FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Mitchell (No 2)

[2020] FCA 1098

File number:	VID 1449 of 2018
Judge:	**BEACH J**
Date of judgment:	31 July 2020
Catchwords:	**CORPORATIONS** – directors' duties – domestic broadcast rights for the Australian Open – information flow and reporting to the board of Tennis Australia – negotiations with the Seven Network – renewal of rights agreement – existence of competitive tension – potential rival bids – relevance of exclusive negotiating period – loss of opportunity to go to tender – directors' failure to present information to board – role of directors in negotiations – secret dealings between a director of one party with a representative of the counterparty – failure to exercise due care and diligence as a director – improperly misusing position as a director – improperly misusing information gained as a director – alleged contraventions of ss 180(1), 182(1) and 183(1) of *Corporations Act 2001* (Cth) – declarations of contraventions under s 1317E – civil penalties under s 1317G – disqualification orders under ss 206C and 206E
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 77, 79 *Corporations Act 2001* (Cth) ss 180, 182, 183, 189, 1317S, 1318 *Criminal Code* (Cth) s 12.3(6) *Evidence Act 1995* (Cth) ss 135, 136, 140 *Federal Court of Australia Act 1976* (Cth) s 46
Cases cited:	*Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 *Australian Securities and Investments Commission v Cassimatis* (No 8) (2016) 336 ALR 209 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291 *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502 *Australian Securities and Investments Commission v Rich*

(2003) 174 FLR 128

Australian Securities and Investments Commission v Rich (2009) 236 FLR 1

AWA Ltd v Daniels t/a Deloitte Haskins & Sells (1992) 7 ACSR 759

Briginshaw v Briginshaw (1938) 60 CLR 336

Cassimatis v Australian Securities and Investments Commission (2020) 376 ALR 261

Chew v The Queen (1992) 173 CLR 626

Daniels v Anderson (1995) 37 NSWLR 438

Doyle v Australian Securities and Investments Commission (2005) 227 CLR 18

Grove v Flavel (1986) 43 SASR 410

Jones v Dunkel (1959) 101 CLR 298

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170

News Ltd v South Sydney District Rugby League Football Club Ltd (2003) 215 CLR 563

Shafron v Australian Securities and Investments Commission (2012) 247 CLR 465

The Queen v Byrnes (1995) 183 CLR 501

Vrisakis v Australian Securities Commission (1993) 9 WAR 395

Weissensteiner v The Queen (1993) 178 CLR 217

Woolworths Ltd v Kelly (1991) 22 NSWLR 189

Wyong Shire Council v Shirt (1980) 146 CLR 40

Date of hearing:	4, 6 to 8, 11 to 15, 18 to 22, 27 November 2019, 2, 3, 5 and 6 December 2019
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Category:	Catchwords
Number of paragraphs:	2025

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ORDERS

VID 1449 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**HAROLD CHARLES MITCHELL** First Defendant
	STEPHEN JAMES HEALY Second Defendant
JUDGE:	**BEACH J**
DATE OF ORDER:	**31 JULY 2020**

THE COURT ORDERS THAT:

1. The proceeding as against the second defendant be dismissed.
2. ASIC pay the second defendant's costs of and incidental to the proceeding including all reserved costs, to be taxed in default of agreement.
3. Within 14 days of the date hereof, ASIC file and serve proposed minutes of orders to give effect to these reasons and short written submissions (limited to five pages) dealing with the making of declarations against the first defendant, the further conduct of the penalty phase and as to costs.
4. Within 14 days of receipt of ASIC's proposed minutes of orders and submissions, the first defendant file and serve responding proposed minutes of orders and submissions (limited to five pages).
5. Liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BEACH J:

1 ASIC has sued two former directors of Tennis Australia Ltd (TA), Mr Harold Mitchell and Mr Stephen Healy. It says that Mr Mitchell contravened ss 180(1), 182(1) and 183(1) of the *Corporations Act 2001* (Cth) and that Mr Healy contravened s 180(1). ASIC seeks declarations under s 1317E, civil penalties under s 1317G and disqualification orders under ss 206C and 206E.

2 TA is the peak body for the sport of tennis in Australia. Its members are each of the State and Territory tennis associations. It is a company limited by guarantee. Mr Healy was the president of TA. He is a solicitor and former professional tennis player. Mr Mitchell was a vice president of TA. He is through various corporate vehicles the owner of a media buying business.

3 TA stages a number of tennis tournaments in Australia, notably the Australian Open (AO) at Melbourne Park in the searing heat and brilliant sunshine of January each year. One of TA's major sources of revenue is the fees that it earns from the licensing of rights to broadcast its tournaments both domestically and internationally. In 2012 the rights to broadcast within Australia, which I will refer to as the domestic broadcast rights, had been held for 40 years by Seven Network (Operations) Ltd or its predecessor entity (Seven), the operator of the Channel Seven television network. The then most recent agreement was due to expire in July 2014 (the Seven agreement). Pursuant to the Seven agreement the broadcast fees payable by Seven were $100.75 million over the five years of that agreement, being 2010 to 2014, including $20 million for 2013 and $21 million for 2014. Under the Seven agreement, Seven did not have a right of last refusal in respect of any renewal of the rights, but it did have an exclusive negotiating period with TA from 1 April 2013 to 30 September 2013 (the ENP).

4 The genesis of ASIC's proceedings arises out of the unanimous decision of TA's board of directors on 20 May 2013 to accept the recommendation of TA's then CEO, Mr Steven Wood, to approve a $195.1 million domestic broadcast rights deal with Seven. This was to achieve the renewal of the domestic broadcast rights for a further five years. The domestic rights fee negotiated with Seven was a very substantial increase over the Seven agreement.

5 TA achieved most of its commercial aims in its domestic broadcast rights negotiations with Seven, including importantly the assumption of the host broadcast role, increased exploitation of digital and streaming coverage, and control over archive footage. Further, by TA becoming

the host broadcaster it enabled it to tailor the coverage of the AO into individual international markets, thereby unlocking increased revenues in the form of international rights fees and higher sponsorships.

6 On 29 May 2013 TA executed a new long form five year agreement with Seven to broadcast in Australia the AO and other Australian tennis tournaments staged by TA.

7 Now ASIC alleges that in the internal deliberations by TA in respect of that agreement, and in its negotiations with Seven for the agreement, the defendants failed to exercise the degree of care and diligence that a reasonable person in their position would exercise. Further, it is said that Mr Mitchell improperly misused his position as a director of TA and improperly misused information gained from that position to gain an advantage for Seven during the course of its negotiations with TA.

8 In summary, I would reject all of ASIC's case against Mr Healy. But I would accept some parts of its case against Mr Mitchell. Let me make these general points at the outset.

9 First, much of ASIC's construction of its evidence displayed confirmatory bias.

10 Second, the various cover up and conspiracy theories that it floated turned out to lack substance.

11 Third, when one analyses the evidence, the Seven deal with TA procured largely through the efforts of Mr Wood and his executive management team was anticipated to be and was very advantageous for TA. The directors of TA were entitled to take that deal, as against the risks of rejecting it and going out to competitive tender after the ENP had elapsed. Further, in my view they had the information necessary to make such an informed choice.

12 Fourth, although I am applying a retrospective lens, one modification to the focus that can be made to diminish the effect of hindsight is to endeavour to perceive the events as they were unfolding in real time appreciating the speed and concurrent conflicting themes and actors at work with different roles, skills, motivations and objectives. And when one does this, personality differences of board members, dissension and diverse styles can all be seen in a more positive light as part of the robust dynamics necessary to achieve the best outcome. But an observer without that perspective may only observe board dysfunction and then seek to identify and condemn the culprit. I say all of this because once one adopts the appropriate perspective, the board processes of TA that I have had to scrutinise can be seen in a much more favourable light than ASIC would have it.

13 Fifth, in my view once the evidence was in, the case against Mr Healy was not sustainable in terms of the pleaded allegations, whatever view one took about the evidence of Dr Janet Young and Ms Kerryn Pratt concerning the events of 2014 and 2015, which I note were well after the dates of the pleaded contraventions; Dr Young and Ms Pratt were former directors of TA.

14 Sixth, the case against Mr Mitchell presented an interesting problem. True it is that he was keen to do a deal with Seven. True it is that he thought that this should have been done and dusted as soon as realistically possible; after all, he was all for momentum. And true it is that he was a host broadcast sceptic. Moreover, he was not a details man. He did not think much of legal niceties and long form agreements; as he would perceive it, mere matters of detail that had the tendency to produce unnecessary delay. But ASIC's case that Mr Mitchell deliberately sought to prefer Seven's interests over TA's interests fails. I am satisfied that although some of his conduct could be criticised, nevertheless he acted in what he perceived to be TA's interests. Further, ASIC did not allege let alone prove that Mr Mitchell was acting in a conflict of interest. So much for Dr Young's views expressed after the event, and so much for the distracting events of 2014 and 2015 upon which I admitted, regrettably, large slabs of evidence lathered with distortion and self-justification.

15 What then was Mr Mitchell doing in his private communications with Mr Bruce McWilliam of Seven, who seemed quite a colourful character? In the context of TA's negotiations with Seven, was Mr Mitchell acting as a good cop to Mr Wood's bad cop approach? If so, that strategy was uncommunicated and therefore uncoordinated as between them, although this is not necessarily fatal to such a characterisation. Was Mr Mitchell really trying to present himself to Mr McWilliam as the leader of the negotiations and the go to person at TA, rather than Mr Wood, so that he could control the course of events? This is more likely, but such behaviour had the capacity to undermine what Mr Wood was doing. After all, it was Mr Wood as the CEO who had the authority of the board to lead TA's negotiations with Seven, not Mr Mitchell.

16 I gained the impression from the picture painted of Mr Mitchell, who did not personally give evidence, that he was one of those characters who often liked to and did get his own way. But I am satisfied that in the present context his mindset was bona fide in the sense that he sought to act in the interests of TA. But his subjective motivations for acting as he did on the one hand, and the objective characterisation and effect of his conduct on the other hand, are two

quite different things. And his bona fides are not a sufficient answer to the contraventions alleged by ASIC.

17 In my view, Mr Mitchell stepped over the line in his dealings with Mr McWilliam. And his overall conduct had the tendency to undermine the stance and approach of Mr Wood. There were some things that he communicated to Mr McWilliam that he ought not to have done, particularly in the latter part of 2012. Now none of this ultimately caused damage to TA. And none of this was motivated by anything other than Mr Mitchell's perception that he thought that it was in the interests of TA that a deal with Seven should be stitched up sooner rather than later. But to so conclude does not entail that Mr Mitchell has not contravened some of his director's duties. In my view, he did so contravene s 180(1) on three occasions; see my findings at [1713] to [1741]. But his contraventions are far narrower in scope than ASIC would have it. Moreover, and in order to be helpful to both ASIC and Mr Mitchell, I would indicate now that any necessary general deterrence, specific deterrence and protective objectives may well be served by making declarations and imposing a moderate pecuniary penalty without any disqualification order being imposed. But I will hear further from ASIC and Mr Mitchell on these questions.

18 Let me now set out my detailed reasons.

19 For convenience, I have structured my analysis as follows:

(a) ASIC's narrative – [21] to [136]

(b) The factual background – [137] to [681]

(c) The key themes relevant to negotiations – [682] to [899]

(d) The post-contravention conduct – [900] to [1121]

(e) The case against Mr Healy – [1122] to [1512]

(f) The case against Mr Mitchell – [1513] to [2023]

(g) Conclusion – [2024] to [2025]

20 Unusually, I will begin with a detailed summary of ASIC's factual narrative. Only with that appreciation can the forensic detail which follows be assimilated and then contrasted. And in that respect, let me explain how what follows in later sections of my reasons has been built up. First, I have set out a largely neutral factual background of the relevant events in 2012 and the first half of 2013 concerning TA's negotiations with Seven, information flow within TA and the decision making processes within TA including, of course, the board's involvement.

Second, I have then sought to distil some of the key themes relevant to the negotiations, including the potential for competition. Only with an appreciation of such themes can one put oneself in the position and mind-set of TA, its directors and particularly Mr Healy and Mr Mitchell at the relevant time. Third, I have then sought to address the evidence concerning the post-contravention conduct, that is, the events of 2014 and 2015. Now much of this is peripheral. But I have considered it to the extent that it throws probative light on the events of 2012 and the first half of 2013 or constitutes admissions made by the defendants. Moreover, it goes without saying that before drawing conclusions and to the extent that any part of ASIC's case is circumstantial, I have considered the totality of the evidence, whether the evidentiary facts have afforded proof or an indication that was prospectant, concomitant or retrospectant. And the linear sequence of these written reasons should not distract from that reality, which is that I have considered all of the evidence and considered the probative force of its combined weight; if you like, simplistic "strands in a cable" or "links in a chain" type metaphors can be invoked to explain such a conception. Fourth, I have then addressed ASIC's specific case against Mr Healy. Finally, I have then turned to ASIC's specific case against Mr Mitchell. Now it may be thought that I should have reversed the order of these last two sections. But information flow to TA's board is an over-lapping theme of ASIC's case against both Mr Healy and Mr Mitchell. And as Mr Healy and Mr Wood were more responsible for the relevant information flow to the board than Mr Mitchell, it is more suitable to address that over-lapping theme first in the context of ASIC's case against Mr Healy.

ASIC'S NARRATIVE

21 In this section I will set out ASIC's narrative concerning the relevant events and a summary of the allegations that it has made against Mr Mitchell and Mr Healy.

22 But first it is necessary to identify the key characters and entities relevant to its narrative and the broader evidence:

- Mr Peter Armstrong: Director of TA, 2014 to 2016
- Mr Stephen Ayles: Commercial director of TA, 2008 to 2013
- Mr Jeffrey Browne: Managing director of Nine, 2010 to 2013
- Mr Tim Browne: In-house lawyer of TA
- Mr Ashley Cooper: Director of TA, during, inter-alia, 2012 to 2013
- Mr James Davies: Director of TA, 2011 to 2013

- Mr John Fitzgerald: Director of TA, 2010 to 2013
- Mr Chris Freeman: Director of TA, 2007 to 2017
- Gemba Pty Ltd: Sports consultancy and media rights valuer
- Mr Greg George: Head of broadcasting of TA
- Mr Chris Guinness: Asia Pacific head of IMG from 2011 to the present
- Mr David Gyngell: CEO of Nine, 2007 to 2015
- Mr Steven Healy: Director, 2008 to 2017, and president of TA, 2010 to 2017
- Mr Graeme Holloway: Director of TA, during, inter-alia, 2012 to 2013
- Mr Russell Howcroft: Executive general manager of Network Ten, during, inter-alia, 2013
- IMG Media Ltd: a US based sports and media business and the licensee of TA's international media rights
- Mr Ken Laffey: Director of TA, 2014 to 2016
- Mr Jonathan Marquard: Chief operating officer of Network Ten, 2012 to 2013
- Mr Lewis Martin: Managing director (Melbourne) of Seven
- Mr Hamish McLennan: CEO of Network Ten, during, inter-alia, 2013
- Mr Bruce McWilliam: Group chief legal and commercial director of Seven during, inter-alia, 2012 to 2014
- Mr Harold Mitchell: Director, 2008 to 2016, and vice-president of TA, 2010 to 2016
- Nine Entertainment Holdings Co Ltd: Operator of the Channel Nine television network
- Mr Darren Pearce: Chief communications officer at TA, 2012 to 2014, and also prior to that time director of marketing
- Mr Roger Perrins: Director, Legal and Melbourne Park redevelopment at TA, 2010 to 2013
- Ms Kerryn Pratt: Director of TA, 2013 to 2016
- Mr David Roberts: Chief operating officer, chief financial officer and company secretary of TA, during, inter-alia, 2012 to 2018
- Seven Network (Operations) Ltd: Operator of Channel Seven television network
- Mr Kerry Stokes: Chairman of Seven

- Mr Scott Tanner: Director of TA, 2007 to 2015
- Ten Network Holdings Ltd: Operator of Channel Ten television network
- Mr Craig Tiley: Director of tennis, 2005 to 2013, then CEO of TA, 2013 to present
- Mr James Warburton: CEO of Network Ten, during, inter-alia, 2012 to 2013
- Mr Steven Wood: CEO of TA, 2005 to 2013
- Mr Tim Worner: CEO of Seven, 2013 to 2019 and head of television, inter-alia, 2012
- Dr Janet Young: Director of TA, 2008 to 2016

(a) A questionable chronicle

23 Let me now set out ASIC's narrative.

24 In late 2011, negotiations for a renewal of the Seven agreement started between TA and Seven. On ASIC's case, Seven's competitors were also interested in the rights. According to ASIC, in January 2012 Mr Jonathan Marquard, chief operating officer of Ten Network Holdings Ltd (Network Ten), approached Mr Wood, chief executive officer of TA, and Mr Stephen Ayles, commercial director of TA, and told them that Network Ten would be very interested in acquiring the domestic rights.

25 According to ASIC, Mr Marquard repeated Network Ten's interest to Mr Ayles several more times until about May 2012, when he told Mr Ayles that "Ten would be willing to pay in excess of 40 million annually for those rights". According to ASIC, this message, repeated to Mr Ayles several more times, was reported to Mr Wood, who reported it to Mr Mitchell and Mr Healy. But according to ASIC, neither Mr Mitchell nor Mr Healy ever reported it to the board of TA.

26 Meanwhile, TA's management obtained a report in May 2012 from Gemba Pty Ltd (Gemba), a valuer of sports broadcast rights (the Gemba report). Gemba said that the rights were undervalued under the Seven agreement, and according to ASIC recommended that they be broken down into free to air TV (FTA) rights, subscription TV (STV) rights, online rights and mobile rights. According to ASIC, Gemba valued the FTA rights at between $158 and $212 million over a five year term, the STV rights at $12 to $14.5 million, online rights at $5.05 to $9.15 million and the mobile rights at $831,000 to $2.8 million. According to ASIC, the aggregate rights were thus valued over five years at between $175.88 million and $238.4 million or between $35 and $48 million per annum. Now according to ASIC, Mr Wood told

Mr Healy about the Gemba report and sent him a copy, but Mr Healy never put the Gemba report before the TA board.

27 ASIC's narrative continued. In anticipation of the Gemba report going to the TA board, Mr Ayles asked Gemba to produce a summary version of its report for putting to the board (Gemba summary). In June 2012, Gemba did so. Mr Wood emailed a copy of the Gemba summary to Mr Healy and handed a hard copy to Mr Mitchell. According to ASIC, Mr Mitchell looked quickly at it and told Mr Wood, "Get Ayles fired. This is garbage. This is crap. Don't bother getting reports like this again". ASIC also complains that the Gemba summary was never presented to the TA board.

28 ASIC says that Gemba's valuation coincided with the level of interest that had already been expressed by Network Ten and was later confirmed by an expression of interest by Nine Entertainment Holdings Co Ltd (Nine). It is said that this occurred in late 2012, first in a meeting between Mr David Gyngell, the CEO of Nine, and Mr Wood and Mr Ayles, and second in a phone call shortly afterwards from Mr Jeffrey Browne, managing director of Nine, to Mr Wood. According to ASIC, in that phone call Mr Browne assured Mr Wood that despite Nine's commitment to the cricket, "[W]e can do the tennis … and I will pay you what it's worth… A number with a 4 in front of it is not out of the question". ASIC says that Mr Wood reported this to Mr Healy, but Mr Healy never reported this to the board.

29 Further, ASIC says that in late 2012 interest in the domestic broadcast rights was also expressed to TA by IMG Media Ltd (IMG). IMG is a US based company and one of the biggest sports marketing companies in the world, but it is not a broadcaster. It on-sells broadcast rights to broadcasters for a commission or share of the revenue paid by the broadcaster. In other words, it is little more than an agent.

30 In 2012 IMG held the rights to license TA's international broadcast rights. By a letter dated 16 November 2012 IMG offered TA a guaranteed minimum of $30 million a year for the domestic rights for seven years, plus a split of between 85% and 100% of anything above $30 million in revenue from the broadcaster (the first IMG offer). So, for example, if the broadcaster paid $40 million for the domestic rights, TA would receive $38.5 million. But the offer was conditional on approval by the board of IMG and acceptance by TA of a concurrent offer for its international broadcast rights, which were due to expire in 2014. According to ASIC, Mr Wood, to whom the first IMG offer had been sent, gave copies to Mr Healy and Mr Mitchell on 22 and 23 November 2012 respectively.

31 On 30 November 2012, Mr Chris Guinness, Asia Pacific Head of IMG, told Mr Wood that the first IMG offer had been approved by the board of IMG. According to ASIC, Mr Wood reported this both to Mr Healy and to Mr Mitchell. Yet, so ASIC complains, neither Mr Healy nor Mr Mitchell ever put the first IMG offer before the board of TA. Instead, TA's board was told about the offer at its meeting on 3 December 2012 by Mr Wood, who said that it was for hundreds of millions of dollars, but subject to conditions. But on ASIC's case, before he could say more, Mr Mitchell interjected to dismiss the first IMG offer and to say that TA should be dealing with Seven. Nothing more was said at the board meeting as to the first IMG offer.

32 On 1 March 2013, at Mr Wood's request, IMG restated its offer reducing it from seven to five years and uncoupling it from an offer for the international rights (the second IMG offer). The level of fees remained the same. Further, between the first and second IMG offers, IMG had had a number of discussions with Network Ten and had, according to ASIC, secured a non-binding commitment from Network Ten to bid for the domestic rights in the event that they were awarded to IMG. According to ASIC, Mr Wood, to whom the second IMG offer had been sent, told Mr Healy about the further offer, but Mr Healy never told the board at any time; I should say that ASIC during the running of its case abandoned its criticism of Mr Healy on this aspect to some extent.

33 Around late March 2013, Mr Hamish McLennan, the recently appointed new CEO of Network Ten, separately approached Mr Wood and said, according to ASIC, that it could pay about $50 million a year for the domestic broadcast rights. ASIC says that Mr Wood reported this to Mr Healy, who did not report it to the board. ASIC says that Network Ten were engaging in serious internal deliberations in respect of sports rights and were very keen to acquire the rights to one of the major sports.

34 Meanwhile, negotiations between TA and Seven for a renewal of the Seven agreement continued throughout 2012 and into early 2013. Seven made a number of written offers from 3 September 2012 to 26 March 2013, each of which included fees of no more than $24 million a year. Notwithstanding the low level of these offers, according to ASIC Mr Mitchell repeatedly pressed Mr Wood to do a deal with Seven.

35 Further, according to ASIC, not only was Mr Mitchell pressuring Mr Wood to finalise a deal with Seven, but he was also reporting to Seven on TA's internal deliberations.

36 Now a meeting was scheduled between TA and Seven in mid-2012. On ASIC's case, shortly beforehand Mr Tim Worner, the CEO of Seven, emailed others at Seven saying that "our understanding is that Harold will support our very strong stance". ASIC says that after the scheduled meeting Mr Mitchell called Mr McWilliam and said, "We should try to wrap it up this week". Later, in an email in August 2012 Mr Worner urged others at Seven to wrap up the tennis rights: "Time is our enemy as the price will only go up. Not down".

37 On 10 October 2012, Mr Mitchell sent an email to Mr Wood saying that "We better fix Channel 7…We are ready to do it all". Mr Mitchell then forwarded this email to Mr McWilliam and Mr Lewis Martin, managing director of Seven in Melbourne, and added, "Let's wrap this up next week. Leave it with me".

38 In late November and early December 2012, according to ASIC, Mr Mitchell said to Mr Wood a number of times, "Tell me again you're going to get the deal done with Seven by the new year".

39 Now it is not in doubt that the negotiations between TA and Seven in the early stages did not go into the level of fees but focused on other substantive questions such as the archive rights, the quality of the broadcast, the separation of FTA, STV, online and mobile rights and who would be host broadcaster. As I have indicated, the host broadcaster was responsible for producing the broadcast feed. Up to this point Seven had always performed this role, but TA was keen to become host broadcaster to give it more control over the broadcast and to enable it better to exploit its international rights.

40 And it is also not in doubt that another negotiation issue between TA and Seven was over a long form agreement. By 2012 the contractual documents constituting the Seven agreement comprised a series of letters and other short form documents amending the original long form agreement from 2007. Seven were keen to get TA to commit early to a renewal and to do so by an exchange of letters.

41 In early November, Seven sent one of its offer letters to TA. TA returned a marked-up version of the letter to Seven. According to ASIC, this produced a blunt response from Mr McWilliam, who accused Mr Wood of "completely bad faith", said it was "amateur hour" and derided TA's response to the offer as a "piece of rubbish" and a "piece of crap." Mr McWilliam insisted that an agreement had been reached at a prior meeting and alleged, "you sat there and agreed things with us and Harold".

42 According to ASIC, shortly after this correspondence Mr Mitchell and Mr McWilliam spoke by telephone and Mr Mitchell re-assured Mr McWilliam, "It will be OK. We will sign your document".

43 Now because of Seven's repeated insistence that a deal had already been concluded, it was not in doubt that Mr Wood wanted a clause to be included in any Seven offer that it was not binding until the conclusion of a long form agreement. He proposed a form of clause to Seven and also sent a copy to Mr Mitchell. But Mr Mitchell told Mr Wood that it was "a lawyer's way of saying 'I don't trust you' Bad sign! Won't fly with them… Or me!!!" On ASIC's case, Mr Mitchell then reported to Mr McWilliam that he had "stamped on" Mr Wood's proposal for a non-binding clause and had also "jumped on" Mr Wood appointing IMG to sell the rights. This led to Mr McWilliam telling other Seven directors: "We have to hope Harold can carry the board".

44 On 3 December 2012, the TA board met. According to ASIC, on the morning of the meeting Mr Mitchell and Mr McWilliam spoke for 13 and a half minutes on the telephone. At the meeting, Mr Wood reported to the board on the negotiations for the broadcast rights and of the offers received from Seven and IMG. According to ASIC, Mr Mitchell dismissed the first IMG offer, which was not tabled at the meeting, and told the board that Seven's offer was reasonable and that Mr Wood and he would "wrap this up" with Seven and bring it back to the board. Immediately after that meeting, Mr Mitchell told Mr Wood: "Just get the deal done with Seven, we're not doing IMG".

45 After the 3 December 2012 board meeting TA management, according to ASIC, were concerned that the board was not being fully informed about the broadcast rights. It sought advice from a law firm about this, which advice was received around 10 December 2012; TA has claimed legal professional privilege over the advice and its terms are not in evidence.

46 In mid-December 2012 Mr McWilliam requested a Sunday meeting with Mr Mitchell in Melbourne to discuss the broadcast rights. Mr Mitchell proposed that Mr Wood also be invited. But when Mr McWilliam proposed that he send Mr Wood some points in advance of the meeting, Mr Mitchell replied, "Think we should hold it until Sunday! He talks to the people on his staff [a]nd gets pushed into a corner! To[o] much thinking time!" The meeting proceeded, but not with Mr Wood present.

47 Mr McWilliam reported on the meeting to Mr Worner and Mr Don Voelte (also of Seven) in the following terms: "Steve [w]ood wasn't at the meeting, just Harold, who insists it is all going to plan".

48 Around 18 December 2012, Mr Ayles and Mr Greg George, head of broadcasting for TA, prepared a paper at Mr Wood's request comparing Seven's offer and the first IMG offer in the light of, first, the interest expressed by other potential buyers, second, of the Gemba report and third, of sales of broadcast rights for other sports (the Ayles paper). According to ASIC Mr Wood made some amendments to the Ayles paper. According to ASIC, Mr Wood sent his amended paper to Mr Healy. Then, so ASIC says, Mr Healy gave some comments on it. Mr Wood also reported, according to ASIC, the recommendations of the paper to Mr Mitchell, adding that they needed to get more information on the domestic broadcast rights to the board. According to ASIC, Mr Mitchell responded:

> You're not going to do that. You're going to do it this way with Seven. This will cost you your job. When will you learn to be a good CEO? Let me handle that.

49 On ASIC's case, after that exchange Mr Wood told Mr Healy that he thought Mr Mitchell was hijacking the negotiations. Mr Healy assured Mr Wood that he would speak to Mr Mitchell and ask him to stop interfering. Further, according to ASIC, Mr Wood told Mr Healy that he thought the board should see the Ayles paper and that TA should take the rights to market.

50 On ASIC's case, around late February 2013 Mr Wood again recommended to Mr Healy that the board should see the Ayles paper as an inclusion in the board pack for the board meeting on 4 March 2013. But Mr Healy said that it would be sufficient to discuss the paper. The paper was neither included in the board pack nor discussed at that meeting.

51 On ASIC's case, on 23 February 2013 Mr Kerry Stokes, the chairman of Seven, told Mr McWilliam of the meeting to be held by the board of TA on 4 March 2013, "We need to make sure we are there at this board meeting." Mr McWilliam replied, "Agree … I will call Harold again about this … Harold swears we [are] safe".

52 At the TA board meeting on 4 March 2013 there was little detailed discussion of the TV rights. Mr Mitchell proposed that a subcommittee be formed, consisting of himself as chair and of Mr Healy, Mr Wood, and Mr Chris Freeman, "to meet to discuss TA's strategy on the domestic broadcast renewal and then report back to the Board". The recommendation was accepted. According to ASIC, Mr Scott Tanner, a director of TA, said that he opposed Mr Mitchell's participation in the board subcommittee because of potential conflicts of interest; this was not

minuted. According to ASIC there was also a sharp exchange between Mr Mitchell and Dr Young at that meeting when Mr Mitchell accused her of leaking information concerning the broadcast rights to the press. Dr Young denied the allegation and Mr Mitchell apologised to her.

