A CAUTIONARY TALE: *SEVEN NETWORK V NEWS LTD*

Chris Davies[1]

I Introduction

The *Seven Network v News Ltd*[2] case involved litigation between the Seven Network ('Seven') and virtually every major media organisation in Australia in relation to the granting of television rights for the Australian Football League (AFL) and National Rugby League (NRL). Seven's argument was that anti-competitive behaviour during this period had led to the demise of its pay television network, C7. This case note will therefore examine the decision in regard to the application of the *Trade Practices Act 1974* (Cth) (TPA) to the case, and Justice Sackville's warning about mega-litigation.

II *Seven Network v News Ltd*

A *The Seven Network's Claims*

In regard to the anti-competitive behaviour, Seven claimed that, during the period 1999-2000 when the AFL pay television rights were awarded to News Ltd, Foxtel had refused to negotiate with C7 for it to be carried on Foxtel. This conduct, Seven claimed, was designed to harm C7 and to favour the interests of Fox sports, who were C7's competitor, with the purpose being to 'kill' C7.[3] Secondly, there had been a consortium that included News Ltd, Foxtel, PBL and Telstra, who made an agreement (the 'Master Agreement'), the objective of which, Seven claimed, was to deprive C7 of the pay television rights to the AFL and NRL, two 'marquee' sports which were essential to C7's continued existence as a sports channel.[4] According to Seven, the effect or likely effect of

---

1 Dr Chris Davies. Senior Lecturer, School of Law, James Cook University.

2 [2007] FCA 1062.

3 Ibid [83].

4 Ibid [84]-[85]. As Justice Sackville noted, it was also claimed that C7 was denied access to Telstra Multimedia's hybrid fibre coaxial cable, but in the end it had played a minor part in the proceedings.

the Master Agreement was to substantially lessen competition in the wholesale sports market channel, the AFL pay rights market, the NRL pay rights market, and the retail pay television market.[5] This, therefore, would have involved a contravention of s 45(2)(b)(ii) of the TPA.[6] It was then claimed that the arrangement also contained a provision that had the purpose of substantially lessening competition in each of the four markets that had been identified by Seven.[7] If the claim was successful, this would constitute a breach of s 45(a)(ii) of the TPA. Another claim by Seven was that Foxtel had taken 'advantage of its market power for the purpose of preventing Seven from competitive conduct in several markets', and thus had contravened s 46(i) of the TPA.[8]

B *Markets Under the Trade Practices Act*

An important consideration in the case therefore was the definition of the relevant markets for the television rights. This had also been evident in a number of interlocutory judgments made during the trial in regard to the reports of a number of expert witnesses. These judgments had held that the specialised knowledge required for such reports was in regard to the relevant markets, namely those relating to the Australia's pay television industry.[9] Market definition was also of central importance to Seven's s 45 claims, while the s 46 case was that Foxtel had taken advantage of its market power for a proscribed purpose.[10]

Justice Sackville noted that the expert witnesses and the parties had agreed that markets at least as narrow as separate ones for the AFL and NRL broadcasting rights did exist,[11] but disagreed as to whether there were separate markets for the respective pay television rights and free to air television rights.[12] In regard to these markets, it was noted that coalitions could be formed between free to air and pay operators,[13]

---

5 *Seven Network v News Ltd* [2007] FCA 1062, [90].

6 Ibid [92].

7 Ibid [94].

8 Ibid [96].

9 See *Seven Network Ltd v News Ltd (No 15),* [23]. For a discussion see Chris Davies 'Seven Network v News Ltd: The Interlocutory Stage' (2006) 13 *James Cook University Law Review* 260-267, 261-264.

10 *Seven Network v News Ltd* [2007] FCA 1062, [1757].

