FEDERAL COURT OF AUSTRALIA

Seven Cable Television Pty Ltd v Telstra Corp Ltd [2000] FCA 350

CONTRACT – formation – whether parties had reached agreement on essential terms – parties negotiating a complex broadcasting contract – whether uncertainty of terms renders agreement unenforceable – whether uncertainty of terms indicates parties had not reached agreement – alleged contract executed on date parties commenced broadcasting business – parties continued negotiations regarding terms of business – parties later executed a contract covering the same subject matter bit on different terms

CONTRACT – variation – where two contracts deal with the same subject matter – whether later contract varies the earlier contract – whether rights under the earlier contract survive execution of the later contract – effect of drafting provisions as to intent and operation of the agreement

MEDIA LAW – telecommunications and broadcasting – access regime created by Part XIC of *Trade Practices Act 1974* – s 152AR(4)(d) creates an exception to the access regime where granting access would deprive a person of a "protected contractual right" – policy objectives of the legislation – "protected contractual right" whether term should be given a strict interpretation – section aims to protect the substance of the right – the same right may exist under different contracts at different times

TRADE PRACTICES – telecommunications – access regime created by part XIC of *Trade Practices Act 1974* – s 152AR(4)(d) creates an exception to that access regime where granting access would deprive a person of a "protected contractual right" – policy objectives of the legislation – "protected contractual right" whether term should be given a strict interpretation – section aims to protect the substance of the right – the same right may exist under different contracts at different times

Trade Practices Act 1974 (Cth) s 152AR
Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997 (Cth) s 39

Masters v Cameron (1954) 91 CLR 353 distinguished
Australian Broadcasting Commission v XIVth Commonwealth Games (1988) 18 NSWLR 540 applied
York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth (1949) 80 CLR 11 applied
Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429 distinguished
Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991) 24 NSWLR 1 applied
GR Securities Pty Ltd v Baulkam Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631 applied
MacKay v Dick (1881) 6 AC 251 distinguished
Street v Mountford [1985] 1 AC 809 followed
Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd (1957) 98 CLR 93 applied
Dan v Barclays Australia Limited (1983) 57 ALJR 442 applied

Lewison *The Interpretation of Contracts* 2nd ed. 1997

SEVEN CABLE TELEVISION PTY LIMITED v
TELSTRA CORPORATION LIMITED & ORS
N 1095 OF 1999

TAMBERLIN J
SYDNEY
27 MARCH 2000

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 1095 OF 1999**

BETWEEN: **SEVEN CABLE TELEVISION PTY LIMITED**
(ACN 082 901 442)
APPLICANT

AND: **TELSTRA CORPORATION LIMITED**
(ACN 051 775 556)
FIRST RESPONDENT

TELSTRA MULTIMEDIA PTY LIMITED
(ACN 069 279 072)
SECOND RESPONDENT

TELSTRA MEDIA PTY LIMITED
(ACN 069 279 027)
THIRD RESPONDENT

THE NEWS CORPORATION LIMITED
(ACN 007 910 330)
FOURTH RESPONDENT

NEWS LIMITED
(ACN 007 871 178)
FIFTH RESPONDENT

SKY CABLE PTY LIMITED
(ACN 069 799 640)
SIXTH RESPONDENT

FOXTEL MANAGEMENT PTY LIMITED
(ACN 068 671 938)
SEVENTH RESPONDENT

FOXTEL MANAGEMENT PTY LIMITED
(ACN 068 671 938)
FIRST CROSS CLAIMANT

SKY CABLE PTY LIMITED
(ACN 069 799 640)
SECOND CROSS CLAIMANT

SEVEN CABLE TELEVISION PTY LIMITED
(ACN 082 901 442)
FIRST CROSS RESPONDENT

TELSTRA MULTIMEDIA PTY LIMITED
(ACN 069 279 072)
SECOND CROSS RESPONDENT

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
THIRD CROSS RESPONDENT

TELEVISION & RADIO BROADCASTING SERVICES AUSTRALIA PTY LIMITED
(ACN 070 677 717)
FOURTH CROSS RESPONDENT

TELSTRA MEDIA PTY LIMITED
(ACN 069 279 027)
FIFTH CROSS RESPONDENT

JUDGE: **TAMBERLIN J**

DATE: **27 MARCH 2000**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 This proceeding arises from a request by the applicant ("Seven") for Telstra Multimedia Pty Limited ("Telstra Multimedia") to provide Seven with access to its broadcast carriage services to enable it to provide pay television coverage of the Year 2000 Olympic Games, and also to provide additional television services on an ongoing basis. It raises for consideration the meaning and operation of s 152AR of the *Trade Practices Act 1974* (Cth) ("the TPA"), which is found in Part XIC and which was inserted by Act No 58 of 1997 as part of a scheme of legislation designed to open up access to broadcasting services.

2 Seven together with a cross-respondent to this proceeding, Television and Radio Broadcasting Services Australia Pty Limited ("TARBS"), claim that they are entitled to access the broadcast services pursuant to the legislative scheme in Part XIC. The first to third respondents, to be referred to in these reasons as "Telstra", and the fourth to seventh respondents, to be referred to as "News", challenge the claimed right to access under the TPA on the assertion, *inter alia*, that FOXTEL Management Pty Limited ("FOXTEL Management") has the **exclusive** right to provide and manage these services. It is claimed that this entitlement amounts to a "protected contractual right" under s 152AR of the TPA

and therefore stands as an exception to the standard access obligations contained therein.

Section 152AR

3 Part XIC of the TPA is headed "TELECOMMUNICATIONS ACCESS REGIME" and what is described as "a simplified outline" is conveniently contained in s 152AA and reads as follows:

> *"**152AA Simplified outline***
>
> *The following is a simplified outline of this Part:*
> *This Part sets out a telecommunications access regime.*
> *The Commission [Australian Competition and Consumer Commission] 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, but no access undertaking is in operation, the terms and conditions are to be determined by the Commission acting as an arbitrator.*
> *An access undertaking may adopt the terms and conditions set out in a "telecommunications access code".*
> *The Commission may conduct an arbitration of a dispute about access to declared services. The Commission's determination on the arbitration must not be inconsistent with the standard access obligations or an access undertaking.*
> *The Commission may register agreements about access to declared services.*
> *A carrier, carriage service provider or related body must not prevent or hinder access to a declared service." (Emphasis added)*

4 The object of Part XIC, which came into force on 30 April 1997, is expressed (in s 152AB) as being to promote the long-term interests of end-users of "listed services", including carriage services and services supplied by means of carriage services. Subsection (2) requires that when determining the long-term interest of end-users regard must be had to the **objective** of **promoting competition in markets for services.** This includes consideration of whether a particular matter is likely to remove obstacles to end-users gaining access to listed services. The objects also draw attention to the purpose of encouraging the economically efficient use

of the communications infrastructure by which services are supplied.

5 The relevant provisions of s 152AR are as follows:

*"**152AR Standard access obligations***

(1) This section sets out the "standard access obligations".

Access provider and active declared services

*(2) For the purposes of this section, if a carrier or a carriage service provider supplies **declared services**, whether to itself or to other persons:*

(a) the carrier or provider is an "access provider"; and

*(b) the declared services are "**active declared services**".*

Supply of active declared service to service provider

*(3) **An access provider must, if requested, to do so by a service provider:***

*(a) **supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services;** and*

(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and

(c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

Limit on paragraph (3)(a) obligation

(4) 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****.*
>
> *...*
>
> *(12) In this section:*
>
> *...*
>
> *"****protected contractual right" means a right under a contract that was in force at the beginning of 13 September 1996****." (Emphasis added)*

6 For present purposes it can be assumed that the services requested are "active declared services."

The parties

7 Seven is a "service provider" that has requested access to the services provided by Telstra Multimedia. TARBS has also requested the supply of broadcasting services from Telstra, News and FOXTEL.

8 Sky Cable Pty Limited, a subsidiary of News Limited and Telstra Media Pty Limited, a subsidiary of Telstra Corporation Limited ("Telstra Corp"), together conduct a pay television business in partnership under the business name "FOXTEL". FOXTEL Management is the agent for the FOXTEL partners and conducts the pay television services on their behalf. Among other activities FOXTEL Management broadcasts the pay television services on their behalf. That service uses a broadband cable network which is owned, controlled and operated by Telstra Multimedia.

9 The requests of both Seven and TARBS have been refused by Telstra Multimedia. For the purposes of the proceedings before me, substantially the same issues arise in the case of TARBS as apply in respect of the case advanced by Seven.

Operational nature of the FOXTEL broadcasting services

10 Peter Glen Smart, Director of Engineering and Technology at FOXTEL Management, gave general evidence as to the nature of the services provided by FOXTEL. This evidence was not disputed. He said that there are two components to FOXTEL's business in offering pay television services to subscribers. The first is the supply of **content** (programs) available for broadcast; and the second is **information and associated facilities** which enable limits to be placed on the ability of subscribers to view the content in accordance with the channel entitlements subscribed for by them. There are accordingly two streams of information transmitted to subscribers from FOXTEL. One is the program signal which when received constitutes the program for viewing. The other is the data relating to subscribers and their program entitlements, which is referred to as conditional access data. FOXTEL broadcasts these two streams of information using a hybrid fibre coaxial ("HFC") network which is owned by Telstra Multimedia. The components that make up the television service delivery system are:

(a) a playout centre at Pyrmont (Sydney);

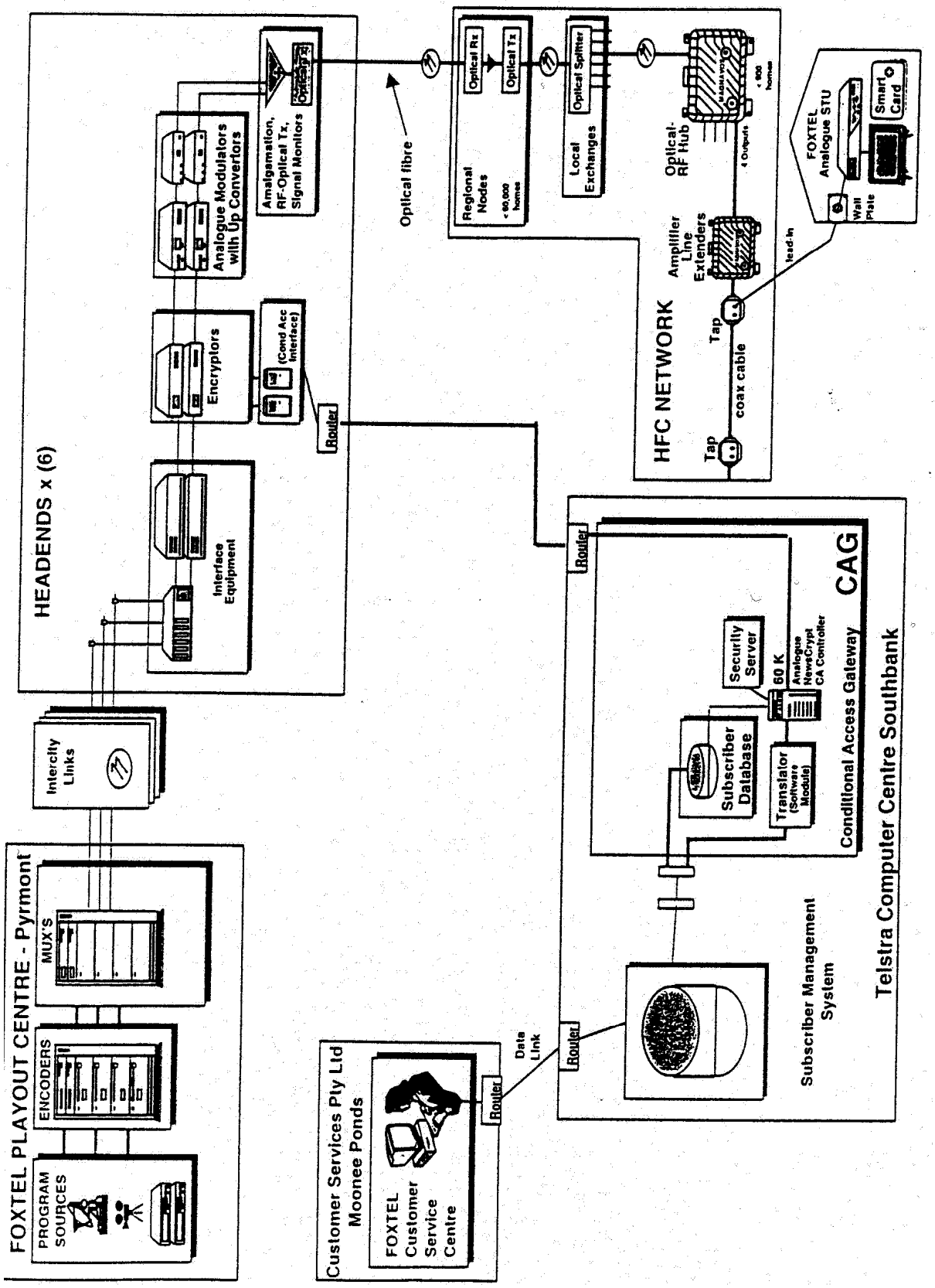
(b) the headends;

(c) a conditional access system;

(d) the HFC network; and

(e) the subscriber reception equipment.

11 These components are illustrated in the diagram which is set out below.


FOXTEL PLAYOUT CENTRE - Pyrmont
PROGRAM SOURCES
ENCODERS
MUX'S
Intercity Links
HEADENDS x (6)
Interface Equipment
Encryptors
(Cond Acc Interface)
Router
Analogue Modulators with Up Convertors
Amalgamation, RF-Optical Tx, Signal Monitors
Optical fibre
Regional Nodes
< 60,000 homes
Optical Rx
Optical Tx
Local Exchanges
Optical Splitter
Optical-RF Hub
HFC NETWORK
Amplifier Line Extenders
Tap
coax cable
Tap
lead-in
FOXTEL Analogue STU
Wall Plate
Smart Card
Telstra Computer Centre Southbank
Conditional Access Gateway
CAG
Securily Server
60 K
Analogue NewsCrypt CA Controller
Subscriber Database
Translator (Software Module)
Subscriber Management System
Router
Router
Router
Data Link
Customer Services Pty Ltd
Moonee Ponds
FOXTEL Customer Service Centre

12 The compilation and preparation of programs to be broadcast by FOXTEL is carried out at the Pyrmont playout centre. The equipment located at the centre assembles programs for broadcast as a continuous stream of information. Each program normally comprises the scheduled program, for example, a movie, sports program or series, as well as a program or channel identification and promotional and advertising material. Once compiled, this continuous stream of program information constitutes the program signal that is broadcast to subscribers.