53 ASIC's narrative continued. After that meeting, Mr Wood instructed Mr Ayles to prepare a paper setting out a process for how the board subcommittee should operate. Mr Ayles did so in the form of a paper that envisaged three stages of negotiations (the board subcommittee paper). The third stage envisaged that "[d]epending on Seven's reaction/approach during the [exclusive negotiating] period TA may be required to test the market via a formal bidding process". Mr Ayles emailed the board subcommittee paper to Mr Wood on 8 March 2013, who then emailed the paper to Mr Mitchell the same day. About two hours later, Mr Mitchell replied:

> Steve, I've [had a] quick look at this 7 pages of the paper. I'm not happy.
>
> As Chairman of any subcommittee, any framework documentation that we might commence would only be in a manner that I suggest.
>
> I therefore have put your paper on hold until we can speak. …

54 According to ASIC, they spoke shortly after, when Mr Mitchell said the following to Mr Wood:

> You should get on and do the deal with Seven.
>
> I have never heard of Gemba.
>
> The reports from Gemba were a waste of time.
>
> Ayles should be fired after commissioning Gemba.
>
> The long-standing arrangement in place for media rights in Australia that has existed for many years is that Nine has the cricket, Seven has the tennis and football and Ten gets the dregs.
>
> TA should not seek to disturb this long-standing arrangement.
>
> You should keep off the grass.

55 On 23 March 2013, Mr Wood emailed a copy of the board subcommittee paper to Mr Healy. The board subcommittee never met and never transacted any business.

56 According to ASIC, throughout March 2013 Mr Mitchell was in regular contact with Mr McWilliam. Phone records disclose a 10 minute call on 4 March 2013, a two minute call on 5 March 2013, a nine minute call on 14 March 2013, and seven text messages on 18 March 2013.

57 On 26 March 2013, Mr Wood and Mr Mitchell met with Mr Worner and Mr McWilliam in Mr Mitchell's office in South Melbourne. Mr Worner and Mr McWilliam handed over a letter containing a new offer from Seven. The rights fees remained at $24 million per annum. Mr Wood said at the meeting that TA wanted to take over the host broadcast of the AO. But according to ASIC, this was rejected not only by Mr Worner and Mr McWilliam but also by Mr Mitchell, who told Mr Wood after the meeting: "TA is not going to do the host broadcast. You don't know what you're doing".

58 On 1 April 2013 the ENP with Seven began.

59 On 5 April 2013 Mr Worner sent an email to others at Seven expressing concern that the longer it took to negotiate a deal with TA, the more likely Seven's competitors would focus on the tennis "as cricket situation develops"; negotiations were then also in train for a new broadcasting deal for the cricket. Seven was concerned that the loser in that bid, which would be either Nine or Network Ten, would bid aggressively for the tennis. Mr Worner then emailed Mr Wood and Mr Mitchell and said, "it would be good to get the main terms nailed down and then lock everyone up to conclude the long form". That email was sent at 10.20 am on 5 April 2013. According to ASIC, phone records disclose that Mr McWilliam rang Mr Mitchell at 10.22 am and they spoke for nine minutes. ASIC invited me to infer that in this conversation Mr McWilliam passed on to Mr Mitchell Seven's concerns about delay and the outcome of the cricket negotiations.

60 A meeting between TA and Seven was planned for 9 May 2013, but Mr Wood and Mr Martin of Seven met informally beforehand over breakfast on 7 May 2013. In his report to others at Seven of the meeting with Mr Wood, Mr Martin wrote in respect of the possibility that Network Ten would partner with Foxtel in a bid: "If I was Ten I would leap at it – coming from nothing I'll take something – I could enter a premium sport, take it off Seven and at a manageable price supported by News [l]td press!".

61 Now at the meeting between TA and Seven on 9 May 2013 there was no resolution of the key issues concerning the fees, host broadcast and digital rights. In his report of the meeting, Mr McWilliam again expressed Seven's concern about the impact of the cricket rights when he said:

> But given gyngell's telling tim (down the other end of the room) cricket's a $100 mill
> A year proposition (he's considering matching) we have to take this off the table.

62 According to ASIC, the next day Mr McWilliam called Mr Mitchell and spoke to him for five minutes. The day after that there was a newspaper article which said that Network Ten had bid $500 million for the cricket. In the wake of this publicity, Gemba sent TA a further report saying that the cricket negotiations presented TA with the opportunity to win a significant increase in the broadcast rights fees. Apparently this further report was unsolicited.

63 On 16 May 2013, Mr Wood travelled to Sydney and met with Mr Worner alone. He told Mr Worner: "We need at least $40 million per annum". Mr Worner replied that Seven could not do that. Mr Worner showed Mr Wood some advertising figures then said, "Seven is prepared to offer $195 million over five years". Mr Wood said again that TA wanted the host broadcast. Mr Worner replied: "We can work something out on that".

64 Later that day Mr McWilliam called Mr Mitchell and they spoke for five minutes. ASIC invited me to infer that Mr McWilliam told Mr Mitchell about Mr Worner's offer to Mr Wood. Mr McWilliam then emailed others at Seven:

> Also spoke to Harold (in shanghai) who thought we had been more generous than we expected and he said they were now more nervous of what production responsibilities they were taking on. Harold said they had a board meeting of TA on Monday.

65 On 17 May 2013, Seven put an offer of $195.1 million over five years in writing. The offer left open for further negotiation the question of host broadcast production.

66 Seven's final offer was reported to the board of TA on 20 May 2013. According to ASIC, Mr Mitchell told the board that the board subcommittee, which had never met, recommended that the board accept the final offer; ASIC's case on this was muddled and I will return to this later. He also said that Nine was not interested in the tennis as it was committed to the cricket and that Network Ten was not in a sound financial position and so should not be considered. He also said that he did not understand why TA would want to do the host broadcast. The board resolved to accept Seven's final offer.

67 ASIC's narrative continued. Mr Mitchell also asked at the meeting whether a long form of the agreement could be concluded within a week. According to ASIC, the CFO/COO and company secretary of TA, Mr David Roberts, concerned that this would weaken TA's negotiating position, replied that he did not think it was a good idea. Mr Mitchell then said to Mr Roberts "That's how CFOs lose their job".

68 ASIC says that there was no imperative for TA to conclude the long form agreement expeditiously and that there were good reasons for TA to take time over it. The ENP still had

four and a half months to run. ASIC invited me to infer that in pressuring TA management to conclude a long form agreement expeditiously, Mr Mitchell was motivated by Seven's concerns about delay and the potential impact of the cricket rights negotiations.

69 In the event, between 27 and 29 May 2013 the long form agreement was negotiated to a conclusion. In the course of those negotiations, from which Mr Mitchell was absent, Seven agreed for TA to be the host broadcaster. On 29 May 2013, the long form agreement was signed.

70 Now according to ASIC, before the long form agreement was signed between TA and Seven, Network Ten again approached TA to express its interest in the broadcast rights. And in the midst of the negotiations for the long form agreement, Mr Worner reported to the Seven board that he hoped the agreement would be concluded soon. He said:

> The cricket rights negotiations could reach an end point by this weekend and we would not welcome the prospect of a cricket-less Nine or Ten arriving on the scene.

71 In June 2013, the cricket rights were awarded for $500 million. This was divided between Nine, being $400 million for test cricket and one day internationals, and Network Ten, being $100 million for domestic T20. This was as a result of a competitive tender.

72 According to ASIC, the concluded long form agreement between TA and Seven had a number of serious and adverse repercussions, both immediate and longer term. There was immediate and unfavourable press reaction to the deal, which included criticism by both Nine and Network Ten for the failure to put the rights out to tender as cricket had done. ASIC says that TA went into damage control over the deal with Seven and Mr Wood prepared a detailed defence of the deal for directors.

73 Let me now turn to ASIC's narrative concerning later events, which I have dealt with in a later section of my reasons concerning post-contravention conduct.

74 ASIC says that on 15 July 2013, Dr Young met Mr Healy and told him that she was concerned that Mr Mitchell had had a conflict of interest in the renewal of the agreement with Seven. According to ASIC, Mr Healy responded:

> I had my own concerns about Harold's conflicts of interest. In fact, I was concerned and went to see him and asked him to step aside from the negotiations, but he refused to do so.

75 In August 2013, Mr Wood resigned as CEO and was replaced by Mr Craig Tiley. According to ASIC, his resignation followed criticism of his performance by Mr Mitchell over the level

of TA's accumulated reserves. According to ASIC, Mr Wood's removal was likely to be payback by Mr Mitchell for Mr Wood's refusal to follow Mr Mitchell's repeated instructions to do an unfavourable deal with Seven. I am tempted to pause at this point, but I will let ASIC's narrative continue.

76 In late 2013, Mr Tiley and Mr Roberts caused a TA finance analyst to prepare a summary of the net financial benefits of the broadcast rights agreement with Seven. According to ASIC, the summary showed that after taking account of the cost of host broadcasting, what were described as "contra" items and other non-cash items, the net cash benefits of the Seven deal to TA were $125,665,723.

77 In October 2013, Ms Pratt was appointed to the TA board. She was also appointed to the audit and risk committee.

78 On 12 May 2014, at a meeting of the audit and risk committee, Ms Pratt saw budgeted figures for the cost of the host broadcast. According to ASIC, she expressed concern that the cost could blow out to $9 million to $10 million. But Mr Roberts replied that it would be only $5.8 million, of which $4 million was being paid by Seven. According to ASIC, Ms Pratt asked why TA had accepted only $4 million more from Seven, when the host broadcast would cost more. According to ASIC, Mr Roberts said that TA should have gone to market for the deal. He said that Mr Mitchell had done an about turn on TA's assumption of the host broadcast, having been against it until Seven conceded it.

79 On 19 May 2014, the TA board was scheduled to meet in Sydney. ASIC says that on the evening before the meeting and at a dinner in Sydney, Mr Tiley told Dr Young that Mr Healy knew more about the broadcast deal than the board, that there was a one page summary of the deal which she would be shocked to see and that the contract had been too rushed. ASIC says that Mr Tiley also told Ms Pratt about the one page summary but asked her not to raise the numbers as nothing could be done, that the organisation's processes had broken down over the broadcast deal, that Mr Healy was implicated in this and that it would never happen again.

80 According to ASIC, the next morning before the board meeting, Mr Roberts told Dr Young that IMG had offered $40 million per annum for the broadcast rights, that management had expected to get $50 million per annum, that information was withheld from the board and that Mr Mitchell had employed aggressive and bullying tactics.

81 Further, ASIC says that Mr Healy told Ms Pratt before the board meeting that he was uncomfortable with the process by which the contract with Seven had been negotiated. According to ASIC, he told Ms Pratt:

> Please do not raise the issues about the media broadcast contract with the Seven Network at the meeting. It will create disharmony and issues for me and others. …
>
> Roberts and I were bullied into the deal by Mitchell. Mitchell rushed the executive team to conclude the negotiation … When Roberts questioned it, Mitchell said to Roberts, 'That's how CFOs lose their jobs'.

82 ASIC says that after the board meeting, Ms Pratt told Mr Healy: "I am very concerned about Harold's conflict of interest in the deal, with his mate Bruce McWilliam, and how the integrity of the board was compromised". According to ASIC, Mr Healy replied:

> Yes. This is terrible. It will never happen again. I should have stood up to Harold and got independent advice.

83 In May 2014, Ms Pratt asked for a copy of the contract with Seven. ASIC sought to weave a cover up theme on some of the events around this time which I will return to later.

84 ASIC says that around mid-December 2014, Mr Healy again told Dr Young that he had asked Mr Mitchell to stand aside from the negotiations and that procedures would be changed next time around.

85 Let me go further forward in ASIC's narrative into 2015.

86 The TA board met on 5 October 2015. At that meeting, Mr Healy proposed that Mr Mitchell, who was nearing the end of his term, be nominated for re-appointment to the board for three years. Ms Pratt, Dr Young and another director Mr Peter Armstrong opposed the proposal. According to ASIC only two directors eligible to vote, namely, Mr Freeman and Mr Ken Laffey, supported Mr Mitchell. According to ASIC, as a compromise the board resolved to nominate Mr Mitchell for one year but on the understanding that he would retire in February 2016 after the next AO, with Mr Healy to communicate that to Mr Mitchell.

87 Further, according to ASIC, on 16 October 2015, Mr Healy and Dr Young had a heated meeting in which Dr Young asked Mr Healy why he supported Mr Mitchell for a further three year term. According to ASIC, Mr Healy called Dr Young a liar and accused her of putting her personal interest of wanting to be vice-president above all else. But according to ASIC, he also told Dr Young that Mr Mitchell had withheld information and given misleading information to the board about the broadcast rights deal, that the board believed that there was only one

prospective television network and that there had been a total disregard of the committee process. According to ASIC he also told her that Mr Mitchell had bullied directors and management, that Mr Mitchell tried to get TA to accept Seven's offer of $22 million per annum, that the value of the Seven deal was really $125 million not $195 million, and that he, Mr Healy, had tried to get Mr Mitchell to withdraw.

88 Let me press on with ASIC's narrative. A TA general meeting of its members was scheduled for 23 October 2015. At that general meeting resolutions were to be proposed for the appointment and re-appointment of directors. The agenda foreshadowed that Mr Mitchell would be re-appointed for a further one year. But according to ASIC, Ms Pratt was concerned that this did not reflect the resolution at the last directors' meeting and so called a further directors' meeting immediately before the general meeting on 23 October 2015. According to ASIC, at that directors' meeting Mr Mitchell attacked Ms Pratt and Dr Young for not being "team players", and then resigned.

89 But ASIC says that Mr Mitchell was not done. In November 2015, according to ASIC there was an apparent ground-swell of support for him among the member associations of TA. And in apparent response to that ground-swell, Mr Healy notified the board that he intended to nominate Mr Mitchell for the vacant board position. According to ASIC, he also notified a resolution to amend TA's constitution to give the president a casting vote on board nominations. An extraordinary general meeting of TA was then held by telephone conference at 7.00 pm on Sunday 6 December 2015, which passed a resolution amending the constitution. This paved the way for the board to reappoint Mr Mitchell, which it did the next day.

90 ASIC says that at this time and in an apparent concession to the dissenting directors, the board resolved to constitute an independent inquiry into whether Mr Mitchell had any conflict of interest in relation to the broadcast rights contract with Seven. But according to ASIC, Mr Tanner could see what was coming and he resigned from the board on 11 December 2015. He told Dr Young the same day, "I can see where the report is going".

91 ASIC says that the so-called inquiry was a whitewash. According to ASIC, although the inquiry was supposed to be into whether Mr Mitchell had a conflict of interest in respect of TA's dealings with Seven, the inquiry did not interview Mr Mitchell or anyone from Seven. According to ASIC, those conducting the inquiry appear to have received a written confirmation from Mr Mitchell's adviser that Mr Mitchell's media buying business had business relationships with Seven which were not materially different from relationships with

other media outlets. But it says that the inquiry did not appear to have investigated Mr Mitchell's dealings with Seven any further.

92 Further, according to ASIC, the inquiry reported only that nothing had been brought to its attention during the course of the review which would suggest that Mr Mitchell had a material personal interest in connection with the broadcast rights deal with Seven. ASIC says that this unsurprising and meaningless conclusion did not answer the question of whether Mr Mitchell had a conflict of interest. Further, it says that it was made in ignorance of the vast body of evidence unearthed by ASIC of "direct collusion" between Mr Mitchell and Seven in the course of the negotiation of the broadcast rights deal.

93 Further, according to ASIC, in the course of the inquiry Dr Young had notified two former directors who had been in office at the relevant time, the late Mr Graeme Holloway and Mr James Davies, of the inquiry in case they wanted to participate. ASIC said that this was something that she was entitled to do. Dr Young notified Ms Karen Wood, one the two persons conducting the inquiry, of her contact with the two former directors. Ms Wood then told Mr Healy. Ms Wood then told Dr Young that Mr Healy was "comfortable for us to speak to both" former directors and would set up a time to speak to them. But according to ASIC, within an hour of that communication Mr Healy wrote to all board members that there had been "a fundamental and serious breach of directors' duties" by a director who had involved former directors in the review without his permission.

94 ASIC says that Mr Healy's allegation of breach of directors' duties by Dr Young not only contradicted what Ms Wood had said in her email to Dr Young, but was also wrong. According to ASIC Mr Healy claimed that the allegation was based on advice from the solicitors conducting the inquiry, but ASIC says that there is no evidence of any such advice nor any support for it in the inquiry report. The report instead contained a section headed "Additional observations", which ASIC says included what looked to be a heavily negotiated passage urging "great care" in any discussions with non-board members, though it recognised that any external party consulted over the inquiry also owed strict duties of confidentiality.

95 Nevertheless, according to ASIC, Mr Healy's baseless allegation of breach of directors' duties by Dr Young was the pretext for demanding not only her resignation but that of the other remaining dissenters, Ms Pratt and Mr Armstrong. ASIC says that Mr Armstrong was caught up in this purge for doing no more than expressing support for Dr Young and Ms Pratt in raising

concerns over Mr Mitchell's role in the broadcast deal. On 18 December 2015 he had written to Mr Healy:

> I do support Janet [Young] and my other colleagues, however, in expressing their concerns on the matter. As I see it, in doing so, they are doing no more than exercising their fiduciary duties as directors of Tennis Australia in what they consider to be the best interests of the organisation.

96 On 6 January 2016 the board passed motions of no confidence in Dr Young, Ms Pratt and Mr Armstrong and each of them resigned before a special general meeting which had been called to remove them on 15 January 2016.

97 Thus, so ASIC says, in a shameful coda to the sorry saga of the Seven broadcast rights deal of 2013, the directors who had sought faithfully and conscientiously to discharge their duties to TA were all removed from the board and those who flagrantly breached their duties were confirmed in their positions.

98 I will come back and deal with ASIC's penny dreadful narrative concerning these post 2013 events later.

99 Finally, ASIC says that in a revealing postscript to the 2013 broadcast rights deal, in March 2018 TA put the broadcast rights out to competitive tender which was won by Nine at a price of $60 million per annum.

(b) Contraventions alleged against Mr Mitchell

100 ASIC alleges in its further amended statement of claim (FASOC) that Mr Mitchell breached ss 180(1), 182(1) and 183(1) by engaging in the following conduct which it was said was engaged in by Mr Mitchell exercising his powers or discharging his duties as a director of TA.

101 But let me stress at the outset that ASIC's allegations of contravention only concern events up to the end of May 2013. There are no allegations of contravention concerning any event in 2014 or 2015.

102 ASIC says that by dismissing the first IMG offer out of hand, Mr Mitchell contravened s 180(1) because a reasonable person occupying such an office with the same responsibilities as him would not have dismissed the first IMG offer but would have given it serious consideration. Further, by that conduct he contravened s 182(1) by using his position as a director of TA improperly to gain an advantage for Seven.

103 Further, ASIC says that by informing Mr McWilliam of the first IMG offer on 30 November 2012, Mr Mitchell contravened s 180(1) because a reasonable person occupying such an office with the same responsibilities as him would not have disclosed to Seven the details of a rival's offer for the domestic broadcast rights. Further, he contravened s 183(1) by improperly using information, namely the details of the first IMG offer, he obtained because of his position as a director of TA because it was confidential to TA and IMG and was disclosed without the consent of IMG to gain an advantage for Seven.

104 Further, ASIC says that by instructing Mr Wood on 1 December 2012 to abandon his request to Seven for a non-binding clause pending the formalisation of a long form agreement, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have given that instruction to Mr Wood. Further, by that conduct he contravened s 182(1) because he used his position improperly to gain an advantage for Seven.

105 Further, ASIC says that by forwarding his 1 December 2012 emails with Mr Wood to Seven, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have so forwarded them. Further, he contravened s 183(1) because he improperly used information, namely, the emails he obtained because he was a director of TA to disclose TA's internal deliberations to Seven to gain an advantage for Seven.

106 Further, ASIC says that by telling Mr McWilliam that he had "stamped on" Mr Wood's proposal for a non-binding clause and that he had "jumped on [Mr Wood] appointing IMG to sell the rights" Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have told Mr McWilliam those things. Further, he contravened s 183(1) as he improperly used information he obtained, namely, his directions to Mr Wood not to seek a non-binding clause and not to appoint IMG to sell the domestic broadcast rights, because it disclosed to Seven TA's internal deliberations to gain an advantage for Seven.

107 Further, ASIC says that by not disclosing the details of the first IMG offer to the TA board meeting on 3 December 2012 and telling the board that the first IMG offer had a number of shortcomings and should not be considered, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have told the TA board that the first IMG offer should not be considered and would

have disclosed its details to the board. Further, he contravened s 182(1) because he used his position improperly by concealing relevant information from the board on a subject of financial significance for TA, to gain an advantage for Seven.

108 Further, ASIC says that by telling the TA board on 3 December 2012 that he and Mr Wood would work on an agreement with Seven and wrap it up and come back to the board, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have told the TA board that it should only consider making an agreement with Seven. Further, he contravened s 182(1) because he used his position improperly by seeking to prevent the TA board from considering a broadcast rights agreement with any person other than Seven to gain an advantage for Seven.

109 Further, ASIC says that by not disclosing to the TA board at its meeting on 3 December 2012 the level of interest of Network Ten in the domestic broadcast rights, Mr Mitchell contravened s 180(1). Further, he contravened s 182(1) because he used his position improperly as he concealed relevant information from the board on a subject of financial significance for TA to gain an advantage for Seven.

110 Further, ASIC says that by telling Mr McWilliam not to send materials to Mr Wood in advance of a proposed meeting on 13 December 2012, Mr Mitchell contravened s 180(1). Further, he contravened s 182(1) because he used his position improperly by withholding advance receipt of materials which could only disadvantage Mr Wood in his negotiations at the meeting, to gain an advantage for Seven.

111 Further, ASIC says that by meeting with Mr McWilliam and Mr Martin alone and without Mr Wood on 16 December 2012 and telling them that "it is all going to plan", Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have met alone with Mr McWilliam and Mr Martin or told them that it was all going to plan. Further, he contravened s 183(1) because he improperly used information that he obtained because he was a director of TA, namely, that TA's deliberations concerning the domestic broadcast rights were going to plan, as it disclosed to Seven TA's internal deliberations to gain an advantage for Seven. I should note that in closing address, ASIC abandoned the "meeting alone" dimension of this allegation.

112 Further, ASIC says that by telling Mr Wood that TA would not follow the recommendations of the Ayles paper but would instead award the broadcast rights to Seven, Mr Mitchell

contravened s 180(1). Further, he contravened s 182(1) because he used his position to restrict TA's consideration of the broadcast rights to gain an advantage for Seven.

113 Further, ASIC says that by assuring Mr McWilliam in January and February 2013 that Seven "was safe" and that TA would renew the broadcast rights agreement with it, Mr Mitchell contravened s 180(1). Further, he contravened s 183(1) because he improperly used information he obtained because he was a director of TA, namely, TA's internal deliberations concerning the domestic broadcast rights, as it disclosed to Seven TA's internal deliberations to gain an advantage for Seven.

114 Further, ASIC says that by not disclosing to the TA board at its meeting on 4 March 2013 the level of interest of Network Ten in the domestic broadcast rights, Mr Mitchell contravened s 180(1). Further, he contravened s 182(1) because he used his position as director of TA improperly, as he concealed relevant information from the board on a subject of financial significance for TA to gain an advantage for Seven.

115 Further, ASIC says that by informing Mr McWilliam what happened concerning the domestic broadcast rights at the TA board meeting on 4 March 2013, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have given Mr McWilliam that information. Further, he contravened s 183(1) because he improperly used information that he obtained because he was a director of TA, namely, the TA board's deliberations concerning the domestic broadcast rights, as it disclosed to Seven TA's internal deliberations to gain an advantage for Seven.

116 Further, ASIC says that by instructing Mr Wood on 8 March 2013 not to distribute the board subcommittee paper to other members of the board subcommittee and not to send out any other documents unless he approved them, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have imposed such restrictions on senior managers. He is further alleged to have used his position as director of TA improperly, because he concealed relevant information from the members of the board subcommittee of financial significance for TA to gain an advantage for Seven, and thereby contravened s 182(1).

117 Further, ASIC says that by failing to convene any meetings of the board subcommittee to ensure that it fulfilled its functions, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would have

ensured that the board subcommittee fulfilled its functions. Further, he contravened s 182(1) because he used his position as director of TA improperly, as the failure of the board subcommittee to fulfil its functions meant that it could not give the TA board the advice it needed to assess the Seven offers to gain an advantage for Seven.

118 Further, ASIC says that by telling Mr Wood to do the deal with Seven and to "keep off the grass", Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have told Mr Wood those things. Further, he contravened s 182(1) because he used his position as director of TA improperly as he sought to restrict TA's consideration of the domestic broadcast rights to gain an advantage for Seven.

119 Further, ASIC says that by informing Mr McWilliam on 16 May 2013 that Seven's final offer was generous, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have told Mr McWilliam the offer was generous. Further, he contravened s 183(1) because he improperly used information that he obtained because he was a director of TA, namely, his assessment of the offer, as it disclosed to Seven TA's internal deliberations to gain an advantage for Seven.

120 Further, ASIC says that by recommending to the TA board at its meeting on 20 May 2013 to accept Seven's final offer, Mr Mitchell contravened s 180(1) because a reasonable person in his position would not have made that recommendation but would instead have recommended a competitive tender for the domestic broadcast rights. Further, he contravened s 182(1) because he used his position as director of TA improperly as he made a recommendation which if accepted would not be in TA's best interests to gain an advantage for Seven.

121 Further, ASIC says that by telling the TA board at its meeting on 20 May 2013 that the board subcommittee recommended that TA accept Seven's final offer, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would have told the board that the board subcommittee made no recommendation as it had not considered Seven's final offer. Further, he contravened s 182(1) as he used his position as director of TA improperly as he misled the TA board about the board subcommittee's position to gain an advantage for Seven.

122 Further, ASIC says that by not disclosing to the TA board at its meeting on 20 May 2013 the level of interest of Network Ten in the domestic broadcast rights or the opinion of Gemba that

TA had the opportunity to increase significantly the amount it received for the domestic broadcast rights, Mr Mitchell contravened s 180(1). Further, he contravened s 182(1) as he improperly used his position as director of TA by withholding relevant information from the board of financial significance for TA to gain an advantage for Seven.

123 Finally, ASIC says that by telling the TA board at its meeting on 20 May 2013 that Nine was not interested in the domestic broadcast rights and that Network Ten could not afford to pay for them, Mr Mitchell contravened s 180(1) because a reasonable person occupying the office of director of TA with the same responsibilities as him would not have said those things to the board. Further, he contravened s 182(1) because he used his position as director of TA improperly as the board was misled about the true market for the domestic broadcast rights to gain an advantage for Seven. I would say now that it would seem that ASIC's allegation is wrongly directed to the 20 May 2013 board meeting; it would seem that analogous comments were made at the 4 March 2013 board meeting, but ASIC makes no such allegation referable to the 4 March 2013 meeting.

(c) Contraventions alleged against Mr Healy

124 ASIC alleges that Mr Healy contravened s 180(1) of the Act in various respects, but the allegations of contravention only concern events up to the end of May 2013.

125 ASIC says that by failing to ensure that important documents were included in the board pack for the board meeting on 3 December 2012, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair of the board of directors of TA with the same responsibilities as him would have ensured those documents were included in the board pack.

126 Further, ASIC says that by not disclosing to the TA board at its meeting on 3 December 2012 the first IMG offer and Network Ten's interest, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair with the same responsibilities as him would have told the TA board of the first IMG offer and Network Ten's interest.

127 Further, ASIC says that by failing to ensure that important documents were included in the board pack for the board meeting on 4 March 2013, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair

with the same responsibilities as him would have ensured those documents were included in the board pack.

128 Further, ASIC says that by not disclosing to the TA board at its meeting on 4 March 2013 the level of interest of Network Ten in the domestic broadcast rights, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair with the same responsibilities as him would have told the TA board of the level of interest of Network Ten.

129 Further, ASIC says that by failing to ensure that important documents were included in the board pack for the board meeting on 20 May 2013, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair with the same responsibilities as him would have ensured those documents were included in the board pack.

130 Finally, ASIC says that by not disclosing to the TA board at its meeting on 20 May 2013 the level of interest of Network Ten and Nine in the domestic broadcast rights or the opinion of Gemba that TA had the opportunity to increase significantly the amount it received for the domestic broadcast rights, Mr Healy failed to exercise his powers or discharge his duties as director of TA, and a reasonable person occupying the office of chair with the same responsibilities as him would have disclosed those matters to the board.

(d) Harm to TA

131 ASIC alleges that each of the contraventions of Mr Mitchell and Mr Healy caused harm to TA by depriving it of the opportunity of obtaining a higher fee for the domestic broadcast rights in 2013 that it could have obtained by competitive tender.

132 ASIC says that it does not have to establish that the contraventions caused a loss as for a common law claim for damages. It says that proof of any such loss and of causation at common law are unnecessary.

133 ASIC's case as opened was that the price paid by Seven was at the bottom end of the expected valuation and also that there were competing parties willing at least to bid up the price for the rights. ASIC says that the failure by TA to get the benefit of such competition was harm in the relevant sense.

134 Further, ASIC says that although it is likely that the overall harm to TA alleged by ASIC resulted from a *combination* of the alleged contraventions, nevertheless each individual contravention contributed to that overall harm and can therefore be said to have caused TA harm.