11 Ibid [1804].

12 Ibid [1783].

13 Ibid [1836].

and while this often meant that free to air had the first choice of, for example, the games in NRL, this did not mean that Fox Sports was 'left with an unattractive and unwanted residue.'[14] His Honour therefore concluded that Seven had not established that 'AFL and NRL pay rights markets existed as separate and distinct markets from AFL and NRL free to air rights markets.'[15]

Justice Sackville pointed out that the wholesale sports channel market pleaded by Seven was central to its case,[16] the market being said to consist of Foxtel, Fox Sports, C7, ESPN and TAB.[17] His Honour noted that whether C7 or Fox Sports competed for sports rights may be significant in determining whether there was a market for the sale and acquisition of particular or general sports rights, but it had little or no bearing on whether a wholesale sports channel market existed or not.[18] What also had to be considered in relation to this market was whether the AFL and NRL were 'marquee' sports[19] with his Honour stating that they were,[20] the AFL and NRL being 'clearly the most important sports subscription drivers for pay television in Australia.'[21] However, his Honour held that AFL and NRL pay television rights were supplied in separate markets, there being 'separate AFL and NRL product markets within the channel supply market.'[22] Justice Sackville also held that the availability of C7 as a sports channel did play a part in the negotiations of Fox Sports and Austar, but this did not support the existence of a wholesale sports channel market.[23] Nor did the negotiations between Fox Sports and Optus support the proposition that C7 was a close competitor of Fox Sports in such a market.[24]

---

14 Ibid [1835].

15 Ibid [1856].

16 Ibid [1858].

17 Ibid [1898].

18 Ibid [1873].

19 These were defined as being the 'must have' or 'major sports': see *Seven Network v News Ltd* [2007] FCA 1062, [1876].

20 *Seven Network v News Ltd* [2007] FCA 1062, [1882].

21 Ibid [1896].

22 Ibid [1914].

23 Ibid [1956].

24 Ibid [1961].

It was therefore his Honour's conclusion that C7 and Fox Sports were not competitors in a wholesale sports channel market.[25]

The other market pleaded by Seven was that of a retail pay television market, this being 'an Australian-wide market for the retail supply of pay television services.'[26] Justice Sackville noted that pay and free-to-air television did not as such compete for viewers, as the emphasis of pay television was not to provide offerings for mass audiences, but channels and programs that appealed to strong minority preferences not catered for, or insufficiently catered for, on free to air television.[27] It therefore offered what free to air could not, namely, a very wide choice amongst a range of programs that could be seen in the viewer's home.[28] It was then held by his Honour that Seven had established a retail pay television market in which Foxtel, Optus and Austar operated.[29]

C *Seven's Effects Case Under s 45(2) of the TPA*

Section 45(2)(a)(ii) of the TPA states 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*, or would have or be likely to have the effect, of substantially lessening competition. This section therefore covers the purpose case argued by Seven. Section 45(2)(b)(ii) meanwhile states that a corporation shall not give *effect* to a provision of a contract, arrangement or understanding if that provision has the purpose, or has or is likely to have the effect, of lessening competition. It is this section that has to be examined in regard to Seven's s 45(2) effects case.

It was stated by Justice Sackville that, in light of his findings in regard to the markets relied on by Seven, the only aspect of the s 45(2) effects case was in regard to the retail pay television market.[30] His Honour then held that an arrangement had been reached between News Ltd,

---

[25] Ibid [2002].

[26] Ibid [2004].

[27] Ibid [2031].

[28] Ibid [2038]. In the case it was argued that Foxtel competed in the entertainment market and therefore competed with other entertainment sources such as DVDs, cinema, the internet, as well as free-to air television: see [2072].

[29] Ibid [2077].

[30] Ibid [2179].

