature of Evidence	Transcript
Optus				
LAY WITNESSES				
C Keely	74	3 April 2006	Examination in Chief by Mr A J L Bannon SC	6106–6107
	74–75	3–4 April 2006	Cross-Examination by Mr J H Karkar QC	6107–6225
	75	4 April 2006	Re-Examination by Mr A J L Bannon SC	6225–6242
Lee Hsien Yang	76	5 April 2006	Examination in Chief by Mr A J L Bannon SC	6247–6249
	76–77	5–6 April 2006	Cross-Examination by Mr J H Karkar QC	6249–6384
	77	6 April 2006	Re-Examination by Mr A J L Bannon SC	6384–6393
M Ebeid	78	10 April 2006	Examination in Chief by Mr A J L Bannon SC	6396–6397
	78–79	10–11 April 2006	Cross-Examination by Mr J H Karkar QC	6397–6490
	79	11 April 2006	Re-Examination by Mr A J L Bannon SC	6490–6491
P Fletcher	79	11 April 2006	Examination in Chief by Mr A J L Bannon SC	6492
	79–80	11–12 April 2006	Cross-Examination by Mr J H Karkar QC	6492–6596
C Anderson	81	26 April 2006	Examination in Chief by Mr A J L Bannon SC	6604
	81–83	26–28 April 2006	Cross-Examination by Mr J H Karkar QC	6605–6770
	83	28 April 2006	Re-Examination by Mr A J L Bannon SC	6771–6772

* Indicates a witness whose Statement was entered into evidence, but who was not cross-examined.

I certify that the preceding 3404 numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 27 July 2007

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Counsel for the First, Second, Thirteenth, Nineteenth and Twentieth Respondents (News Parties):	Mr N C Hutley SC, Mr P R Whitford SC, Mr P J Brereton, Mr M Pesman and Dr C Mantziaris
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Counsel for the Seventh, Eighth and Twenty-First Respondents (PBL Parties):	Mr A J Meagher SC, Mr A J Payne and Mr D B Studdy
Solicitors for the Seventh, Eighth and Twenty-First Respondents (PBL Parties):	Gilbert + Tobin Lawyers
Counsel for the Tenth Respondent (Ten) (until 6 February 2006):	Mr J R J Lockhart
Solicitors for the Tenth Respondent (Ten) (until 6 February 2006):	Blake Dawson Waldron Lawyers
Counsel for the Eleventh Respondent (AFL) (until 5 December 2005):	Mr T F Bathurst QC and Mr M Connock
Solicitors for the Eleventh Respondent (AFL) (until 5 December 2005):	Browne & Co, Solicitors & Consultants

Counsel for the Twelfth Respondent (ARL):	Mr A Sullivan QC and Mr S W Climpson
Solicitors for the Twelfth Respondent (ARL):	Sparke Helmore Lawyers
Counsel for the Fourteenth Respondent (NRL Ltd):	Mr J E Marshall SC
Solicitors for the Fourteenth Respondent (NRL Ltd):	Kennedys
Counsel for the Sixteenth and Twenty-Second Respondents/First and Second Cross-Claimants (Optus Parties):	Mr A Bannon SC, Mr M J Leeming SC and Mr J C Hewitt
Solicitors for the Sixteenth and Twenty-Second Respondents/First and Second Cross-Claimants (Optus Parties):	Chang Pistilli & Simmons Corporate Lawyers
Solicitors for the Seventeenth and Eighteenth Respondent (Austar Parties)	TressCox Lawyers
Dates of Hearing:	12–15, 19–22, 26–29 September 2005; 5–6, 10–12, 17–21, 26–28, 31 October 2005; 1–3, 14–18, 21–24, 28–30 November 2005; 1, 5–8, 12–15 December 2005; 6–9, 13–16, 20–23, 28 February 2006; 6–7, 20–23, 27–30 March 2006;

3–6, 10–12, 26–28 April 2006;

1, 3–5, 8–11, 15–18, 22–23, 26, 29–31 May 2006;

1, 5–7, 15, 20 June 2006;

4, 18–21, 25–29 September 2007;

3–5 October 2006;

Date of Judgment: 27 July 2007