135 I would say now that ASIC's harm theory was problematic at the start of the trial and not maintainable by its end.

136 Let me now turn to my principal task which is to mine the facts from the coal-face of forensic inquiry. I will add some law later once the facts have been separated and processed.

FACTUAL BACKGROUND

137 It is appropriate at this point to set out my synthesis of various matters from the documentary and witness evidence including a chronological sequence of the key events up to June 2013. ASIC's pleaded case concerns the acts and omissions of Mr Healy and Mr Mitchell up to that point in time. Later events are dealt with in a separate part of my reasons, although they may throw light on earlier events. Indeed, ASIC says that later events may constitute in some cases admissions. Whether and how that could be so is something that I will discuss later.

Tennis Australia

138 As I have said, TA is a company limited by guarantee and is the governing body for tennis in Australia. Its members are the State and Territory peak tennis associations.

139 As I have said, TA organises and conducts the AO, one of only four Grand Slam events. It owns and controls the right to broadcast feeds of the tennis tournaments that it organises, including the AO, the Sydney International, the Kooyong Classic, the Brisbane International and the Hopman Cup. TA also licenses the right to broadcast feeds of official matches of the Davis Cup and the Federation Cup. Generally, TA is responsible for marketing the broadcast rights for the AO and the other tournaments and the granting of licences for those rights.

140 TA's operations and activities are primarily funded by revenues from its tennis events including marketing and the licensing of rights and by government grants. In the 2011/2012 financial year, TA's annual revenue was $167,021,117. In that financial year, revenue from grants of television rights to broadcast tennis events was about $45 million. In the 2012/2013 financial year, TA's annual revenue was $176,212,052. In that financial year, revenue from grants of television rights to broadcast tennis events was about $45 million. Further, TA received

$5,399,995 in government grants, and ticket sales and sponsorship comprised the majority of the balance of TA's revenue. In the 2013/2014 financial year, TA's annual revenue was $196,720,823. In that financial year, revenue from the grant of television rights was about $51 million.

TA's board and management

141 During the period from December 2012 to December 2013, the directors of TA were:

- Mr Healy, president and chairman
- Mr Freeman, vice president
- Mr Mitchell, vice president
- Dr Young
- Mr Tanner
- Mr Davies
- Mr Ashley Cooper
- Mr Holloway
- Mr John Fitzgerald
- Ms Pratt

142 I will say something about the background of Mr Healy and Mr Mitchell later. At this point let me say something about Mr Wood.

143 Mr Wood was employed by TA as its CEO between 1 July 2005 and 1 October 2013; he was not though a director. As CEO, he was responsible for all aspects of TA's activities, which included the AO, the AO series lead-up tournaments, player development, all competitions, player pathways for education and all matters to do with the tennis business. He reported to the president and to the board. During his time as CEO, TA had two presidents. The first was Mr Geoff Pollard, who served until 2010 and the second was Mr Healy, who was president from 2010.

144 Mr Wood was also an ex officio member of the following TA board committees from at least 2009 until he left TA in October 2013:

- the audit and risk committee
- the investment advisory committee

- the AO focus group.

145 In 2008, Mr Wood created an executive management team (EMT). The EMT consisted of himself, Mr Darren Pearce, director of marketing, Mr Roberts, COO/CFO and company secretary, Mr Tiley, director of tennis, and Mr Ayles, commercial director. The EMT had a group email address of executiveteam@tennis.com.au and Mr Wood received emails sent to this address.

146 Mr Wood was ASIC's principal witness. Mr Wood for the most part was a reliable witness. Now admittedly he gave cautious evidence at times, but I did not detect any real obfuscation.

147 I should say that occasionally his evidence was vague, with little independent recollection beyond the documents referred to in his written evidence or that he was cross-examined on. This created a difficulty for me in assessing some of his written evidence, because it would seem that parts of his two affidavits had been drafted so as to represent his recollection as being more detailed than it in fact was. This impacted on the reliability of some of his evidence.

148 I also perceived that on a few, albeit seldom occasions, a little of his evidence was tinged so as to more support ASIC's case thesis in a fashion that was not convincingly justified.

149 But on the whole I have accepted his evidence, which for the most part, particularly after being stress tested under cross-examination, more supported the case of Mr Healy in particular.

150 Let me make a more general observation which is apparent from all of the evidence. There is little doubt of Mr Wood's considerable commercial experience and acumen. His commercial negotiating and strategic skills were well up to the task of negotiating with Seven what turned out to be a very good deal. And indeed in that context he was hardly overborne by Mr Mitchell, although no doubt he saw him as a source of irritation and interference in his negotiations with Seven. But judged in the result, albeit achieved with less flamboyance than some CEOs, Mr Wood was very effective at firmly achieving what he needed to do on behalf of TA, to the considerable benefit of that organisation.

151 The commercial business unit of TA was managed by Mr Ayles. Its responsibility was to generate revenue and conduct all of TA's business dealings.

152 Mr Ayles commenced employment with TA in about 2008 and he departed in October 2013. When he commenced at TA, he was the head of major events and was responsible for all of the lead in events to the AO. In particular, he was the tournament director for the Brisbane

International tournament, and he oversaw the Davis Cup and Federation Cup events that were hosted in Australia.

153 Within six months of commencing his employment at TA, Mr Ayles was offered the role of commercial director. As commercial director, he reported to Mr Wood. Mr Ayles oversaw all of the commercial revenue streams for TA, including for the AO and its lead in events. He was responsible for broadcasting, sponsorship, ticketing and hospitality for the AO, the Davis Cup, the Federation Cup, the Hopman Cup, the Brisbane International and the Sydney International. The tournament directors for each of these events reported to Mr Ayles. He was responsible for running the domestic and international broadcasts for the AO, the Davis Cup, the Federation Cup, the Hopman Cup, the Brisbane International and the Sydney International. He also oversaw TA's internal production team and also worked closely with IMG and Seven in this capacity.

154 He led the commercial team of TA, which was responsible for generating revenue and conducting TA's business. The commercial team was also responsible for transactions relating to the television broadcast rights, although as CEO, Mr Wood was also heavily involved in the grant of TA's broadcast rights due to the size of those transactions. There was also a commercial management team, which was a subset of the commercial team, which consisted of Mr George, head of broadcasting, Mr Glenn Findlay, head of sponsorship, Mr Frances Travers, head of ticketing and hospitality and Ms Kay Godkhindi, head of major events.

155 As I have said, Mr Ayles was part of the EMT of TA. During the time Mr Ayles worked at TA, the EMT usually met on a weekly basis.

156 Mr Ayles was occasionally asked to attend TA board meetings. This generally occurred if a major strategic issue or a major commercial transaction was going to be discussed at the meeting. The commercial management team and Mr Ayles were involved in preparing some of the documents for TA's board meetings. The usual process was that each commercial management team member prepared a report and provided it to him. He then reviewed the reports and wrote an executive summary. He provided the reports and the executive summary to Mr Wood for his consideration and feedback. Occasionally, Mr Wood responded with questions and Mr Ayles responded accordingly.

157 Mr Ayles was responsible for driving or overseeing the negotiation of commercial transactions between TA and third parties. His usual practice was to conclude transactions up to the value

of around $5 million per annum, with the approval of the CEO. Larger commercial transactions went to the board for approval.

158 Mr Ayles was also called as a witness by ASIC. For the most part he gave reliable evidence, although at times he was slightly slick in his answers in cross-examination.

159 Mr Tanner was serious and smart. He had considerable commercial experience. I found his evidence to be highly reliable and of much assistance. The only qualification concerns his written evidence concerning what was said about the board subcommittee on 20 May 2013. He seemed to confirm Dr Young's version. But it seems to me more likely that the corrected minutes reflect the true version of what was said, as reflected in Mr Healy's evidence.

160 Let me at this point say something about some of the other witnesses.

161 Mr Tiley, called by ASIC, was a very reliable and good witness. He had been employed by TA since 4 July 2005.

162 He was recruited by TA from the United States in July 2005 to be its director of player development. Within his first year at TA, he was appointed director of tennis and also the tournament director of the AO. His role as director of tennis involved overseeing participation in tennis in Australia and elite player performance. He reported to TA's then chief executive officer Mr Wood. In his role as AO tournament director, he was (and still is) responsible for overseeing all AO operations, however he had no commercial or marketing role with respect to the AO until he became the CEO. From his commencement at TA in July 2005, he was a member of TA's EMT.

163 During 2012, he was generally aware, through informal conversations with other members of the EMT and from reading EMT group emails that he received, that TA's agreement with Seven for the right to broadcast Australian tennis events (including the AO) in Australia was coming up for possible renewal, but he had no direct involvement in this matter as it was not within his area of responsibility or expertise at the time. In around May 2013, he became aware that TA had made an agreement with Seven for the domestic broadcast rights for 2015 to 2019.

164 He held the role of director of tennis until 30 September 2013. On 1 October 2013, he was appointed CEO of TA, following Mr Wood's resignation. He also at the time became an ex officio member of TA's audit and risk committee due to his role as CEO.

165 I will discuss his evidence later when I discuss post-contravention conduct.

166 Mr Davies, called by ASIC, was a non-executive director of TA from 24 October 2011 to 27 October 2014. His expertise was in marketing. He had limited recall, and he was not that co-operative under questioning by Dr Matthew Collins QC for Mr Mitchell. Relevantly though he recalled that at the 20 May 2013 board meeting Mr Mitchell recommended that Seven's final offer be accepted; he did not recall anyone saying that the board subcommittee had so recommended.

167 Mr Pearce, called by ASIC, the chief communications officer, was honest and helpful in his evidence. He was a strong proponent for TA to take over the host broadcast. He had asked Ms Renata Capela in early May 2013 to do some costings on the host broadcast.

168 Mr Roberts, called by ASIC, the CFO/COO and company secretary at the time, was reliable and I have no reason to doubt his evidence generally. The same may also be said of Mr Freeman's evidence.

169 Further, the written evidence in chief of Mr Roger Perrins, Mr Fitzgerald and Mr Guinness was tendered by ASIC without any cross-examination.

170 Further, Mr Gyngell gave short evidence which was inconsequential. He seemed to have a self awareness of this as the following exchange indicates:

> MR DE YOUNG: No further questions.
>
> HIS HONOUR: Very good. Mr Pearce, Mr Young doesn't want to cross-examine.
>
> MR PEARCE: Might the witness be excused, your Honour.
>
> HIS HONOUR: Very good. Thanks, Mr Gyngell, that's it. You are free to go.
>
> MR GYNGELL: I came from Byron Bay for that.
>
> HIS HONOUR: Trust me, it's better to have an anti-climax.
>
> MR PEARCE: It's the first time I've seen a witness disappointed to leave the witness box. This case has got a number of interesting features.

171 I will discuss the reliability of some of the other witnesses later including Dr Young, Ms Pratt, Mr Marquard, Mr McLennan and Mr Browne who were all called by ASIC. Mr Mitchell called no witnesses. Mr Healy gave personal evidence but otherwise called no other witnesses. I will discuss the reliability of his evidence later.

Meeting agendas and board packs

172 The general process for the preparation for TA's board meetings was as follows.

173 The agenda for the board meetings was set by Mr Healy and Mr Wood. Mr Roberts usually drafted an agenda for the board meetings, sent the draft to Mr Wood and consulted with Mr Wood to see if there was anything else to be included. Mr Roberts then sent the draft agenda to Mr Healy to see if there was anything else that he wanted included or removed; on occasions Mr Wood sent the draft agenda to Mr Healy. The draft agenda was then signed off by Mr Healy, which then allowed for the creation of the board papers. Approval needed to be obtained from Mr Healy to put an item on the meeting agenda. The version of the agenda that came back from Mr Healy was usually the basis for the board pack.

174 The agendas for TA board meetings were at a high level of abstraction, consisting of a number of standard agenda items for each meeting with an occasional special agenda item. Standard agenda items included the CEO's report, the financial report and also divisional reports. Under these general practices, there would only be a need for Mr Healy to discuss the agenda where there was some special item over and above the standard agenda items that needed to be raised.

175 It would seem that to the extent that Mr Healy sought amendments to the draft agenda for TA board meetings, his focus was usually upon matters concerned with the promotion and development of the sport of tennis as distinct from matters concerning the commercial affairs of TA.

176 It was Mr Wood's practice, prior to each board meeting, to telephone most or all of the directors in order to check if there were any particular matters on the agenda that were of concern to them or matters which they intended to raise at the meeting.

177 Now the mechanism through which TA directors were informed about TA's commercial affairs at board meetings was either through Mr Wood's CEO's report which, at Mr Wood's discretion, ranged from written to oral or a combination of both, or Mr Ayles' commercial business unit report which was a standard agenda item and standard inclusion in the board pack for each meeting.

178 Generally, preparation of board packs for meetings was the responsibility of and supervised by Mr Wood. Mr Wood reviewed the material which was to be included in the board pack. For the most part it would seem that it was Mr Wood's decision whether to include any documents in a board pack. I am talking here about the practice adopted rather than the question of responsibility, which latter issue I will discuss later when dealing with the specific case against Mr Healy.

179 Now the CEO's report was the means through which Mr Wood kept the board informed regarding the domestic broadcast rights in 2012 and 2013. And as I have said, the CEO's report could either be in writing, and included in the board pack by Mr Wood, or delivered orally by Mr Wood at the board meeting. In this regard it was a matter for Mr Wood to determine what was to be included in the CEO's report to the board. In deciding what to include in his CEO's reports, Mr Wood was concerned to ensure that all matters of importance were brought to the attention of the board. And he made the choice and exercised his discretion about what level of detail would assist the board.

180 Mr Wood compiled the board packs with the help of his executive assistant, Ms Maxine McKendrick, and Mr Roberts. The board packs were in hard copy and were usually distributed to the directors by courier about a week prior to the board meeting. But if a document was received after the distribution of the board pack or if it was commercially sensitive, it would be tabled at the board meeting.

181 In the first instance it was the role of members of the EMT to put together the board papers according to their area of responsibility. Papers from Mr Ayles' commercial team would be sent directly to Mr Wood for vetting. Mr Wood received reports from each of the business heads. And as I have said, he also prepared his own CEO report for each meeting which was included in the board pack. Those papers and reports would then be sent to Ms McKendrick for inclusion in the board pack.

182 At this point let me say something concerning the taking of minutes at board meetings.

183 Mr Roberts gave the following evidence in answer to Dr Collins QC concerning the taking of minutes:

> Mr Roberts, in the period when you were the CFO, company secretary and then COO of Tennis Australia, you attended board meetings?---That's correct.
>
> But you were never a member of the board?---That's correct.
>
> And in your role as company secretary, I think you tell us in your affidavit you were responsible for preparing the minutes of each board meeting?---The final preparation of the minutes, yes.
>
> With the assistance of a minute secretary?---With the assistance of a minute secretary.
>
> And you tell us that board meetings were not electronically recorded?---No.
>
> And the minutes that were prepared are not verbatim or complete records of everything that was said in the course of particular board meetings?---That is correct.
>
> But they were summaries – is this a fair way of putting it? They were summaries of

> the gist of the discussion which had occurred?---Yes.

184 On the further question of the raw minutes he gave the following answers to Mr Neil Young QC for Mr Healy:

> Yes. The raw minutes didn't seem to capture some of the things in your authorised minutes, did they?---Well those rough notes that were taken, it's never supposed to be verbatim, everything included.
>
> But there's a lot of material in the raw minutes that you saw that is not reflected in the approved minutes; correct?---Yes.
>
> And you would expect that, because the minutes, as you said, are not a complete record of everything that was said?---Correct.

TA's broadcast rights

185 As I have indicated, a significant proportion of TA's revenue was from the grant of the rights to broadcast its events, in particular the AO. TA granted rights to broadcast both domestically and internationally on FTA channels, STV channels and digital services. The grant of rights included permission to use online content and for audiences to access content through apps on their personal devices.

186 Now Seven Group Holdings Ltd at all relevant times owned Seven which operated a television network in Australia. As at 2012, Seven had held the domestic broadcast rights for tennis in Australia for over 40 years, including the AO, the Sydney International, the Kooyong Classic, the Brisbane International and the Davis Cup, including by way of FTA, STV and new media such as online and mobile telephone services. I will refer to this collectively as the domestic broadcast rights. Let me delve into some history for the moment.

187 On 25 October 2007, TA and Seven made an agreement for the domestic broadcast rights which I have previously referred to as the Seven agreement. The Seven agreement was subsequently varied. As at 2010 it consisted of various documents including:

- a heads of agreement between TA and Seven dated 17 August 2005;
- a letter from Mr David Leckie of Seven to Mr Wood dated 25 October 2007; and
- a letter of variation from Mr Wood to Mr McWilliam of Seven dated 19 November 2010.

188 There were also earlier relevant documents such as a 1999 broadcasting agreement and a deed of variation that I do not need to particularise which formed part of the contractual matrix.

189 The Seven agreement was a short-form contract. A long-form agreement was never finalised, although it had been intended that such an agreement be so formalised.

190 By the Seven agreement, Seven had a six month exclusive negotiating period, which I have defined as the ENP, from 1 April 2013 to 30 September 2013 to negotiate a new licence agreement to commence on the expiry of the Seven agreement; originally this was agreed to have been a four month period with a different starting date, although I do not need to go through the entrails of the contractual history.

191 Over the period 2010 to 2014 the rights fees payable per annum under the Seven agreement were as follows:

- 2010 – $17.2 million.
- 2011 – $18.06 million.
- 2012 – $18.96 million.
- 2013 – $19.91 million.
- 2014 – $20.91 million.

192 Under the Seven agreement, Seven was responsible for the host broadcast of the AO and other events including the Davis Cup. The Kooyong event and Hopman Cup were separate. To state the matter both generally and simplistically, the host broadcaster is responsible for producing the content of the event and bears the production costs for the event.

193 By the end of 2011, Mr Wood was of the view that it was important for TA to become responsible for the host broadcast under any new domestic broadcast rights agreement. With TA as the host broadcaster, TA would have the opportunity to increase its fees for international broadcast as TA would control the production of the AO and how tennis was shown and presented across the world. Mr Wood was also keen for TA to create and control the production in order to grow content distribution available with new technologies, such as mobile phones and tablets. Mr Wood felt that by being able to create greater content and by distributing that content across multiple platforms, TA would be able to leverage any additional consumer engagement by attracting increased sponsorship and new sponsors. I will discuss this issue in much more detail later.

194 Let me make one other preliminary point at this stage. As at 2012, the international broadcast rights for the AO were held by IMG. IMG is an international sports agency. It is not a

broadcaster. In 2012, IMG held TA's global distribution broadcast rights, with the exception of Australia and Japan, under a six-year agreement that was due to expire in 2014. IMG acted only as an agent between TA and broadcasters. I will return to deal with IMG's involvement in the key events later in this chronology and also thematically in a separate section of my reasons.

Events in early 2012

195 As at the start of 2012, TA and Seven had a good long-term business relationship. But it was Mr Wood's then view that Seven had underexploited the STV, digital and internet rights. He thought that TA could realise greater revenues from these platforms by being the host broadcaster so that it could carve these platforms out of any new agreement. And as I have said, he was also interested in TA taking control of host broadcast production so that it could better satisfy its international partners by improving the broadcast product for overseas markets. He also believed that TA could realise a significant uplift in the annual fee payable for the domestic broadcast rights because it would have a better product internationally, and a better product locally, which would be more attractive to TA's sponsors.

196 Now as at the start of 2012, the Seven agreement was due to expire in January 2014. It was therefore necessary for TA to enter into a new agreement prior to January 2014 to renew or extend the Seven agreement or to grant the domestic broadcast rights to an entity other than Seven.

197 And at this time, both Mr Wood and Mr Ayles considered that any future agreement for the domestic broadcast rights needed to remedy what TA considered to be the following deficiencies in the Seven agreement.

198 First, Seven and TA had never entered into a long form agreement in relation to the Seven agreement. This meant that many aspects of the Seven agreement were uncertain because they were not committed to writing. This made it difficult to resolve disputes when TA's position and Seven's position differed.

199 Second, the Seven agreement did not properly cover new media or mobile coverage. Further, it did not properly address who would own the broadcasting rights for new technologies which developed during the period of the agreement.

200 Third, as I have said, TA wanted to take over the host broadcasting role.

201 Let me now proceed with a more detailed chronology from early 2012.

202 Discussions with Seven by email, phone and in person took place throughout the course of 2012. As CEO, Mr Wood was the lead representative for TA. TA's media and commercial heads, being Mr Pearce and Mr Ayles, also became involved. I will weave in Mr Mitchell's involvement as the occasion arises. Mr McWilliam, Seven's commercial director, and Mr Martin, Seven's managing director in Melbourne, were the primary representatives for Seven.

203 On 30 January 2012, Mr Wood received an email from Mr McWilliam asking if Seven could announce the extension of the Seven agreement for either 2 or 3 years. On 31 January 2012, Mr Wood replied to Mr McWilliam and said that TA needed clarity around a number of items before the agreement could be extended. Mr McWilliam replied to Mr Wood's email later that day and said:

> In April last year you and Harold came in and we agreed for the 2 year extension in order for TA to get the ratings bonus last year (remember you asked for the pro rata sign on fee, which we all agreed in David's office).
>
> Here's the letter. Let's just sign this and worry about what changes we need to accommodate the relocation in Year 3 separately?
>
> If you sign and send back we can also pay the last year's ratings bonus before this year's!

204 Mr McWilliam's email attached an unsigned and undated letter in relation to extending the Seven agreement by two years, to 2016.

205 On 31 January 2012 at 2:39 pm, Mr McWilliam called Mr Mitchell and they had a seven and a half minutes telephone call. On that same day Mr McWilliam sent an email to Mr Stokes and others saying, inter-alia:

> Harold says in the meantime Ten has been down trying to disrupt the apple cart.
>
> …
>
> Harold assures us all will be okay but thinks we shouldn't leave the gate open.

206 On 2 February 2012, Mr Wood replied by email to Mr McWilliam's 31 January 2012 email and said "We may have discussed an extension, but it was not agreed by us due to the redevelopment and a few other issues". Mr Wood suggested that TA start Seven's ENP early. Mr McWilliam replied to his email later that day, reattaching the unsigned and undated letter.

207 On 3 February 2012, Mr Wood replied to Mr McWilliam and said that TA and Seven had not reached a final agreement but rather had discussed key commercial terms. Mr Wood suggested that TA and Seven could start the ENP following the Davis Cup.

208 On 10 February 2012 at 5:16 pm, Mr Mitchell rang Mr McWilliam and they had an eight and a half minutes conversation.

209 In around early March 2012, Mr Wood and Mr Ayles had a meeting with Mr McWilliam and Mr Martin of Seven at a cafe in Melbourne. At this meeting, Mr McWilliam said words to the effect of "Steve, when we recently met, you and I agreed that the renewal of the broadcast rights deal was done". Mr Wood responded with words to the effect of "No, that's not what I said". Mr Ayles then said to Mr McWilliam and Mr Martin words to the effect of "Steve said he didn't agree, so let's start talking about a renewal now". Mr Ayles does not recall what, if anything, was said in response, but he recalls observing that Mr McWilliam and Mr Martin both appeared unhappy. Mr Ayles does not recall anyone mentioning a proposed figure for the domestic broadcast rights fees at this meeting.

210 On 2 March 2012 at 9:24 am, Mr Mitchell called Mr McWilliam and they had a seven minutes conversation.

211 In EMT meetings during March and April 2012, Mr Roberts and Mr Pearce both told Mr Ayles that they were against a deal being done with Seven at the current offer level. At the time, Mr Ayles understood that the current offer from Seven was a CPI increase on the rights fees under the Seven agreement and did not include TA undertaking the host broadcast.

212 On 4 April 2012, Mr Wood sent a letter by email to Mr McWilliam in the following terms:

> **Negotiation of possible renewal**
>
> My apologies for not responding earlier. Craig Tiley and I had to travel to the US to address the players' concerns regarding prize money, and we got stuck there for over two weeks.
>
> Thanks again for lunch in early March. It is always great to celebrate another fantastic and record breaking Summer of Tennis for both our organisations.
>
> As you are aware, the Australian Open and Australian Open Series events continue to grow at a rapid rate, and we look forward to continuing to work with the Seven Network ("Seven") to ensure that the Summer of Tennis remains one of Australia's premier sporting and broadcast events.
>
> As discussed at lunch, Tennis Australia ("TA") is willing to explore the possibility of extending our current relationship beyond 2014. However, again as discussed, there are a number of issues that we think need to be talked through before TA can agree to

any renewal or extension. My team is working through this process in detail now, but as requested, here is a list of indicative issues:

(a) the proposed rights fee – the current uplift proposed by Seven needs to be discussed;

(b) the digital and new media landscape – we want to talk about Seven's plans going forward, and how Seven and TA might both be able to best use Australian Open and Australian Open Series content on various (existing and future) platforms to promote and ensure maximum exposure for these events and tennis generally. For example, what's Seven's plan for live streaming and other digital offerings on internet, mobile and tablets?;

(c) the Melbourne Park redevelopment – as discussed, this is an enormous undertaking by TA and the Victorian Government, which will have implications for the future broadcast of Australian Open events. We need to talk through these plans with Seven, including how they may impact on our decision on the future of host broadcasting. The scope and design of Stage 2 of the redevelopment is still being finalised, but we can keep you across this; and

(d) our existing agreement is becoming out-dated and needs modernisation – TA and Seven have still not signed the current Rights Agreement for 2007 to 2014, and Seven has still not agreed the archive rights clause (which is of concern to TA). Some critical clauses (and new concepts) will need to be discussed as part of any renewal to try and "future proof" our arrangement, including by addressing multi-channelling, minimum coverage requirements, digital and new media rights (including live streaming), use of player images, archive rights, host broadcast requirements, and the future broadcast compound.

Obviously Seven will have some issues it wants to raise too.

Given these various issues, we think we should commence the six month exclusive negotiation period now, and start discussing "a further licence of Transmission Rights to the Australian Events and the Davis Cup Events" (as referred to in clause 2(b) of the current Rights Agreement). This exclusive negotiation period should start as soon as possible.

Please confirm that the exclusive negotiation period can start so that we work toward extending our partnership, and start discussing the terms of a possible renewal and new agreement. Once you have provided confirmation, our teams can schedule in some key dates and structures for these negotiations.

Good luck for the rest of the AFL season – it was certainly a sensational opening round.

213 On 10 April 2012, Mr McWilliam responded to Mr Wood with a detailed email, which attached a "without prejudice" offer (as he labelled it) in the following terms.

214 The email stated:

Whilst I hope you had a nice easter, there are a number of points in your letter which are disappointing to say the least and which you must understand we need to take issue with as they are not correct.

For a start the suggestion to amend the contract to Seven's detriment by changing the exclusive negotiating period is insulting and unnecessary, why would we agree to that?

Also preposterous is your unfortunate accusation that we have not agreed to an archive provision, especially as there is a clear provision about archive (even if that is inconvenient to you) and we have agreed to give TA many concessions on that already. We are very disappointed to hear that you would meet with Ten Network which is in breach of our agreement as it cuts across the exclusive negotiating language and shows how cynical your request is.

Let me remind you there is an existing agreement and we have agreed many times to give TA additional concessions to the archive provision. However, your legal department continues to chip away and not reflect those discussions even after we think we have gotten there, by attempting to expand your rights and narrow ours, despite the fact not only that there is an existing agreement which prevails unless any further compromise is reached. That just throws us back onto the old wording so they do themselves out of any benefit. Remember that our position on archive is very strong and TA has not been able to counter those arguments. Despite all of this, in the interests of the relationship only, we were prepared to give TA concessions to cover its concerns which included an expanded use of archives not only for your sponsors but even permitted TA to grant third party clip licences, other than to Seven's competitors. Surely no party could have gone further to agree concessions in the face of a strong existing contractual provision, which shows just how strong our commitment to acting in good faith is. However, TA in its latest drafting has endeavoured to give a very narrow interpretation to 'Seven competitors' (which does not reflect the discussions) and also attempt to restrict Seven's rights to sub-licence more than currently. Seven currently does not have any restriction against sub-licensing Archive Footage to third parties, yet TA is attempting to introduce one. We asked for the gaps to be filled in, not new restrictions to be imposed. Nevertheless to say we have failed to agree is unnecessarily insulting and counter productive given it is clear who has failed to agree to compromise on what exists already.

Re the extension, there is an agreed extension. You agreed the same in David Leckie's office (you came up specially) when we agreed to your request to pro rata the sign on fee and since then we have been trying to get it signed. You came up to see us, with Harold Mitchell, and we agreed. Steve in every dealing I have had with you I know that you a man of your word who has tried to go the extra yards for us (like you did with the Fox Sorts agreement). We hold you in such high regard that frankly I am a little surprised by this latest note, is your director of commercial business taking his duties a little too literally? Our clear deal is only part of an enormously successful relationship over a long period.

Against that background we have always said that on other issues we are happy to discuss how we can share things, but rights such as streaming etc sit with us (as they do normally under exclusive rights agreements) and whilst we are happy to negotiate in good faith it does not detract from the fact that we have an agreement. Yes if you want to see an expanded use of those rights as you mentioned at our lunch, we can demonstrate that. This also shows I hope our good faith attitude to delivering TA the best under the agreement which has worked well for many years now.

On the Melbourne Park renovation I don't think that affects the 2 years agreed extension does it? I thought that was an issue for a 3 tear extension but not for a 2 year one? If I am wrong, then please let us know because we can work something out as we always said we would work towards something mutually satisfactory to help you on this.