13 There are a number of different "packages" of pay television offered by FOXTEL to subscribers. They may view different programs depending on the specific "package" to which they subscribe. This requires, as an essential component of the service delivery system, a means by which FOXTEL can control access of subscribers to available programs. This is known as the conditional access system. The components of this system are the subscriber management system and the conditional access gateway located at the Telstra Computer Centre at Southbank, and a smart card and set top unit ("STU") located at each subscriber's premises.

14 The subscriber management system is a computer system owned and maintained by Telstra Multimedia using software licensed from a third party. Information is stored and managed in the system in respect of each Telstra subscriber. This information includes names, addresses and other contact details; an account number; a smart card number; billing details and other relevant information. Such information may include, for example, methods of payment used; a history of billing information; entitlements to packages; and historic and marketing information relevant to each subscriber.

15 This subscriber information is entered and maintained on the system by a contractor, which provides services to Telstra Multimedia, which in turn provides its services to FOXTEL Management.

16 The subscriber management system transmits information of the smart card number and program entitlements in respect of each subscriber to the conditional access gateway. The gateway then generates conditional access data which is received at the headends, located in various cities. The headends encrypt a program signal that has been broadcast to it from the playout centre, and combine that encrypted signal with the conditional access data to provide

a combined information stream. This information stream is broadcast from the headends to each subscriber over the HFC network.

17 Subscriber reception equipment includes "wall plates", a fly-cable, an STU and a smart card. Subscribers are connected to the HFC network at the "wall plates" located on each subscriber's property. A fly-cable then connects the network, where it ends at the wall plate, to the subscriber's STU. The STU is a unit which sits on or by the subscriber's television receiver and receives the combined information stream from the HFC network. In conjunction with the smart card, the STU decrypts the program signal component of the combined information stream in accordance with the subscriber's entitlements. The program signal is then transmitted by the STU to the subscriber's television receiver. The smart card is a secure microprocessor which contains software and has memory capacity configured for the operations of FOXTEL. It is fitted into the STU at the time of the connection. (FOXTEL removes these units when a subscriber no longer subscribes to the services).

The issues

18 Although there are many issues between the parties currently in dispute in other proceedings, the essential issues for determination in the present proceeding before me are:

(1) whether FOXTEL had any protected rights under a contract that was in force at the beginning of 13 September 1996 within the meaning of s 152AR(4) and (12); and, if so,

(2) whether those rights survived until the time when Seven and TARBS requested access; and, if so

(3) whether the granting of any of the requests from Seven or TARBS would **deprive** FOXTEL of such rights.

How the issues arise

19 On 30 June 1997, the Australian Competition and Consumer Commission (the "ACCC") issued a statement (the "Deeming Statement") which specified a broadcasting access service ("BA service") as a declared service under s 39 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (Cth) (the "Transitional Act"). A BA service is an analogue service necessary to enable supply of a broadcasting service by means of line links that deliver signals to end-users. The effect of a statement under s 39 is that the

service is deemed to be a declared service under s 152AL of the TPA and therefore one to which the standard access obligations under s 152AR of the TPA apply.

20 On 8 September 1999 the ACCC made a declaration that an analogue subscription television broadcast carriage service ("ASTBC service") is a "declared service" for the purposes of Part XIC of the TPA (the "Declaration").

21 The validity of the 1997 Deeming Statement and the 1999 Declaration are currently under challenge under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("the ADJR Act") in proceedings before Wilcox J. These challenges are based on public law grounds.

22 By letter dated 25 August 1999, Seven requested that Telstra Multimedia supply it with BA services as services declared by the ACCC under the Transitional Act, so that Seven could provide three subscription broadcasting services, two of which would be used for Olympic Games coverage.

23 By further letters dated 30 August, 3 September and 8 September 1999, Seven requested that Telstra Multimedia supply it with ASTBC services. Relevantly, the 8 September letter was in the following terms:

> *"**Request for supply of analogue subscription television broadcast carriage services and related services***
>
> ***A. Background***
>
> *We refer to our letters to you dated 30 August 1999 and 3 September 1999. In the event that the requests made under section 152AR of the* Trade Practices Act *in those letters were not valid requests, Seven Cable Television Pty Limited ("Seven") makes the requests for services set out in this letter.*
>
> ***The purpose of this letter is to request**:*
>
> *1 under Section 152AR(3) of the Trade Practices Act (Cth) ("Act"), **that Telstra Multimedia** Pty Limited ("Telstra Multimedia"):*
>
> *(a) **supply Seven analogue subscription television broadcast carriage services** ("broadcast carriage services") **declared by the ACCC** under Section 152 AL(3) of the Act, so that Seven can provide 3 subscription television services;*

(b) ***give Seven billing information*** *in connection with matters associated with, or incidental to, the supply of the broadcast carriage services; and*

(c) *if Telstra Multimedia provides the whole or any part of the broadcast carriage services by means of conditional-access customer equipment,* ***supply to Seven any service that is necessary to enable Seven to supply the 3 subscription television services*** *by means of the broadcast carriage services and using the equipment; and*

2 ***commence and carry out negotiations with Seven as to the terms and conditions*** *upon which Telstra Multimedia will supply and give the services requested.*

Seven proposes to provide 2 of the subscription television services over the period 13 September 2000 to 2 October 2000*, inclusive, and also needs time for testing of the services.* ***These 2 services will be covering the Olympic Games*** *("Olympic Services").*

Seven wishes to commence providing the other service as soon as possible and preferably by no later than 1 October 1999 *and proposes to supply that service* ***on an ongoing basis*** *("Non Olympic Service").*

The requests specified in this letter are for a period of 24 hours a day in all geographic locations in which Telstra Multimedia provides broadcast carriage services.

...

F. Terms and Conditions of carriage

Seven requests that Telstra Multimedia promptly enter into negotiations with Seven as to the terms and conditions upon which Telstra Multimedia will supply such broadcast carriage services and additional services to Seven.

G. Prior Request

Seven made requests to Telstra Multimedia on 25 August 1999, in relation to the provision of broadcasting access services*, declared by statement issued by the ACCC on 30 June 1997 which specified a broadcast access service as an "eligible service" under section 39 of the* Telecommunications (Transitional Provisions and Consequential Amendments) Act *1997 (Cth). Seven requires Telstra Multimedia to negotiate with it in respect of both sets of requests. Subject to a satisfactory outcome to Seven being reached****, Seven may be prepared to withdraw one of these requests.***

H. Reasons and Response

If Telstra Multimedia is unable to provide one or more of the whole or any part of the broadcast carriage services and the billing information or

conditional-access customer services requested under B and C above, Seven requests Telstra Multimedia to inform Seven in writing as to the reasons why Telstra Multimedia is unable to do so by 17 September 1999.

Please respond in writing to the requests in this letter to Seven, at Level 13, 1 Pacific Highway, North Sydney by 17 September 1999.
..." (Emphasis added)

24 This request was refused by Telstra. Among the reasons for refusal was the assertion that the provision of the services by Telstra Multimedia would have the effect of depriving FOXTEL of its "protected contractual right" under s 152AR(4), and that therefore there was no obligation to provide the services. In the course of the hearing, the basis for this right was said to be found in a letter signed on behalf of Telstra Multimedia and FOXTEL Management dated 23 October 1995 ("the 23 October letter").

25 TARBS, by an earlier letter dated 20 August 1998 addressed to Telstra Corp, News Corporation Ltd ("News Corp") and FOXTEL, sought access to active declared services necessary to enable it to supply content by means of the FOXTEL cable system, including its customer STU equipment and the conditional access system. The TARB's request was in these terms:

"As you are aware on 18 August, 1998 Foxtel ceased to supply to nightmoves *subscribers the contents service which has been made available to you by our company under the name* nightmoves *and which was before that date, supplied by you to* nightmoves *subscribers using the Telstra/Foxtel broadband cable infrastructure ('the Foxtel Cable Service').*

TARBS wishes to continue to provide content to nightmoves *subscribers and proposes to use the Foxtel Cable Service in order to provide this content service as a subscription narrowcast service to those members of the public who have access to the Foxtel Cable Service and who may wish to subscribe through our company to the* nightmoves *service.*

TARBS also proposes to supply the following additional narrowcast services:

- 7 x 24 hours foreign language channels.

Accordingly, we now make this request in accordance with our entitlement to do so under s 152AR of the Trade Practices Act seeking access rights to eight (8) channels of the Foxtel Cable Service 24 hours a day and in all geographical locations where the Foxtel Cable Service is available. Provision of these additional channels on a non-exclusive basis is in the end users' best

interests. Access is requested to all services (being Active Declared Services) necessary to enable it to supply content by means of the Foxtel Cable Service including customer STU equipment and the Conditional Access System."

26 On 26 August 1998 FOXTEL Management replied stating that it was not the access provider and therefore it was unable to enter a relationship with TARBS. Also on 28 August Telstra Multimedia refused to grant access because, it said, it was the provider of the broadcast cable service to FOXTEL and the grant of access to TARBS would have the effect of depriving FOXTEL of a protected contractual right. Accordingly, it said it had no obligation to comply with the request.

Contractual History

27 In the context of these proceedings, four documents impacting on the relationship between various entities associated with Telstra Corp and News Corp are of particular significance. These are:

(1) an "Umbrella Agreement" between News Corp and Telstra Corp dated 9 March 1995;

(2) a version of a Broadband Co-oporation Agreement, dated 12 July 1995 ("July 1995 BCA");

(3) a letter dated 23 October 1995, signed by Telstra Multimedia and FOXTEL Management. It is this letter that is said by Telstra/News to be the source of the "protected contractual right"; and

(4) a second version of a BCA executed by Telstra Multimedia and FOXTEL Management dated 14 April 1997 ("April 1997 BCA").

The web of relationships created by these agreements is important and it is therefore necessary to set them out in some detail. The provisions of central importance are those which concern the rights of FOXTEL to provide Services.

The Umbrella Agreement

28 On 9 March 1995 News Corp and Telstra Corp entered into a long-term agreement described as an "Umbrella Agreement" which created an "Alliance" for the principal purpose of establishing businesses in the broadband video home entertainment sector in Australia. The purpose of that agreement was expressed to be to record the "overall terms" of that "Alliance". The Umbrella Agreement was for a term of over fifteen years.

29 The recitals to the Umbrella Agreement set out the background of the parties as follows:

> *"A. News is a major international media company with:*
>
> *(a) extensive experience developing and operating pay television businesses;*
>
> *(b) access to exclusive rights to programming material suitable for pay television businesses;*
>
> *(c) extensive expertise and proprietary rights relating to encryption, compression and customer service facilities; and*
>
> *(d) extensive expertise in the development and operation of on-line services for both consumer and business customers.*
>
> *B. Telstra is the leading telecommunications company in Australia with:*
>
> *(a) extensive experience developing and operating telecommunications networks and technologies which are also suitable to be used for the construction and operation of a broadband network;*
>
> *(b) extensive experience and skill in delivering telecommunications services to residential consumers in Australia by means of telecommunications networks and technologies; and*
>
> *(c) an established customer base in Australia."*

30 The objects and basic principles of the agreement set out in cll 2.1 and 2.2 in the following terms:

> *"2.1 This agreement is intended to set out the terms of the Alliance between News [Corp] and Telstra [Corp] and the overall structure of the businesses to be established within the scope of the Alliance and to identify the relevant entities and contractual arrangements that will initially be established in order to accomplish the business objectives set out in clause 2.2.*
>
> *2.2 The parties agree that the objectives of the Alliance are:*
>
> *(a) to establish through Joint Venture Entities, leading businesses within the broadband video home entertainment sector in Australia;*
>
> *(b) to exploit significant offshore business opportunities in countries where Telstra and News do business; and*

(c) to exploit those business opportunities on a profitable basis."

31 The commitment of the parties to the "Broadband System" are set out in clauses 2.11 and 2.12 as follows:

> *"2.11 The parties agree that Telstra and Broadbandco must be the exclusive supplier of all Broadband System Services used by any Joint Venture Entity. Any use by a Joint Venture Entity of a Broadband System Service other than by Telstra or Broadbandco must be approved by both parties.*
>
> *2.12 Telstra and News each must procure that for all services provided by means of the Broadband System operated by Broadbandco and delivered through the Set-Top Unit, whether or not they are Services, all conditional access functions must be provided by the Broadbandco Partnership."*

The "Broadbandco Partnership" is defined in the Umbrella Agreement as a partnership in which the capital is primarily owned by a Telstra Corp subsidiary, with a very small percentage of the capital being held by Moco Management as agent for the Moco Partnership. The Moco Partnership was a partnership in which Telstra Corp subsidiaries and News Corp subsidiaries held equal parts.