PBL, Telstra and Foxtel on 13 December whereby News Ltd would make a bid for the AFL broadcasting rights, and Fox Sports, the NRL pay television rights. The parties also understood that Foxtel had an option to take a sub-licence of the AFL pay television rights for $30m a year.[31] It was also noted that while Seven consistently maintained that securing the AFL pay television rights was essential to the survival of C7, it failed to make its best offer for those rights.[32] Justice Sackville expressed the opinion that if Seven had taken the commercial steps open to it, there was a 'strong likelihood' it would have succeeded.[33] Despite Seven being 'the author of its own misfortune,' it was held that the likely effect of the Master Agreement provision was that News would acquire the AFL broadcasting rights, and Foxtel, a sub-licence for the AFL pay television rights.[34] The question then was whether at the time effect was given to the Master Agreement provision, whether it was likely to have the effect of substantially lessening competition in the retail pay television market.[35] It was then held that in the absence of the conduct alleged to have contravened s 45(2)(b)(ii) of the TPA, the major pay television retailers would have entered into an agreement on similar terms to those incorporated in the Foxtel-Optus CSA. The allegedly contravening conduct was therefore unlikely to have had the effect of substantially lessening competition in the retail pay television market.[36] Thus, Seven's effects case under s 45(2) failed.

D *Seven's Purpose Case Under s 45(2) of the TPA*

It was also contended by Seven that the Consortium Respondents had made contracts, arrangements or understandings containing provisions that had the purpose of substantially lessening competition. The alleged purpose was that Foxtel would acquire the AFL pay television rights, and that C7 would be prevented from acquiring the NRL pay television rights, with the objective being to force C7 out of business. This would then prevent C7 from competing against Fox Sports for pay television rights, with both Foxtel and Fox Sports as suppliers in the wholesale sports channel market, and against Foxtel as a provider of services in

---

31 Ibid [2264].

32 Ibid [2274].

33 Ibid [2280].

34 Ibid [2282].

35 Ibid [2285].

36 Ibid [2309].

the retail pay television market.[37] It was accepted that the first step was to identify the impugned provision, as the relevant purpose relates to that provision, with it being the subjective purpose that needs to be referred to.[38] On a matter of construction, Justice Sackville expressed a preference for 'a construction that limits the operation of s 45(2) to cases where the substantial purpose for each of the parties responsible for including the relevant provision in a contract is to substantially lessen competition.'[39]

Seven had contended that a party can contravene s 45(2) in a market that it believes exists, even if the market does not in fact exist.[40] It was held however that the purpose of substantially lessening competition has to be in a market that actually exists.[41] This therefore means that proof is required that a contravener of s 45(2) must have subjectively appreciated the precise nature of the market in which competition would be lessened.[42] Justice Sackville then held that the question as to whether an alleged contravener had the purpose of substantially lessening competition needed to be dealt with in two stages. The first was to identify the objective the alleged contravener sought to achieve by including the relevant provision in the contract, and the second was that object, if effectuated, was realistically capable of substantially lessening competition in any relevant market.[43] Thus, if Seven could establish that the object or purpose was the 'killing off' of C7, it was then a question as to whether the achievement of that object or purpose was realistically capable of lessening competition in the retail pay television market.[44] Justice Sackville then held that the answer to that question was no, as any lessening of competition in that market would have occurred anyway since, regardless of C7, Optus would have ceased to have provided even weak competition to Foxtel in this market.[45] The purpose case under s 45(2)(a)(ii) therefore failed, with this conclusion

37 Ibid [2325].

38 Ibid [2389].

39 Ibid [2403].

40 Ibid [2319].

41 Ibid [2424].

42 Ibid [2428].

43 Ibid [2431].

44 Ibid [2433].

45 Ibid [2436].

applying to each of the six provisions on which Seven relied on for its case.[46]

In relation to Seven's purpose case against News Ltd, Foxtel and PBL, Justice Sackville also noted that it was difficult to see why a corporation which sought a legitimate commercial objective such as the manufacture of superior products would contravene the TPA even if it acted with the deliberate intent of harming its competitors.[47] The only time a problem would arise under the TPA was when substantial market power under s 46 was present. His Honour also noted that there was nothing inherently wrong in having an objective of becoming the dominant supplier of a product or service as long as attaining that objective did not require the use of anti-competitive means, or required conduct that was in contravention of the TPA.[48] Competition, by its very nature, is deliberate and ruthless,[49] and competitors will often try to injure and even eliminate each other.[50]