I am sorry to respond in strong terms however against what we know your letter is misleading in how it sets things out and can even be viewed as insulting of our efforts to help you, and cannot go uncorrected.

> Having said that, we would like to work together to document the extension and without prejudice to our position we are prepared to agree as follows, which contains some further concessions on archive and online if we can get a deal done. They are offered on a without prejudice basis, but will be binding on us concluding an agreement in the terms offered, but they do not detract from our position that there is a done deal which should be respected.
>
> We look forward to hearing from you on a more positive note.

215 As I have indicated, Mr Ayles produced a commercial report as part of the board pack for each TA board meeting. His commercial report for the 16 April 2012 TA board meeting included the following:

> TA has commenced the assessment of the next domestic broadcast rights renewal. This includes an evaluation of TA's appetite and capacity to undertake host broadcast and a recommended position with respect to the breaking up of the respective rights ie traditional broadcast, digital and new media, mobile, gambling, etc. An ENP with incumbent broadcaster Seven must contractually commence by 1 April 2013.

216 Mr Wood's CEO report for the same TA board meeting included the following:

> **Commercial Update**
>
> …
>
> TA has also commenced the assessment of the next domestic broadcast rights renewal, including an evaluation of host broadcast arrangements and the value of breaking up of these rights on various media platforms (ie traditional broadcast, digital and new media, mobile, gambling, etc).

217 On 21 April 2012 there was a flurry of emails between Mr Wood and Mr McWilliam. I do not need to set out their terms. Mr Wood had the last word at this time and affirmed his position that TA had not at that time agreed to a renewal or extension with Seven. Reference was made by Mr Wood to a forthcoming meeting in May.

218 On 27 April 2012 at 2:42 pm, Mr Mitchell called Mr McWilliam and they had a five and a half minutes conversation.

219 Following the meeting in early March 2012 with Seven representatives that I have referred to above, there were other meetings.

220 On or around 18 May 2012, a meeting took place at Mr Mitchell's office in South Melbourne. A further meeting may have taken place at Mr Mitchell's office in June 2012 although the evidence is murky as to this. For the moment I will confine myself to the meeting on or around 18 May 2012. The attendees were Mr Mitchell, Mr Wood, Mr Martin, Mr McWilliam and Mr Ayles. During the meeting, Mr Mitchell was seated at the head of the table in his office, with

Mr Wood and Mr Ayles sitting on one side, and Mr Martin and Mr McWilliam sitting on the other side.

221 At the meeting Mr Mitchell asked Mr Martin and Mr McWilliam to describe Seven's latest offer for the domestic broadcast rights, which they did. Mr Mitchell then said words to the effect of, "A small increase on what we currently receive appears reasonable, given the large increase that was received last renewal". Mr Mitchell then asked Mr Wood and Mr Ayles what they thought the domestic broadcast rights were worth. Mr Ayles replied, "North of 40 million". Mr Martin responded with words to the effect of, "That is ridiculous". Mr Martin said that he was calling Seven's office in Sydney. He then made a phone call. When he finished the call, he said words to the effect of, "We only receive $28 million in revenue in advertising from the Australian Open". Mr Ayles said words to the effect of, "If we're so far apart on the valuation, it might be sensible just to go to the market". Mr McWilliam and Mr Martin expressed dissatisfaction with what he said. Mr Mitchell asked Mr Ayles , in front of Mr McWilliam and Mr Martin, where the valuation of $40 million had come from. Mr Ayles told Mr Mitchell that the valuation of $40 million came from independent research, including the Gemba report. Mr Mitchell said words to the effect of, "Why did you get Gemba?". Mr Ayles replied with words to the effect of: "Tennis Australia used Gemba previously to justify the last significant increase under the previous broadcast deal. They are independent and have no vested interest in the outcome and are a respected research company".

222 Further, at the meeting, Mr Mitchell said words to the effect of "We need to get this deal done as soon as possible". During the meeting, Mr Mitchell also said words to the effect of "Come on guys, let's talk about it and get a deal done" and "I want to get this deal done".

223 After the meeting, they were all walking through the reception area of Mr Mitchell's office building on their way to leave when Mr Mitchell said words to Mr Ayles to the effect of "Can we have a chat?". Mr Wood, Mr Martin and Mr McWilliam kept walking and exited the building and Mr Ayles stayed behind to speak with Mr Mitchell. Mr Mitchell then said to Mr Ayles words to the effect of, "The board is telling me you're doing a great job. These sort of decisions can go a long way to impacting your future at Tennis Australia".

224 On 18 May 2012 at 11.46 am, Mr Mitchell called Mr McWilliam and they spoke for two minutes. On the same day Mr McWilliam advised Mr Stokes, Mr Worner and others by email:

> Have just returned from Harold's office

> TA will look at a 5 year extension, not a 2 year one, this is from end of current deal, meaning first year of new deal would be 2015 (so through until and including 2019)
>
> We had offered $22.56 million for 2015 and $23.24 for 2016 – bear in mind we have/retain "all rights" as per current agreement (some concessions on archive but that doesn't hurt us as it is for 14 days after the Open)
>
> They started off wanting a big jump for 2015, this is what we can get them at (I think):
>
> 1. $5 million sign on fee (this can be amortized over term of new deal, checking with PL);
> 2. New rights fee would be $25 million p.a., going up by $2.5 mill a year
> 3. We would commit to online streaming of dirty feed (this is on Yahooo!7 so we can monetize that – in addition TZ would give us their pictures of the courts we aren't covering. And we can keep the ad revenues – so we have to make sure this is a winner, hopefully we can get a contribution from Yahoo! 7; also we have the mobile streaming rights
> 4. Fox Sports currently pays US for the pay rights and we only give them the secondary courts and nothing in week 2 – we may be forced to give them something ON DELAY ONLY in second week
> 5. With the Melbourne Park renovation program, TA says they will be upgrading the broadcast centre and they claim it will deliver us savings. Saul whilst the result will probably be to eliminate charge backs to other users as an income centre, we will build into the contract that it won't cost us more. This is the best we can achieve and bear in mind under a new contract it is a blank sheet of paper anyway. We made the point to TA that if it costs us more it is tantamount to rights fee
> 6. I feel the above outcome, whilst more expensive, puts off a major jump in 2017 (or 2015) and locks us into a strong contract. Sadly our friends at Ten have been speaking $40 mill a year in rights fees and whilst Harold has pooh poohed that, management of TA is aware
> 7. We are meeting again with Harold next week
>
> Thoughts? We want to close this out and it firms up a long term relationship

225 In around mid-2012, Mr Ayles also recalled that he was present when Mr Mitchell said words to the effect of:

> Ten can't afford the broadcast rights and they'll go broke anyway. Nine have the cricket. You need to get on board with Seven before they change their mind.

226 In Mr Wood's CEO report for the 28 May 2012 board meeting he included the following:

> All TA's broadcast contracts for AO2013 are already in place, and as such, we have now commenced planning for the next domestic broadcast rights renewal for the 2015 Australian Summer of Tennis. This will in turn impact on how we approach our broadcast business and international broadcast renewals.

227 For that same board pack, Mr Ayles prepared his "Commercial Business Unit Report" which included the following:

> With all broadcast contracts for AO 2013 in place, planning and analysis is now focusing on the next domestic broadcast rights renewal for the post AO 2014 period. Part of this activity has included engaging other sports rights holders on their respective approaches and models with a view to maximising both commercial and exposure returns.

228 Let me pause the chronology at this point and say something about the Gemba report.

229 In early 2012, both Mr Healy and Mr Tanner spoke to Mr Wood about the broadcast rights and said that TA should obtain a valuation of its domestic rights. Mr Wood agreed with Mr Healy and Mr Tanner that it was important for TA to obtain a valuation of its domestic rights.

230 In about April 2012, Mr Wood asked Mr Ayles to commission a report from Gemba on the value of TA's broadcast rights. Mr Wood knew that Gemba had expertise in sports marketing, including sponsorship valuation and analysing and advising about broadcast rights. Gemba had previously provided a broadcast rights valuation to TA in 2007. Mr Wood and Mr Ayles discussed obtaining independent expert guidance as to the value of the domestic broadcast rights.

231 Mr Ayles also considered that it was important for TA to obtain independent expert guidance regarding the domestic broadcast rights to assist it in deciding how to best deal with the grant of the domestic broadcast rights and assist it in its negotiations with Seven and other potential broadcast partners. He believed that expert guidance would confirm his own view that a competitive market place would deliver a significant uplift on the price paid for the domestic broadcast rights. There is little doubt that Mr Ayles' view at all relevant times was that it was preferable to go to market or competitive tender. In this respect his strategy had a different emphasis to that of Mr Wood, and certainly that of Mr Mitchell.

232 Mr Ayles agreed with Mr Wood that Gemba should prepare the valuation given that TA had previously engaged Gemba to value the rights for the Seven agreement. On that occasion, Gemba's valuation was used to justify the increase in the domestic broadcast rights fees from around $7 million to around $20 million per annum. Further, Gemba was a leading sports and entertainment consultancy firm, it had significant experience in the valuation of sports broadcast rights and it delivered TA regular monthly research on various aspects of tennis from both a commercial and participation perspective. Moreover, Gemba had no vested interest in the outcome of the valuation of the domestic broadcast rights.

233 Soon after his conversation with Mr Wood, Mr Ayles contacted Mr Rob Mills, his contact at Gemba, and asked him to prepare a valuation of TA's domestic broadcast rights, including FTA and STV rights, and also online, gaming and mobile rights.

234 On or about 1 May 2012, Mr Ayles received a report from Gemba titled "Australian Open Domestic Broadcast Rights Valuation", which I have previously referred to as the Gemba report. The Gemba report said that there was an opportunity for TA to significantly increase the fees it earned from the broadcast rights. Mr Ayles provided the Gemba report to Mr Wood in person shortly after he received it. Mr Ayles did not provide the Gemba report to Mr Mitchell. Mr Ayles did not speak to Mr Healy about the Gemba report. Mr Ayles spoke to Mr Freeman about the Gemba report, but did not provide him with a copy. I should say at this point that I will analyse the Gemba report in detail in a separate section of my reasons.

235 After Mr Ayles had received the Gemba report, he had a discussion with Mr Wood. They agreed to commission Gemba to prepare a shorter version of the Gemba report summarising the information in the Gemba report for the board. Mr Ayles believed at the time that providing a summary of the Gemba report to the board would help it to reach an informed view as to the value of the domestic broadcast rights.

236 In mid May 2012, Mr Wood told Mr Healy and Mr Tanner about the Gemba report. He told them that the Gemba report was favourable to TA and that there was an opportunity to have a significant increase in broadcast rights fees.

237 In June 2012, Mr Ayles received a summary of the Gemba report, titled "Australian Open Domestic Broadcast Rights Valuation – Board Pack", which I have previously referred to as the Gemba summary.

238 In mid June 2012, Mr Wood emailed a copy of the Gemba summary to Mr Healy. He also in about June 2012 gave a copy of the Gemba summary to Mr Mitchell at his office in South Melbourne. Mr Mitchell had a quick look at it and they had the following exchange:

> Mr Mitchell: Who did this?
>
> Mr Wood: Ayles commissioned the report.
>
> Mr Mitchell: Get Ayles fired. This is garbage. This is crap. Don't bother getting reports like this again.

239 Further I should note that in relation to the Gemba report, Mr Wood had also sent Mr Healy by email a copy of the Gemba report in mid June 2012. In his covering email, Mr Wood wrote

that "[In] short, their upper estimate of the value of our rights is $40m". So this was Mr Wood's view as to the key message of the Gemba report. Mr Wood's covering email also indicated that management would be taking the whole of the Gemba report into account in structuring their internal approach to negotiations, which is what subsequently occurred.

240 Let me pause at this point and say something on Network Ten.

241 Network Ten was a potential competitor of Seven for the domestic broadcasting rights. Indeed Seven knew this as early as January 2012 as reflected in the email Mr McWilliam sent to Mr Stokes on 31 January 2012 stating the following:

> At the board meeting last April, the board asked that we get a 3 year extension rather than the 2 year one that had been agreed. Remember you were conscious AFL is also up at the end of this time
>
> We took this back to Tennis Australia. There is a slight issue in the third year in that the remodelling of Melbourne Park requires close down of areas and relocation of our broadcast compound, etc. we have not been able to resolve terms of this as yet
>
> Steve wood has delayed coming back firstly until after Wimbledon then after US Open and now after Davis Cup
>
> Harold says in the meantime Ten has been down trying to disrupt the apple cart. Warburton of course knows a lot about this
>
> If this is okay I will go back suggesting we ink the 2 year extension and negotiate in good faith for year 3 to take account of changed conditions flowing form the redevelopment, is this okay?
>
> Harold assures us all will be okay but thinks we shouldn't leave the gate open. Harold's off to UK tonight and I read the below email to him before I sent it to Steve Wood. Harold recognises how we have invested in the event and built it up and says they are not so fickle but I don't want things to change so that our offer looks unattractive (even though it is fully priced). We actually agreed the below deal in David's office in April

242 In early 2012, Mr Ayles said to Mr Wood that he had been approached by Mr Marquard, chief operating officer of Network Ten, who informed Mr Ayles that Network Ten was interested in acquiring the domestic broadcast rights when the Seven agreement was due to expire. Mr Ayles mentioned to Mr Wood that Mr Marquard had said to him that Network Ten was willing to pay between $40 and $50 million per year for the broadcast rights.

243 In or around May 2012, Mr Wood spoke with Mr Mitchell and told him that Mr Ayles had had discussions with Network Ten in respect of the domestic broadcast rights and that Network Ten was indicating that they might be willing to pay $40 or $50 million per annum for the domestic broadcast rights. Mr Wood could not recall whether this conversation took place by telephone or, if not, where it was held.

244 At about the same time, Mr Wood said that he had told Mr Healy that Network Ten had said that it was willing to pay $40 or $50 million per annum for the rights. I note that Mr Healy did not recall this. I will discuss this later.

245 From about May 2012, Mr Ayles spoke with Mr Marquard over the telephone every two to three weeks, primarily concerning the Hopman Cup. But on a number of those occasions they also discussed the domestic broadcast rights. They also met in person five or six times during 2012.

246 In or around May 2012, Mr Ayles met with Mr Marquard. Mr Marquard said words to the effect of:

> Ten is interested in the Australian Open domestic broadcast rights. Ten would be willing to pay in excess of 40 million annually for those rights.

247 Mr Ayles replied with words to the effect:

> We have an exclusive negotiating period with Seven coming up. We are not inviting any offers.

248 Mr Marquard repeated that Network Ten was interested in the domestic broadcast rights and was willing to pay in excess of $40 million annually in several of their subsequent meetings and telephone calls. Mr Ayles' usual response was that Seven had an ENP with TA.

249 Mr Ayles recalls thinking at the time that the figure put by Mr Marquard was consistent with the Gemba report and confirmed what he thought was the value of the domestic broadcast rights. He recalls thinking that TA could obtain an offer in excess of $40 million and that the number proposed by Mr Marquard was offered in the absence of competitive tension.

250 Some time prior to 23 May 2012, Mr James Warburton, CEO of Network Ten, and Mr Marquard invited Mr Ayles and Mr Wood to meet with them at Network Ten's office at 1 Saunders Street, Pyrmont. At this meeting, which took place on 23 May 2012, Mr Marquard said that Network Ten was very interested in TA's domestic broadcast rights and that Network Ten would be willing to pay a significant amount for them. There was some dispute in the evidence as to whether figures were mentioned. I will return to this later. Now the primary purpose of the meeting was to discuss the Hopman Cup, which Network Ten had secured the rights to broadcast for two years starting in January 2013. During the meeting, Mr Warburton said words to the effect of, "With the Hopman Cup, we want to show Tennis Australia that Ten can produce tennis, with the hope of securing the Australian Open domestic broadcast rights in the future".

251 Mr Ayles recalls that during one of his meetings or calls with Mr Marquard, Mr Ayles said words to the effect of, "What's Ten's financial capacity to purchase the broadcast rights?". Mr Marquard responded with words to the effect: "There's no issue with Ten's financial capacity". Shortly after this conversation with Mr Marquard, Mr Ayles said to Mr Wood words to the effect: "Jon Marquard said to me that there is no issue with Ten's financial capacity".

252 I will go forward in the chronology just to complete the Network Ten position a little.

253 On 5 October 2012, Mr Ayles was at the Olsen Hotel in South Yarra for a TA executive offsite meeting. Prior to this meeting, he met with Mr Marquard at the hotel to discuss Network Ten's interest in acquiring the domestic broadcast rights. Mr Marquard said words to the effect: "I am personally responsible for securing these rights and I want to be very clear that Ten is very interested in them". Mr Ayles responded with words to the effect: "I'll let the executive know". Mr Ayles does not recall Mr Marquard mentioning any numbers during this meeting.

254 Let me go back to June 2012 and deal with the chronology from thereon.

Events from June 2012

255 On 6 June 2012 at 12.35 pm, Mr Martin sent an email to Mr McWilliam and Mr Worner stating:

> Steve Ayles from Tennis Australia has asked for a meeting with me next week in prep for the Harold meeting.
>
> In short it would be a grinding session to iron out and or clarify the details in preparation for the meeting with Harold.
>
> I see merit in having such a meeting and would want Renee down here with me as Steve will be joined by Tim Burrowes
>
> Agree?

256 At 12.44 pm, Mr Worner responded:

> Fine although urgency has come out of this situation. Pls be aware that – following discussions with the Board – we have decided to reject their excessive demands and use every bit of our exclusive negotiating period.
>
> Bruce has the details and our understanding is that Harold will support our very strong stance.

257 Mr McWilliam also gave the following evidence in answer to Mr Michael Pearce SC for ASIC:

> And then shortly after that, Mr Worner writes an email, saying "Our understanding is that Harold will support our very strong stance". Now, I'm putting to you that you well knew that Mr Mitchell had told you, Channel 7, that he will support your stance in any – against any inflation in the rights fees?---Well, I'm sorry, but I can't agree with you.

> What is the strong stance that is said there, that he will support?
>
> HIS HONOUR: Well, I think you've got to be careful here, because this is Mr Worner's email. Isn't it. And when - - -
>
> MR PEARCE: Well, except - - -
>
> HIS HONOUR: Hold on. When he says "Our understanding is that Harold will support our very strong stance" – so that's Mr Worner, making a statement about our understanding. So query what that means, and then the very strong stance: query what that means. Now, you're quite entitled to cross-examine Mr McWilliam, but there is a difficulty with this.
>
> MR PEARCE: With respect I take your Honour's point, but it's introduced by the words "Bruce has the details".
>
> HIS HONOUR: Well, I know that. Bruce, obviously, has the details, as Mr McWilliam has said, of what has been going on during the course of the negotiation to that point, but the separate concept is –
>
> *Our understanding is that Harold will support our very strong stance.*
>
> I think you've got to be careful about blending the two concepts, don't you?
>
> MR PEARCE: From your knowledge, Mr McWilliam, what did you think the very strong stance was about?---"Don't get too far ahead of yourself yet. Don't go up for the sake of it."
>
> And you don't know where the understanding referred to in that email came from?---I don't – sorry, Mr Pearce. I just don't think our – I just don't think it's specific enough for me to make any meaningful comment on.
>
> I'm putting to you that the understanding came from you and you got that from Mr Mitchell in discussions you had with Mr Mitchell?---I've already said to you I don't agree with that; sorry.

258 On 8 June 2012 at 5.31 pm, Mr Mitchell called Mr McWilliam and they had a just under five minutes conversation.

259 A further meeting was held between Seven and TA on 15 June 2012 at the Olsen Hotel in South Yarra, attended by Mr McWilliam, Mr Perrins, TA's Director, Legal and Melbourne Park Redevelopment, Mr Wood and others. Mr Mitchell was not there. At this meeting they discussed the domestic broadcast rights. During the meeting, Seven raised the possibility of extending the AO by starting it one day earlier to mimic the French Open.

260 Between 16 and 19 June 2012, Mr McWilliam and Mr Wood sent some emails to each other in respect of the negotiations and which referred to the 15 June 2012 meeting.

261 On 18 June 2012, Mr Mitchell phoned Mr McWilliam and said words to the effect that "we should try to wrap it up this week". On 18 June 2012, Mr McWilliam emailed Mr Martin and others at Seven saying, inter-alia:

> Lewis. Harold just rang. I said AFR article annoying but predictable
>
> He said we shld try to wrap it up this week

262 On 19 June 2012, Mr McWilliam texted Mr Mitchell, which he then reproduced in an internal email, saying:

> Harold do you reckon we can get $24 mill for 2015 going up by a mill a year. Increase ratings bonus to a million, start on the sunday? We really worry about giving up rights as host broadcaster too, fine for steve to want to make permanent facilities but we don't want to have to sign up to some awful rate card + be restricted as host broadcaster. Steve is many things but he is not Cecil b de milne

263 On 9 July 2012 between 2:48 pm and 3:12 pm, several phone calls of varying durations took place between Mr Mitchell and Mr McWilliam.

264 There was to be a board meeting on 20 July 2012. In Mr Wood's CEO report for the 20 July 2012 board pack he advised the board that "preliminary discussions have commenced with Channel Seven regarding a possible renewal of their domestic broadcast rights for 2015 and beyond".

265 For that same board pack, Mr Ayles prepared his "Commercial Business Unit Report" which included the following information:

> **Broadcast**
>
> **Seven**
>
> Initial meetings have taken place with Seven in relation to free-to-air rights post AO 2014 with discussions continuing.

266 On 24 August 2012, Mr McWilliam and Mr Martin had a conference call with Mr Wood at which a further proposal was made. Mr McWilliam reported on this in an internal email attaching what appears to be a draft letter dated 24 August 2012.

267 There was to be a board meeting on 27 August 2012. Mr Ayles prepared his "Commercial Business Unit Report" for the 27 August 2012 board pack in which he announced a newly formed "Media Rights" team which would, inter-alia, be "continuing planning and negotiations for the next domestic television (FTA and Pay), online and mobile broadcast rights deal beyond the expiry of the current contract and for AO2015 onwards".

268 In Mr Wood's CEO report, also included in the board pack, he noted that:

> …[T]he Commercial team has recently re-organised its Broadcast team to refine its focus on growth and exploiting new opportunities. Greg George will move from his role as Commercial Manager to a newly created position of Manager, Media Rights.

> This position will encompass the revenue side of Tennis Australia's broadcast, gaming and digital/online businesses.

269 At the board meeting on 27 August 2012, Mr Wood also tabled a presentation concerning revenue income growth which was one item referable to strategic planning. The objective was described as to "[m]aximise revenue from the commercialisation of Tennis Australia's assets". There was a risk that this would not occur if TA did not control host broadcasting.

270 On 28 August 2012 at 6.10 am, Mr Worner circulated the following internal email:

> [I hope] Steve Wood does not read today's SMH. We should try and wrap up the Melb Cup and the tennis. Time is our enemy as the price will only go up. Not down.

271 At 6.39 am, Mr McWilliam responded:

> We left draft with him friday. He is obviously at US Open. This has been hard to pin down. Like NRL become obsessed with doing the production and on charging for it. We hope we worried him sufficiently re the logistics. But who knows. Lastly no doubt nine and ten will stick noses in

272 At 6.47 am, Mr Worner replied:

> Nine won't. Cos of cricket I reckon and also fear of what we might do re cricket if they deliberately foil. Ten will. We have to weigh heavily on their parlous state and can you put an elite event on a crap network ?

273 At 6.56 am, Mr McWilliam responded:

> Doing that don't worry. Lewis I think I will send harold another sms. Where is he at the moment

274 At 7.23 am, Mr Martin chimed in:

> Harold (Biggles) could be anywhere – location no longer any impediment to access, so send text.

275 On 30 August 2012, Mr McWilliam sent an email to Mr Mitchell requesting "guidance" concerning the negotiations with Mr Wood and TA. Mr Mitchell replied: "Talk soon".

276 On 3 September 2012, Mr McWilliam sent an email to Mr Wood in respect of contract renewal terms for the domestic broadcast rights attaching a letter with an offer from Seven in relation to a further extension of the media rights agreement for 2015 to 2019 (Seven's September offer). The terms offered included a $5 million sign-on fee. The rights fees offer was as follows, commencing from 2015:

- 2015 – $22.6 million;
- 2016 – $23.3 million;

- 2017 – $24 million;
- 2018 – $24.7 million; and
- 2019 – $25.4 million

277 These fees for the five years only totalled $120 million. Further, under this offer, Seven would continue to retain sole and exclusive host broadcasting rights. Ultimately, I would note at this point that Mr Wood through his considerable efforts was able in May 2013 to negotiate both rights fees totalling $195.1 million together with getting host broadcasting rights. Indeed, what he was able to negotiate was within the range of Gemba's *expressed* figure of $40 million per annum.

278 I would note that Seven was very keen to retain host broadcasting as Mr McWilliam's email demonstrated:

> I know you are busy with the US Open right now, but I wanted to try to quickly address the concerns you raised in our conference call Friday before last, so that we can try to settle this and allow you to get on with your day to day issues.
>
> To this end, you will see that we have agreed to cover courts 4 & 5 or online streaming – you can come up with whatever production values you want (although we assume it will mostly be a one camera production as it will be hard to justify the cost on some courts, but we will leave that in your capable hands). Given that we bought the exclusive internet rights, we think it is fair that we retain the first right to stream this ourselves through Yahoo!7, but if Y7 doesn't take up the option, we will let TA do it provided that if it has a deleterious effect on our ratings (which isn't good for either of us), we will need to come up with an alternative that works for us both. I trust this gets you where you need to be?
>
> On the production side of things, we know you might be making a significant investment in permanent facilities etc which may result in some savings to us. So we will agree to share our savings with you if your new installations to the broadcast facility etc result in production savings on our end. As we discussed the other day, we are more concerned about the host broadcast operations which are our bread and butter, we do this 52 weeks a year so we have the people, expertise, negotiating power etc. When some other sporting bodies – we mentioned v8s in our call – attempted to take over this type of thing themselves, the exercise did not prove at all fruitful – they actually just lost money, resulting in compromises to the production.
>
> The rest is the same as before and we have discussed and, I believe, agreed in principle. Look forward to discussing further

279 On or around 3 September 2012, Mr Wood showed Mr Ayles Seven's September offer. Mr Ayles recalls thinking at the time that the financial offer in the letter was inadequate, as it was still significantly lower than his valuation of the rights, which was supported by the Gemba report. He recalls saying words to this effect to Mr Wood when he showed him Seven's September offer. He also recalls saying words to the same effect in an EMT meeting. He also

recalls thinking that several of the other terms in Seven's September offer were unacceptable, namely, those relating to archive, online and streaming rights.

280 On 13 September 2012, Mr Wood replied to Mr McWilliam and Mr Martin. In this email he wrote, inter-alia, "...we need to get the principles right before we start trying to agree any specific details. It's important to us both and we can't rush this". His concerns were that there were a number of points of principle, such as the host broadcast production and streaming rights, which had not been clarified. In other words, he wanted to get the points of principle agreed before working out the long-form.

281 For a 2 October 2012 board meeting, Mr Ayles prepared his "Commercial Business Unit Report" for the board pack in which he advised the board:

> The newly restructured broadcast and digital team continues intensive planning for the appropriate structures and format of a new domestic broadcast deal for 2015 onwards, including the possible sale of these rights on a platform-by-platform basis and Tennis Australia assuming responsibility for conducting the host broadcast.
>
> …
>
> **Broadcast**
>
> The key activities for the broadcast team currently include:
>
> - Securing the domestic rights for post AO2014, including an assessment of undertaking host production in-house;
>
> …

282 On 10 October 2012, Mr Mitchell sent Mr Wood an email about Seven. He was clearly concerned to reach a deal sooner rather than later. He wrote:

> Steve
>
> We better fix Channel 7. Give me a call when you get back. We are ready to do it all.

283 Mr Wood replied to Mr Mitchell on the same day, stating that he would arrive back in Australia late that Friday and would call him on the following Monday.

284 Mr Mitchell later that day forwarded his earlier email to Mr Wood to Mr Martin and Mr McWilliam saying:

> Bruce and Lewis,
>
> Let's wrap this up next week.
>
> Leave it with me.

285 Mr McWilliam responded: "Thanks Harold. Would be good. Look forward".

286 Later, Mr Wood rang Mr Mitchell back and Mr Mitchell said to him that he was ready to do a deal with Seven.

287 On 12 October 2012 at 10.37 am, Mr McWilliam sent Mr Mitchell an email in the following terms:

> Thanks Harold – agree and thanks. We hear you are in our city today making a speech so hope it goes well.
>
> What about Nine!
>
> It would be fantastic to wrap up; I know we are negotiating between ourselves in making this point but clearly the climate is dire – we love Tennis as you know, but best to strike whilst the iron is hot to ensure a long term deal and before the industry descends into a spiral of cost cutting.
>
> We have already told the v8s we are not negotiating with them other than for a decrease

288 On 12 October 2012 at 11:49 am, Mr Mitchell rang Mr McWilliam and they had a just under eleven minutes conversation.

289 On 17 October 2012, Mr Mitchell and Mr Wood met with Mr McWilliam and Mr Martin at Mr Mitchell's apartment in Spring Street, Melbourne. At the meeting they discussed further details about the domestic broadcast rights. They did not reach any final agreement. Mr Wood recalled shaking hands with Mr McWilliam at this meeting, but to Mr Wood this handshake did not signify any final agreement. It was Mr Wood's intention to negotiate a long-form contract and there were still some details which needed to be negotiated.