32 The scope of the Alliance is set out in cl 3. Relevantly, sub-cll 3.1 and 3.2 read as follows:

> *"3.1 The scope of the Alliance is all businesses within the broadband video home entertainment sector which comprise businesses which provide or manage the provision of Services. The purpose of this clause 3 is to define Services and by doing so to define the scope of the Alliance.*
>
> *3.2 In this agreement **Service means, subject** to clauses 3.3, 3.4 and 3.5, a service that:*
>
> *(a) **delivers to a Residential Subscriber** either **a Video Program** on a Television or **an Audio Program via Set-Top Unit**;*
>
> *(b) is not provided with an Associated Return Path Service other than a Limited Return Path Service; and*
>
> *(c) is not a Narrowband Service." (Emphasis added)*

33 Clause 4 is concerned with the operational structure of the Alliance and relevantly cl 4.4(a) reads as follows:

> *"4.4 The operational relationship between the Joint Venture Entities will be governed by the following agreements:*
>
> *(a) an agreement between Broadbandco Partnership and Moco Management as agent for Moco Partnership setting out the terms on which Broadbandco Partnership and the Moco Partnership will co-operate in the establishment of their respective businesses substantially in the form of annexure 3 ("Broadband Co-operation Agreement");*
> *...".*

34 The agreement referred to as the Broadband Co-operation Agreement ("BCA") underwent revisions at various times. For present purposes, the relevant version, which it is appropriate to consider as a starting point in addressing the issues in this case, is Revision 5 of 12 July 1995 (the "July 1995 BCA").

The July 1995 BCA

35 The July 1995 BCA was made between the Broadbandco Partnership which, as referred to above, was in broad terms equivalent to Telstra interests, and the FOXTEL partnership which in broad terms is a joint venture between Telstra and News. A third party to that agreement was News Corp.

36 The Recitals the July 1995 BCA included the following statements:

> *"A. Broadbandco proposes to establish business as a broadband system operator delivering broadband system services to customers in Australia.*
>
> *B. FOXTEL proposes to establish a business of providing and managing the provision of broadband video home entertainment services in Australia.*
>
> *C. FOXTEL Digitial Cable Television Pty Limited, ... proposes to establish a business of providing a Subscription Television Broadcasting Service to residential subscribers in Australia to be managed by FOXTEL Television.*
>
> *D. ...*
>
> *(a) FOXTEL will be the founding customer for Broadbandco's broadband system service ..."*

37 Clause 1 of the July 1995 BCA contains the following definitions:

> ***"Broadband Systems Service*** *means the service provided by Broadbandco to enable the* ***delivery*** *and* ***management of the delivery*** *of Services to Subscribers in accordance with this agreement.*
> *…*
>
> ***Services*** *has the meaning given in the Umbrella Agreement [see above] and, in relation to services provided or the provision of which is managed by FOXTEL, includes (except for the purposes of clause 3) additional services provided or the provision of which is managed by FOXTEL on a non-exclusive basis under the Umbrella Agreement.*

38 Other terms are defined as follows:

> *"****Channel*** *means a stream of signals for Services provided or the provision of which is managed by FOXTEL.*
>
> ***Channel package*** *means a selection of Channels nominated by FOXTEL Management to be subscribed for together.*
> *…*
>
> ***FOXTEL*** *means the FOXTEL Partnership established by the FOXTEL Partnership Agreement.*
>
> ***FOXTEL Partnership Agreement*** *means the partnership agreement dated the date of this agreement between Telstra Media Pty Limited, Sky Cable Pty Limited and FOXTEL Management*
>
> ***STU*** *means, in relation to a Subscriber, a device which is connected to or part of a Television and which, when operated with an enabled SmartCard, allows the Subscriber to receive in descrambled form those Channels or Channel Packages to which the Subscriber is entitled.*
> *…*
>
> ***Subscriber*** *means a person who has subscribed for Channels and who is entitled to receive them."*

39 Clause 3 is important and reads as follows:

> ***"3 EXCLUSIVE RELATIONSHIP***
>
> *3.1(a)* *Broadbandco and FOXTEL acknowledge that they have decided to establish their respective businesses on the basis of the Initial Business Plan and the forecast revenues set out in that plan.*
>
> *(b)* *That plan depends, amongst other things, on* ***FOXTEL's exclusive entitlement to provide or manage the provision of Services delivered to Subscribers*** *by means of the Broadband System Service in accordance with this clause 3.*

(c) *Broadbandco and FOXTEL further acknowledge that this exclusive entitlement enables FOXTEL to provide and manage the provision of Services to Subscribers on an attractive, marketable, co-ordinated and efficient basis. This, in turn, directly affects the forecast revenues set out in the Initial Business Plan.*

(d) ***FOXTEL intends, on reasonable commercial terms, to offer to provide and manage the provision of Services of Other Service Providers subject to FOXTEL's requirement that it be able to provide and manage the provision of ServiceS to Subscribers on an attractive, marketable, co-ordinated and efficient basis****.*

(Check language with RGF)

(e) *Subject only to clauses 3.10 and 3.11, for the avoidance of doubt, and to emphasise the intention of both Broadbandco and FOXTEL, nothing in this agreement in any way restricts or otherwise affects Broadbandco's right in its absolute discretion to use or permit the use of facilities controlled by it for or in connection with the delivery of services which are not Services to any person on Broadbandco's own behalf or on behalf of any other person.*

3.2 Subject to this clause, FOXTEL shall:

(a) ***exclusively provide or manage the provision of Services delivered to Subscribers*** *through use of the Broadband System Service; and*

(b) *utilise or otherwise exploit the functions comprised in the entire Broadband System Service only for the purpose of paragraph (a) above.*

3.3 ***To give effect to clause 3.2*** *and subject to clause 3.7,* ***Broadbandco will not use or permit the use of facilities controlled by Broadbandco for the delivery of Services by any Other Service Provider****.*

3.4 Subject to this clause 3, ***whenever Broadbandco may be required by Law to use or permit any Other Service provider to use facilities controlled by Broadbandco*** *to deliver Services, Broadbandco shall arrange for FOXTEL to satisfy that legal requirement and FOXTEL undertakes to provide that service and to satisfy, to the extent necessary, on behalf of Broadbandco any legal requirements imposed upon Broadbandco.*

...

3.7 Broadbandco may use or permit an entity other than FOXTEL to use the facilities controlled by Broadbandco to deliver Services if FOXTEL after a reasonable period has not, in Broadbandco's reasonable estimation after consultation with FOXTEL Management, complied with clause 3.4

...

*3.10 **Unless required by Law** and permitted by both technological developments and network system reconfiguration, Broadbandco may not provide a broadband system service, utilising STU Functionality, to deliver a service which is not a Service unless that broadband system service includes a conditional access function and a subscriber database function equivalent to the Conditional Access Function and the Subscriber Database Function."*

The 23 October letter

40 The letter of 23 October 1995 is of importance because the Telstra/News interests contend that the FOXTEL protected contractual rights arise under this document. Between 12 July 1995 and 23 October 1995 there were extensive negotiations and communications between the parties in relation to the terms of the July 1995 BCA. The latter date is significant for two reasons. The first is that on that date FOXTEL commenced to provide the services which were the subject of the agreement. The second is because the protected contractual rights relied on by Telstra and News are said to arise under a legally binding agreement made on that date, namely the 23 October letter incorporating the July 1995 BCA (the "October Letter Agreement").

41 On 23 October 1995 the Chief Executive Officer of Telstra Multimedia, Mr Moriarty, and a "duly Authorised representative of FOXTEL Management", Mr Mockeridge, signed the 23 October letter. It is in the following terms:

"FOXTEL Management Pty Limited
Wharf 8
Murray Street
PYRMONT NSW 2009

Dear Sirs

Broadband Cooperation Agreement – Interim Arrangements

As you know, Telstra and News have recently entered into a Head of Agreement with Australis. ***The purpose of this letter is to record the terms on which Telstra Multimedia Pty Limited*** *("Telstra Multimedia")* ***proposes***

to provide the Broadband System Service to FOXTEL Management, pending completion of the merger contemplated by that Heads of Agreement.

Interim Arrangements

Pending completion of the Australis merger, Telstra Multimedia will provide the Broadband System Service to FOXTEL Management on a monthly basis substantially on the terms of the draft Broadband Cooperation Agreement dated 12 July 1995, as supplemented by correspondence and negotiations *between us ("BCA").*

If the Australis Merger is Completed

If the Australis merger is completed, the arrangements set out in this letter will terminate on completion of that merger.

If the Australis Merger is Not Completed

If the Australis merger is not completed, either Telstra Multimedia or FOXTEL Management may require the other to enter into a long form Broadband Cooperation Agreement, substantially in the terms of the BCA*.*

…

Interpretation

FOXTEL Management is FOXTEL Management Pty Limited on behalf of FOXTEL Partnership.

Terms used in this letter and not otherwise defined have the meaning given in the BCA.

If you agree to the terms contained in this letter, I would be grateful if you would sign the enclosed copy of the letter and return it to me.

Kind regards,

[Signature]
Gerry Moriarty
Chief Executive Officer

[Signature]
T. Mockridge
Duly Authorised Representative of FOXTEL Management Pty Ltd" (Emphasis added except headings)

The contemplated Australis Merger

42 By way of background, the position was that prior to and as at 23 October 1995, negotiations were proceeding in relation to a possible merger of FOXTEL interests with Australis Media Limited ("Australis"). Australis held valuable rights under an agreement to supply FOXTEL content by way of movies at prices which were generous to Australis. Australis also had assets relating to a satellite broadcasting service. On 18 October 1995, five days before the important letter of 23 October, a "Heads of Agreement" was executed by Telstra Corp, News Corp, Australis and various subsidiary entities, which in simple terms contemplated the issue of a large parcel of shares in Australis to News in return for the sale of FOXTEL assets to Austalis. The Heads of Agreement were subject to a number of conditions precedent, one of which was approval of the merger by the predecessor to the ACCC. One consequence of the proposed merger, which continued to be negotiated though the latter quarter of 1995, was a need to draft a new BCA in lieu of the arrangement contemplated by the July 1995 BCA. The terms of this new BCA were finalised by the parties on 22 December 1995. However the proposed merger did not proceed because the ACCC refused to approve it. It was evident by the end of April 1996 that the merger was no longer a possibility.

Submissions on the 23 October letter

43 Counsel for Telstra and News both submit that it is the letter of 23 October 1995 incorporating the July 1995 BCA which constitutes the contract under which FOXTEL was granted protected contractual rights, and which continued in existence as at 13 September 1996. They contend that these rights remain in full force and effect through to the present time when enforcement of them is sought in the context of s 152AR. Seven and TARBS submit that no binding contract was created by the 23 October letter.

44 The nature of the protected contractual rights as formulated by Telstra are in these terms:

> *"(a) FOXTEL and the FOXTEL Television Partnership together have a **right to prevent** Telstra Multimedia from using or permitting the use of the facilities controlled by Telstra Multimedia to deliver a subscription television service provided by an Other Service Provider as defined in the [July 1995] BCA, which was a right arising under a contract that was in force at the beginning of 13 September 1996.*
>
> *(b) Pursuant to the Letter Agreement [October Letter Agreement] and clause 3.2 of the BCA, FOXTEL has the **exclusive right** to provide or manage the provision of Services delivered to Subscribers through the*

use of the Broadband System Service and to utilise or otherwise exploit the functions comprised in the entire Broadband System only for that purpose, and Telstra Multimedia agrees not to use or permit the use of facilities controlled by Telstra Multimedia for the delivery of services by any other Service provider. ***Clause 5.2 of the April 1997 Restatement BCA confers the same, or substantially the same, rights on FOXTEL*** *...").*

(c) Pursuant to the Letter Agreement and clause 3.10 of the BCA, unless otherwise required by Law and permitted by both technological developments and network system reconfiguration, Telstra Multimedia may not provide a Broadband System Service, utilising STU Functionality, to deliver a service which is not a Service unless the Broadband System Service includes a conditional access function and a subscriber database function equivalent to the Conditional Access Function and the Subscriber Database Function, as defined . ***Clause 5.12 of the April 1997 Restatement BCA confers the same or substantially the same, right on FOXTEL*** *...)"*

45 The final formulation of the protected contractual rights as claimed by News is framed as follows:

"1. The ***right to prevent*** *Telstra Multimedia from using, or permitting use of its broadband telecommunications network to deliver* ***a subscription television service*** *which is not provided by FOXTEL or the provision of which is not managed by FOXTEL (by virtue of its having entered into an agreement with a third party to do so) except where Telstra Multimedia is required by law to so use or permit the use of that network.*

2. The right to prevent Telstra Multimedia from providing any broadband system service utilising set top functionality to deliver a service, other than one which delivers to a person in a private residential dwelling either a video program on a television or an audio program via a set top unit, unless that service includes conditional access and subscriber database functions equivalent to those functions currently provided by Telstra Multimedia to FOXTEL.

3. The right to require Telstra Multimedia to establish, maintain and supply its broadband system service to FOXTEL to a standard which meets world's best practice for comparable services as to signal, quality and transmission reliability.

4. The right to require Telstra Multimedia to supply to FOXTEL the number and type of channels required by FOXTEL's business plan from time to time."

46 For convenience, the rights identified in pars (a) and (b) of Telstra's formulation and in par 1

of News' formulation, will be referred to collectively in these reasons as the "exclusivity" rights. The rights identified in par (c) and 2 respectively will be referred to collectively as the "bundling" rights. In relation to 3 and 4 above it is not an issue in this proceeding whether the grant of access to Seven or TARBS would have the effect of **depriving** FOXTEL of any of the rights in these paragraphs. The discussion below of the question whether there were protected contractual rights in respect of pars 3 and 4 above will turn on the reasoning in respect of the first two paragraphs.

The April 1997 BCA

47 Negotiations and communications continued between the parties after 23 October 1995 through September 1996 to 14 April 1997 when, it is common ground, a binding BCA was executed between the parties, namely the April 1997 BCA. The parties to the April 1997 BCA were Telstra Multimedia, and FOXTEL Management for and on behalf of the FOXTEL Partnership.

48 The Recitals to the April 1997 BCA state that on the commencement date, defined as 23 October 1995, Telstra Multimedia was establishing a business as a broadband system operator delivering broadband system services to customers in Australia, and that FOXTEL was establishing a business of providing and managing the provision of broadband video home entertainment services in Australia. The Recitals envisage that FOXTEL would be the founding customer for Telstra Multimedia's broadband system service, and that the FOXTEL Television Partnership would be the founding customer for FOXTEL's management of the provision of broadband video home entertainment services.