E *Seven's Case Based on s 46 of the TPA*

It was also alleged by Seven that Foxtel had taken advantage of its substantial power in the retail pay television market for a purpose that was proscribed by s 46(1) of the TPA,[51] Foxtel having, since November 1998, a substantial degree of power in the retail pay television market.[52] Justice Sackville noted that for a contravention of s 46(1) to be established, three elements had to be satisfied. First, the corporation must have a substantial degree of power in a market, and secondly it must have taken advantage of that power. Finally, a corporation must do so for one of more of the proscribed purposes listed in s 46(1)(a),(b) and (c),[53] namely eliminating or substantially damaging a competitor, preventing entry into that market, or deterring engagement in competitive conduct in that, or any other, market.

---

46 Ibid [2438].

47 Ibid [2492].

48 Ibid [2503].

49 Ibid [2487]. See *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177, 191.

50 Ibid [2486].

51 Ibid [2619].

52 Ibid [2620].

53 Ibid [2633].

In regard to Foxtel's refusal to accept an offer from C7 in a letter from 16 April, 1999, Foxtel was not facilitated by its power in the retail pay television market because even in the absence of such power, Foxtel could have acted in the same way. Therefore, no contravention of s 46(1) had been established by Foxtel's refusal to accept the proposal made by C7 in the letter dated 16 April, 1999.[54] Foxtel's later refusal to deal with C7 pending the awarding of the AFL pay television rights was also held not to take advantage of its substantial power in the retail pay television market.[55] Furthermore, Foxtel informing the AFL that C7 would not be given the opportunity to broadcast its channels on Foxtel was not materially facilitated by its substantial degree of power in the retail pay television market,[56] with Justice Sackville having earlier accepted evidence indicating Foxtel's genuine concerns as to the quality of C7's channels.[57]

His Honour also noted that if any contraventions had been made by Foxtel's statements to the AFL regarding C7, they had taken place seven years earlier and the transactions had therefore been superseded by subsequent events, and there was no proof of any loss to Seven.[58]

III Mega-litigation

During, and also at the conclusion of the trial, questions were raised about the cost of the lengthy trial and the fact that the estimated $200m costs were going to be tax deductible.[59] In his judgment, meanwhile, Justice Sackville went to considerable lengths to warn about the dangers of what he described as 'mega-litigation', namely civil litigation involving many parties in a case that runs for many months and therefore imposes a burden on the court system and thus the community.[60] This particular

---

54 Ibid [2695].

55 Ibid [2745].

56 Ibid [2757].

57 Ibid [2607].

58 Ibid [2763].

59 Vanda Carson, 'Taxpayers to have a stake in huge costs of C7 case', *The Australian*, 8 September 2006, 25. See also Chris Davies 'Seven Network v News Ltd: The Interlocutory Stage' (2006) 13 *James Cook University Law Review* 260-267, 265-266.

60 *Seven Network v News Ltd* [2007] FCA 1062, [1].

case, for instance, took 120 sitting days,[61] with 12,849 documents amounting to 115 586 pages being admitted into evidence.[62] The $200m cost of the litigation was, in his Honour's opinion, 'not only extraordinarily wasteful but borders on the scandalous'.[63]