290 The same day, Mr McWilliam sent an email to Mr Mitchell, Mr Martin and Mr Wood which attached an amended version of the offer made on 3 September 2012 (Seven's October offer). In that offer, Seven conceded the archive rights to TA. But otherwise the offer, including the proposed annual rights fees and the host broadcaster question, remained the same as under Seven's September offer.

291 At around that time, Mr Wood showed Mr Ayles Seven's October offer. Mr Ayles' view of this offer was the same as his view of Seven's September offer.

292 On 18 and 19 October 2012, Mr Mitchell spoke with Mr McWilliam in two telephone calls about matters concerning the online and mobile streaming of the Australian Open and said that Mr Wood was "a bit jumpy". On 19 October 2012 Mr McWilliam emailed Mr Martin, Mr Shtein, Ms Quirk and others saying, inter-alia:

> Just spoke to Harold

He said Steve wood is going to call you Lewis

They want confirmation that if yahoo!7 doesn't stream it, and give undertaking by November, they can do it

I assume this relates to clause 5 which says

"With effect from the 2015 AO, but subject to Seven being able to agree upon reasonable commercial terms with the relevant party, Seven agrees to commit to online and mobile streaming of its coverage of the AO (i.e. simulcast of a full dirty feed, inclusive of Seven's watermark, promotions, commercials and advertising)."

I told Harold we will do it and we are not having default clauses inserted into contracts – we will not for instance have our commercial negotiating position compromise by people realising we are up against a deadline, we need to make this clear

I spoke to Rohan (copied) who said yahoo 7 doing it isn't going to be a problem. We may even be able to do a deal with Optus or someone else... as we have to try to monetize it

I am happy to insert wording which says in effect that we will advise TZ of our position on this by 1 November the year before the relevant AO

The good thing is this is getting v close I think, Lewis hear Steve out. Harold said he is a bit jumpy

Also of course none of this is relevant until the extension years... but don't make too big a point out of that

293 On 22 October 2012, in an email from Mr Martin to Mr McWilliam and others at Seven, Mr Martin described a telephone conversation with Mr Wood on or before 22 October 2012. Mr Wood did not recall that conversation, but the three numbered points in it accurately reflected his position at the time. The email stated:

Steve Wood call. Please note my views below in bold are internal only.

1. Archive – he says we can retain our rights but he wants them non-exclusive so TA can on sell to anyone after the Open? He says TA want their content seen beyond the two weeks.

As it stands right now Fox Sports have the replay rights but choose not to run them – we sold Fox those rights as part of the STV package which goes thru to 2014. In terms of other media TA can show all match replays in their entirety on the AO website 48hours after the day of the match. Also TA can, 7days after the open, sell clip (highlight) rights to anyone other than our competitors.

Its only TA who show an interest in these archive (replay) rights and we have, in this negotiation, already conceded to them the right to show replays on the AO website during the Aust Open albeit 48hrs after the match.

Whilst there doesn't seem to be much demand for this content it is important we retain these rights to maintain our value proposition for our future STV offering.

2. Online/mobile (clause 5) – he wants live content "everywhere". What he wants is, in the event we don't sell online or mobile rights, he wants the right to sell them and he wants a clean feed to sell!

This is totally unacceptable these rights are ours and we intend to exploit them and we will as we have done in each of the last 4 years for mobile – so it's a moot point. If TA have this right they will give it away as a throw in to secure their own sponsorship deal.

3. Host broadcaster (clause 7) – he has gone back to wanting TA to be the host broadcaster and says that the letter does not allow for that! He is right it doesn't.

This about 2 things for us –

1. As host broadcaster we receive income for broadcast services and that revenue stream will be threatened by losing the Host broadcaster right.

2. Controlling the quality of the broadcast pictures – (TA's motivation here is primarily to maximise on court signage exposure)

It's the revenue and the picture control TA want access to – what they don't fully appreciate or have yet to explore is the viability of how a two week annual event could substantiate a host broadcaster cost/model.

TA want the option though to allow them to at least explore the viability of a host broadcast model.

It's important we hold onto our Host broadcaster position, my only concern is that it might be a gap that allows a naive and desperate Ten to engage on.

Saul is there another angle other being international host broadcaster that we could look at that protects our revenue and control?

Finally he wants to set a deadline here of December 18th.

294 Later on 22 October 2012, Mr McWilliam sent Mr Wood an email with the subject line "draft reply to Steve wood". It stated:

How's this

Dear Steve

I understand from Lewis you have asked for 3 changes:-

1 AO streaming rights after the Open. If all is agreed we would accept this but the original broadcaster can't lose its replay rights

2 Online mobile rights: we will commit to these as per the draft we gave you however these rights cannot be taken away. We already do mobile rights and we can extend to online "dirty feed" but we won't weaken our negotiating hand for rights we pay so dearly for. There is a commitment though to do this

3 Host feed: sorry Steve we provide a very good coverage and we don't wish to negotiate with a committee for the feed. In addition we provide you an HD feed to supply to international licensees. We have never had complaints about our production standards We do not want to get a feed from a third party that has different emphasis etc. to our broadcast driven one. We hope you understand

> If we can put these points behind us then we are there, and we thought we had gotten there in our meeting. Can you please confirm?

295 On 23 October 2012, Mr McWilliam sent an email to Mr Wood, copying in Mr Mitchell. The email attached a further amendment to Seven's September offer and Seven's October offer (Seven's revised October offer), both in mark-up and clean. The amendments related to the rights to further AO archive material and host broadcasting discussions. It is significant to note that under this offer Seven was still to remain as sole and exclusive host broadcaster. But a clause was added saying that:

> [I]f TA wishes to discuss becoming the host broadcaster, it will have good faith negotiations with Seven to agree arrangements under which Seven is not disadvantaged from either a financial, quality or editorial perspective…

296 At around this time, Mr Wood showed Mr Ayles Seven's revised October offer. Mr Ayles' view of this offer was the same as his view of Seven's previous offers.

297 At this point, let me pause and deal with another matter, namely, IMG's involvement around this time. Let me retrace my steps a little to explain some of the background.

298 In 2008, TA granted IMG a licence to broadcast the AO outside Australia for six years. Further, the sponsorship arm of IMG was TA's sponsorship agent internationally and assisted TA in securing the sponsorship of KIA for the AO.

299 IMG is and has been for some time one of the largest sports marketing companies globally. In about 2012 to 2013, IMG represented Cricket Australia's international broadcast rights and the broadcasting rights for the English Premier League, Wimbledon and the US Open. IMG also managed tennis players such as Ms Maria Sharapova, Mr Roger Federer and others.

300 Since 2009, Mr Ayles had known Mr Guinness, senior vice-president and Asia Pacific head of IMG. During 2012, Mr Ayles had regular phone calls with him discussing the broadcast rights for the AO in different countries. Further, he dealt with IMG and IMG's sponsorship arm on a daily to weekly basis by virtue of their broadcasting and sponsorship partnerships with TA.

301 In mid to late 2012, Mr Ayles had a telephone discussion with Mr Guinness, in which Mr Guinness said words to the effect that IMG was interested in the domestic broadcast rights. This conversation occurred after Mr Ayles had received the Gemba report.

302 In late October 2012, Mr Ayles had a conversation with Mr Wood regarding the offers Seven had made in September and October. Mr Wood said to him words to the effect: "I'm going to ask Chris Guinness what he thinks".

303 Mr Wood contacted Mr Guinness. Mr Wood gave him a copy of Seven's offer, although he could not recall whether it was Seven's October offer or Seven's revised October offer, and sought Mr Guinness' views. He did this because he knew that Mr Guinness was skilled and very experienced in assessing the value of broadcasting agreements and Mr Wood wanted his advice.

304 Around this time, Mr Ayles also had a conversation with Mr Guinness over the phone. He said to Mr Guinness that Seven was offering the same numbers as under the Seven agreement, with a CPI increase. Mr Guinness said words to the effect:

> That's ridiculous. We will offer you significantly more. The offer from Seven is massively undervalued, given everything that is happening with live sports rights in Australia at the time. Live sports rights are going up significantly.

305 Mr Ayles was not certain to which one of Seven's offers Mr Guinness was referring in that conversation.

306 On 31 October 2012, Mr Guinness wrote a letter to Mr Wood in respect of TA's domestic rights renewal. Mr Guinness commenced his advice by querying the offer and suggested reasons why TA should go to market. He said:

> Essentially my view is that this is a "one-sided" offer, from a broadcaster that clearly feels no competitive pressure. The offer not only undervalues TA's rights but also commits TA to a long term agreement without minimum coverage assurances or any meaningful ability for TA to carve out and control content for it's own use. Before commenting on specific terms of Seven's offer and not withstanding any exclusive negotiation period, I would question why TA would not consider going to market for the following reasons:
>
> - If you are a premium rights holder (The Australian Open continues to be one of the premium sporting highlights in Australia) it is a good time to go to market. There is sufficient competition in the FTA space to be very confident of a meaningful and positive uplift in value and on superior terms if rights are released for tender and a competitive process is initiated.
> - This is reinforced by the recent significant increases in rights value for AFL and NRL. It is likely to be matched by the new deal for Cricket Australia, who are currently in the middle of an exclusive negotiation period with the Nine Network but are very confident of going to market if these negotiations fail.
> - Recently, we saw Fox (in partnership with Nine) pay nearly 100% more for ICC rights (2012-2015) than for the previous four year period (Fox paid US$38m). This number was being driven by the fact the Cricket World Cup is being hosted in Australia and NZ in 2015 but the premium paid was nevertheless very substantial. When events take place in Australia, they carry a huge local premium and broadcasters are prepared to cash in on this.
> - The Australian Open provides the perfect vehicle for a broadcaster to promote its upcoming programming slate for the year to the Australian audience.

…

- Ten is extremely keen to acquire some headline domestic sporting rights. Having lost out on the AFL and NRL rights, the remaining domestic rights which are of interest to Ten are Australian Cricket, V8's and the Australian Open. Ten is fully aware of the value of the Australian Open broadcast rights and we believe is willing to bid competitively to win them.

307 Mr Wood agreed with the opening observations. So too did Mr Ayles. But in relation to the suggestion of going to market, Mr Ayles at the time was keener on this option than Mr Wood. Further, the contractual provisions in the Seven agreement concerning the ENP had to be observed.

308 Mr Guinness also gave advice concerning the advantages of host broadcasting. He said in terms:

> Before TA commits to signing such a long term deal it must properly evaluate the benefits of controlling and managing the host broadcast operation for the Australian Open. In spite of the cost, the benefits are tangible.
>
> Host broadcast production benefits:
>
> - Complete editorial control over the host broadcast, including standardized shooting and cutting patterns. This can also incorporate TA's marketing and communication messages as well as offering better exploitation and activation for TA's commercial partners.
> - Better control of camera placements and equipment to match all the other major tournaments in the world. In particular the placement of courtside cameras 3 and 4 would result in a greater consistency in the production value across all television courts.
> - A true world feed production is particularly helpful for international clients who are currently dependent upon the local broadcaster to deliver what they need. That is not always a priority for Seven and this can cause issues and frustration for TA's international licensees.
> - Currently it is a case of the 'tail wagging the dog' because the local network has obligations and commitments that inhibit delivering a true world feed for the international takers.
> - The reduction of the domestic broadcaster's influence on the match scheduling which would allow the Australian Open to stand out from the other Grand Slams by allowing international partners more of a "voice". Tennis Australia could have far more influence into proceedings and filter the domestic broadcaster's demands.
>
> In Seven's offer there is no commitment to show other courts live either on their main channel or via their digital channel or website. Neither is there any commitment to sublicense these matches to Pay TV or any other outlet to provide wider live (or delayed) coverage to the Australian public and to TA and it's partners.
>
> In short, in terms of production, Seven offer no increased production value or coverage of any additional courts from what they currently provide. Rather than offer a full host

broadcast service they only offer to produce 2 additional courts for an agreed price at TA's cost. The ultimate objective for a Grand Slam should be for all matches to be produced in HD and to be made available for all broadcasters/platforms across the world. This is the case at Wimbledon and at the US Open.

309 Of course, as matters turned out, TA procured host broadcasting rights.

310 Mr Guinness concluded:

> In summary I believe there are compelling reasons for TA to issue a competitive tender process in the Australia market and in this regard I don't believe Gemba's valuations are unrealistic. However the value that TA can generate for it's rights will ultimately (in a tender) be determined by competitive tension, packaging and the rights TA chooses to retain/carve out for it's own use. (In the UK Cricket Australia's rights have tripled in value because of the emergence of British Telecom as a serious competitor to BSkyB. The EPL's rights also increased 70% for the same reason at a time when the UK economy has suffered a double dip recession).
>
> If however you decide not to go to market then, apart from seeking a significant uplift on current rights fee levels, you need to secure as a minimum the following commitments from Seven:
>
> - Seven needs to put a value on the exclusive live FTA rights, live PAY TV rights (we believe Fox would prefer to deal directly with TA) and live multi-court streaming (pc, mobile, tablet) rights. As stated, there is clearly a value in the live streaming but without Seven attributing a value, TA cannot calculate whether retaining streaming rights for their website and digital applications would make sense for their commercial program.
>
> - Seven need to give TA a value on the production costs to allow T A to have a good faith negotiation (as per 7b) on whether to take the production in house. TA need to evaluate its options and for them to even consider this early offer from Seven they need to look at the host broadcast options especially as the term is through to 2019.
>
> - In terms of other carve outs, TA should also look to carve out 3D and 4K (ultra HD) rights for the time being and see whether these rights could provide you value at a later date to renegotiate. A greater range of digital rights should be carved out particularly domestic betting rights as betting legislation in Australia is expected to change and in-play betting will be legalized and will open up an untapped area of commercial value.
>
> - If Seven is not willing to sublicense or stream additional live coverage themselves by 2015 (details to be included in the contract), rights should revert back to TA to show on their own website or in partnership with another outlet.
>
> - Any additional coverage (i.e. other courts) should be undertaken as a host broadcaster obligation - i.e. clean feeds should be provided to TA and not paid for by TA. It is currently proposed that the coverage includes Seven's branding and commercials, which is clearly not adequate for international distribution.
>
> - TA need to have control of the host broadcast and world feed (even if produced by Seven) with set conditions and parameters.
>
> - Seven's transmission of the Australian Open should be in HD, especially by 2015.

311 Of course, as I have said, given the ENP, the rights could not be put out to competitive tender at this time. Moreover, TA could not simply go through the motions in terms of the ENP.

Events from November 2012

312 On 1 November 2012, Mr Wood sent an email to Mr McWilliam containing a proposed long form agreement clause in the following terms:

> Thanks for the meeting today.
>
> I would like the clause written below to be the long form clause.
>
> The parties agree that while this letter sets out their in principle agreement and is intended to form the basis for the grant of Transmission Rights to Seven for the period from its execution to 30 June 2019 (for the Australian Events) and 31 December 2019 (for the Davis Cup Events), it is expressly intended to be non-binding and will have no legal effect even once signed by both parties TA and Seven agree to enter into good faith negotiations immediately after execution of this letter to agree on a long-form agreement, incorporating the above provisions as well as a regime to be agreed regarding various secondary issues required to "future proof" our arrangement (for example multi-channelling, back-to-back arrangements to TA's agreement with MOPT regarding access to the broadcast compound, the ratings bonus clause, news access rights, promotion of live-odds and related betting issues, use of player imagery, sponsor protection, highlight rights and other changes required by TA assuming control of all or part of the host broadcast) with a view to executing that long-form agreement by 21 December 2012. The grant of rights contemplated in this letter will only become effective if and once that long-form agreement is agreed and signed.

313 Later that day, Mr McWilliam sent an email to Mr Mitchell, Mr Worner, Mr Martin and Mr Wood. The email attached a letter from Mr Worner with a proposal for a further five-year extension of the domestic broadcast rights (Seven's November offer). Mr Worner offered to pay to TA total domestic rights fees as follows:

- 2015 – $22.6 million;
- 2016 – $23.3 million;
- 2017 – $24 million;
- 2018 – $24.7 million; and
- 2019 – $25.4 million

314 Under Seven's November offer, Seven was to remain host broadcaster and be responsible for production costs. Further, the annual rights fees stayed the same. As for the long-form question, that question was still up in the air concerning whether any new heads of agreement would be binding before the long-form was agreed. Mr Wood considered that there should be nothing binding until the long-form was agreed. Mr McWilliam took a different view.

315 On or around 1 November 2012, Mr Wood showed Mr Ayles Seven's November offer. Mr Ayles' view of this offer was the same as his view of Seven's previous offers. Now at the time, Mr Ayles was aware that one of the issues in relation to the domestic broadcast rights was the question of who would undertake responsibility for producing the host broadcast. Mr Ayles felt at the time that it would be beneficial for TA to take over the host broadcast because it would be able to better control the content of the broadcast. He understood that TA would incur significant costs if it was to become the host broadcaster, but he thought that this would be worthwhile in order to obtain better control of the broadcast feed. Mr Ayles was aware, based on his experience as commercial director of TA, that traditional television broadcasts comprised 12 minutes of content and four minutes of advertisements. During the operation of the Seven agreement, he observed that Seven had been using the "content" time, in addition to the "advertising" time, on the AO broadcast to promote television shows aired on Seven. He thought that the "content" time should be used to promote TA's events and programs, rather than Seven's television shows. Mr Ayles also considered that Seven was not giving enough coverage to side courts during the AO. He considered that it was in TA's interests to give greater coverage to the side courts as this would likely impact the value of its international broadcast rights. He believed that taking control of the host broadcast would help to achieve this.

316 On 2 November 2012 at 2:08 pm, Mr McWilliam rang Mr Mitchell and they had a just under eight minutes conversation.

317 On 7 November 2012, Mr Wood sent an email to Mr McWilliam in respect of the rights renewal. In this email he wrote:

> We have taken the time to have a close look at what you have proposed and there are a number of items we still need to clarify so we can move forward.
>
> We have taken your document and made some changes with a view to drive more clarity in our partnership for the next seven years.

318 To this email, he attached a copy of Seven's November offer with comments from TA marked up. Mr Perrins had prepared the mark-up to the letter, which Mr Wood settled. The marked-up version included some of the principles that TA were seeking in the long-form agreement. For example, TA did not want to grant Seven a first right of refusal and did not want to agree to limitations on its rights to discuss proposals from other parties prior to the commencement of any ENP. Further, TA added the option to elect to become the host broadcaster. Further, Mr Wood's position concerning a long-form agreement and the binding question was

enshrined. Further, there were tweakings as between the annual rights fees and the ratings bonus amounts. But it was made clear in an editorial comment that the *quantum* of the rights fees were not being worked out in detail at that stage.

319 In response, on the same day Mr McWilliam sent an email to Mr Wood, copying in Mr Worner and Mr Mitchell. Mr McWilliam wrote:

> Steve
>
> I can only say that this is sent in completely bad faith.
>
> After all our negotiations for you to change so much and to take rights out and change rights fees and then to say it is non-binding.
>
> If this has been done on your instructions then you have not told the truth to us in negotiations. You sit there and agree things and then this rubbish comes back. We agreed and shook hands the other day, I listed the points and we all shook hands
>
> You had better read it and tell me this piece of rubbish wasn't prepared on your instructions otherwise you sat there and agreed things with us and Harold and have come back in a completely different way
>
> To say that something that a sign on payment is made on is non-binding is amateur hour and it has never been our deal.
>
> As you can see I am very disappointed and never expected you would do this
>
> We need to sign what we agreed, which is reflected in what we sent you. We had the draft in front of us, and we went through the 5 or so points which we embodied.
>
> This needs to be fixed

320 On 8 November 2012 at 10:32 am, Mr Mitchell and Mr McWilliam spoke on the phone for five and a half minutes.

321 On 16 November 2012 at 3.56 pm, Mr Wood sent an email to Mr McWilliam, copying in Mr Martin and Mr Mitchell, in respect of a timetable. In this email he wrote:

> Following our recent meeting and subsequent correspondence, I am now moving to a timetable to finalise our agreement.
>
> In this regard, my intention is to prepare a final position to put to our Board at the December 3 meeting. Following the Board meeting we will be in a position to sign off on the terms of the new agreement.
>
> As we discussed at our recent meeting, it is important to Tennis Australia, and I am sure to Seven, that the terms sheet then be transformed into a long form agreement, as a matter of reasonable urgency.
>
> In order to achieve a mutually agreed position on the issues raised in our response and some of the related practicalities would it be possible for you and I to meet here in Melbourne next week?
>
> At that meeting, we should be able to finalise a position for me to take to the TA Board.

322 I would note that that anticipated meeting did not take place. Further, clearly on any view, neither the rights fees nor the host broadcasting question had been agreed at this time; these were the two major issues.

323 On the same day, at 5.29 pm, Mr McWilliam responded, inter-alia, as follows:

> As to "signing off on the terms of our agreement". As you know we have done that.
>
> I am of course delighted to meet up with you. It is helping my qantas points balance incredibly. But the fact is we agreed the 5 outstanding points. I summed them up - we all agreed. Harold was in the room, along with tim, also copied. We all shook hands.
>
> And with the greatest respect, that piece of crap you sent to me was insulting and didn't make sense e.g., that we would send you a cheque for $9 mill if you decide to do your own production. As you know that was never discussed + by the way the value of our production speaks for itself and won't be replaced even if you were to take over production. We still have all our stuff we do to deliver big time both for our viewers and for TA. And you get that feed for free! As a professional, if you seriously believe a bunch of part timers engaged 2 weeks a year can replace what saul shtein wins world wide awards for and does 52 weeks a year for 30 years? So what -- we pay you $9 mill and still have to produce our coverage -- seriously!
>
> After agreeing the 5 "outstanding" points, summing them up and shaking plus getting a bit of paper from you to include a couple of tiny bits (like contribution to legends lunch) which we agreed to add , and then to get that piece of swiss cheese (ie holes everywhere - carving out 3G 4G 5G etc rights, really!) was v upsetting. And lastly the bit saying that we pay you guys 20 mill plus and year and for you to then seriously assert you can hand the pay rights to fox sports and ESPN -- seriously -- and for $1!! Where's the fairness in that. Steve get it clear - we r buying exclusive rights and paying a premium.
>
> Finally, the comments re "long form" is a furphy. It has not stopped us paying or performing. Anyway Renee has sent one to you this week
>
> As you can see I have calmed down a lot from last week. Anyway I look forward to getting together, let me know when suits. Make sure the "nice" steve wood turns up, not the alter ego for the bloke who produced that silly mark up (mr perrins sauce?) - no a stitch up wld be a better description
>
> Look forward to seeing you soon

324 Further, earlier that day at 8.17 am, Mr McWilliam emailed Mr Worner and Mr Martin saying "We had the call from Harold as we were leaving the AGM saying it would be okay and that they would sign our document". Mr Worner emailed back: "Ok that's good. If we actually believe that". Mr McWilliam responded: "Yes… authority disconnect… I will chase Steve up…".

325 Further, on 16 November 2012, Ms Vivian Fung on behalf of Mr Guinness sent an email to Mr Wood attaching an offer from IMG in respect of the domestic and international rights, which I

have previously defined as the first IMG offer. The email also attached a non-disclosure agreement (NDA).

326 At around this time Mr Wood showed Mr Ayles the first IMG offer.

327 The first IMG offer, and the conversation in late October 2012 with Mr Guinness, gave Mr Ayles greater confidence that the domestic broadcast rights were worth more than what Seven was offering to pay for them. This was for the following reasons.

328 First, the base annual fee in the first IMG offer, which was $30 million, was higher than the annual fees in each of the offers Seven had made.

329 Second, the first IMG offer also provided a significant upside for both parties if IMG was successful in achieving a figure higher than $30 million when it licensed the domestic broadcast rights.

330 Third, Mr Ayles believed that IMG would not have offered a base annual fee of $30 million unless it was confident that it could license the domestic broadcast rights for a fee that was higher than $30 million. He had confidence in IMG's ability to secure a higher fee, given his experience with them internationally.

331 I will discuss the first IMG offer in detail in a separate part of my reasons.

332 On 19 November 2012, Mr Wood was copied to an email from Mr McWilliam to Mr Tim Browne, an in house lawyer at TA. Mr McWilliam was replying to an email Mr Browne had sent to Seven and said, inter-alia:

> We are definitely keen to finalise a long form agreement as quickly as possible, but what do you mean by "convert all the issues that have been discussed"?
>
> Please be mindful in terms of your drafting to only include points that have been agreed, not merely raised by one party. That would be a complete waste of time. Your recent mark up of our extension letter was insulting and completely misleading given the issues discussed and agreed at our meeting.
>
> …
>
> I do not believe you have any interest in a long form agreement but in clawing back thing that you don't like about the deal. We will not allow a ridiculous debate a "long form" and some side line players to divert this.
>
> I hope that is clear. Our draft reflects fully the discussions and agreement made at the meeting on Thursday 1 November 2012. Any points raised by Steve since then have not been agreed by Seven and, in fact, have positively been rejected as being raised subsequent to (and inconsistent with) the agreement made.

333 On 19 November 2012 at 12.41 pm, Mr Mitchell called Mr McWilliam and they had an eight and a half minute conversation.

334 On 19 November 2012, Mr Wood forwarded the first IMG offer to Mr Perrins and asked him to come and see him. Mr Wood recalls that he asked Mr Perrins about the NDA, how to handle it and how to comply with it properly.

335 On 21 November 2012, Mr Perrins forwarded the first IMG offer to the EMT. In his email Mr Perrins wrote, inter-alia:

> I attach the IMG Proposal as discussed for your review in connection with the Seven broadcast rights deal 2015-19. The NDA obligations you have all agreed to by email this afternoon and evening apply to this document. I have separately asked IMG to proceed to obtain IMG Board approval of the Proposal (after they first exclude paragraph 1 and 6 of the "Process" section on page 5).

336 Mr Wood signed the NDA provided by IMG on 21 November 2012.

337 After the first IMG offer had been received, in around mid to late November 2012, Mr Ayles had a telephone conversation with Mr Guinness. He said words to the effect: "The offer from IMG should not combine domestic and international broadcast rights".

338 The first IMG offer was discussed at a meeting around this time of the EMT. Someone said that it was not helpful that the first IMG offer did not have IMG's board's approval. Mr Ayles also said to Mr Wood, in private, words to the effect: "We should get IMG to obtain board approval to make the offer more compelling to the board".

339 On 22 November 2012, Mr Wood travelled to Sydney and met with Mr Healy for an hour and a half in the morning at the offices of Mr Healy's law firm, Gadens. Mr Wood brought with him to the meeting copies of Seven's November offer and the first IMG offer and discussed both with Mr Healy.

340 As part of the discussion of the first IMG offer, Mr Wood drew attention to the fact that IMG's offer was only open until 31 December 2012, and was conditional on extending the international rights agreement with IMG. In that context, Mr Wood explained that extending the international rights agreement with IMG was contrary to TA's host broadcast strategy to maximise international revenue. Mr Wood and Mr Healy also discussed the uplift that other sports had achieved in their broadcast rights fees in recent agreements that they had negotiated. In that context, Mr Wood explained that the Gemba report was significant because it valued TA's broadcast rights across all platforms at up to $40 million per year.

341 Mr Wood and Mr Healy then discussed the material that should be disclosed to the board in relation to the domestic broadcast rights at the 3 December 2012 board meeting.

342 First, Mr Healy said that Mr Wood should report to the board the percentage increases in broadcast rights fees that other Australian sporting bodies had achieved. Mr Healy and Mr Wood agreed that recent contracts entered into by the Australian Football League (AFL), National Rugby League (NRL) and the Football Federation Australia (FFA) were most relevant, and they discussed that Mr Wood should present percentage increase figures for each of the recent rights contracts.

343 Second, Mr Wood said that the important conclusion to be drawn from the Gemba report was that Gemba had valued TA's domestic broadcast rights at up to $40 million across all platforms, and he intended to inform the board of that fact.

344 Third, Mr Healy and Mr Wood discussed and agreed that Mr Wood should describe the key elements of Seven's November offer and the first IMG offer, and in particular the fact that IMG's offer had a condition that linked that offer to an extension of the existing international rights agreement with IMG.

345 Now I should note, as I have said, that in relation to the Gemba report, Mr Wood had sent Mr Healy copies of both the Gemba report and the Gemba summary in mid June 2012. In his covering email, Mr Wood wrote that "[In] short, their upper estimate of the value of our rights is $40m". So this was Mr Wood's view as to the key message of the Gemba report. Mr Wood's covering email also indicated that management would be taking the whole of the Gemba report into account in structuring their internal approach to negotiations, which is what subsequently occurred. I note that Mr Wood had previously told Mr Healy that the Gemba report was favourable to TA and that there was an opportunity to have a significant increase in broadcast rights fees. The advice that Mr Wood gave Mr Healy in mid June 2012 was to the same effect as the advice that Mr Wood gave Mr Healy on 22 November 2012, namely, that the key conclusion to be drawn from the Gemba report was that it estimated the value of the domestic rights to be up to $40 million across all platforms.

346 Mr Healy relied upon Mr Wood's judgment and advice in these respects and considered that Mr Wood should make a report to the board.

347 Mr Wood prepared a three page note that he used as a reference point during this meeting. He left Mr Healy with a copy of that note at the end of the meeting. That note included references

to the key points that Mr Wood would present to the board, as discussed during the meeting, namely, the rights increases recently received by Australian sporting bodies, as well as Seven's November offer, the first IMG offer, and the valuation that Gemba had given for the rights.

