

High Noon for Kerry Stokes

The court case being conducted by Channel Seven against 22 parties led by News Ltd has reached a crucial stage. The judge, Justice Sackville has expressed concerns over the vast amounts of money spent on the case and possible community concern that so many resources can be devoted to the one case. He has requested the parties to seek a compromise or narrow the issues and in particular for Seven to enter mediation with the sporting bodies, the AFL and NRL. The judge is also concerned over the publication by a News Ltd newspaper The Australian quoting a former Seven chief executive contradicting the evidence given by the Seven Chairman Kerry Stokes without disclosing that the executive had declined to testify to the court.

Firstly, a brief background to the case. On one side Kerry Stokes can be seen like the Marshall in High Noon, “a man who is too proud to run” and who is refused help at every turn against a gang of outlaws.

Alternatively he can be seen as a rich litigant who is trying to achieve through the court what he could not achieve commercially.

Seven's case is that in 1999 and 2000 News saw an opportunity to put the Channel 7 sports channel C7 out of business leaving Fox Sports and Foxtel as the monopoly suppliers of Australian sports programming for provision to Pay TV suppliers.

Seven claim that this was achieved by News Ltd using its management control over Foxtel to ensure C7 could not get on the platform and to influence the NRL not to accept the C7 bid for the NRL. Thirdly, Seven claims that Foxtel made a predatory bid for the AFL indirectly through News.

Seven are arguing breaches of sections 45 of the Trade Practices Act that it is unlawful to enter into any arrangement which has the purpose or likely effect of substantially reducing competition and Section 46, that it is unlawful for a firm with substantial market power to eliminate or damage a competitor or deter another firm from entering into a market or competing with the incumbents.

The outcomes are largely uncontested; C7 was not allowed on the Foxtel platform, Seven did not win the rights to the AFL and the NRL, C7 went out of business and Fox Sports ended up as the monopoly supplier of Australian sports programming on Foxtel.

It would seem that a major issue in determining liability is whether the purpose of the respondents was to Kill C7 or whether C7's death was the commercial consequence of being unable to secure the rights to the AFL or the NRL with insufficient other sports programming to continue to be viable. If purpose cannot be proven is likely effect sufficient to determine liability and what could be the extent of the damages.

Seven is seeking the forced disposal by News and PBL of their shareholdings in Foxtel and Fox Sports. Further Seven are claiming relief of over \$1 billion for commercial damages and the missed opportunity cost of being an integrated media company.

After 29 days of hearing the case and with many to go, the judge called time out for a week and asked the parties to give careful consideration to their positions, to seek a compromise or at least narrow the issues.

The judge questioned whether the evidence from the two witnesses had in all respects supported the claims for relief and whether the expert evidence, presumably including from an Nobel prize winning economist, is therefore based upon factual assumptions.

The judge pointed out that “the range of possible outcomes does not necessarily constitute a win for any or at least most of the parties.”

Finally, the judge foresaw that he may direct Seven, the AFL and the NRL to engage in mediation.

If there is a mediated settlement, a restless peace could rule the town but it may not be long before a fight breaks out again about media ownership and control in Australia.

If Stokes wins, Seven seeks over a billion dollars in damages, access to the Foxtel network and forced changes in Pay TV ownership.

If Stokes loses, he may have to throw more than his tin star into the dirt. It may cost him a small fortune.