While Justice Sackville noted that much of the cost of mega-litigation is generated by the discovery process,[64] it is also characterised by 'heavy, unthinking reliance on expert reports'. Thus, his Honour was of the opinion that courts may need to restrict the volume of expert evidence.[65] Justice Sackville also stated that separate trials on liability and relief would have deferred the need for expert reports, and also given the experts a firmer foundation for their opinions and calculations when they did prepare them. However, as his Honour pointed out, 'ultimately the only effective restraint might be for the parties to recognise that large scale litigation is generally a very blunt and disproportionately expensive means of resolving major commercial disputes.'[66] Justice Sackville also suggested that the boards and shareholders of the companies involved in such litigation also needed 'to take a more critical and sustained interest in the proceedings.'[67] His Honour's final comment on the matter was a cautionary tale about the longest civil trial in Australian legal history, *Duke Group Ltd (in Liq) v Pilmer* [68] which had taken ten and half years from the time the trial commenced to when special leave was refused by the High Court.[69] This was given as a warning about the dangers of the present case being taken further on appeal.

It should also be noted that Justice Sackville was not the only one to raise such concerns, and one outcome of the case was the suggestion that these mega-litigation cases involving big companies should be settled by arbitration, and not in the tax-payer funded court system.[70]

---

61 Ibid [6].

62 Ibid [15].

63 Ibid [18].

64 Ibid [19].

65 Ibid [23].

66 Ibid [28].

67 Ibid.

68 (1998) 27 ACSR 1.

69 *Seven Network v News Ltd* [2007] FCA 1062, [72].

70 Chris Merritt, 'Black comedy of Seven saga cues calls for private battles to quit public courts', *The Australian*, 3 August 2007, 29. It should be noted,

IV Conclusion

The first comment that should be made in relation to Justice Sackville's judgment was his obvious attempt to make the decision 'appeal proof'. Despite his efforts, an appeal has been made, fulfilling his Honour's prophecy as to 'the virtual inevitability of an appeal.'[71] The case therefore joins the *News Ltd v Australian Rugby Football League Ltd*[72] and *South Sydney v News Ltd*[73] as recent cases involving sport and the media in Australia that have seen the original decision appealed. Seven can perhaps take heart that, in both instances, an appeal to the Full Court of the Federal Court was successful. Given the importance of the definition of markets in the case, one thing that such an appeal is likely to examine is whether Justice Sackville was correct in limiting the markets that could be argued to just the retail pay television market. The author, however, agrees with Justice Sackville's conclusions in regard to the markets argued in the case. It would also be likely to examine his conclusions in regard to the purpose and effects case under s 45, and perhaps that there had been no misuse of market power under s 46. However, the author agrees with Justice Sackville in regard to the need to distinguish between the ruthless nature of competitive business, and actual anti-competitive behaviour, and that it was the former rather than the latter that was exhibited in this case.

---

however, that such calls came from the Institute of Arbitrators & Mediators Australia, which could be considered to have a vested interest in such a proposal.

[71] Ibid [2107].

[72] (1996) 135 ALR 33; (1996) 139 ALR 193.

[73] *South Sydney District Rugby League Football Club Limited v News Limited* (2000) 177 ALR 611 (Trial Case); *South Sydney District Rugby League Football Club Limited v News Limited* (2001) 181 ALR 181 (Appeal Case). Note that the original decision was restored by the High Court in *News Ltd v South Sydney District Rugby League Football Club Limited* (2003) 77 ALJR 1515. For discussion of these cases see Chris Davies 'Souths v News Ltd' (2001) 8 *James Cook University Law Review* 121-129; Saul Fridman, 'Before the High Court: Sport and the Law: The South Sydney Appeal,' (2002) 24 *The Sydney Law Review* 558-568; Chris Davies 'News Limited v South Sydney District Rugby League Football Club Limited' (2003) 10 *James Cook University Law Review* 116-128.

Whatever the outcome of the appeal, the case has further indicated that Part IV of the TPA can at least be argued in a sports and media case, while it is also likely to contribute to the definition of markets under this part of the TPA. The added cost of the appeal, plus the fact that it could then be appealed to the High Court, will undoubtedly raise further questions about the issue of mega-litigation and what should be done to prevent its high cost to the community. It may well be that in the future the suggestion that such cases involving major companies should be settled by mediation will eventuate, thus reducing this cost to the community.