348 Later on 22 November 2012, following the meeting at Mr Healy's offices, Mr Wood sent Mr Healy copies of Seven's November offer and the first IMG offer as well as Mr Wood's preferred long form agreement clause.

349 Now I should say at this point that Mr Wood prepared a written CEO's report for the 3 December 2012 board meeting but decided not to include anything about the domestic broadcast rights in that written report. Rather, he decided to make an oral report to the board concerning the status of those negotiations. Mr Wood did not include Seven's November offer, the first IMG offer, the Gemba report or the Gemba summary in the board pack for the 3 December 2012 board meeting.

350 On about 23 November 2012, Mr Wood gave a copy of the first IMG offer to Mr Mitchell. To the best of his recollection, he gave it to him at his office in South Melbourne. Mr Mitchell looked at the first IMG offer, and dismissed it, saying words to the following effect:

> I've always disliked IMG.
>
> Why would you use them?

351 On 25 November 2012 at 7.28 am, Mr Wood sent an email to Mr Mitchell, through Ms Caroline Rice, Mr Mitchell's executive assistant, and wrote that the first IMG offer was subject to an NDA. Mr Wood attached a copy of the NDA that he had signed on 21 November 2012.

352 On 25 November 2012, at 2.24 pm, Mr Mitchell sent an email to Mr Wood, copying in Ms Rice. In this email, Mr Mitchell wrote:

> Thanks for the note on IMG!
>
> It is their usual tactic!
>
> Fails to impress, but we will talk tomorrow!
>
> I have yet to read it again, but I have to say that they seem to be well informed!
>
> Harold

353 IMG insisted that TA should maintain confidentiality concerning IMG's proposal(s). So much is apparent from the terms of the relevant NDA. Mr Wood made Mr Mitchell aware of the NDA in the email he sent to him. But it is fair to say that at that time Mr Mitchell was unimpressed with both the first IMG offer and the NDA. But it is appropriate to note that there

were carve outs in the NDA (see IMG's letter to Mr Wood dated 20 November 2012). Clause 2 provided:

> TA shall be entitled to disclose the contents of IMG's Domestic Proposal (but not, for the avoidance of doubt, the International Proposal) to its current domestic broadcaster, Seven Network, strictly subject to the following terms:
>
> (i) Seven Network must first undertake to keep such information confidential and not disclose it to any third party, on terms no less stringent than those set out herein;
>
> (ii) Such disclosure shall be for the sole purpose of discussions between TA and Seven Network regarding TA's Domestic Media Rights 2015-2021;
>
> (iii) Such disclosure shall not affect the other confidentiality and non-disclosure obligations hereunder, and without limitation TA must still obtain the consent of IMG before disclosing to Seven that the Domestic Proposal is from IMG, and/or before disclosing the contents of the Domestic Proposal to any other prospective broadcasters, but IMG shall consider such requests for consent acting reasonably and in good faith.

354 I have set this out to show that it was contemplated that TA including Mr Mitchell could show or communicate the first IMG offer to Seven. In my view, Mr Mitchell subsequently told Mr McWilliam of the first IMG offer, albeit that he did not procure any express undertaking from Seven as referred to in sub-condition (i). But this was a technical breach of the NDA at best. First, Mr McWilliam of Seven in my view would have understood the need to maintain confidence. Second, confidentiality was maintained by Seven as best I can tell. Third, the whole point of procuring the first IMG offer was to use that as leverage in negotiations with Seven. But to so use it, you necessarily needed to disclose it to Seven. I will return later to discuss Mr Mitchell's disclosure to Mr McWilliam.

355 On 26 November 2012, Mr McWilliam wrote an email to Mr Wood asking when they could meet as Mr Wood had not responded to his 16 November 2012 email.

356 On 30 November 2012, Mr Guinness wrote an email to Mr Wood confirming that the first IMG offer had been approved by the IMG board and was now unconditional. On the same day, Mr Wood forwarded this email to Mr Mitchell. At about the same time Mr Wood telephoned Mr Healy and informed him that the IMG offer was now unconditional.

357 On 30 November 2012 at 9:54 am and 5:03 pm, Mr Mitchell called Mr McWilliam twice and had conversations of ten minutes and five and a half minutes duration.

358 On 1 December 2012, there was a series of emails between Mr Mitchell and Mr Wood in respect of a long form agreement with Seven. At 1.54 pm on that day Mr Wood wrote to Mr Mitchell and said, inter-alia:

> Hi Harold,
>
> To progress the Seven deal during Monday's board meeting I think we should insert in their existing letter a long form clause similar to the one drafted below.
>
> The parties agree that while this letter sets out their in principle agreement and is intended to form the basis for the grant of Transmission Rights to Seven for the period from its execution to 30 June 2019 (for the Australian Events) and 31 December 2019 (for the Davis Cup Events), it is expressly intended to be non-binding and will have no legal effect even once signed by both parties. TA and Seven agree to enter into good faith negotiations immediately after the execution of this letter to agree on a long-form agreement, incorporating the above provisions as well as a regime to be agreed regarding various secondary issues required to "future proof" our arrangement (for example multi-channelling, back-to-back arrangements to TA's new agreement with MOPT regarding access to the broadcast compound, the rating bonus clause, news access rights, promotion of live-odds and related betting issues, use of player imagery, sponsor protection, highlight rights and other changes required by TA assuming control of all or part of the host broadcast) with a view to executing that long-form agreement by March 31 2013. The grant of rights contemplated in this letter will only become effective if and once that long-form agreement is agreed and signed.

359 Mr Wood's mind-set at this time was that getting a long form agreement was important to TA because it would set out the specific commercial terms for all content creation and distribution, which would ensure clarity and certainty for TA. Mr Wood felt that the Seven agreement did not contain the necessary details to protect TA's interests in relation to, inter-alia, multi-channelling, archive rights, replay schedules and sponsorship. Without a long form agreement on these matters, Seven had discretion to broadcast tennis on any of its channels rather than just its primary channel, could restrict access to archival footage, and could replay tennis at times that did not promote the sport, for example, a week after the final rather than immediately following a final.

360 At 2.36 pm that day Mr Mitchell responded to Mr Wood's email:

> Steve
>
> This was the section Bruce rejected, saying
> That it allows the contract to be null and void
> On a range of matters that have not been
> Established!
> Basically it is a lawyers [sic] way of saying "I
> don't trust you"
> Bad sign!
> Won't fly with them... Or me!!!

361 At 2.57 pm Mr Wood responded to Mr Mitchell:

> Harold,
>
> We need to modernise our old contract from 2006 which has been stalled since we signed the last letter. We don't want to rely on Sevens [sic] "best endeavours" because that has not worked in TA's interests which is why the current contract remains unsigned.
>
> By removing the secondary range of matters will this clause work?
>
> The parties agree that while this letter sets out their in principle agreement and is intended to form the basis for the grant of Transmission Rights to Seven for the period from its execution to 30 June 2019 (for the Australian Events) and 31 December 2019 (for the Davis Cup Events), it is expressly intended to be non-binding and will have no legal effect even once signed by both parties. TA and Seven agree to enter into good faith negotiations immediately after execution of this letter to agree on a long-form agreement by March 31 2013. The grant of rights contemplated in this letter will only become effective if and once that long-form agreement is agreed and signed.

362 On the same day Mr Mitchell forwarded to Mr McWilliam Mr Wood's first email of 1 December 2012 and Mr Mitchell's response. He didn't forward Mr Wood's second email of 1 December 2012 which had been sent to Mr Mitchell at 2.57 pm.

363 On 2 December 2012, Mr McWilliam reported to Seven:

> Got this from harold yesterday. Tennis Australia board meeting is tomorrow. Steve wood tried to stick in a Clause saying our extension is "non binding" -- as if then there's anything to gain in signing it. Harold says he has stamped on it so let's keep our fingers crossed.
>
> We have already had to jump on steve for going back on the handshake reached in harold's flat a few weeks back.
>
> The plain fact is the ceo of tennis australia does not want to do this deal. Harold had to also jump on him appointing IMG to sell the rights - which would be a wasted commission (rumour is v8s is paying Caliburn $3.8 mill minimum). It seems to be a battle against him (the ceo) and harold. We have to hope harold can carry the board. We should know tomorrow

364 On 3 December 2012 at 9:11 am, Mr McWilliam called Mr Mitchell and they had a thirteen and a half minute conversation, presumably about the domestic broadcast rights. This was before TA's board meeting which I will come to in a moment.

365 Let me deal with some other matters at this point.

366 In late November and early December 2012, Mr Wood spoke with Mr Mitchell a number of times on the telephone. During these telephone calls Mr Mitchell said to Mr Wood repeatedly words to the effect, "Tell me again you're going to get the deal done with Seven by the new year".

367 Let me pause and say something about Nine at this point.

368 In or around late 2012, Mr Wood and Mr Ayles met with Mr Gyngell, the then-CEO of Nine. During that meeting, Mr Gyngell said words to the effect: "Despite the fact we already have the cricket rights, Nine is very interested in the tennis rights". Mr Ayles does not recall Mr Gyngell mentioning any numbers in that meeting.

369 Shortly after the meeting with Mr Gyngell, Mr Browne, Nine's managing director had a telephone call in his car with Mr Wood about the domestic broadcast rights. There was conflicting evidence given of this conversation which I will return to later.

370 Let me deal with another matter.

371 Mr Tanner under questioning by Mr Young QC gave evidence of a conversation that he had with Mr Wood before the 3 December 2012 board meeting:

> Now, in the same conversation, you refer to a number of matters. Can I direct you to paragraphs 22 and – paragraph 22 for the moment. That's a conversation with Mr Wood in which he told you of Seven's then offer. Do you see that?---I do.
>
> Did you tell Mr Wood what your view was of that offer?---I did.
>
> Yes. And what was it?---I thought it was insufficient.
>
> Yes. Did you explain to Mr Wood why you thought it was insufficient?---Steve and I had been having a dialogue on what we thought the value of these rights were and what the uplift was that we were hoping to get.
>
> Yes?---And it was nowhere near that.
>
> Yes. And you had gauged the uplift by reference to what you had seen was being achieved by other sports in respect of their television rights?---The uplift the AFL had achieved, the uplift the NRL had achieved and then advice that we had or that Steve had gotten from Gemba to do a valuation on those rights, that he had spoken to me about.
>
> Yes. Now, did you specifically discuss the percentage uplifts that other sports had achieved with Mr Wood?---Yes. Absolutely.
>
> And, in relation to the valuation you got from Gemba, what was the discussion between you and Mr Wood concerning that?---That the Gemba had, we had spoken about it earlier in the year, I think early in 2012. He had commissioned a valuation of our TV rights and they had valued at about $40 million at the time we were paying about $20 million. So it was close to 100 per cent uplift which was sort of the upper end of, you know, if you looked at the market comparables was being achieved.
>
> Yes. Yes. All right. Now, was those elements, Gemba's valuation of, I think you said around 40 – about 40 million, the uplifts achieved in percentage terms by other sports, was that part of your conversation with Mr Wood just before the December board meeting?---I believe it was, yeah.
>
> Now, in paragraph 25, during this conversation before the December 2012 board meeting, you refer to Mr Wood telling you that IMG had expressed interest in the domestic broadcast rights. Do you see that? Can you tell his Honour what you recall

> Mr Wood told you about the IMG expression of interest?---I remember Steve mentioning that he had had an approach from IMG. They were also interested in the domestic rights. They had the international rights at this point and so that was probably the substance of it.
>
> Yes. Did Mr Wood tell you that the IMG offer put forward a quite attractive figure?---Maybe, I'm not sure whether it was in this conversation but I – a figure in the back of my mind was $50 million.
>
> Yes?---And frankly I haven't been able to work out where that number came from except in a conversation with Steve. So as to whether it was this conversation or not, I don't know but I don't see that number anywhere and based on the document that I was shown by ASIC, there was a seven-year offer that IMG were putting on the table at this time.
>
> Yes?---And it was for $30 million a year, so it was 2010.
>
> 30 million plus the profit share of any amounts above $30 million?---Above that, yeah.
>
> So it was 30 million plus?---Yeah, who knows what that might have been, yeah.
>
> Now - - -?---Can you hear me okay?
>
> In this conversation with Mr Wood in December, did Mr Wood tell you that Channel 10 and Channel 9 had expressed some interest?---He did but it was sort of engine Channel 9 and Channel 10 are sort of sniffing around and they've got some interest as well.
>
> Yes?---It wasn't specific I don't – you know, I don't recall.
>
> Yes, and their interest was something that, to your mind, was what was to be expected?---Absolutely.

3 December 2012 board meeting

372 As I have already indicated, for TA's 3 December 2012 board meeting, Mr Wood decided not to include in the board pack Seven's November offer, the first IMG offer, the Gemba report or the Gemba summary. But Mr Wood had prepared clean versions of both the Seven and IMG offers and it was Mr Wood's intention to table them at the board meeting.

373 At the 3 December 2012 board meeting, which was at noon, Mr Healy, Mr Cooper, Mr Mitchell, Mr Holloway, Mr Fitzgerald, Dr Young, Mr Freeman and Mr Davies were present, as too were Mr Wood, Mr Roberts and Mr Tiley. Mr Tanner was an apology. Mr Ayles was not present.

374 At the board meeting, Mr Wood presented his oral CEO's report in which he provided the board with an update in relation to the domestic broadcast rights negotiation. Mr Wood's presentation included the matters that he discussed with Mr Healy on 22 November 2012. The agreed minutes note the following:

> The Chief Executive Officer updated the Board on recent domestic broadcast

> negotiations and reported that Network 7 had offered a 5-year deal on similar terms as the last agreement. He also advised that the Company had received an offer from IMG in relation to domestic and international broadcast rights in an increasing trend toward total media broadcast buy outs.
>
> The Chief Executive Officer reported that the proposed Network 7 extension would produce an 18% increase in rights fees on the previous agreement over five years. The President noted that an 18% increase over five years seemed small relative to the reported increases enjoyed by other major sports in their new broadcasting deals.
>
> In response to a query from Mr Davies as to Fox Sports broadcast of the Australian Open and whether it was worth having a separate agreement with a secondary broadcaster to secure more exposure for users of the internet and mobile phones, the Chief Executive Officer advised that the Network 7 deal would include simulcast via the internet. He also advised that currently, Optus pay Network 7 a rights fee to broadcast via mobile phones. He also advised that for the 2013 Australian Open, the AO website will have a free application that will link the Network 7 telecast feed to Optus.
>
> In response to a query from Dr Young as to whether IMG had any current involvement in broadcast rights, the Chief Executive Officer advised that IMG had an existing commission-based model for international rights but not domestic rights.
>
> Mr Mitchell reported that Tennis Australia had received a significant uplift in domestic rights fees in the previous renewal and he considered the current offer from Network 7 as reasonable in the current economic environment. He advised that, in his view, the IMG offer contained a number of shortcomings and should not be considered. He further advised that both he and the Chief Executive Officer would continue to work on the domestic rights agreement and would come back to the Board at a later date.
>
> In response to a query from Mr Davies as to whether TA had ambition to eventually produce the broadcast feed in-house, the Chief Executive Officer replied that it was a strategic possibility for the future.
>
> In response to a query from Mr Freeman as to why the existing (2009-2014) Network 7 agreement had yet to be signed, the Chief Executive Officer reported that the Company had experienced a number of challenges which had yet to be fully resolved with the Network. He advised that the proposed renewal agreement with Network 7 would include a deadline for the completion of a binding long-form agreement.
>
> The President reiterated that the domestic broadcast rights agreement post 2014 would come back to the Board for consideration and final approval.

375 But of course it is to be noted that these minutes were not complete. Moreover, some figures were not noted due to confidentiality concerns; sometimes minutes were circulated to TA's member associations and accordingly some discretion had to be exercised as to their content.

376 There were also raw minutes prepared that it is accepted were incomplete. Moreover, in some respects the minute taker may not have appreciated what was being said. It is not productive to recite the cross-examination on this topic.

377 Let me synthesise some themes concerning what was discussed at the board meeting.

378 Mr Wood started by raising Seven's November offer. He described how much was being offered by Seven under that offer and summed it up by saying that over the term of the agreement it produced an 18% increase in rights fees over five years.

379 The percentage increases in rights fees achieved in other sports were mentioned, with Mr Healy noting that the 18% uplift offered by Seven seemed small.

380 Mr Wood specifically referred to TA having obtained a valuation from Gemba valuing the rights at up to $40 million.

381 Mr Wood informed the board that the first IMG offer had been received and disclosed the figures being offered, the fact it was a seven-year proposal and that it was conditional on TA accepting the linked offer for the international rights. There was then a discussion about the undesirability of proceeding with an agent such as IMG and that it would be better to have a direct relationship with the domestic broadcaster.

382 Mr Mitchell expressed strong criticism of the first IMG offer. He said words to the following effect about the first IMG offer:

> The IMG offer is unrealistic and TA should be dealing with Seven.
>
> IMG's offer has a number of shortcomings.
>
> I don't like IMG as they are a commission-based broker who do not add value to TA's business.
>
> I don't trust IMG.
>
> The IMG offer is too conditional.
>
> IMG has been naughty.

383 Mr Wood did not agree with what Mr Mitchell said about IMG. Mr Wood also gave evidence that because of what Mr Mitchell said about the first IMG offer, Mr Wood did not table it. I doubt that evidence. But in any event the evidence does not go anywhere for reasons that will become apparent later.

384 Mr Wood said that neither Seven November's offer nor the first IMG offer gave Tennis Australia control of the host broadcast.

385 Mr Mitchell said that Seven's November offer was reasonable in the current economic environment. No other director who spoke at the board meeting agreed with Mr Mitchell's view about the Seven offer.

386 In terms of what Mr Mitchell said, Mr Roberts was asked by Dr Collins QC:

Yes. And you were responsible for finalising the preparation of these minutes?---I was.

Can I ask you, on page 1128, to have a look, please, at the fifth paragraph?---Yes.

It begins with the words:

> *Mr Mitchell reported –*

Do you see that?---Yes.

Continuing:

> *Mr Mitchell reported that Tennis Australia had received a significant uplift in domestic rights fees in the previous renewal.*

Do you have a recollection of Mr Mitchell using those words or words to that effect?---Words to that effect, yes.

And then:

> *And he considered the current offer from Network Seven as reasonable in the current economic environment.*

And do you have a recollection of him using those words?---Vague recollection. I'm not sure exactly what words were used, but that was the tenor of the – of what was said.

The tenor of it was the current offer was reasonable in the current economic environment?---Yes.

Did Mr Mitchell explain what he meant by current economic climate?---Not to my knowledge. Not that I can recall.

Then there's a reference to IMG in the next sentence. Then do you see the final sentence in that paragraph:

> *He further advised that both he and the chief executive officer would continue to work on the domestic rights agreement and would come back to the board at a later date.*

?---Yes.

You recollect Mr Mitchell using those words?---Yes.

And is that the way in which the debate in respect of the domestic rights came to an end on that day, that is, with an agreement of the board that Mr Mitchell and Mr Wood would continue to work on the agreement and come back to the board at a later date?---That's correct.

Thank you. Now, in your affidavit, Mr Roberts, could I ask you to have a look at paragraph 32?---32?

Yes. Three-two, at page 6?---Yes.

I just want to ask you about the second sentence. You see you say there:

> *I do not recall the precise words Mitchell used, but he said words to the effect that he quite liked Seven's November offer.*

> Do you have a recollection of Mr Mitchell using those words?---Not a recollection of his using those words – those particular words, no.
>
> Is your recollection that he used words that he considered the offer to be reasonable in the current economic circumstances?---That was the tenor of what was said. I can't remember exactly what was said, but I would take it that what was said in the minutes is closer to what was said than what I've said here in this affidavit.
>
> Thank you. Now, at the 3 December 2012 board meeting, did anyone move that the board accept the then current Channel 7 offer there and then?---No.
>
> Did Mr Mitchell say that the board should accept the then current Channel 7 offer there and then?---No.

387 During the board meeting, Mr Mitchell said words to the effect that "the most appropriate partner for TA was Seven". He said that he and Mr Wood would "wrap this up" and get back to the board. He said that the two of them would finalise the deal and come back to the board for approval.

388 At the meeting, Mr Wood also said words to the effect that Nine and Network Ten had expressed interest in the domestic broadcast rights. This interest was not discussed in detail. Mr Wood did not tell the board that he had met with Mr Warburton or Mr Marquard, that Mr Marquard had expressed "serious interest" or that figures of $40 to $50 million per annum had been mentioned by Network Ten and Nine.

389 Under cross-examination by Mr Young QC, Mr Freeman gave the following evidence:

> Now, this morning you said that the board had talked about the viability of Channel 10. Did that come up at the board meeting on 3 December?---I can't remember if it was actually expressed in that meeting. I know it was a matter that had been discussed somewhere. It was very firmly implanted in my mind that Channel 7 – Channel 10, I beg your pardon, had very significant financial difficulties and were a high-risk counterparty, given the five-year term.
>
> Yes?---But I can't recall - - -
>
> You can't recall?--- - - - exactly what was said.
>
> - - - which meeting it came up at?---I can't recall that.
>
> Now, yesterday you also said that counterparty issues had been addressed. And you instanced discussions the board had generally around IMG and to some lesser extent Channel 9 as competitors. Do you recall what was discussed about Channel 9 as a potential counterparty?---Look, I think the words may well have been Mr Mitchell's, that Seven was a natural partner for us for Tennis Australia. Nine had very much – I remember this comment. Channel 9 had the cricket.
>
> Yes?---And it would be a tough issue for Nine and Seven to have both.
>
> Both cricket and tennis?---Both cricket and – sorry – cricket and tennis.
>
> Yes. Now, are you able to separate, in your mind, whether those counterparty issues

> came up on 3 December or 20 May or at both board meetings?---I don't think they came – they were discussed at the 20 May board meeting, so it must have been earlier.
>
> Yes. And the other board meeting where you recall some substantial discussion about broadcast rights issues was the board meeting on 3 December; correct?---Yes.
>
> That's because you didn't attend the board meeting on 4 March?---I was absent on 4 March. Correct.

390 Mr Fitzgerald gave the following written evidence concerning the 3 December 2012 board meeting:

> While I would have been interested to see what IMG or Seven were proposing, I would not have been at the forefront of making the final decision. The quality of the broadcast and how the game was projected to the Australian public was the most important thing for me.
>
> Without more information, I needed to defer to someone with knowledge about the broadcasting industry, and the only person with that knowledge on the board was, I thought, Harold Mitchell. He knew the broadcasting industry better than any other person on the board. He had his own media business. If he had said something about this, I would have listened.

391 Further, he also said:

> I understood that Ten Network Holdings Ltd had expressed an interest in acquiring the domestic broadcast rights as it was discussed during board meetings. I do not recall precisely when I heard that Network Ten was interested in acquiring the domestic broadcast rights. I recall that at the time there were question marks about how Network Ten would deliver the product. Seven and Nine Entertainment Holdings Co Ltd were the best broadcasters of sport, though if other board members had said that Network Ten could deliver, I would not have had enough information to deny Network Ten the opportunity. I cannot recall if there was an amount of money which I was told that either Network Ten or Nine Entertainment was willing to pay for the domestic broadcast rights.
>
> I cannot recall hearing about any specific offer for the domestic broadcast rights being made by Network Ten. However, as a board member, I was interested in obtaining more detail about Network Ten's interest so that I could evaluate that interest. I recall that, at the time, there was a question about Network Ten's financial state and its ability to bid for the domestic broadcast rights.
>
> I cannot recall being told by Steve Healy, TA's chairman and president, at any board meeting or otherwise, that he had had contact with any executive from Network Ten or that Network Ten had expressed to him any interest in acquiring the domestic broadcast rights.
>
> I cannot recall being told by Mitchell or anyone else, at any board meeting or otherwise, that Seven was concerned that Network Ten might outbid it for the domestic broadcast rights.

392 Moreover, he said:

> I do not recall being told, at any board meeting or otherwise, that Nine Entertainment had expressed any interest in acquiring the domestic broadcast rights. However, I assumed that every free-to-air television network would be interested in the rights. I

> wanted to know how interested each party was in acquiring the rights, and I wanted to know about any offer that had been made by any party for the rights.

393 Clearly, no decision was being sought or made other than that neither Seven's November offer nor the first IMG offer were to be accepted, and negotiations with Seven were to continue.

Post-3 December 2012 board meeting

394 Immediately after the 3 December 2012 board meeting, Mr Mitchell took Mr Wood aside in Mr Wood's office and told him to make sure that he signed up Seven's November offer by the Christmas break. Mr Wood told Mr Mitchell that he was of the view that IMG held their international broadcast rights, they had done very well in increasing those in the previous four years, so they should seriously consider their offer. Mr Mitchell said words to the effect, "Just get the deal done with Seven, we're not doing IMG".

395 Mr Tanner was not at the 3 December board meeting. Mr Wood telephoned him following the meeting. Mr Wood said to him words to the effect:

> I wish you had been there.

396 After the 3 December 2012 board meeting, Mr Wood met with Mr Ayles, Mr Roberts, Mr Pearce and Mr Perrins to discuss the events at the board meeting and to decide what the next steps should be. Mr Wood told the meeting that he was concerned that not all of the relevant information had been provided to the TA board in respect of the domestic broadcast rights. He also said Mr Mitchell was pushing TA to conclude the deal with Seven. But he said that he did not think it was in TA's best interests to do so. He recalled that Mr Ayles, in particular, said that he was concerned with the way in which the board was dealing with the broadcast rights.

397 Shortly after the meeting, Mr Wood said to Mr Ayles words to the effect:

> Mitchell discredited IMG and said that IMG couldn't be trusted. He said that anyone who was serious about IMG's offer must be on the take.
>
> Mitchell wants to do a deal with Seven now.

398 After this discussion with Mr Wood, Mr Ayles was concerned that Mr Mitchell was pushing to do a deal with Seven before the ENP had started. Mr Ayles thought that this would result in an inferior outcome for TA. He was concerned because it seemed to him that Mr Mitchell did not want TA to consider any offers from other parties, especially Network Ten and IMG. He formed this view based on what he saw at the meetings he attended between Mr Mitchell, Mr Wood and Seven, as well as from what he heard from Mr Wood about Mr Mitchell's comments at the 3 December 2012 board meeting.

399 On 4 December 2012, Mr Guinness wrote to Mr Ayles asking for an update on the first IMG offer. Mr Ayles called Mr Guinness that day and left a message for him. Mr Ayles then replied to him and wrote, "Not good – left message for you. Harold raised it and basically damned the entire IMG offer".

400 On or around 7 December 2012, Mr Ayles said words to the following effect to Mr Wood: "The Gemba report and IMG offer need to be forwarded to the TA board".

401 On 7 December 2012, Mr Ayles sent an email to Mr Wood and the EMT which contained media articles that related to the cricket rights and stated that "Ten has publicly declared it's [sic] keen interest in the rights". He sent the email to inform the EMT that he thought the process Cricket Australia was undertaking had merit. Based on his experience and the material he had read, he believed TA and Cricket Australia had several parallels. They both had a significant sports broadcast rights asset and had the same opportunities and the same potential buyers. Both TA and Cricket Australia were considering awarding rights to traditional FTA broadcasters, but in addition their rights also had appeal for mobile and other technology platforms. Mr Ayles thought TA should be doing what Cricket Australia was doing by taking the rights to the open market. In that email he noted, inter-alia, that Network Ten had expressed its interest in the cricket rights and that Cricket Australia was planning on letting their exclusive negotiation period lapse.

402 In the same email Mr Ayles wrote, inter-alia, "Steve Assume you have sent the IMG/Gemba info to the Board members? This would be great to follow up with". He wrote this to put pressure on Mr Wood in order that the first IMG offer and the Gemba report or summary would be provided to the board. It would seem that what was being publicised concerning the cricket rights may partly have provoked this.

403 On 10 December 2012, Mr Wood forwarded Mr Ayles' 7 December 2012 email to Mr Perrins. Mr Wood wanted Mr Perrins to consider whether the information in the newspaper article concerning the cricket rights had any impact on TA management's obligations to inform its board about broadcast rights.

404 On the same day Mr Wood sent an email to Mr Healy with links to the two articles in The Age and the Herald Sun that Mr Ayles had emailed previously. In that email he wrote "I will call you later today to discuss the status of the broadcast deal. A couple of interesting articles in

the Age and Herald Sun re the cricket rights". Mr Wood did not recall whether he did then discuss the articles with Mr Healy.

405 Further, on that day Mr Ayles forwarded his 7 December 2012 email to Mr Davies. In his email to Mr Davies he wrote "[m]ore compelling evidence as to why we should go to market with our domestic rights". Mr Ayles sent the email because he was concerned that based on his discussion with Mr Davies, the TA board was not being provided with all of the information that Mr Ayles considered was relevant to its deliberations.

406 Further, on that day Mr Wood asked Mr George, TA's media rights manager, to prepare an analysis of Seven's November offer and the first IMG offer.

407 Further, around this time Mr Ayles asked Mr George whether he could do an analysis of Seven's November offer and the first IMG offer. He wanted to compare those offers to enable TA to properly consider the first IMG offer, to the extent it related to the domestic broadcast rights.

408 On 10 December 2012, Mr George emailed Mr Ayles with an analysis he had conducted of Seven's November offer and the first IMG offer as they related to the domestic broadcast rights (TA rights analysis). His email asked Mr Ayles to review the TA rights analysis. Mr Ayles agreed with Mr George's analysis.