49 Clause 1 is concerned with the interpretation and effect of the agreement. *Inter alia*, it purports to set out the intentions of the parties with respect to the effect and operation of the October Letter Agreement and the July 1995 BCA. Clause 1.10(d) reads:

> *(d) By recording their agreement in this document, the parties do not intend to vary, terminate, discharge or rescind their agreement. ... To the extent (if any) that the parties have otherwise varied their agreement since the Commencement Date, the parties did not intend any such variation to terminate discharge or rescind their agreement. This document is to be interpreted to give effect to the parties intention as set out in this clause 1.10(d)"*

50 Clause 1.11(p) is to similar effect, but relates specifically to the exclusivity right and the

bundling right.

51 Relevantly, cl 1.11(n) reads:

> *"The parties recognise that [clauses 3.2 and 3.3 of the July 1995 BCA are] in all material commercial respects identical to ... clause 5.2 of this document."*

52 Clause 1.11(o) is to similar effect in relation to the bundling right.

53 Of particular importance is cl 5 of the April 1997 BCA, which concerns the exclusive relationship of the parties. This subject matter was dealt with in cl 3 of the July 1995 BCA. It is these clauses that FOXTEL/News submit support the exclusivity right and the bundling right.

54 In clause 5.1 the parties refer to the earlier history of the relationship and their present intent. Clause 5.2 is concerned with the grant of an exclusive right to FOXTEL and reads:

> *"5.2 (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 Services Provider where provision of those Services is managed by FOXTEL for the Other Service Provider.*
>
> *(c) Subject to Law, Telstra Multimedia may not provide Broadband Transmission Services to a Non-Service Provider*

except subject to a condition that the Non-Service Provider may only use that Broadband Transmission Service to deliver services which are not Services."

55 Clause 5.3 is concerned with the effect of legal requirements imposed on Telstra Multimedia and reads:

"5.3 (a) Where a Law requires Telstra Multimedia to use or permit the use of Telstra Multimedia's Broadband System or a facility controlled by Telstra Multimedia to deliver Services provided by an Other Service Provider, Telstra Multimedia must request and arrange for FOXTEL to satisfy that requirement.

(b) Upon a request being made by Telstra Multimedia, FOXTEL must arrange for the delivery by suitable means of the Services provided by the Other Service Provider and satisfy to the extent necessary on behalf of Telstra Multimedia the relevant requirement imposed by Law on Telstra Multimedia. In doing so, FOXTEL may only conclude an agreement relating to the delivery of Services provided by the Other Service Provider after consulting with Telstra Multimedia and securing Telstra Multimedia's reasonable agreement regarding the terms and conditions under which FOXTEL will arrange delivery of the Services.

(c) To the extent the Law requires Telstra Multimdedia to use or permit the use of Telstra Multimedia's Broadband System or facilities controlled by Telstra Multimedia to deliver Services provided by an Other Service Provider, FOXTEL may only act as Telstra Multimedia's agent in relation to that use and FOXTEL must act in accordance with Telstra Multimedia's policies regarding capacity, pricing and other conditions attaching to that use."

56 Clause 5.5 relates to "legal requirements imposed on FOXTEL" with respect to Other Service Providers and relevantly reads:

"5.5 Where a Law requires FOXTEL to provide a Broadband Transmission Service by means of or including Telstra Multimedia's Broadband System which is capable of being used to deliver Services, FOXTEL must:

(a) inform Telstra Multimedia promptly of any claim presented to FOXTEL of a legal entitlement in relation to the provision by FOXTEL of that Broadband Transmission Service;

(b) to the extent permitted by the relevant Law, comply with the relevant Law in a way that does not involve providing a

Broadband Transmission Service in a manner inconsistent with clause 5.12;

(c) to the extent it is provided by means of Telstra Multimedia's Broadband System, act only as Telstra Multimedia's agent in relation to the provision of that Broadband Transmission Service pursuant to Telstra Multimedia's policies regarding capacity, pricing, and other conditions attaching to that Broadband Transmission Service; and

(d) to the extent it is provided by means of Telstra Multimedia's Broadband System, conclude an agreement relating to delivery of that Broadband Transmission Service only after consulting with Telstra Multimedia and securing Telstra Multimedia's reasonable agreement regarding the terms and conditions under which FOXTEL will arrange delivery of the Services.

57 Clauses 5.6 and 5.7 relevantly read:

"5.6 Nothing in clause 5.5 by implication or otherwise qualifies Telstra Multimedia's control of Telstra Multimedia's Broadband System or the facilities that comprise Telstra Multimedia's Broadband System or its control over performance of the Conditional Access Function, the Subscriber Database or the Subscriber Database Function.

5.7 Telstra Multimedia may use or permit the use of Telstra Multimedia's Broadband System or any facility controlled by Telstra Multimedia to deliver Services provided by any Other Service Provider where:

(a) FOXTEL does not within a reasonable period comply in accordance with clause 5.3 with a request by Telstra Multimedia under clause 5.3(a); or

(b) Law does not permit the relevant requirement imposed by Law upon Telstra Multimedia to be satisfied by FOXTEL in the manner stipulated in clause 5.3(b)."

58 Clause 5.12 provides:

"5.12 Unless:

(a) required by Law; and

(b) permitted by both technological developments and network system reconfiguration,

neither Telstra Multimedia nor FOXTEL (as agent of Telstra Multimedia or otherwise) may provide a Broadband Transmission Service, utilising STU Functionality, as the means of delivering a service (including, without limitation, an Other Service and a service which is not a Service) unless that

Broadband Transmission Service includes a conditional access function and a subscriber database function equivalent to the Conditional Access Function and the Subscriber Database Function."

59 Clause 7 is concerned with the supply of the Broadband System Service and its utilisation. It provides:

> *"7.1 Telstra Multimedia must establish, maintain and supply to FOXTEL the Broadband System Service for the Term. Subject to clauses 7.6 to 7.12, Telstra Multimedia must supply the Broadband System Service in accordance with this agreement and to a standard which meets world's best practice for comparable services (including in terms of delivery technology) as to signal quality and transmission reliability. In connection with the Broadband System Service, Telstra Multimedia must, among other things:*
>
> *(a) receive signals for the Channels at each Head End and scramble those signals, in the case of Digital Channels, at the relevant play out centre and, in the case of Analogue Channels, at the Head End;*
>
> *(b) modulate those signals at each Head End and transmit them to Subscribers' STU's;*
>
> *(c) deliver STU's to Subscribers and connect them; and*
>
> *(d) subject to clause 12, remedy faults affecting the delivery of Channels to Subscribers;*
>
> *to enable FOXTEL to provide or manage the provision of Services in accordance with its Business Plan.*
>
> ...
>
> *7.4 Telstra Multimedia must supply FOXTEL with the number and type of Digital Channels and Analogue Channels required by FOXTEL's Business Plan from time to time."*

60 The Term of the April 1997 BCA is defined to mean the period from the Commencement Date, namely 23 October 1995, to the End Date, which is defined, subject to some qualifications, to mean a date ten years after termination of the Alliance in accordance with the Umbrella Agreement. The Alliance under the Umbrella Agreement was to continue until the **later** of (a) 1 March 2010, and (b) termination of the Alliance pursuant to clause 14, unless terminated earlier. It is evident that the April 1997 BCA was a long term agreement.

Background to the legislation

61 On 1 August 1995 the Minister for Communications and the Arts, Mr Lee, announced changes to policy, legislation and regulation of telecommunications, to be introduced from 1 July 1997. Attached to that announcement was a document entitled "Telecommunications Policy Principles: Post 1997". In the announcement the Minister said that the new policy framework would open the door to substantial competition and would allow for more industry players with a view to striking a balance between greater competition and the need to spread the benefits of improved services to as many people as possible. The central element of the new arrangements was stated to be full and open competition in the provision of services following on the then current transitional arrangements commenced in 1992 of two general carriers (Telstra and Optus) and three mobile carriers (Telstra, Optus and Vodaphone) due to expire in July 1997. The announcement emphasises that the reforms would create a more competitive industry and one in which competition would be sustained through appropriate constraints on anti-competitive behaviour.

62 In the policy principles attachment, under the heading "Competition Policy", it is stated that the interconnection and access regime provides for a right of a service provider to interconnect with carriers' networks on terms and conditions to be agreed or arbitrated.

63 Principle 19 requires that carriers must interconnect all requesting service providers, including those requesting broadcasting services, and act as common carriers. An access undertaking by a carrier must not confine the availability of services to any class or classes of persons without the agreement of the ACCC acting on general competition policy principles.

64 Principle 20 provides that each carrier is required to give an undertaking in relation to the interconnection of service providers and access to its carriage services by content providers. It went on to provide that a carrier would be able to deny a request for interconnection or carriage on reasonable grounds, including connection not being technically feasible or sufficient capacity not being available.

65 Principle 22 is to the effect that in order to facilitate access to customers, carriers and service providers must make the customer equipment it owns accessible to other carriers or service providers, including, for example, access to STU's. Furthermore, any carrier or service provider operating a subscriber management system used to control or manage access to services must provide access to that system at a fair price.

66 The Telecommunications Policy Principles do not make any reference to any specific concept which provides for protection of existing rights in terms in any way analogous to those presently under consideration.

67 The first exposure draft of the proposed legislation which eventually was to become Part XIC of the TPA was released on 20 December 1995 (Exhibit F). That draft did not contain any reference to a "protected contractual right" of the nature of that set out in s 152AR(4)(d).

68 The second exposure draft of the proposed legislation was published on 13 September 1996 (Exhibit G) (which is the cut off date for the existence of protected rights) and contained a provision substantially similar to that which found expression in s 152AR(4)(d). That draft was first introduced into Parliament on 5 December 1996.

69 In the period leading up to 23 October 1995, and for some months thereafter, it appears that the legislative background against which the July 1995 BCA was being negotiated did not disclose any detail as to the nature or extent of the proposed access regime or as to whether existing rights would be protected and the extent of any such protection. Negotiations and communications between the parties prior to 23 October 1995 and thereafter were against the background that it was known that after mid-1997 access in some form would be required to be given. This legislative backdrop is an important part of the context in which the communications regarding the July 1995 BCA and negotiation of it should be considered. When the statutory regime was finally enacted it provided for the protection of pre-existing contractual rights so that it became necessary to focus on the nature and operation of the rights given by the contractual provisions.

Protected contractual right – approach to interpretation

70 For the purposes of resolving the main issues in this proceeding it is convenient to approach the matter on the basis that the principal right under consideration is the exclusivity right, said to have been conferred on FOXTEL by the October Letter Agreement, and with that in mind the discussion will centre around this right. The existence and operation of the other rights relied on as protected contractual rights will follow from the conclusions reached with respect to the exclusivity right.

71 A number of questions arise as matters of interpretation when determining whether there is a

protected contractual right. They are as follows:

(1) whether, having regard to the legislative background and objects of Part XIC of the TPA, the term "protected contracted right" should be given a narrow meaning;

(2) whether there must have been a contractual right in existence as at 13 September 1996 and whether such a right must be in existence at the time it is sought to be enforced;

(3) whether it is necessary that an **identical contract** must have continued in force unaltered since 13 September 1996 up to the time when it is sought to be enforced; and

(4) whether the **right** sought to be enforced must be **identical** to the right in existence on 13 September 1996.

72 Seven submits that having regard to the evident purpose of Part XIC of the TPA, to make access available for the benefit of end-users and to promote competition, the definition of "protected contractual right" which provides an exception to, or limits, the right of access should be given a narrow meaning. In support of this submission Counsel for Seven referred to comments by Gummow J in *Suatu Holdings Pty Limited v Australian Postal Corporation* (1989) 86 ALR 532 where his Honour said at 541:

> *"There are two precepts of statutory interpretation which provide some particular assistance in deciding this question. First, the provision is to be read in its context, including the other provisions of the statute, ... Secondly, a statutory limitation or exclusion provision such as s 104 [a protective clause] is to be strictly construed for it protects the interests of a statutory authority* ***which is given privileges in the nature of a monopoly*** *for provision of a public service, at the expense of what otherwise would be individual justiciable rights ... Thus, such phrases in s 104(1) as 'in respect of' and "by reason of" are to be construed narrowly rather than generously, as would otherwise be the case." (Emphasis added)*

73 These comments of his Honour were directed in that case to the assertion by the Australian Postal Commission of a statutory immunity to an action for damages under the TPA. While that decision bears little resemblance factually to the present dispute, it is of some relevance because the clear intent of the Part XIC access regime is to open up a market where there was previously a monopoly, and subs 152R(4)(d) is a limitation on that intent.

74 In reply Telstra/News submit that the rights of access expressly and specifically do not apply

where a grant of access would deprive a person of a right under a contract which was in force at 13 September 1996. Therefore, it is said, since protection of such contractual rights is also a purpose of s 152AR(4), the section should be approached without any predisposition to a narrow interpretation.

75 While there is some force in the submission of Telstra/News, in my opinion, having regard to the legislative background of Part XIC and especially to the expressed objective in s 152AB(2) of promoting competition, it is appropriate to give a strict construction to the statutory expression "protected contractual right". Such an approach facilitates the achievement of the clear legislative purpose by narrowing pre-existing exclusive arrangements calculated to prevent access by competitors or to delimit the terms of access by such competitors. The right claimed to exist in the present case is designed to operate in such a way. This is not to say that full effect must not be given to the language used but rather that there should be a strict construction of the language used so as not to frustrate the purpose of the legislation.

76 Another issue which arises, as a matter of statutory interpretation, is whether, given its context in s 152AR(4), the right asserted in the present case is a right of a nature which comes within the meaning of "protected contractual right". Seven contends that, having regard to the objects of Part XIC, the rights of exclusivity and bundling (see for example cll 3.2, 3.3 and 3.10 of the July 1995 BCA) are not rights of a kind which were intended to be afforded protection under s 152AR(4)(d). It is said that the rights asserted by FOXTEL are directly counter to the evident policy of the legislation which is to open access and provide greater benefits to the end-user through free and open competition. There is some force in this submission. However the difficulty with it is that the section is silent on this aspect. The sub-section simply refers to a right under a contract and not to the character, quality or extent of that right. Accordingly I do not approach the question on the basis that the "right" referred to in s 152AR(4)(d) cannot as a matter of interpretation include a right of exclusivity or bundling, although as noted earlier that policy does favour a strict construction.

77 Counsel for Seven further submits that subs 152AR(4)(a), (b) and (c) are concerned with circumstances which have the effect of preventing either a service provider or an access provider from obtaining **sufficient** access to meet that provider's needs or requirements. Therefore it is said that subs (4)(d) should be read down so as to protect only contractual

rights which concern sufficiency of access and not rights of a more general nature such as a right to exclusivity or to require bundling. Again, in my view, the language of subs (4)(d) is not limited by reference to the preceding three paragraphs and it should not be read down for that reasons. Moreover, the focus of subs (4)(d) departs from that of the earlier paragraphs in that it is concerned with **deprivation of a contractual right** as opposed to sufficiency of access.

Existence of a contractual right

78 The parties are in agreement that in order to attract protection, there must have been a protected contractual right in existence as at 13 September 1996 and that such a right must be in existence at the time it sought to be enforced. This comes from a reading of the legislative scheme as discussed above. Section 152AR requires an access provider to supply an active declared service to a service provider on request (subs (3)) unless, *inter alia,* it would have the effect of depriving any person of a protected contractual right (subs (4)(d)). As a matter of interpretation the right must be in existence at the time that access is sought by another service provider for the granting of such access to have the effect of depriving the person of the right. The requirement that the right existed under a contract that was in force at the beginning of 13 September 1996 comes directly from the definition of "protected contractual right" in subs 152AR(12).

Whether right must continue under the same contract

79 Seven then submits that subs 152AR(4)(d) requires not only that the same **right** must remain in existence up to the time when it is asserted or is sought to be enforced, but also that the **same contract** under which the right arises must continue in existence unaltered (or alternatively **substantially unaltered**) in relevant respects up to such time. It is contended by Seven that if there ever were any rights in existence as at 13 September 1996, those rights were extinguished by a subsequent variation, specifically the execution of the April 1997 BCA. Expressed another way, the submission is if the specific contract under which the right arose comes to an end, or is varied in any way, so does the protected contractual right.

80 Telstra and News submit, on the other hand, that it is only the **right** that needs to continue in existence and not the **contract**. On this approach if a **right**, was in existence as at 13 September 1996 and has continued in existence by reason of being embodied in the April 1997 BCA then that is sufficient.

81 Subsections (4)(d) and (12) of s 152AR are silent as to the need for the continued existence of either the **right** or the **contract**. However, as discussed above, it is evident that in order to be deprived of a right by a subsequent grant of access, the right relied on by FOXTEL to prevent access must be in existence at the time access is sought to be granted or is granted. If it has been extinguished, for example by agreement or by operation of law, it cannot then be asserted. On the other hand, it is by no means evident that s 152AR requires that the identical **contract** under which the **right** existed as at 13 September 1996, must continue in existence. It seems to me that if the "right" in the same terms is simply restated or preserved between the same parties in another contract and there is **no legal hiatus in the continuance of that right** in its unmodified form, it could not be said that the **right** had been lost. This would be contrary to the evident purpose of the provision in ss 152AR(4)(d) which in my view is designed to protect a contractual **right**, provided that the right **was** in existence on the specified date, rather than contracts.

82 One consequence of Seven's submission would be that if the parties set out to continue the existence of the contractual right and embody it, for example, by entry into a deed in substantially identical terms, the right would be lost because the contract under which the "right" arose was extinguished. This would be a curious result, given the paragraph's purpose.

83 The approach proposed by Seven, in my view, adopts too restrictive an interpretation. What is to be protected and enforced is the "right" and not the "contract". Of course, as counsel for Seven points out, other provisions in the contract in which the right is framed may be varied in such a way as to alter the substance of the right itself, for example by extension of the term of the agreement, and if this occurs, then, in my view, the protection is not enlivened.

Whether continuing right must remain the same

84 The next question which arises is whether the "right" sought to be enforced must be the **identical** right or whether it must be **substantially** the same right as that in existence at 13 September 1996. Again, given that one of the purposes of the provision is to protect an existing right, and given that the TPA is designed to operate in a commercial context, it is in my view appropriate to look at the substance of the right and not simply the form of the linguistic clothing in which the right is conferred.

85 A further general question of interpretation raised by Counsel for Telstra is whether any variation of a substantial nature to the overall contract or a particular provision of the contract will extinguish or lead to loss of the right. In my view, it is not any or every variation which could have such an effect. It must depend on the nature and extent of the variation in each case considered as a matter of substance and its effect on the character of the protected right.

86 Finally, in this consideration of preliminary issues of interpretation, there was some discussion as to whether s 152AR(4) is in the nature of an exception to s 152AR(3) or whether it operates to delineate the nature and extent of the right of access conferred by subs (3). This question does not assume importance in the present case, in my view, because this is not a case which turns on onus of proof. Again, the proper approach is to consider the language of the section in its factual and legal matrix having regard to its natural and ordinary meaning.

Formation of contract – general principles

87 Telstra/News submit that there was a concluded and legally binding contract in existence before 13 September 1996 giving FOXTEL exclusive rights to access Telstra Multimedia's broadcasting systems. They submit that such a contract arose by virtue of the 23 October letter incorporating the July 1995 BCA. They argue that the parties had agreed on the terms by which FOXTEL would be given access to the broadband network. Although no BCA was finally executed until 14 April 1997, this later BCA is said to be no more than a formal restatement of the October Letter Agreement.

88 Seven submits that the 23 October letter incorporating the July 1995 BCA does not create contractual obligations that establish the rights claimed by News and Telstra. It submits that the parties remained in a state of negotiation as at that date and had not reached agreement on essential terms of the arrangement.

89 A useful starting point in determining whether parties engaged in negotiations have concluded a contract is the statement of the Court in *Masters v Cameron* (1954) 91 CLR 353 at 360-361, where it said:

> *"Where parties who have been in negotiation* ***reach agreement upon terms of a contractual nature*** *and* ***also agree that the matter of their negotiation shall be dealt with by a formal contract****, the case may belong to any of three classes.* ***It may be one in which the parties have reached finality in***

> ***arranging all the terms of the bargain and intend to be immediately bound to the performance of those terms****, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be* ***a case in which the parties have completely agreed upon all terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply****, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly****, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.***
>
> ***In each of the first two cases there is a binding contract****: in the first case a contract binding the parties* ***at once to perform the agreed terms whether the contemplated formal agreement comes into existence or not****, and to join (if they have so agreed) in settling and executing the formal documents; and in the* ***second case a contract binding the parties to join in bringing the formal contract into existence*** *and then to carry it into execution. Of these two cases the first is the more common. ...*
>
> ***Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own****: ... The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, ... or simply because they wish to reserve to themselves right to withdraw at any time until the formal document is signed. These possibilities were both referred to in* Rossiter v Miller . *Lord O'Hagan said: 'Undoubtedly,* ***if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed****. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made.'..." (Emphasis added)*

90 It is useful to keep in mind the opening remarks of the Court in that case which make it clear that the above principles apply where the parties have in fact **reached agreement** upon terms of a contractual nature. For there to be a binding contract the references to reaching "finality in arranging all the terms of the bargain" and to the parties having "completely agreed upon all the terms of their bargain" are important.

91 In the present case, Telstra and News contend that the October Letter Agreement falls within the first class in *Masters v Cameron* . They submit that the parties reached finality in arranging the terms of their bargain, particularly with respect to exclusivity, and intended to

be immediately bound to perform those terms, although both parties proposed to have their agreement restated in a long form BCA which might be fuller or more precise but not different in effect. In support of this submission, they emphasise that on the date of the letter, FOXTEL commenced operations and Telstra Multimedia was to commence performance of its services.

92 The relevant principles as to formation of contract were also considered in *Australian Broadcasting Commission v XIVth Commonwealth Games* (1988) 18 NSWLR 540 at 549-550 where Gleeson CJ (with whom Hope and Mahoney JJA agreed) said:

> *"This is not a case in which the parties have signed a single document which, because it contains some such expression as 'subject to contract', gives rise to the problem in question. ... The case* ***involves the objective determination of the intention of the parties from a consideration of a series of communications exchanged by them in the context of their dealings over a period of time****. In those circumstances* ***it is both appropriate and necessary to have regard to the commercial circumstances surrounding the exchange of communications and, in particular to the subject matter of those communications:*** *... Furthermore, ... it is proper to* ***have regard to communications between the parties subsequent to the date of the alleged contrac****t to the extent that those communications throw light upon the meaning of the language which is being considered for the purpose of determining whether it expresses an intention one way or the other upon the critical matter. At the least,* ***such subsequent communications will often form part of the context in which the particular exchanges in question are to be evaluated.****" (Emphasis added)*

93 His Honour said at 548:

> *"In a case where a court is required to make a judgment concerning the intention of the parties in relation to what might broadly be described as a* Masters v Cameron *... dispute, it will normally be of importance that the court have an understanding of the commercial context in which the dispute arises, and* ***a most significant feature of that context will relate to the subject which the parties regard, or would ordinarily be expected to regard, as matters to be covered by their contract****. In some cases, such as transactions involving the sale and purchase of land, or leases, courts may properly feel well equipped to form a view on such matters without the need for much evidence.* ***In many cases****, however, of which the present is a good example, there is a need for evidence in one form or another as to what subjects would be regarded as requiring agreement between the parties. In this* ***case the best evidence on that subject is to be found in the actual communications between the parties and, in particular, in the issues which they in fact address when they set about drafting their detailed contract****." (Emphasis added)*

94 The question of whether it was the intention of the parties to make a concluded bargain is not the same as a question of whether the parties had reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract: *Australian Broadcasting Commission v XIVth Commonwealth Games* at 548. See also *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 326, per Mahoney JA; and *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1980) 5 CLR 647 at 650, per Higgins J. Should a court be satisfied as to the intention of the parties to enter into a contract, the approach which a court will generally take in determining the existence of a binding contract, in the context of commercial circumstances and party communications, is conveniently summarised by Williams J in *York Air Conditioning and Refrigeration (A/sia) Pty Ltd v The Commonwealth* (1949) 80 CLR 11 at 26-27 as follows:

> *"In* Scammell and Nephew Ltd v Ouston *Lord Wright said ' the object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation ...**it is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain.**' In* Hillas & Co Ltd v Arcos Ltd *Lord Tomlin, referring to the words 'of fair specification' said 'that is something which if the parties fail to agree can be ascertained just as much as the fair value of a property.'.... After all, the parties being businessmen ought to be left to decide what degree of precision it is essential to express in their contracts, if no legal principle is violated.' In the present case it is clear that the parties believed they had made a concluded and enforceable contract and the provisions of the standard conditions are in my opinion sufficiently definite to enable the Court to give them a practical meaning. There is no objection to the parties agreeing that the ascertainment of some fact in the performance of the contract shall be a matter of 'estimation, approximation and apportionment'. A contract which states that the price is to be a reasonable price is a valid and enforceable contract...."(Emphasis added, footnotes excluded)*

95 It is important to note the emphasis in the above statements on the necessity to have an agreement on terms which are sufficiently definite or capable of being defined so as to enable the court to spell out the rights and obligations of the parties with reasonable certainty. In *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, the meaning of the clauses in issue was found to be capable of being ascertained by

the Court. However, this situation was contrasted with one in which there was more than mere uncertainty of meaning of a term of the contract that could be resolved by the Court. In this regard it is worth noting that the number and significance of the areas in respect of which parties have failed to agree will be of relevance to both questions of intention and of whether the parties have reached an agreement which is capable of forming a binding contract: *Australian Broadcasting Commission v XIVth Commonwealth Games* at 548.

96 The formation of a contract, in my view, involves more than a serial accumulation of separate and discrete agreed clauses. Consensus on several particular terms of an overall agreement normally will not give rise to a contract until all essential terms have been formulated and agreed upon. A contract is more than the sum of its parts considered separately, just as a melody is different from the individual notes, to adopt the well known statement of Learned Hand J in *Helvering v Gregory* 69 F 2d 809 at 810 (1934). A concluded contract is an end result of negotiations and one provision of the overall concluded contract may interact with and affect the meaning and operation of other agreed provisions. One consequence of this process is that in order to properly understand the meaning and operation of a particular provision it is essential to consider such provision in the context of all the terms contained in the overall concluded contract.

97 When parties are negotiating in order to arrive at a contract to govern their legal relations the process is often complex, especially in cases of detailed and wide ranging agreements intended to endure over many years. In the course of negotiations there will generally be a constant and ongoing process of adjustment and readjustment of the positions adopted by the parties on particular clauses. This process sometimes involves a series of mutual "trade-offs" whereby a concession is made by one party in respect of one provision in exchange for the giving of a concession by the other party in respect of a different provision. It will also involve compromise and adjustment so that it is often difficult to determine whether at any particular point of time prior to execution of a final agreement the parties have entered into contractual relations. Before a final contract is made it is also difficult to detach any particular provision from its context and say that a final agreement has been reached on that particular clause as a discrete agreement. In the present case, for example, unresolved negotiations as to other provisions of the BCA which do not directly relate to exclusivity, may lead to reconsideration of the position of the other party with respect to the exclusivity provision. One particular example which comes to mind is the duration of the agreement.

This can effect the extent and impact of an exclusivity clause. Therefore where the parties remained in negotiation on conditions other than, say, bundling and exclusivity, such negotiations must be taken into account because they may impact upon the final decision of the parties with respect to those subject matters. When speaking of a **contractual** right, there is, of course, no such right until a binding contract is made.