409 On 11 December 2012, Mr George sent an email attaching the TA rights analysis to Mr Wood and copied it to Mr Roberts, Mr Perrins, Mr Browne and Mr Ayles. Mr George concluded in this email that "TA would be significantly better off with the IMG proposal than proceeding with the Ch 7 deal as it is currently set out". Mr Ayles recalls that he agreed with Mr George's conclusion in the email given that the minimum annual guarantee in the first IMG offer was greater than the annual rights fees in Seven's November offer.

410 But Mr Wood did not agree with Mr George's conclusion because it took no account of the possibility of TA getting host production or of the value of the long relationship with Seven.

411 Mr Wood was of the view that Seven's November offer and the first IMG offer were starting points only and would each evolve.

412 Now at around this time and due to Mr Wood's concern about whether the TA board had been given all of the relevant information, he asked Mr Perrins to seek legal advice from TA's

external solicitors. He asked him to help him to get a view on how the process should operate and how TA's management should discharge their duties to TA.

413 Mr Wood received and read the advice from TA's external solicitors on 10 December 2012. After receiving the advice, Mr Wood asked Mr Pearce to draft a covering email that Mr Wood could send to Mr Healy. Mr Wood asked Mr Pearce to write this email as he was the head of marketing and communication. Mr Wood wanted him to write a clear and concise note for Mr Healy to tell him what needed to be done.

414 On 12 December 2012 at 12.48 pm, Mr Pearce sent Mr Wood the draft email, copying in Mr Roberts. The draft email to be sent by Mr Wood to Mr Healy read as follows:

> Hi Steve,
>
> Hope all is well.
>
> Following on from our chat on Monday, I wanted to update you on the latest developments in terms of the Media Rights discussions.
>
> I think we are both pretty much in agreement that the Board needs to be fully across all the relevant information on such an important deal.
>
> … [Redacted by TA]
>
> With that in mind, I think it is time to share the detail of the IMG Offer with all Board members and provide a detailed comparison of the two offers on the table.
>
> All Board members will need to sign a Non-Disclosure Agreement before viewing the offer. I think it is probably appropriate (if you are okay with it) that you write to them and send them the NDA explaining what it is for.
>
> When you get a chance, I'd also like to talk you through how I see it panning it from here but basically I think it's probably best that we do nothing more than sit on our hands at this point, politely decline the current Channel Seven offer and keep working on a longer term negotiation strategy.
>
> While Harold's views are well known and should be heard, there is also a lot of other evidence that needs to be considered in any deliberation. Ultimately, the best course of action is to have all decision-makers fully appraised of all of the evidence.
>
> Let's chat soon
>
> Regards
>
> Steve

415 Later that day, Mr Wood decided not to send Mr Pearce's draft email and instead to send his own cover email attaching the advice. At 4.03 pm, he sent an email to Mr Healy which attached the advice. In that email, Mr Wood wrote, inter-alia, the following:

> Hi Steve,

> You mentioned that three Board members had come to you with concerns regarding the Broadcast discussion at the Board meeting.
>
> … [Redacted by TA]
>
> I think we will need to disclose the IMG Offer to all Board members and provide some analysis of the two offers on the table. This is not intended to pre judge the issue. The Seven offer may well be the correct one to accept however the IMG offer gives TA at least $30m more and expires at the end of December.
>
> Regards
>
> Steve

416 Mr Wood wrote this email to Mr Healy because he wanted to point out to the board the weaknesses in Seven's November offer that Mr Mitchell had supported at the 3 December 2012 board meeting. Now as has been correctly pointed out by the defendants, it might be said that Mr Wood's concerns were misplaced.

417 First, as Mr Wood knew, the first IMG offer had been discussed at the 3 December 2012 board meeting.

418 Second, as Mr Wood knew, at the 3 December 2012 board meeting the board had expressed negative views about the first IMG offer, principally on the grounds that it did not want to deal through an agent in relation to the domestic broadcast rights, and it objected to the condition linking the domestic offer to an extension of IMG's international rights on the same terms and conditions aside from price that presently applied.

419 Third, in fact the first IMG offer had been solicited by Mr Wood for leverage with Seven and also for the purpose of signifying that there was a value differential between what IMG was saying the value was and Seven's November offer. I will discuss this aspect later in more detail in a separate section.

420 Fourth, on no view was the first IMG offer a viable offer that TA would contemplate accepting for the reasons identified by the board, and also because its 31 December 2012 expiry date and other deficiencies meant that it was clearly incapable of acceptance. Again, I will elaborate in more detail on this later.

421 Now Mr Healy had a discussion with Mr Wood about the latter's 12 December 2012 email. Mr Healy gave the following evidence:

> On 12 December 2012, I received an email from Wood. … I understood Wood's email to be referring to the fact that the IMG letter of 16 November 2012 containing the first IMG Offer had not been tabled at the Board, and to be proposing it should now go to

> the Board. As far as I was concerned the substance of the first IMG Offer had been disclosed at the 3 December 2012 Board meeting, there had been extensive discussion about it, the Board consensus was that the first IMG Offer was unsatisfactory, and the Board did not want to deal through an agent.
>
> I had a discussion with Wood about his email in which I said words to the effect of "it's fine to send IMG's letter of offer to the Board, but to give it perspective it needs a covering paper comparing it to the Seven offer and pointing out the deficiencies of each offer". Wood said that that he would prepare a covering paper for the Board. I considered, and I recall I told Wood, that simply providing the offers to the Board without a cover paper explaining the deficiencies of the first IMG Offer that had been discussed at the 3 December 2012 Board meeting would lead to confusion. I also expected that the covering letter would refer to the fact that the first IMG Offer expired at the end of December, which was a matter that Wood had mentioned in his 12 December 2012 email to me and we had discussed on 22 November 2012.

422 Following sending the 12 December email to Mr Healy, Mr Wood asked Mr Ayles to prepare a paper setting out a framework for TA to negotiate the broadcast rights. This became what has been referred to as the Ayles paper. Multiple versions of the Ayles paper exist.

423 On 12 December 2012, Mr Guinness emailed Mr Ayles asking, "Any update on your domestic situation?" Mr Ayles replied to him on the same day and said "Plenty going on – Harold dismissed the IMG offer and told the board that he and SW would get the deal done with Seven. I'll update you when we next speak".

424 Let me now go to the genesis and evolution of the Ayles paper.

425 In early to mid-December 2012, Mr Ayles attended a meeting of the EMT. At that meeting, the EMT decided to prepare a paper for the TA board regarding the domestic broadcast rights. Mr Ayles said to the other members of the EMT that those members of the team who were supportive of putting the rights to market should discuss the matter with any directors with whom they had a relationship, being Mr Pearce with Mr Davies, Mr Wood with Mr Tanner, and Mr Ayles with Mr Freeman. Mr Ayles' intention was to do his best to ensure that the board members had all of the information required in order to make the best decision in respect of the award of the domestic broadcast rights.

426 On 12 December 2012, at 6:26pm, Mr Ayles received an email from Mr Perrins with the subject line "Board Paper Broadcast". He does not recall what Mr Perrins said in that email, but he responded at 9:49pm the same day in the following terms:

> We need to have an executive meeting before anything further is progressed on this. We do NOT want a Board meeting that compares the two offers and possibly recommends us to progress negotiations with Seven or IMG. The focus is NOT about the relative merits of each offer. Our aim is to convince the Board that there is sufficient competitive tension to enable us to drive a higher rights fee than those currently being

> offered and the ability to deliver the event the way we want ie host broadcast and digital exploitation. If we are to prepare a submission to the Board this should be the focus and the offers from Seven and IMG simply support our stance. We should also include the advice from Gemba, IMG and Colin Smith. Our recommendation should be that given all the available intelligence that we reject the current offers, honour the Seven ENP and then go to market. This report should come from the CEO.

427 Mr George and Mr Ayles prepared the Ayles paper for the TA board regarding the domestic broadcast rights. The purpose of the Ayles paper was to set out for the TA board the key terms of the Seven agreement, to identify what TA was seeking to get out of a future agreement and to provide an analysis of the market conditions, including a review of live sports broadcast transactions both in Australia and globally at that time.

428 Mr Ayles prepared the Ayles paper because he was concerned that TA could do a deal with Seven without going to market, which he believed would result in a commercially inferior outcome for TA. By this time he was of the view that in order to obtain the best possible deal, TA should go to market with the domestic broadcast rights, by which he meant that TA should put the domestic broadcast rights out to competitive tender after the expiry of the exclusive negotiation period with Seven. Mr Ayles based his views on his discussions with Seven, Nine, Network Ten and IMG, described earlier, the Gemba report, the IMG opinion, the first IMG offer and Seven's successive offers and the fact that Cricket Australia was putting its broadcast rights out to the open market. He believed that there was sufficient interest in the domestic broadcast rights to create competitive tension if the domestic broadcast rights were put out to the open market. He believed that if TA did so, it could obtain rights fees of more than $40 million per year for the domestic broadcast rights.

429 On or around 18 December 2012, Mr Ayles provided Mr Wood with his draft paper. In the Ayles paper, Mr Ayles analysed Seven's November offer and the first IMG offer. The paper considered what TA was seeking to achieve out of a future agreement, provided an analysis of the market conditions and reviewed recent live sports transactions in Australia and internationally. Mr Ayles concluded that neither offer adequately addressed TA's minimum requirements. He recommended that TA should reject both offers and commence exclusive negotiations with Seven from 1 April 2013. He also recommended that if no satisfactory deal could be reached during the ENP, TA should start a tender process.

430 Mr Wood agreed with the conclusion in the Ayles paper that both offers should be rejected and that TA should hold off concluding a deal with Seven before the commencement of the ENP. Mr Wood also agreed that, unless a satisfactory deal could be done with Seven during that

period, the domestic broadcast rights should go out to market. I will return to other versions of the Ayles paper later and also the debate before me concerning the recommendations.

431 Let me now go back a step and deal with some other events around this time.

432 On 10 and 11 December 2012, Mr McWilliam and Mr Mitchell had five telephone calls, one of which was just under six minutes duration and another of which was six and a half minutes.

433 On 13 and 14 December 2012, various emails were exchanged between Mr McWilliam and Mr Mitchell concerning dealing with Mr Wood. There was also a short telephone conversation between them on 14 December 2012 at 9.12 am.

434 On Thursday 13 December 2012 at 9.59 am, Mr McWilliam emailed Mr Mitchell and asked whether it would be possible for Mr Martin and him to meet Mr Mitchell in Melbourne on Sunday 16 December at Mr Mitchell's apartment for brunch.

435 At 10.49 am that same day, Mr Mitchell's PA emailed and said:

> Hi Bruce
>
> This should be fine.
>
> Harold lands in Melbourne on Saturday morning from London.
>
> May I suggest going out for a bite to eat at the European which is next door to Harold's apartment?

436 Mr McWilliam responded: "Brilliant, + thanks for coming back – what time do you think would work for him? Can I get the apartment address again too?".

437 Then Mr Mitchell responded directly:

> Presume it is Tennis!
>
> Are you planning to have Steve Wood also!
>
> Would save time

438 Mr McWilliam responded: "And happy with that of course".

439 At 12.19 pm, Mr McWilliam sent an email to Mr Mitchell, after Mr Mitchell's PA had suggested meeting after 10.00 am on Sunday:

> Thanks Harold that s great 10 is fine... just wanted to run thru a few things we could do for Steve if it assists, specifically am thinking
>
> 1. Provided not before 2017 if we can't nut out a production deal TA can terminate and seek other offers provided we get a last (reason is we

are facilitating it happening).... Harold v8s were up here yesterday full of woe on what they are losing on their production and seeking to get out of it. Steve's position isn't rational on this that we would just issue a cheque for the current cost of our coverage seeing as a lot of that is what we call "unilaterals" i.e. stuff done for ourselves. We thought our provision was fair but that is a fall back

2. Don't understand his issues for long form as we have given TA one that meets the current contract

3. Bear in mind we gave up archive etc to try and get this over the line, they are benefits Steve gets

4. Lastly he can't force us to do deals with fox sports and if we don't want to say he takes the rights back for $1 as that isn't sensible!! Hopefully that bit was a try on, he knows from experience how little fox will pay – he can't get the premium form us for exclusivity and then reserve the right to hand them over to a competitor for $1!!

5. Carve outs for various forms of HD etc don't work

6. We thought we had summed up the points and done a hand shake in your flat as you know

Hope you landed in good shape best Bruce

440 Now stopping here. None of this accords with ASIC's conspiracy theory that Mr Mitchell was out to exclude Mr Wood.

441 Later that same day at 7.39 pm, Mr McWilliam sent an email to Mr Mitchell:

Harold

Is it useful to send steve (ahead of sunday) a few points we could accept, or confusing?

I guess we don't like him saying we have to sell to fox and online and forcing us with taking the rights away if we don't. When we r paying a premium amount

Secondly he missed the point on production. For a start, if they build permanent facility. then we don't need to build our own, and we should pay for that. At fair rate card. But shouldn't cost us more than what it costs to do it ourselves. Second if ever they produce own production. Host feed has to be reasonable cost. Steve is confusing the total cost of our production with what we'd get from TA if they were host broadcaster. It is very hard to be specific in advance but he cant say it is unilateral $9 mill when we probably still have to spend a third of that anyway given nature of our coverage commentators etc.

What do you think – send him something in advance or hold for sunday?

And them wanting to cover player interviews etc will just take away from our coverage, impose different priorities etc

442 Mr Mitchell responded:

Just on my way to Heathrow!
Think we should hold it until Sunday!
He talks to the people on his staff

> And gets pushed into a corner !
> To much thinking time!

443 On 15 December 2012, Mr McWilliam told Mr Voelte, a director of Seven, that he was flying to Melbourne to meet Mr Mitchell and Mr Wood.

444 He also sent the following email to Mr Voelte, copied to Mr Worner:

> Yes thanks. Nice of harold to do it.
>
> Elephant in the room is of course the ceo is trying build huge infrastructure + take over host feed production + facilities when govt redevelop Melbourne park. Building up own organization – glory seeker/megalomaniac! Of course it will be a disaster given such a short event, all done with contractors, can you imagine!! We have tried to show them how it is a nightmare for the v8s – where now they r trying to hit us with "cost plus" can u imagine how awful on something you don't control. Anyway we try to preserve ability to negotiate in good faith if + when tennis Australia wants to phase it is, that's all we can do
>
> Second elephant in the room is them saying how come NRL + AFL get massive rises + we don't?
>
> Otherwise the guy (head of tennis australia) is trying to retain online rights and now wants to be able to sub-licence to fox sports "so more tennis is shown on TV" which of course cuts completely across our exclusivity for which we pay such a premium. We have undertaken to do more streaming and on mobiles whether ourselves or thru yahoo7 – of course digital rights are more valuable as time goes on + particularly if we can do a deal with telstra this is the type of currency we need
>
> Anyhow we have to keep plugging on

445 On 16 December 2012, Mr Mitchell and Mr McWilliam met. Mr Wood was not present. Mr McWilliam reported to Mr Voelte at Seven by email at 2:26 pm:

> Steve wood wasn't at the meeting, just harold, who insists it is all going to plan. I told him how we could best meet Steve wood's concerns, and what we obviously couldn't do. So I will send back a mark up of the extension letter and covering email and he will handle from there.
>
> Fingers crossed as they say.

446 On the same day at 4.35 pm, Mr McWilliam also sent an email to Mr Mitchell with an attachment:

> Dear Harold
>
> Thanks for today. As attached, we have marked up another extension agreement and have tried to take on Steve's points where we can.
>
> The changes are as marked (however note some mark ups just reproduce the mark up from our previous one, seeing Steve did not use our latest version, we wanted to try and show what had changed in totality):--
>
> As we went through briefly today, the main points are:

1. We have accepted the Kooyong condition. TA should just use its best commercial endeavours to secure these rights.

2. We have kept the ratings bonus (increased) as is. Steve wanted to move $750K of the million into base, however, as you know this is an important agenda for us in making sure everyone is on the same page to "win".

3. We included Steve's reference to the "excluded" rights - please note we didn't exclude 3G and 4G or gambling as this totally undermines exclusivity.

4. On "archive" we have largely done what Steve wants including referring to a list of competitors plus referred expressly to mobiles tablets + social media.

5. Re online streaming, we just can't carve this out as Steve had written it (enabling the rights to be taken back) it undermines exclusivity however we have committed to the streaming.

6. On Melbourne Park redevelopment we included the descriptive wording. Where we use facilities provided, which we undertake to, we just want to build in the protection of it not costing us more.

7. Re host feed, we will co-operate of course, even though we don't think it works for a 2 week event. We have tried to explain how Steve's request for a $9 million payment doesn't work as Seven still has to do its unilateral domestic coverage, pay commentators etc. Our domestic coverage costs would also increase if we were not the host. We would happily pay for stuff we need (+ don't have to pay for as a result of it being provided to us). But again, given we provide the signal to TA we think ultimately that's more efficient as this is a 2 week event essentially and outsourcing is ultimately cheaper. And as always we would negotiate in good faith. If TA is concerned about corporate sponsors and venue signage, we are happy to work with them on this to better service the corporate clients - and have offered this to their team on several occasions.

8. Lastly, re Fox Sports: we can't be forced to give up rights, Again, we will negotiate for more replays in good faith. But we pay a premium for exclusivity and this has to be understood, so again the rights can't be taken back for$1!

9. The last match point is as agreed in Melbourne (where the $5 million is refunded if TA wants to not grant the right) and the extension has to be binding. We have provided a long form draft, but this can't and doesn't need to hold us up. We have existed without a consolidated long-form since 2007. It's pretty straight forward, the existing long-form just gets read in conjunction with this short-form draft. This is very common with most deals.

Once again thanks for your help on this and I think it is looking good.

447 On 18 December 2012, Mr Wood met with Mr Healy and Mr Pearce in TA's office in Melbourne to discuss Seven's November offer. Mr Pearce and Mr Wood said to Mr Healy words to the effect that Seven was warehousing the digital rights and that they had trapped them by retaining the host broadcasting responsibility. Mr Wood said to Mr Healy that this was why it was so important for TA to have the host production responsibilities in the new deal. Mr Wood asked Mr Pearce to attend the meeting to help him tell Mr Healy why TA needed to conduct the host broadcast.

448 Let me now return to the Ayles paper.

449 On 19 December 2012 at 4.21 pm, Mr Wood sent an email to Mr Healy. The email attached a copy of the Ayles paper with some minor changes made by Mr Wood. Mr Wood asked Mr Healy to contact him once he had read the report. Mr Wood recalls having a conversation with him around this time in which Mr Wood said to him words to the effect that he thought he could get a better outcome from Seven in the ENP.

450 The version of the Ayles paper received by Mr Healy went beyond a comparison of Seven's November offer and the first IMG offer. The version of the Ayles paper received by Mr Healy did not contain any attachments.

451 On 19 December 2012 at 9.27 pm, Mr Wood sent an email to Mr Perrins and Mr Ayles about the Ayles paper, copying in Mr Roberts, Mr Browne, Mr Pearce and Mr Tiley. In this email he wrote:

> FYI
>
> Just to let you know the latest I have made a few changes to the latest paper and have now sent the SW version paper as a draft to SH this afternoon.
>
> Thanks [sic] you for your work on producing this paper at short notice

452 Mr Ayles made further changes to the draft of the Ayles paper he had sent to Mr Wood, but did not see the version of the paper which Mr Wood had sent to Mr Healy.

453 What should also be noted at this point and has been stressed by Mr Young QC for Mr Healy is that the Ayles paper, being the version prepared by Mr Ayles on 18 December 2012, was never provided to Mr Healy. And ASIC's allegation regarding Mr Healy's receipt of the Ayles paper is confined to the version of 19 December 2012 that Mr Healy had in fact seen which had been received from Mr Wood.

454 On 20 December 2012 at 2.38 pm, Mr Ayles emailed the Ayles paper, together with a number of other attachments, to the EMT with the subject line "Final domestic broadcast report with attachments". The attachments to the email were:

- the final Ayles paper;
- a Global Media & Sports presentation, which was a powerpoint presentation titled "Media Rights and Insights for Tennis" prepared by Global Media & Sports in July 2012 on media rights, the digital revolution and how they apply to TA (the Global Media and Sports Presentation);

- Seven's November offer;
- the first IMG offer;
- the Gemba summary; and
- the letter from Mr Guinness dated 31 October 2012, entitled "TA Domestic Broadcast Renewal", analysing the offer made by Seven.

455 Again, this version of the Ayles paper with the attachments was also never provided to Mr Healy.

456 On 20 December 2012, Mr Guinness sent an email to Mr Wood asking for an update in respect of the first IMG offer. On 21 December 2012, Mr Wood sent an email to Mr Guinness explaining, inter-alia, that the board was unable to properly consider the various broadcast deals on offer to TA. In that email Mr Wood also wrote, "I have asked Steve Ayles to work with you to reshape a [sic] some of the elements of the current IMG offer so that it can genuinely be put in the best position in front of the TA Board".

457 On 22 December 2012, Mr Wood forwarded these emails to Mr Ayles. Mr Wood asked Mr Ayles to speak with Mr Guinness for the purpose of getting Mr Guinness to unlink the domestic and international offers and to provide a separate offer for the domestic rights and international rights so that the domestic offer could more easily be compared against Seven's November offer.

458 On or about 24 December 2012, Mr Healy by telephone provided Mr Wood with comments on, and some changes to, the version of the Ayles paper which Mr Wood had sent to him. During that conversation, Mr Healy said to Mr Wood that the Ayles paper did not take into account what had been discussed at the 3 December 2012 board meeting, and as such appeared as if it was prepared before that board meeting. Mr Healy said that the paper needed to address the deficiencies with the offers which had been discussed at the 3 December 2012 board meeting.

459 Mr Healy also queried the recommendation in the paper as it appeared to cut across TA's ENP obligations towards Seven. I will elaborate on the debate concerning Mr Ayles' recommendation later.

460 It appears that Mr Wood noted Mr Healy's comments by hand on Mr Wood's version of the Ayles paper. The document constituting Mr Wood's note of Mr Healy's comments discussed between Mr Healy and Mr Wood was not produced in evidence.

461 It would seem that Mr Wood passed his note recording Mr Healy's comments on to Mr Ayles, but these do not seem to have been incorporated into the so-called final Ayles paper as relied upon by ASIC.

462 Mr Wood spoke with Mr Ayles and Mr Wood gave Mr Ayles a copy of the draft Ayles paper which had a number of handwritten comments marked up on the document. Mr Wood said to him words to the effect: "These are comments from Steve Healy. Steve thinks there is a mistake about the arithmetic in the paper". Mr Ayles recalls that Mr Healy's comments regarding the figures were in fact incorrect and that his comments did not in any event relate to Mr Ayles' conclusion in the Ayles paper that TA should take the domestic broadcast rights to market if there was no satisfactory deal, that is, towards the upper end of the range of $40 million to $60 million per annum that could be reached during the ENP.

463 Now at this point let me make some general observations. ASIC has put a case that Mr Healy breached his duty by not including in the board pack for the March and May 2013 board meetings a version of the Ayles paper that he never received. The following circumstances may be noted.

464 First, the only document Mr Healy received differed in substantive respects from the pleaded Ayles paper.

465 Second, the version of the Ayles paper received by Mr Healy did not match Mr Healy's request for a document comparing Seven's November offer and the first IMG offer.

466 Third, Mr Healy identified problems in and suggested changes to the version of the Ayles paper he received, which changes have not been produced.

467 Fourth, the Ayles paper contained a comparative analysis of the first IMG offer and Seven's November offer, as well as the strategic objectives that the board should be pursuing. The recommendation in the final version of the paper was that if a satisfactory deal could not be reached in the ENP with Seven, TA should commence a tender process.

468 Fifth, and contrastingly, the "recommendation" section in the version of the paper that Mr Wood amended and sent to Mr Healy removed the conditional "if a satisfactory deal cannot be

reached [in the ENP], TA should commence a tender process". That conditional recommendation was, however, in the final version of the Ayles paper. Mr Wood could not recall why he had modified the version of the Ayles paper he had sent to Mr Healy in circumstances where his view throughout the negotiations was that TA should get to the ENP process and, if possible, achieve a satisfactory deal or the best deal it could with Seven during the course of the ENP process. Moreover, the amended recommendation by Mr Wood did not make sense. As Mr Young QC pointed out, following it to its logical conclusion would potentially constitute TA breaching its existing contract with Seven which required TA to participate in and give effect to the ENP.

469 Further, in late December 2012, Mr Wood visited Mr Mitchell in his home in Spring Street, Melbourne. Mr Wood told Mr Mitchell what Mr Ayles had written in the Ayles paper, in particular about the process that Mr Ayles had proposed. Mr Wood also told Mr Mitchell that they needed to get more information on the broadcast rights to the board in order to educate the other TA board members. Mr Mitchell said to him words to the following effect:

> You're not going to do that.
>
> You're going to do it this way with Seven.
>
> This will cost you your job. When will you learn to be a good CEO?
>
> Let me handle that.

470 I would note that in about late December 2012, Mr Ayles had a phone call with Mr Freeman. He discussed with him the information in the Ayles paper including the valuations of the domestic broadcast rights, offers received from IMG and Seven and the competitive tension because he hoped that Mr Freeman might be a useful ally in supporting the process that was recommended in the Ayles paper. Mr Ayles is not certain whether he had completed the Ayles paper by this time, but he does recall that he discussed with Mr Freeman the information that was ultimately included in it. Mr Freeman said words to the effect of, "Harold is aware of this and doesn't agree with it".

471 Now Mr Wood subsequently had a telephone conversation with Mr Healy. Mr Wood said that he used words to the effect that he thought Mr Mitchell was hijacking the negotiations. Mr Healy said to him words to the effect, "Leave it to me. I'll fly down and see Harold and tell him how the process will operate in the future." Mr Wood said that he also told Mr Healy that he thought that the board should see the Ayles paper and its attached documents.

472 Mr Healy denied saying that the word "hijacking" was used and denied that he had said to Mr Wood that he would fly down to speak to Mr Mitchell. According to Mr Healy, Mr Wood raised with Mr Healy concerns that Mr Mitchell was interfering in the conduct of the negotiations, and that Mr Wood thought he could get more money for the broadcast rights. In response, Mr Healy said words to the effect that: "Well, if that's your view, I will have a discussion with Harold [Mitchell] and tell him to back off. I will back you".

473 This was the only evidence of a complaint that Mr Wood had made to Mr Healy about Mr Mitchell's involvement in the negotiations. I also note that in that phone call, Mr Wood never said to Mr Healy that he was bullied or overborne by Mr Mitchell.

474 There is a difference between Mr Healy and Mr Wood concerning the timing of this conversation and what precisely was said. I am inclined to accept Mr Wood's version in terms of the hijacking aspect. But at the end of the day the differences may not matter that much.

475 Mr Healy subsequently spoke to Mr Mitchell by telephone and said that he wanted Mr Wood to be driving negotiations, and that Mr Mitchell should only provide input if requested by management. Mr Healy said that otherwise, Mr Mitchell should provide his input through the board. After some discussion, Mr Healy said he was requiring Mr Mitchell to cease his involvement unless asked specifically by management to become involved. Mr Mitchell said words to the effect that he would do as Mr Healy asked. Mr Healy described this conversation as a robust discussion in which he ultimately gave Mr Mitchell a direction to cease his involvement in the negotiations, which Mr Mitchell accepted.

476 I accept that version of the conversation given by Mr Healy.

477 Mr Wood subsequently received an indirect report from Mr Freeman that Mr Healy had spoken to Mr Mitchell regarding governance. Mr Wood accepted that after his discussion with Mr Healy in December 2012 right through until the agreement with Seven was concluded on 29 May 2013, so far as Mr Wood was aware Mr Mitchell did not interfere in Mr Wood's conduct of the negotiations with Seven.

Events from January 2013

478 In early 2013, Mr Ayles had some discussions with Mr Healy at the AO about his recommendations contained in the Ayles paper. According to Mr Ayles he told Mr Healy that TA needed to take the domestic broadcast rights to the market. Again, this was a consistent theme of Mr Ayles. To the best of Mr Ayles' recollection, Mr Healy did not disagree with him.

I am not sure what to make of this evidence. Mr Healy was a lawyer and he well knew that the ENP first had to play out, with Mr Wood seeking to extract the best deal that he could from Seven.

479 There is another matter that I should just flag at this point.

480 ASIC submitted that Mr Healy did not contradict Mr Ayles' evidence that he never expressed any concerns to Mr Ayles about the paper in their discussions of the paper at the 2013 AO. But the only statement which Mr Ayles attributed to Mr Healy was that he identified errors in the arithmetic. This does not support the contention that he never expressed concerns about the paper. Moreover, Mr Healy's evidence was that he did not recall having any such discussion with Mr Ayles on this aspect. I will return later to discuss in more detail Mr Healy's concerns on the Ayles paper.

481 On 4 January 2013, Mr Freeman forwarded an email to Mr Wood in respect of a call Mr Mitchell wanted to set up with him. Mr Freeman asked Mr Wood if he knew what the call was about. Mr Wood responded to Mr Freeman, inter-alia, that "[Mitchell] said he would call you and talk about a call SH made to him about Seven and about governance". Mr Wood did not recall when it was that Mr Mitchell told him that he would call Mr Freeman.