98 In the present case the observations of Kirby P (with whom Waddell AJA agreed) in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 20 as to commercial commitment are apposite namely:

> *"Parties in large commercially risky enterprises (such as the development of a coal mining lease) quite frequently incur expense and waste months of executive time paying consultants and others in a project that comes to nothing. This is an inescapable aspect of commercial negotiation. As even the heads of agreement indicate (and the final draft joint venture agreement confirms) the contract between the parties for a joint venture in the exploration of a coal mining lease had many complex and detailed incidents. Courts are not well equipped, drawing on their own experience, to fill out the detail of such contracts where the parties leave gaps in their own agreement. The fact that this may result in wasted time and money is a risk which parties to negotiation must always weigh up. Courts cannot enforce such agreements because they are incapable of judging where the negotiation on particular points would have taken the parties, acting bona fide but legitimately in their own interests."*

See also *Vroon BV v Fosters's Brewing Group Ltd* [1994] 2 VR 32 at 72-74.

99 Such commercial complexity was also considered by the New South Wales Court of Appeal in *GR Securities Pty Ltd v Baulkam Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631, in respect of ascertaining the intention of the parties:

> *"The magnitude, subject matter, or complexities of the transactions may indicate that the agreement ... was not intended to have legal effect:* Sinclair, Scott & Co Ltd v Naughton *(1929) 43 CLR 310 at 316-317."*

100 However his Honour observed that the decisive issue is always the intention of the parties objectively ascertained from the terms of the document read in light of the surrounding circumstances. If these considerations indicate an intention to be bound immediately, effect must be given to that irrespective of the complexity or magnitude of the subject matter. This observation as to intention must, of course, be separated from the relevance of such matters in determining actual enforceability for reasons of certainty of intended contractual agreements.

Were all essential terms agreed in negotiations, up to 23 October 1995?

101 Seven points out, and I accept, that the negotiations and correspondence between the parties in the period from July through to 23 October 1995 left unresolved a substantial number of significant issues in relation to the then current state of the July 1995 BCA and these issues remained open and undetermined as at 23 October 1995. They concerned significant matters such as:

- reciprocity,
- dual capability and roll-out obligations,
- exclusivity,
- STU ownership,
- programming,
- financial issues,
- guarantee,
- channel capacity, and
- marketing incentives.

102 In support of its submissions as to the fluid and open-ended state of the negotiations as at 23 October, and indeed up to April 1997, Seven handed up a document identifying the regular and numerous "Outstanding Issues Lists" exchanged between Telstra Multimedia and FOXTEL from 12 July 1995 to 6 March 1997 inclusive. An examination of those lists discloses that as at 23 October 1995, they contained references to many issues in the relationship between FOXTEL and Telstra Multimedia in the context of the BCA which were not resolved.

103 In particular with respect to cl 3 concerning exclusivity, as late as 18 October 1995, this subject matter was discussed between the parties and there were outstanding issues as to the right to veto Other Service Providers and programs. There was also an unresolved issue as to the verification of the retail relationship with customers. A revised draft of the BCA was produced, dated 20 October, and this had extensive suggested amendments and additions in relation to cl 3 as well as in relation to many other provisions including cl 10A. These variations to cl 3 also included changes to cl 3.2A concerning the management of services of Other Service Providers; and to cl 3.10 which related to bundling. In addition there were a number of additional suggestions and matters proposed for subsequent discussion. The negotiations as to proposed unresolved variations and deletions to the BCA did not terminate at 23 October but continued on and after that date up to and including April 1996.

104 The evidence also included several previous drafts of the 23 October letter drawn up shortly prior to 23 October. Comparison of these drafts with the final version discloses that earlier drafts made reference to three specific letters. These references were deleted in the final version and the amorphous expression "as supplemented by correspondence and negotiations" was left. This change indicates that a conscious choice was made to move away from a closed specific delineation of the terms in favour of an open-ended and looser arrangement designed to give the parties room to further negotiate. Such a change made the determination of the precise nature of the arrangements more difficult.

105 Therefore, in addition to the qualifications and uncertainties inherent in the expression "**substantially** on the same terms of the **draft** [BCA] dated 12 July 1995", are the uncertainties inherent in the important expression "as supplemented by correspondence and negotiations". This "correspondence" and these "negotiations" are unspecified. There are no details given as to the conditions or terms sought to be derived from the three month long course of correspondence and negotiations between the parties. There are no details as to dates, signatories, or participants in discussions, nor are any details given as to precise material or notes relied on. The reference to "negotiations" is a vague concept in the sense that questions could arise as to what negotiations are included and what amounts to a "negotiation" relevant to the supply of the services. There is no reference to whether the negotiations are oral or written. Nor is there any indication as to the form of the correspondence. For example was it by way of fax, letter or e-mail. Presumably, the reference to the supplementary "correspondence and negotiations" refers to the totality of the exchanges, correspondence, dealings and discussions between the parties themselves, or through their agents, employees or solicitors over the entire period of almost three and half months from 12 July to 23 October 1995. However, no guidance is given as to the relative importance of the numerous recorded meetings, correspondence and draft agreements which come under the expression "correspondence and negotiations". It is no answer to suggest that a court may be able to give content to these items after hearing evidence. The arrangements in this case are complex and wide ranging, and on the material available as at 23 October 1995 a court could not resolve the essential terms of the agreement for the parties.

Analysis of letter

106 The heading to the letter indicates that it was intended to constitute an "Interim Arrangement" with respect to the BCA. As the first paragraph makes clear the letter is to be considered in

the context of the "recent entry" by Telstra Corp and News Corp into Heads of Agreement with Australis, which in fact took place five days earlier on 18 October 1995. Indeed in the last quarter of 1995 the parties were engaged in the preparation of a Broadband Co-operation Agreement involving Australis, in light of the then anticipated merger. This new BCA was intended to be in substitution for the July 1995 BCA negotiated between FOXTEL, Telstra and News Corp.

107 The purpose of the letter was expressed to be to record the terms on which Telstra Multimedia proposed to provide the Broadband System Service to FOXTEL, pending completion of the anticipated merger.

108 The interim or temporary duration of the arrangement envisaged by the letter of 23 October is further highlighted by the sub-heading "Interim Arrangements" and the four lines of text beneath that heading. The reference to "pending completion of the [Australis] merger" is repeated. While the merger was pending Telstra Multimedia undertook to provide the Broadband System Service to FOXTEL Management on a **monthly basis.** The reference to "monthly basis", in my view, does not mean that the arrangement could simply be terminated by a month's notice from either party. This is because it was not an arrangement from month to month in that sense. Nor was it an agreement for any certain term in the sense of a period of months or years. Rather, it was intended to operate until an event occurred, namely until the proposed merger was completed or until such time as it became evident the merger would not proceed. If the merger did not proceed an option was conferred to require entry into a long form agreement.

109 As mentioned above, the arrangement was expressed to be "**substantially**" in terms of the "**draft**" Broadband Co-operation Agreement of 12 July 1995, which is described in the letter as the "BCA". Whilst the reference to "substantially" introduces a lack of precision, this does not mean of itself that there was not a concluded contract. However, the July version was itself a fifth draft, and there are clearly many clauses in the July 1995 BCA which required elaboration and which were reserved for further reconsideration.

Were all the essential terms agreed? - Comparison of the July 1995 & April 1997 BCAs

110 In order to determine whether the parties, as at 23 October 1995, had agreed on all the important terms of the BCA sufficient to establish a binding contract, it is useful to consider

the differences between the arrangement as set out in the July 1995 BCA and the provisions of the April 1997 BCA to see what in fact the parties considered was important before committing to a binding arrangement (see the above quoted remarks of Gleeson CJ in the *Australian Broadcasting Corporation v XIVth Commonwealth Games* at 548). Comparison of the BCA agreements disclose that a substantial number of provisions have been added to, varied in material respects, or deleted as a consequence of ongoing negotiations in the eighteen months following the 23 October letter. These alterations concerned not only the essential concepts of exclusivity and bundling rights, but many other provisions of the July 1995 BCA. In addition, many important provisions in the April 1997 BCA were not foreshadowed, referred to, or dealt with in the July 1995 BCA. The alterations and additions were neither inconsequential nor insignificant.

111 Later in my reasons I consider the effect of cll 1.10(d), 1.11(n), (o) and (p) of the April 1997 BCA. It will be recalled that these clauses contain statements of the parties' intention that the April 1997 BCA did not vary the July 1995 BCA. When interpreting a contract an express statement by the parties as to the meaning and effect of their words should be considered. However in the end it is the words of the contract as a whole that must be given effect to and not particular clauses. I have considered the April 1997 BCA in light of the above clauses but, as will be seen, their express intention has not been sufficient to override the clear differences between the two BCAs.

112 The parties have carried out detailed comparisons between the two agreements. Seven set out the differences in Exhibit H and these have been responded to by the other parties. Having considered the detailed submissions as to these variations, I consider that at least the following differences which exist between the two agreements are of importance:

- *Term of the agreement*

  The 23 October Letter Agreement, incorporating the July 1995 BCA was a short-term interim arrangement, and lies in contrast to the long-term scope of the April 1997 BCA which extended to at least 2010. In the context of the exclusivity arrangements this is an important variation. The different time period means that the rights are in substance different rights.

- *Definition of Other Service Providers*

  The July 1995 BCA defines Other Service Providers as anybody other than FOXTEL who provides Services. Clause 1.1 of the April 1997 BCA begins with this definition,

but then excludes from it providers in situations where FOXTEL does not have a retail relationship with the subscriber. This change restricts the important definition of Other Service Providers and so restricts the exclusivity right. This is a substantial difference.

- *Definition of Subscribers*

  Relevantly, the July 1995 BCA defines a "Subscriber" as a person who has subscribed for "**Channels**." Each Channel must be provided or managed by FOXTEL. The April 1997 BCA defines a "Subscriber" as a person who has subscribed for a "**Channel Package**", being a selection of Channels nominated by FOXTEL. In the July 1995 BCA each Channel did not need to be nominated by FOXTEL and therefore "Subscribers" could include non-FOXTEL subscribers where FOXTEL provides or manage the services. This difference is significant in terms of the parties relationship because the definition of Subscriber feeds into the definition of "Services" under each BCA, which in turn affects, *inter alia,* the definition of Other Service Providers and the scope of FOXTEL's exclusivity rights.

- *Multiple dwelling units - cl 2.9 of the April 1997 BCA*

  This clause deals with the parties obligations in relation to cabling for multiple dwelling units ("MPUs"). MPUs are a complex or group of homes that share common cabling. No specific arrangements were made in relation to MPUs in the July 1995 BCA.

- *Access to Other Service Providers - cl 3.3 of the July 1995 BCA and cl 5.2(a)(ii) of the April 1997 BCA*

  These clauses restrict Broadbandco and Telstra Multimedia respectively from allowing Other Service Providers to use certain facilities. However the two clauses delimit the relevant facilities differently. Clause 3.3 applies to the "facilities controlled by Broadbandco." Clause 5.2(a)(ii), by reference to the *Telecommunications Act 1991* (Cth), applies to "a system, or series of systems, for carrying communications by means of guided or unguided electromagnetic energy or both."

- *Broadbandco's obligations where a Law requires - cl 3.8(a) & (b) of the July 1995 BCA and cl 5.8 of the April 1997 BCA.*

  These clauses relate to the obligations on Broadbandco and Telstra Multimedia respectively where a Law requires them to grant a third party access to the network. Clause 3.8(a) simply required Broadbandco to consult with FOXTEL Management, and consider the effects on FOXTEL as to the terms and conditions of that access. Clause 5.8(a) requires Telstra Multimedia to consult FOXTEL, however before Telstra Multimedia itself acts to comply with the law it must form a reasonable opinion that FOXTEL has failed to satisfy the legal obligations within a reasonable time, or is constrained from doing so by law. Further cl 5.8(b) requires Telstra Multimedia to minimise the effects on FOXTEL's business of providing access.

- *Revenue Calculations - cl 3.8(c) of the July 1995 BCA and cl 5.9(c) of the April 1997 BCA.*

  These clauses contain the formula used to calculate the amount of the revenue, which is received by Broadbandco and Telstra Multimedia respectively when third parties are given access to the network, that is to be remitted to FOXTEL. Clause 3.8(c) required Broadbandco to forward to FOXTEL "any revenue received **for such services**," less certain expenses. In contrast cl 5.9(c) requires Telstra Multimedia to forward to FOXTEL any revenue received "**in connection with**" the delivery of those services. "In connection with" services is broader than revenue "received for … services" and therefore the parties' entitlements to revenue is likely to be different in many cases.

- *The Bundling Right - cl 3.10 of the July 1995 BCA and cl 5.12 of the April 1997 BCA*

  In FOXTEL's submissions these clauses form part of the "bundling" right. The clauses restrict Broadbandco and Telstra Multimedia respectively from providing, to a third party, a Broadband System Service utilising STU Functionality to deliver certain services without a conditional access function ("CAF") and a subscriber database function ("SDF"). There is a significant difference between the two clauses in that under cl 3.10 Broadbandco was restrained from giving access to allow delivery of a "service which is not a Service", whereas the corresponding restraint in cl 5.12 applies to delivery of "a service (including, without limitation, an Other Service and a service which is not a Service) …" The bundling right in the April 1997 BCA is therefore extended to affect the provision of Other Services and arguably, as was put by Seven, the provision of Services, which would be unaffected by the terms of the July 1995 BCA.

- *Consultation - cl 3.11 of the July 1995 BCA and cl 5.13 of the April 1997 BCA*

  These clauses relate to when Broadbandco or Telstra Multimedia must consult with FOXTEL in relation to the provision of access to third parties. The circumstances enlivening this obligation are different in each clause.

- *Exclusive Supply - cl 3.12 of the July 1995 BCA and cl 5.14 of the April 1997 BCA*

  These clauses require FOXTEL to buy from Broadbandco/Telstra Multimedia the services they require to provide Services to Subscribers. They affect the content of the exclusivity right by prescribing which distribution network FOXTEL is required to use when it exercises its exclusivity right. Clause 3.12 required FOXTEL to obtain all such services from Broadbandco. Clause 5.14 on the other hand limits this obligation in two ways. Firstly it does not apply to transmission of signals for Services to headends, and so gives FOXTEL the ability to utilise non-Telstra Multimedia facilities prior to their signal passing through the headends. This was not permitted in the July 1995 BCA. Secondly, cl 3.12 related to "all of the services required to deliver Services to Subscribers" whereas cl 5.14 relates only to "Broadband Transmission Services required to … [deliver] … Services … to Subscribers." The types of services that FOXTEL would be required to purchase from Telstra Multimedia as a result of this second change appear to be significantly

more extensive than Broadband Transmission Services. The effect of these variations is to give FOXTEL greater flexibility when exercising its contractual rights.

- *Novation - cl 5.17 of the April 1997 BCA*

  The April 1997 BCA contains an agreement by FOXTEL that the rights and obligations of Telstra Multimedia may be novated to Telstra Corporation should Telstra Multimedia transfer the Broadband System to Telstra Corporation. Although FOXTEL must be consulted, and be reasonably satisfied its exclusivity rights will not be affected, this new clause alters the rights of FOXTEL as against Telstra Multimedia.

- *Business Plans - cl 5.1 of the July 1995 BCA and cl 7.1 of the April 1997 BCA*

  These clauses relate to the type and quality of services that Broadbandco or Telstra Multimedia are required to provide to FOXTEL. The obligations under the two BCAs are different because cl 5.1 states that Broadbandco's provision of services is to enable FOXTEL to meet its "Initial Business Plan." In contrast Telstra Multimedia's obligation under cl 7.1 was to enable FOXTEL to meet its "Business Plan." The terms of the BCAs are such that these two documents can be different, and the latter may change from time to time. The obligations on Broadbandco or Telstra Multimedia are thus different under the two clauses.

- *Marketing Bonus - cl 9.4 of the July 1995 BCA and cl 11.4 of the April 1997 BCA*

  These clauses deal with a marketing bonus payable to FOXTEL when the number of subscribers it has signed up exceeds a certain percentage of the homes that are passed by Broadbandco's or Telstra Multimedia's cables. In the July 1995 BCA this percentage is called the "projected penetration rate", referrable to the FOXTEL "Initial Business Plan". By contrast in the April 1997 BCA the relevant percentage is the "Adjusted Projected Penetration Rate."

- *Governing Law - cl 20.1 of the July 1995 BCA and cl 22.1 of the April 1997 BCA*

  The law governing the July 1995 BCA under cl 20.1 was the law of New South Wales but this was changed to the law of the Australian Capital Territory under cl 22.1 of the April 1997 BCA.

113 The differences outlined above provide a further indication that the variations and drafting of the April 1997 BCA were not merely a matter of fleshing out an earlier skeletal agreement but were part of a process of moving towards an original and greatly expanded agreement. The comparison leads me to the conclusion that as at 23 October 1995 the parties had not reached a position where *Masters v Cameron* principles could apply because they had not reached agreement on all the essential terms to govern their arrangement.

Were all the essential terms agreed? - Negotiations after 23 October 1995

114 It is not in dispute that subsequent communications between the parties, after the date on which it is alleged agreement was reached, can be considered, and may be important in determining whether a contract has been made. In the present case negotiations as to the BCA continued between the parties up to December 1995 with a view to reaching the new proposed BCA with Australis in order to implement the then intended Australis merger. These negotiations ended on about 22 December 1995 when a final draft was agreed. There were substantial additional clauses embodied in the new BCA, and departures from the July 1995 BCA, as the result of negotiations between 17 July and December. These changes were to reflect the new parties, and the content of the further discussions and negotiations between the parties.

115 After it became evident in April 1996 that the merger would not proceed the parties resumed discussions about reformulating the BCA and further detailed negotiations as to the contents of the BCA ensued. One very live issue in the resumed negotiations was whether the starting point for the BCA should be the July 1995 BCA as contended for by Telstra Multimedia or the 22 December 1995 document as contended for by FOXTEL. In this respect there is correspondence between the parties stating that they have been operating on the basis of the 22 December 1995 BCA. This uncertainty and disagreement indicates that even as at mid-1996 Telstra Multimedia and FOXTEL could not agree even on the appropriate starting point for further negotiations. This circumstance sits uneasily with the suggestion that the July 1995 BCA as incorporated in the October Letter Agreement constituted a binding legal arrangement. As late as 21 February 1997 the parties were still considering what was referred to in correspondence as "what we hope are next to final versions of the Broadband Co-operation Agreement marked (as requested) to show changes from the draft of 20 November 1996 instead of the 28 November 1996 draft". The letter enclosing that draft refers to some "key changes" to the package of proposals since November 1996. These "key changes" are itemised. There are six in number and they relate to important issues. There is some detailed discussion of some of these items in the letter of 21 February. The continuation of negotiations after 23 October 1995 strengthens my view that as at 23 October no final agreement had been reached.

Authority to execute 23 October letter

116 A submission was made that the alleged agreement of 23 October 1995 was signed without authority. I do not accept this submission. Mr Moriarty was the CEO of Telstra Multimedia

at the time and his action was expressly ratified by the Board of that company on 10 April 1997. Mr Mockridge executed the letter under a Power of Attorney from FOXTEL and there is no doubt that he had the necessary authority.

Commercial reality

117 Telstra and News submit that because the 23 October letter was signed on the day when services were to be commenced, involving large financial commitments, the Court should more readily conclude that the parties intended to enter into a concluded contract on that date with binding legal commitments. While this is of course a matter to be taken into account it is not of much assistance in the present case. Both parties had, by 23 October, a strong commercial commitment arising from the expenditure of many millions of dollars in relation to their joint commercial arrangements. It is apparent in the correspondence that the parties were prepared to act on the basis of this extensive **commercial** commitment in the absence of a finalised legal commitment, and the argument advanced by Counsel for News and Telstra to the effect that the parties would not have commenced operation of services without a finalised legal commitment cannot be accepted. In addition to this commercial commitment resulting from prior expenditure it should be kept in mind that Telstra and News had the advantage of the overarching 9 March 1995 Umbrella Agreement which set up "the Alliance" and governed the overall relationship of the parties, and committed them in a **general** way to co-operate in relation to the use of the Broadbandco Broadband System Service: see, for example, cl 2.11 and 3.1, 3.2 and 4.4.

Mackay v Dick

118 Some reliance was placed in submissions for Telstra and News on the list of authorities which has applied the principles set out in *MacKay v Dick* (1881) 6 AC 251 and stated by Blackburn LJ at 263 in the following words:

> *"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect."*

119 However, that principle is of no relevance to the present case because it assumes a binding contract. In the matter before me, the question is not whether the parties should cooperate to give effect to a concluded agreement, but rather the anterior issue of whether any agreement has been reached at all.

120 In relation to some of the variations to the July 1995 BCA, as reflected in the April 1997 BCA, it is said that the additional clauses were simply to work out provisions to deal with circumstances which had developed since the July 1995 BCA. In my view, the modifications to clauses 3 and 5 to meet changing and newly emerging circumstances during the lengthy period of the negotiation do not mean that such terms were already inherent or implicit in the arrangements as at 23 October 1995. It simply means that the new clauses were drawn up from time to time thereafter to provide for those later circumstances. It is no answer to a claim that an agreement has not been reached to say that the negotiations of the parties embraced further provisions which were appropriate in the light of the new difficulties or circumstances which later emerged as a result of the time taken to complete the negotiations.

Conclusion – October 1995 Letter Agreement – no contract

121 The negotiations between the parties both before and after 23 October 1995, and the nature and extent of the variations noted above, lead me to the conclusion that as at 23 October 1995 the parties had not reached agreement on many important matters. While it is always open to parties to negotiate to vary their agreements, in my view this is not what the parties did.

122 The extensive negotiations in the eighteen month period after 23 October 1995, on matters obviously regarded as of considerable importance, also serve to support a conclusion that

there was no binding agreement either during that time or as at 13 September 1996. They cannot be properly regarded as simply a working out of the detail or formalisation of the arrangements referred to in the 23 October letter.

123 Having regard to the foregoing considerations I do not consider that the 23 October letter was a contract or gave rise to any binding contractual rights. The parties to the July 1995 BCA were still in negotiations on 23 October 1995, and for some time afterwards. While there was no doubt a commercial commitment to the arrangement referred to in that letter, the negotiations had not reached the stage where a contract was activated. The letter did not confer any contractual right on FOXTEL Management or any obligation on the part of Telstra Multimedia to FOXTEL Management as to exclusivity, bundling or otherwise. The parties, of course, had the benefit of the March 1995 Umbrella Agreement setting up the "Alliance" and the substantial commercial commitment they had already made towards their joint project, but they did not have a contract by the 23 October letter. Accordingly, FOXTEL Management had no protected contractual rights at the critical date.

124 In view of this conclusion it is strictly not necessary to deal with the other submissions made in relation to the position which would prevail if there had been a protected contractual rights as at that date. Nevertheless, because the matters have been argued I propose to set out my conclusions in respect of the other principal issues and briefly my reasons for reaching these conclusions.

What was the position between 23 October 1995 and 14 April 1997

125 If it were accepted that the 23 October letter created a legally binding contract giving FOXTEL Management a contractual right of exclusivity, the next question which arises is whether that right continued from the time the Australis merger fell through in late April or early May 1996 to the time when the April 1997 BCA was entered into.

126 The relevant part of the 23 October letter that needs to be considered when examining this question is that which appears under the heading "**If the Australis Merger is Not Completed**". The parties there provide that in such circumstance they each have the right to **require** the other party to enter into a long form BCA **substantially** in terms of the July 1995 BCA. This reference contemplates that there is to be a further agreement which will be in "long form" and which was intended to include all the terms of the earlier October Letter

Agreement.

127 It is to be noted that in fact during the period from 23 October 1995 through to 13 September 1996 no final long form BCA was ever entered into. Nor was any demand for the execution of any long form agreement issued by either party. On the contrary, after the merger fell through in April/May 1996, numerous and detailed proposals, communications, negotiations and exchanges took place between the parties, their solicitors, and advisers, until 14 April 1997 (a further period of eleven months) when the terms of the April 1997 BCA were agreed upon and executed. None of these can be construed as amounting to a requirement for execution of a long form agreement.

128 No time is specified in the 23 October letter within which the right to require execution of a long form BCA is to be exercised. In these circumstances it is appropriate to imply that the right must be exercised within a reasonable time after it became evident that the merger had fallen through. In my view, given that the parties had been providing extensive ongoing services since 23 October 1995, a reasonable period for exercise of the "right" to require execution of a long form document would be in the order of three to four months. No formal requirement was made before 13 September 1996 or at all. The parties simply continued to negotiate extensive variations to the July 1995 BCA while their actual commercial relationship continued on an *ad hoc* basis.

129 Perhaps another way of looking at the position is that after the Australis merger had fallen through by April 1996, any right which FOXTEL had was converted to an entitlement to require execution of a long form agreement and that this is a right different in nature from that conferred under the October Letter Agreement.

130 Accordingly, in my view, any protected contractual right which had arisen under the 23 October letter expired or was extinguished by the parties' failure to execute a long form BCA within a reasonable time after the Australis merger fell through. Such final agreement was not achieved until seven months after 13 September 1996. Therefore, I conclude that there was no right in existence as at 13 September 1996 which could satisfy the definition of a protected contractual right because the alleged October Letter Agreement had come to an end and any such right had expired or been extinguished. A long form BCA was not demanded within a reasonable time and the continuance of the parties' conduct during the negotiations

thereafter was simply at will. These negotiations could have been broken off at any time.

Meeting of 11 September 1996

131 News and Telstra also sought in the original pleadings to rely on a meeting of 11 September 1996 between their representatives as giving rise to a protected contractual right. This meeting was held two days before the cut off date of 13 September 1996. However at the hearing before me this was abandoned and no attempt was made to focus on this meeting as giving rise to a protected contractual right or any binding contract. Accordingly it is not necessary to consider the material relating to that meeting. However, the raising and abandonment of this submission reflects an uncertainty in the parties as to exactly what was the agreement even as at November 1999 when the pleadings were filed. It is also interesting to note that the oral arrangements pleaded as arising from this meeting only related to cll 3.2, 3.3, and 3.10 of the July BCA and cll 7.2 and 7.13 of the December 1995 Australis BCA and not to the agreement as a whole. These are the clauses which specifically concern exclusivity provisions.

Variation

132 In my view, the rights and obligations under the April 1997 BCA, particularly with respect to exclusivity and bundling, are so significantly different in substance to those set out in the July 1995 BCA as to amount in law to a variation which replaces and extinguishes those claimed rights under the October Letter Agreement. I have referred to some of the major areas of difference earlier in these reasons see par 112 above. The question whether there has been a "variation" is dependent on the intention of the parties, objectively determined, from the words of the contract. Regard must be had to the nature and extent of any differences. It does not follow, that because the parties have asserted that their mutual intention was not to vary a contract, that what is otherwise a variation is converted into a non-variation. It is also clear that a retrospective declaration as to past intentions as to the existence or non-existence of an agreement attracting protection cannot compel a conclusion that the parties had that objective intention as at 23 October 1995 or indeed as at 13 September 1996. Of course, an express statement of intention is an important consideration when interpreting a contract but if the changes are of such a nature and degree as to give rise, on objective comparison, to a variation in law the mutual declarations of the parties as to their intention will not circumvent that legal consequence. This is particularly so where the subsistence of a statutory right, here the right of Seven and TARBS to access, is in issue. In this connection the words of

Templeman LJ in *Street v Mountford* [1985] 1 AC 809 at 819 are apposite:

> *"Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the* ***parties cannot alter the effect of the agreement by insisting that they only created a licence****. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade." (Emphasis added)*

See also: Lewison *The Interpretation of Contracts* 2nd ed. 1997 at par 8.07 which is concerned with what are described as "False Labels", and *Radaich v Smith* (1959) 101 CLR 209 at 214 and 220.

Discharge of earlier "rights"

133 The News and Telstra respondents submit that to the extent that there is found to be a variation effected by the April 1997 BCA, the parties must revert back to the corresponding provisions of the July 1995 BCA referred to in the October Letter Agreement so that there is in law no variation or extinguishment of rights: see cll 1.10 and 1.11 of the April 1997 BCA.

134 Even on the unfounded assumption that the 23 October Letter granted a contractual right, the question whether the subsequent variations in the April 1997 BCA displaced or discharged such rights is one of degree as pointed out by Dixon CJ and Fullagar J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 113. The nature and extent of the variations between the arrangements in the present case are so extensive as to make it clear that a new independent contract was intended. The April 1997 Agreement was so different that it replaced the earlier arrangement. As Wilson and Dawson JJ said in *Dan v Barclays Australia Limited* (1983) 57 ALJR 442 at 449:

> *"Variation may take the form of rescission of some of the terms of an existing contract but if that is to have the effect of rescission of the whole contract, the rescission must be express or by necessary implication and the determining factor must always be the intention of the parties* ***as disclosed by [the] contract when varied.****" (Emphasis added)*

135 Another problem with this submission is the consequence which flows from the purported literal operation of, for example cl 1.10(d). The type of difficulties which could emerge from

giving effect to these interpretative clauses is adverted to by Williams J in *Tallerman* at 127-8 as follows:

> *"There would be two sets of contracts on foot, the old contracts and the new contract consisting of some of the terms of the old contracts and a new term. The old contracts and those contracts as varied cannot be the same contract. They must be different contracts. The new contract must override the old contracts so far as their terms clash and the old contracts even if they are not rescinded rendered inoperative to this extent. An existing contract that is varied as to one of its terms must be in law a new contract."*

136 If cl 1.10(d) were given literal effect the parties to what on its face is a binding, duly executed, and comprehensive formal agreement made on 14 April 1997 would, in the event of a court finding that there was in law a variation to the July 1995 BCA, revert to the provisions of the July 1995 BCA in respect of those subject matters. The Court is asked to ignore the subsequent negotiated changes to the extent that such a finding is made, notwithstanding that the parties have spent eighteen months since October 1995 moving toward a substantially different agreement which gives rise to a variation. It is difficult to see how such clauses will operate in practice. There is great difficulty in giving effect to cll 1.10(d) and 1.11(p) of the April BCA where to do so would lead to a result manifestly contrary to the course of conduct and their intentions of the parties as disclosed by the words of the April 1997 BCA and their negotiations during the period from late 1995.

137 Further problems will arise, for example, if only some of the 1995 BCA provisions, namely those concerning exclusivity and bundling, are incorporated into the contractual framework provided for by the April 1997 BCA terms and conditions. The impact on other provisions of the April 1997 BCA of partial reversion to the July 1995 BCA will introduce further uncertainties into the April 1997 arrangement. In addition, the remaining terms of the April 1997 BCA will impact on the terms of the July 1995 BCA where they remain operative. The parties will be remitted from a detailed written and final embodiment of their agreement (the April 1997 BCA) to what is clearly a less specific and less complete embodiment of their earlier arrangement (the October Letter Agreement).

138 For the above reasons I do not accept the submissions made for News and Telstra as to the operation of the above interpretation of provisions of the April 1997 BCA. Nor do I accept that they have any relevant force or effect for the purpose of determining whether there is a variation of a "protected contractual right" under s 152AR(4) in the present case or whether

there has been a discharge of any assumed earlier contract or right.

Nature of the claimed exclusive right and deprivation

139 Assuming, again contrary to my conclusion, that FOXTEL had a protected contractual right as at 13 September 1996 which has continued in existence up until the present time, a question arises as to the nature and extent of that right and whether the grant of access to Seven or TARBS would **deprive** FOXTEL of that right.

140 The exclusivity right claimed by FOXTEL is framed in the following terms:

> *"**The right to prevent Telstra** Multimedia **from using, or permitting the use of its** broadband telecommunications **network to deliver a subscription television service which is not provided by Foxtel or the provision of which is not managed by Foxtel** (by virtue of its having entered into an agreement with a third party to do so) except where Telstra Multimedia is required by law to so use or permit the use of that network." (Emphasis added)*

141 This right is said to arise from cll 3.1-3.4 inclusive and 3.7 of the July 1995 BCA, and the corresponding cll 5.1-5.3 and 5.7 of the April 1997 BCA.

142 That clause is headed "Exclusive Relation". Clause 3.1(d) expresses the intention of FOXTEL, on reasonable commercial terms, to offer to provide and manage the provision of Services of Other Service Providers subject to FOXTEL's requirements as to various matters.

143 Clause 3.2, which is expressed to be **subject to cl 3**, obliges FOXTEL to **exclusively provide or manage** the provisions of Services delivered to Subscribers through use of the Broadband System Service. By cl 3.3, **in order to give effect to cl 3.2**, Broadbandco is obliged not to use or permit the use of facilities controlled by it for the delivery of Services by any Other Service Provider. Clause 3.3 is also expressed to be subject to cl 3.7 which provides that Broadbandco may use or permit an entity other than FOXTEL to use facilities controlled by it to deliver Services if FOXTEL has not complied with cl 3.4. The latter provision applies in circumstances where Broadbandco is **required by Law** to use or permit any Other Service Provider to use facilities controlled by it to deliver Services.

144 The effect of cll 3.4 and 3.7 is that subject to some limitations, Broadbandco may grant access to a third party where that grant was required by law. Seven and TARBS submitted that section 152AR(4) was such a law, and accordingly the exclusivity right did not extend to

circumstances such as the present where s 152AR is invoked. The inclusion of the words "may be required by Law" in cl 3.4 does not, in my opinion, bear on the present question. The relevant "Law" for present purposes is s 152AR which, of course, contains the limitation or exception in par (4)(d). That provision incorporates an express exclusion in respect of a "protected contractual right". In order to determine whether there is a protected contractual right it is necessary to direct attention to the terms of the alleged contract. In my view, the references to "requirements of Law" in cl 3 do not assist to determine the operation of the contractual terms in cl 3. Reference to the "Law" takes one back to the underlying question whether there is a protected contractual right and that involves the interpretation of the contract.

145 In my view, on its correct interpretation, cl 3.3 intends to and does impose an obligation on Broadbandco **not** to **permit** the use of its facilities for the delivery of Services by any Other Service Provider and this obligation is imposed in order to give effect to cl 3.2, whereunder FOXTEL Management is to **exclusively** provide or manage the provision of services. Broadbandco is only entitled to permit the use of facilities controlled by it for delivery of Services where such permission or use would not prevent FOXTEL from exclusively providing or managing the provision of Services. The conferral of such a broad right accords with what the parties evidently intended, namely, to give a far reaching exclusive right to FOXTEL Management.

146 Seven and TARBS also submitted that the right to provide or manage in fact encompassed two alternative rights, such that FOXTEL Management could be compelled to manage the provision of services provided by Seven or TARBS without infringing the exclusivity right. I consider that in obliging FOXTEL to exclusively **provide** or **manage** the provision of Services in cl 3 the parties contemplated that "the Law" when enacted would require Broadbandco to provide access to the Other Service Providers and in that event FOXTEL would have the exclusive right to manage the provision of those services by Other Service Providerrs. I consider that properly construed, in the context of the arrangement which the July 1995 BCA envisaged, cl 3.2 was intended by the parties to confer exclusive rights on FOXTEL to both provide, to the extent it so desired and the Law from time to time permitted, and to manage, if it so decided or was required by Law, Services delivered through use of the Broadbandco facilities. Clause 3.3 was intended to impose a corresponding obligation on Broadbandco not to provide these services to any Other Service Provider unless required by

law. Subject to law, whether it provided Services or managed them was within FOXTEL's discretion.

147 Accordingly assuming, contrary to my actual conclusion, a protected contractual right existed and subsisted through to the present time, my conclusion is that under cll 3.2 and 3.3 FOXTEL Management would be deprived of a protected contractual right if Broadbandco (now Telstra Multimedia) granted to Seven or TARBS a right to provide Services whether or not they would be managed by FOXTEL Management. However, because I do not accept that there ever was any protected contractual right in FOXTEL there is in fact no deprivation.

1997 Broadband System Deed (BSD)

148 Several weeks after the hearing the parties filed further written submissions concerning an agreement of 25 July 1997, between Telstra Corp, Telstra Multimedia, News Corp and FOXTEL Management ("the Side Agreement') which was said to set out the terms on which the April 1997 BCA was to be amended if the Merger Agreement with Australis was lawfully terminated. The Side Agreement was stated to take effect from the date of the lawful termination of the Australis merger. The Side Agreement received little attention during the five day hearing although it was adverted to in written submissions. It referred to an unexecuted document which is described as the Broadband System Deed ("BSD"). The parties acknowledged that this was an Establishment Agreement for the purposes of the Umbrella Agreement. The BSD has never been executed but in a submission to the ACCC dated 9 November 1999 Telstra stated that since 25 July 1997 the BSD has been performed in accordance with its terms by the parties to the Side Agreement. Clause 3 of the Side Agreement provides that the April 1997 BCA is to be amended by the BSD.

149 Seven's further submission in relation to the Side Agreement and the BSD is essentially that the BSD was a binding agreement which gave rise to further significant variations to the contractual rights of the Telstra/News respondents. These differences included changes to the term of the April 1997 BCA and the rights under it, and also to the definition of Services.

150 Telstra submits, in substance, that the BSD is not and will not be legally binding until executed in final form. In the alternative, it says that even if the BSD is a binding agreement the provision of a shorter period in respect of any protected right which existed at 13 September 1996 would not cause that right to lose its protection. Furthermore, it says that

Seven has misinterpreted the unexecuted BSD.

151 Correspondence sent to me on 15 March records an agreement that the Court can proceed on the basis that FOXTEL had not executed the BSD, that the BSD Side Agreement has been signed and is binding on the parties to it, and that the reference in FOXTEL's submission of 9 November 1999 to the ACCC should have referred to the **Side Agreement** being entered into on 25 July 1997 and not the BSD.

152 In view of the conclusions which I have earlier set out in relation to the non-existence of any protected contractual rights it is not necessary or appropriate for me to express a concluded opinion on the effect of the July 1997 Side Agreement or the BSD. In taking this approach I am conscious of the position taken by Seven, in its response of 6 March 2000 to the respondent's submissions on the BSD, to the effect that there has been insufficient discovery by News and Telstra in relation to the question whether the BSD is binding on the parties and FOXTEL.

Admissibility and confidentiality

153 In preparing these reasons I have relied on communications and exchanges passing between the parties. I have not found it necessary to rely on internal material or views which were not communicated to the other parties to the arrangements. Accordingly the question of the admissibility of internal communications has not arisen.

154 On the question of confidentiality claims have been made for non-disclosure of documents on the basis that they are of commercial sensitivity. In the case of many of these documents I am not persuaded that they in fact are commercially sensitive at the present time. I have approached the formulation of these reasons on the basis that I should not, where possible, set out extracts or the substance of material which truly attracts confidentiality. To the extent that these reasons make reference to the content of or parts of documents said to be confidential I am satisfied either that they do not disclose anything of current commercial significance or that it is necessary to properly disclose and formulate my reasons for reaching conclusions on relevant issues.

Conclusion

155 My conclusions are that:

1. FOXTEL is not entitled to prevent Telstra granting access to Seven for the purpose of broadcasting the Olympic Games or for the other purposes for which access is sought by Seven on the ground that FOXTEL would be deprived of a "protected contractual right".

2. FOXTEL is not entitled to prevent Telstra granting access to TARBS for the purpose of broadcasting the services sought by it on the ground that FOXTEL would be deprived of a "protected contractual right".

3. As at 23 October 1995 there was no legally binding agreement reached between Telstra Multimedia and FOXTEL and therefore there was no contract capable of giving rise to a protected contractual right. This is because the conditions of the exclusivity and bundling rights were not negotiated to the stage of a legally binding arrangement by 23 October 1995 and other important clauses were left also outstanding. The parties had not agreed on the essential terms of their proposed contract. A comparison of the July 1995 BCA and the April 1997 BCA also indicates the parties had not, as at 23 October 1995 or 13 September 1996, covered essential matters necessary to give rise to a binding contract.

4. The terms of the letter of 23 October itself make it apparent that the parties had not reached agreement on all essential terms or on terms which were capable of being objectively determined. This case is different from that where the parties reach agreement on all the relevant contractual terms, and merely restate them in a formal document later.

5. After 23 October 1995, the parties continued in detailed negotiations with respect to many important provisions, including the exclusivity provisions. After the Australis merger collapsed in April 1996 the parties disagreed as to where to begin when resuming negotiations on the News/Telstra arrangement. This supports a conclusion that had not reached a concluded agreement in the preceding negotiations. Negotiations continued even after 13 September 1996 on important matters. By this date there were still lists of significant

outstanding matters being exchanged and no final BCA agreement was reached until 14 April 1997.

6. If the requests of Seven and TARBS are granted there will be no deprivation of a protected contractual right.

156 I direct the applicant to bring in Draft Short Minutes to give effect these reasons and to provide a copy to all other parties. The matter can be relisted at a convenient time for settlement of appropriate orders. I will hear the parties on costs. My *prima facie* view on costs is that, having been successful, Seven and TARBS are entitled to an order for costs.

I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin.

Associate:

Dated: 27 March 2000

Counsel for the Applicant:	Mr B Ellicott QC Mr S Finch SC Mr C Moore
Solicitor for the Applicant:	Freehill Hollingdale & Page
Counsel for the First to Third Respondents:	Mr T Bathurst QC Mr M A Pembroke SC Mr J Griffiths
Solicitor for the First to Third Respondents:	Mallesons Stephen Jaques
Counsel for the Fourth to Seventh Respondents:	Mr A J Meagher SC Mr M Dicker
Solicitors for the Fourth to Seventh Respondents:	Allen Allen & Hemsley
Counsel for the Second Cross-Respondent:	Mr N Cotman SC

Solicitor for the Second Cross-Respondent:	Peter Cornelius & Partners
Counsel for the ACCC:	Mr A Robertson SC Mr N J Williams
Solicitor for the ACCC:	Australian Government Solicitor
Date of Hearing:	31 January – 1- 4 February 2000 7 February 2000
Date of Additional Written Submissions:	1, 3 and 6 March 2000
Date of Judgment:	27 March 2000