482 On 10 January 2013 at 2.18 pm, Mr Perrins emailed Mr Ayles and Mr Wood about the first IMG offer. Later that day at 3.31 pm, Mr Wood sent an email to Mr Guinness setting out some points for him to consider in respect of making an amended offer including requesting that IMG submit a standalone five-year domestic agency offer for him to present to the TA board; on the same day, Mr Wood forwarded that email to Mr Ayles and Mr Perrins.

483 More generally, between 10 and 17 January 2013, Mr Guinness and Mr Wood emailed each other further in respect of an amended offer from IMG.

484 Now around this time, on 14 January 2013 at 8.47 and 8.55 am Mr Mitchell and Mr McWilliam had two telephone calls, one of seven minutes and the other of three minutes duration. Mr Mitchell called Mr McWilliam and then Mr McWilliam called Mr Mitchell.

485 Further, around this time, on 16 January 2013, Mr Worner emailed Mr Mitchell's assistant regarding an article titled "An Australian Open wildcard for Ten" saying:

> Good morning Harold,
>
> I have to say this is mightily unhelpful. And ignores that the Open is not actually

> profitable for us. Look forward to catching up soon. I am very worried that the dish is running away with the spoon here ! TW

486 I might say though that the article was helpful to TA, and accordingly should have been helpful to Mr Mitchell from one perspective.

487 On 16 January 2013, Mr Wood forwarded to Mr Perrins and Mr Ayles an email chain between Mr Wood and Mr Guinness. Mr Wood identified many of the things that the board at its 3 December 2012 meeting considered to be deficiencies in the first IMG offer. Mr Wood's email closed by saying: "[i]t would be helpful to have a current offer on foot with IMG, (rather than an expired deal which has not been extended), as well as the Seven offer".

488 On 17 January 2013, Mr Wood suggested to Mr Guinness that IMG make an amended offer with a separate offer for the domestic rights and an offer for the international rights. Undoubtedly the reason Mr Wood did this was so that the board would be able to more easily compare the IMG offer for the domestic rights with the Seven offer.

489 On 18 January 2013, Mr Guinness emailed Mr Wood and said:

> We have considered the points made in your email of January 17th. We have tried to come up with a proposal that not only assists TA in this process, but that will also satisfy IMG corporate scrutiny.
>
> We note your request that our offers stay open and capable of acceptance until 30 September 2013. It is not possible from a corporate perspective to have an offer containing a Minimum Guarantee of this magnitude open for that length of time; it is contrary to sound and sensible commercial practice and we will not get board approval for it.
>
> What we are prepared to put to our board for approval (and would be hopeful of obtaining such approval) is the following:
>
> The TA Domestic Rights and TA International Rights elements would both remain open until 5 pm Melbourne time on 1 April 2013.
>
> Further, the TA Domestic Rights offer would remain open until 5pm Melbourne time on 1 October 2013, provided (and strictly on condition) that by 1 April 2013:
>
> (i) We have concluded a legally binding signed extension of our representation of TA's International Rights 2017 - 2019
>
> (ii) We have in place a fully negotiated and agreed long form agreement in relation to TA's Domestic Rights (acknowledging that TA will not be able to sign this before 1 October 2013) and our offer will remain open and capable of acceptance up to 1 October 2013 only on the terms and conditions set out in that long form agreement with no amendment.
>
> As you will recall, our original proposals expired on 31 December 2012. Even if our international rights element had been accepted and concluded by that time, the length of time for which the domestic rights element would have been kept open was left to be determined by IMG at that time. Accordingly, we hope you recognise that we have

> moved a considerable distance from that position.
>
> If agreeable, we will send you a formal proposal incorporating these terms as soon as possible.

490 On 24 and 25 January 2013, there were further emails between Mr Guinness and Mr Wood in respect of a revised offer. On 24 January 2013, Mr Wood wrote to Mr Guinness and said:

> Please proceed to prepare your combined offer expiring on 1 April 2013 and let us have it once you have board approval. We can then proceed to prepare the domestic long form terms for discussion and agreement.
>
> Thanks for the further offer of an extension to 1 October (to our option to accept the domestic representation and minimum guarantee offer), provided the international representation extension has been executed and the domestic long form terms have been agreed by 1 April 2013. However, at this stage we would prefer to put a "cleaner". simpler deal to our board. In practice we are extremely unlikely to renew the international deal early unless we are happy to accept the domestic deal so the extension on terms as offered also does not represent a realistic option and may distract the board.

491 On 25 January 2013, Mr Wood received an email from Mr Guinness, which was copied to Mr Ayles, saying that Mr Guinness would seek board approval to put a revised IMG offer for the domestic rights and a separate offer in respect of the extension of IMG's international rights. The letter pointed out that the domestic offer would be automatically withdrawn on 1 April 2013, but might be extended if, by that date, TA had concluded a legally binding signed extension of IMG's international rights contract in accordance with the international rights offer.

492 Mr Guinness wrote to Mr Wood and said:

> We are not sure why you would be unlikely to extend our international rights representation early unless you accept our domestic rights offer.
>
> Subject to that, we would be prepared to seek board approval for the following:
>
> 1. 5 year TA Domestic Rights offer 2015-2019
>
> 2. 3 year TA International Rights extension 2017-2019
>
> 3. The Domestic Rights offer will remain open and capable of acceptance until 1 April 2013. At that date our Domestic Rights offer will be automatically withdrawn, and will no longer be capable of acceptance.
>
> We note that you want to place before the board what you refer to as a "cleaner" offer. The above proposal is what you have requested. However, please note that if by 1 April 2013 we have both (i) concluded a legally binding signed extension of our representation of TA's International Rights 2017-2019 and (ii) agreed a fully negotiated long form agreement in relation to TA's Domestic Rights, we may still be prepared to keep our Domestic Rights offer open for a further period to be determined by IMG in its discretion. If those conditions are not met, we will not be in a position to make TA a Domestic Rights offer after 1 April 2013. However, needless to say we

> would be happy to discuss assisting TA in its negotiations with Seven post 1 April 2013.

493 Accordingly, in substance and in practical terms, the revised IMG domestic offer was still tied to an agreed extension of IMG's international rights contract. I will discuss this in more detail in a separate section of my reasons.

494 On 25 January 2013 at 9.12 pm, Mr Wood forwarded the emails between Mr Guinness and himself to Mr Perrins and Mr Ayles. On 27 January 2013, Mr Perrins emailed Mr Ayles and Mr Wood in response to the emails between Mr Guinness and Mr Wood.

495 On 1 February 2013, Mr Wood sent a further email to Mr Guinness in respect of an amended domestic rights offer. In that email Mr Wood thanked him for going to his board for the approval of the arrangement he set out in his email on 25 January 2013 and wrote, inter-alia:

> We look forward to receiving confirmation of the terms of the board approval by letter as soon as possible so we can get cracking on drafting and agreeing with you the long form Domestic Agency & Guarantee Agreement and the extension of our International Rights deal.
>
> We appreciate your comments regarding being willing to keep the Domestic deal "on the table" after 1 April (provided we have agreed the long form and if we have extended the International Rights by then) but would prefer to consider that opportunity closer to 1 April (if at all). For the now, please do not make reference to it in the board approved letter.

496 Now on 31 January 2013, Mr Ayles received an email from Mr George attaching a document entitled "Domestic Rights – Executive Paper". The email stated:

> Steve – Tim and I have put together a document to run through with SW, DP, DR and yourself as we discussed earlier this week. It's pretty high level but the aim is to document a process and have everyone agree to it.
>
> …

497 On 1 February 2013, Mr Ayles responded to Mr George by email stating:

> The only thing that is worth adding is how the IMG offer (that we are about to receive an updated version) will help us firstly generate competitive tension and secondly get us through the next couple of months without the possibility of an early deal being done with Seven. Specifically this will help with the Board.

498 On 4 February 2013, Mr Ayles sent an email to the EMT with an attachment entitled "Domestic Rights - Executive Paper 030213 v3", which was a version of the document received from Mr George.

499 The document attached to this email was prepared by Mr George for the purposes of the upcoming TA offsite meeting, which was to be held on 11 and 12 February 2013.

500 On 6 February 2013 at 3.03 pm, Mr McWilliam called Mr Mitchell and they had just under a four minute conversation.

501 On 12 February 2013, Mr George sent a further version of his paper to Mr Ayles. This paper was approved by Mr Ayles. Significantly it stated:

> With the recent IMG proposal providing a significantly better return than Seven's current offer, TA is in a strong bargaining position heading into the ENP with Seven. TA should use the IMG offer to both manage the board and as leverage in negotiations with Seven.

502 On about 13 February 2013, Mr Wood met with Mr Russell Howcroft, executive general manager of Network Ten. Now I note that in January 2013, Network Ten produced and broadcasted the Hopman Cup, which Mr Ayles ran as tournament director. Apparently, TA perceived that Network Ten had done an excellent job. Mr Howcroft told Mr Wood that Network Ten was interested in the domestic broadcast rights. Around this time, Mr Healy told Mr Wood that he had had a meeting with Mr Marquard to discuss the domestic broadcast rights.

503 Apparently, in early 2013, Mr Marquard had "door-stopped" Mr Healy at Mr Healy's office and told him that Network Ten was looking to offer in excess of $40 million per year for the domestic broadcast rights. Mr Healy later said to Mr Ayles that he had met with Mr Marquard and that Mr Marquard had said to him that Network Ten was looking at an offer in excess of $40 million per year for the domestic broadcast rights.

504 Mr Ayles gave the following evidence:

> In late 2012 or early 2013, Marquard said to me during one of our discussions words to the effect that he had "door-stopped" Healy at Healy's office and told him that that Network Ten was looking to offer in excess of $40 million per year for the Domestic Broadcast Rights.
>
> Healy later said to me words to the effect that he had met with Marquard and that Marquard had said to him that Network Ten was looking at an offer in excess of $40 million per year for the Domestic Broadcast Rights. I cannot recall when or where this conversation occurred. To the best of my recollection, others were present when Healy said this, but I cannot recall whom.

505 Although this was challenged by Mr Young QC in cross-examination, I accept Mr Ayles' version of this conversation and also Mr Marquard's version of that conversation.

506 On 22 February 2013, Mr Mitchell called Mr McWilliam to tell him that Mr Warburton was out at Network Ten and Mr McLennan was in; in other words, Mr Warburton had been replaced by Mr McLennan as CEO of Network Ten.

507 On 23 February 2013, emails were exchanged between Mr McWilliam and Mr Stokes and others at Seven concerning the interest of Network Ten and the upcoming TA board meeting on 4 March 2013. Mr Stokes stated:

> Make no mistake they are after the tennis --- they will pay a big cheque to start with a marque even they desperately need something big --- that cheque dosnt have to paid till later and the standing they get and the momentum is just what they need if they have credit funds they'll bet it on Tennis supported b Foxtel
>
> We need to make sure we are there at this board meeting ---- lets not take any chances. I reckon the delay has been so Ten and Foxtel can ready with a bid !

508 Mr McWilliam replied saying:

> Agree, although gyngell told me tonight james had said to him that the tennis was too far away + he was after the cricket.
>
> I will call Harold again about this. I am also worried. The nightmare is if we throw more money out the board says this is working we shouldn't renew early. Harold swears we r safe but I will get onto him again.
>
> Peter lewis told me (and I believe it's been announced) that Ten borrowed $80 mill from CBA yesterday or Thursday

509 Mr Stokes responded:

> Cricket would make more sense for them at the end of the day you need footy and or cricket ! Be interesting if the cricket got split up ! We don't want it all !

March 2013 events

510 On 1 March 2013, Mr Guinness sent an email to Mr Wood which attached an amended offer for TA's domestic broadcast rights for 2015 to 2019, which I have previously defined as the second IMG offer. IMG separately forwarded an offer for TA's international broadcast rights for 2017 to 2019. I should say that between the first IMG offer and the second IMG offer, IMG had had some discussions with Network Ten who had provided some "commitment". I will discuss this in a separate section of my reasons.

511 Mr Wood did not recall if he ever provided the second IMG offer to Mr Mitchell or spoke to him about it. However, he considered that it was unlikely that he gave it to Mr Mitchell. To the best of Mr Wood's recollection, he did tell Mr Healy about the second IMG offer, although he does not recall when or where or what he specifically told him about it. Mr Wood showed Mr Ayles the second IMG offer and the offer for the international broadcast rights.

512 Now although Mr Wood thought that the second IMG offer was more attractive than Seven's November offer, he was concerned that IMG still wanted to link the international and domestic

broadcast rights. Further, he was of the view that TA should control things and had a better chance of securing the host broadcast production if TA negotiated *directly* with a broadcaster. After all, IMG was only an agent.

513 Further and importantly, Mr Wood accepted that a purpose of obtaining the second IMG offer was that stated by Mr Guinness in his email of 1 March 2013:

> I have assumed the main purpose of IMG re-submitting its Domestic Offer is to enable your Board to reject Seven's current offer and either renegotiate a deal with Seven on more favourable terms between the Board meeting and the start of the formal ENP with Seven on April 1st or to simply proceed with further negotiations with Seven during the ENP.

514 So, the second IMG offer was procured as a bargaining chip in the negotiations with Seven to enable TA to point to a rival offer indicating a value point of $30 million plus per annum.

515 Further, TA wanted to de-link the domestic and international rights components. And Mr Guinness had agreed to put separate offers. But in substance those offers remained coupled, as I will explain in a separate section of my reasons.

516 Further, when the second IMG offer was received by Mr Wood, it was apparent that the international broadcast rights condition was even more disadvantageous to TA than that which Mr Guinness had foreshadowed back on 24 January 2013. This was because the interaction of the domestic rights offer and the separate international rights offer of 1 March 2013 meant that there was no more than a possibility that IMG might agree to extend the expiry date of the domestic offer, even if TA signed up to an extension of IMG's international rights prior to 1 April 2013. I will explain this all later.

517 On 4 March 2013, the TA board had a board meeting. Mr Healy, Mr Mitchell, Mr Cooper, Mr Davies, Mr Fitzgerald, Mr Holloway, Mr Tanner and Dr Young were present. So too were Mr Wood, Mr Roberts and Mr Tiley. Mr Freeman was an apology. Mr Ayles did not attend.

518 At the board meeting, Mr Wood provided the board with an update on the domestic broadcast rights as part of his verbal CEO's report. Mr Wood prepared the board pack for the meeting. As with the other meetings during the relevant period, there is no evidence that Mr Healy had any involvement in the preparation of the board pack for the March 2013 board meeting. The board pack included the commercial business unit report prepared by Mr Ayles, which referred to the ENP with Seven commencing on 1 April 2013. It also included the marketing and

communication unit report including reference to the objective of TA being to become the host broadcaster and problems with Seven in that regard under the discussion "Challenges".

519 Mr Wood said that a further offer had been received from IMG which remained at $30 million per annum with some potential upside and which uncoupled the domestic component of the offer from the international offer.

520 He said that the ENP with Seven would commence on 1 April 2013.

521 He said that Nine and Network Ten had both expressed interest in TA's rights. He also referred to Gemba's valuation of the rights being $40 million across all platforms.

522 Under questioning by Mr Young QC, Mr Tanner gave the following evidence concerning the 4 March 2013 board meeting:

> Now, I suggest to you Mr Wood said to the board that there was a Gemba valuation which valued the domestic rights at around $40 million?---I haven't seen that in the minutes but I recall a conversation about that, yes.
>
> Yes. Well, you know that the minutes are far from a complete record of what was discussed, don't you?---I do.
>
> You've looked at the minutes and you can recall things being discussed that are not recorded in the minutes; correct?---I can.
>
> Now, do you recall you gave an interview to ASIC pursuant to section 19 of the ASIC Act?---I do.
>
> And there was a transcript of that, that you've seen?---I have.
>
> I just want to put to you something that you said then. You were being asked about the March board meeting at pages 48 to 50 and you said this:
>
> *The Gemba report suggested something around the $40 million mark.*
>
> And that was one of the numbers that you said was absolutely discussed at the board at length on 4 March. That was accurate evidence, wasn't it?---It was.
>
> And when you say it was discussed at length, can you explain that a little bit further. What was the lengthy discussion that brought in the Gemba valuation of around 40 million?---It was in the context of the value of the rights. I mean, it's quite a straightforward thing. We have to have a benchmark somewhere.
>
> Yes?---We have got percentage uplifts from the other sporting organisations and I recall a conversation around Gemba. Now, the possibility, Mr Young, is that it occurred during a break, it occurred before the board meeting, but I recall that, you know, around that board meeting, that that was the conversation.
>
> But discussing it with other directors?---It's a large boardroom and it is possible the secretary didn't hear that conversation or it was a conversation after he had stopped recording or a bunch of other things could have been the case.
>
> Yes. But it's also a possibility that it was a discussion during the course of the board

meeting that simply wasn't recorded by the minute secretary?---That's certainly possible too. Yes. But it would seem to me that it's an important – it was an important conversation in the context of the board actually having some basis for assessing the value of the rights.

Yes. But your recollection is that it was discussed, that figure - - -?---That's my recollection.

- - - in the course of the board meeting?---That's my recollection.

You mentioned the uplifts achieved by other sports a moment ago in your answer to me. Was that too raised by Mr Wood and then discussed by members of the board in the course of this board meeting?---I don't specifically remember that in the context of this – in this board meeting, no.

Was there discussion to the effect that the Seven offer was only offering about an 18 per cent uplift at this board meeting?---I don't remember the 18 per cent being mentioned again but given that I had not heard that there was a new offer on the table - - -

Yes?--- - - - I think the comment from that I – I don't, look it wasn't mentioned that there was some change in the offer from Channel 7 in any material way.

Yes. Now, I want to suggest as well that in the context of discussing the value of the rights, Mr Wood, at this meeting, referred to a further offer from IMG that had just been received; is that right?---I can recall that – that they had revised their offer.

Yes. Now, at this meeting, Mr Wood referred to a second Gemba offer and your recollection is – I'm sorry, a second IMG offer - - -?---Yes.

- - - and your recollection is that he used the figure of around $50 million in the context of discussing the second IMG offer?---I don't remember the figure of 50 million being discussed in the board meeting. That was outside the board meeting.

Well, in your section 19 examination, when asked about the 4 March board meeting, you said:

> *The IMG deal that I was told about was a 50 million deal.*

And then you went on:

> *They were the correct numbers. So it wasn't as if the board – and they were discussed at the board. Those numbers that I've just gone through were absolutely discussed at the board at length.*

?---You can see me working through my recollection, so - - -

Yes. So your recollection in 2017, when you gave your interview to ASIC, was that the IMG deal was mentioned in the course of the board meeting and the fact that it was about a $50 million deal was something that was absolutely discussed at the board?---It was – it was when I was doing my section 19, and then I looked again at the minutes. It's the sort of thing that would have been recorded in the minutes if it had been discussed at the board meeting.

Well, you say it would have been recorded in the minutes, but you agreed with me that many things were not recorded in the minutes; correct?---Absolutely.

Were you aware that IMG had insisted on a confidentiality agreement?---I had no details of what IMG had offered.

No?---Simply that they had expressed interest.

Yes, and you knew of the figure?---The figure of $50 million had been – Steve had mentioned to me.

Yes?---But, as I said, I've not been able to work out where that figure came from.

Yes?---Simple as that.

Now, if other directors recall an IMG figure being mentioned at this board meeting, you would not dispute their evidence, would you?---No.

If Mr Wood recalled mentioning a figure of, in the IMG second revised offer, you wouldn't dispute his evidence either?---No.

All right?---No.

You've got a distinct recollection of an IMG figure being discussed at the board at length; correct?---I think at length would be a stretch, being discussed.

523 Further, Mr Tanner also gave evidence as to what was discussed at the 4 March 2013 board meeting concerning Nine and Network Ten:

And you say that when you raised that question, Mr Mitchell made a response that Ten was not strong yourself financially and Channel 9 had spent its money on the NRL. You've got a distinct recollection of that?---I do.

And that's not reported in the minutes, is it?---It's not.

No?---No.

Nothing is reported about network 10's lack of financial strength; correct?---No.

Nothing is reported about Channel 9 in the minutes?---No.

Your question about why TA was not putting the rights out to tender is not recorded in the minutes, is it?---No.

And that was, this was an important discussion about the relative attributes of the three free-to-air networks, was it not?---Agree.

…

And the press was observing that it looked like Channel 10 was using some of that capital raising for its working capital needs?---I don't remember that specifically. I do remember they were having trouble with their bank. That was probably the angle that I was - - -

Yes, they had to have a couple of capital raisings, didn't they?---They did.

And the last one had to be guaranteed personally by a number of directors, Mr Lachlan Murdoch, Gina Reinhardt and James Packer?---And Bruce Gordon.

Yes. That is very usual to find directors giving personal guarantees to secure the financial position of a television network; correct?---Yes, but all of the – as I said, all of the networks were – it was a very dynamic and very volatile market, let's put it that way.

Channel 10 was at the bottom of the list, they had by far the worst ratings; correct?---

You mean viewer ratings.

Viewer ratings?---Yeah, yeah.

Ratings of their shows?---Yes.

And they had the smallest share of advertising revenues?---Yes, but I mean I'm not sure this is helpful, this is not my area of expertise, I recall there was some programming changes that they made under the chief executive where they moved away from the teenage and youth market and tried to compete on content similar to Channel 7 and Channel 9.

Yes. But one of the worst things that might occur for Tennis Australia is if you had an unstable entity, financially unstable, paying too much for the rights and then collapsing during the course of the five-year agreement?---It would be absolutely unhelpful, I think, if we were going to go with anybody, we needed to do some due diligence, anybody other than Channel 7. But these rights were very valuable, Mr Young. They were the first major event of the year. They gave the network an opportunity to cross-promote programs that they were going to have during the year.

Yes?---So a question of speculation whether it would have been any different if they had the TV rights to tennis would they have been able to make something of it. I don't know. That is the unanswerable.

From Tennis Australia's perspective, you wanted tennis, the Summer of Tennis, showed on a network which had achieved or was achieving high ratings; correct?---Correct.

You wanted a network that had its primary free-to-air channel available to show the tennis?---Correct.

And not committed to some other sport?---Correct, which was Channel 9's – the challenge with Channel 9.

Yes. And the challenge with Channel 9, to spell that out, was that if they retained the cricket rights through the summer, it's likely that cricket would be on the primary TV channel whenever there was a major cricket match; correct?---Look, I hadn't thought about it that way. What I had thought about was there will be contention between the product and that may result in what you're talking about.

Yes and that would be undesirable for TA?---Absolutely.

Now, at this board meeting, Channel 10 and Channel 9 came up partly because the CEO had mentioned that both networks had expressed interest to him in obtaining the tennis rights; correct?---Yes but again, not to – nothing specific in terms of dollar figures, nothing specific, they're very interested or anything like that.

No. Did any director ask for the dollar figures?---No.

Now, do you agree with this, that after all these matters had been discussed around the board, the end result of the discussion was that the board expressed – well, firstly, Mr Wood expressed the view that he expected Channel 7 to come to the party with a higher offer in the ENP. Do you recall Mr Wood saying that?---I – I do. I do, yeah.

Yes, and did the board generally express the view that it wanted to trigger the ENP to get into that process in the expectation of getting a better offer from Channel 7?---Strange way to put it. I remember it just being more or less presented as we've got the ENP starting on 1 April.

> Yes, but the board, effectively, wanted to move ahead?---Absolutely.
>
> Into the ENP?---Yes.
>
> In the expectation of receiving a better offer from Channel 7?---Yes

524 Neither the contents of the Ayles paper nor the proposed process was discussed at the meeting.

525 Further, the board was not provided with a copy of the second IMG offer at the meeting.

526 At this board meeting, Mr Mitchell recommended that a subcommittee be formed to consider the sale of the broadcast rights. The board resolved to adopt this approach and a subcommittee was formed. This consisted of Mr Mitchell as chairman, Mr Healy, Mr Freeman and Mr Wood (board subcommittee). Let me set out a relevant extract from the minutes:

> The Chief Executive Officer updated the Board on domestic television rights. He reported that the official exclusive negotiation period with Channel 7 would commence on 1 April 2013.
>
> Mr Mitchell recommended that a Board Sub-Committee consisting of Mr Freeman, the President, the Chief Executive Officer and himself, be formed and meet to discuss TA's strategy on the domestic broadcast renewal and then report back to the Board.
>
> It was resolved that:
>
> *Mr Mitchell (Chairman), Mr Freeman, the President and the Chief Executive Officer would form a Sub-Committee to consider the domestic television rights renewal and report back to the Board with recommendations as required.*
>
> In response to a query from Dr Young as to whether there was an exclusive negotiation period Mr Mitchell advised that there was. Mr Mitchell inferred that Dr Young had been aware of this information and had shared this information to a non-Board member. Dr Young requested that Mr Mitchell apologise for his inference and requested that the record show that she categorically denied divulging any confidential information. Mr Mitchell apologised to Dr Young.

527 Further, Mr Tanner said that he opposed Mr Mitchell's participation in the board subcommittee because of potential conflicts of interest; this was not minuted. Further, there was a sharp exchange between Mr Mitchell and Dr Young at the meeting when Mr Mitchell accused her of leaking information concerning the broadcast rights to the press. Dr Young denied the allegation and Mr Mitchell apologised to her.

528 Subsequent to the meeting, Mr Wood told Mr Ayles that the board had resolved to establish a board subcommittee to advise it on TA's strategy for the renewal of the domestic broadcast rights.

529 On 4 March 2013 at 1.11pm and 4.37 pm, Mr Mitchell rang Mr McWilliam twice. The second call was for ten and a half minutes. There was a further call between them for two minutes on 5 March 2013 at 3.17 pm.

530 On 5 March 2013, Mr Guinness sent Mr Ayles an email asking for an update about the board meeting. On 6 March 2013, Mr Ayles replied to Mr Guinness' email and said "[w]ill call you later today to update". On 7 March 2013, Mr Guinness sent an email to Mr Wood asking, inter-alia, "Is it safe to assume that you are unlikely to do a deal with Seven before the start of the ENP?"

531 Following the 4 March 2013 board meeting but prior to 7 March 2013, Mr Wood met with Mr Ayles and Mr Roberts. He instructed Mr Ayles to prepare a framework paper for the board subcommittee. He said to Mr Ayles that this was to be a process document as to how the board subcommittee would operate.

532 On 7 March 2013, Mr Ayles sent an email to Mr Wood which said, inter-alia:

> Steve
>
> Thanks for joining us today and providing the group with an update at the "global" level of what is going on in tennis and how this affects TA.
>
> …
>
> I will send the domestic rights sub-committee information later tonight.

533 On 8 March 2013, Mr Ayles sent an email to Mr Wood attaching a document entitled "Domestic Rights – Board Sub-Committee Paper (070313)"; I have previously referred to this as the board subcommittee paper. This paper was a modification of the executive paper that Mr Ayles had instructed Mr George to prepare in early February 2013.

534 The board subcommittee paper said, under the heading "1. Business/Strategic Objectives for next domestic rights deal/s", inter-alia:

> **a) Maximise commercial returns**
>
> TA is seeking to maximise and increase the commercial return on its next domestic broadcast rights deal. Each component of TA domestic broadcast rights has already been separately value by TA on a platform-by-platform basis (i.e. free-to-air TV, pay TC, mobile telephony, and online/new media/digital rights). TA needs to:
>
> - determine what rights are currently being under-exploited, how to bundle all these rights going forward, which rights should be sold on a platform-by-platform basis, and what rights should be retained for TA to exploit itself.
> - create competitive tension to increase possible rights fees payable for each

platform and bundle of rights.

b) Maximise exposure through control of content and distribution platforms

TA's second strategic priority is to maximise the exposure of its events (AO and AO Series), including as follows:

- TA to control and conduct the role of host broadcaster at AO and AOS events (i.e. production of all coverage of the events).
- a minimum level of commitment must be given by broadcasters on the number of matches/courts broadcast live and on what platforms (across multiple platform providers).
- maximise live coverage on all devices and across all platforms – use it or lose it approach.
- increase coverage of all live courts and free up unused content for exploitation by TA or other third parties.
- significantly reduce the restrictions on what content TA can itself produce and use on its own digital platforms.
- develop AO **and** non-AO properties (including the AO Series which has been neglected and underexploited in past deals).
- enhance content production off court (i.e. colour stories) for TA's own exploitation.

The current contractual arrangements with Seven are out dated and do not enable TA to meet the above objectives. TA is currently the only major Australian sport that grants "all rights" across all platforms to one provider. Some of the specific issues that are currently causing problems in TA's relationship with Seven and which affect the coverage of TA's events, and/or which need to be discussed as part of any new negotiation, are set out in "Annex A". These are indicative issues that need to be addressed as part of the new domestic rights deal/s.

535 Curiously, this was all management speak and really speaking to the EMT. It was not setting out how in process terms the board subcommittee was to operate.

536 Section 2 of the document dealt with "2. Process".

537 It set out the following:

Given the strategic importance to TA of the next domestic rights deal, and because it will be one of the most significant transactions in TA's history, it is imperative that the process is conducted in a systemic, planned and professional manner in order to achieve the strategic objectives outlined above.

Seven's exclusive negotiation period (ENP) begins on 1 April 2013. TA is in a very strong bargaining position heading into the ENP, especially given that the recent IMG proposal provides for a significantly better commercial and strategic return than Seven's current offer, and further empirical and anecdotal evidence gathered by TA indicates that TA's domestic broadcast rights are significantly undervalued under the current deal. TA should use the IMG offer and other evidence as key leverage in negotiations with Seven.

The domestic rights negotiations can be divided into three main phases:

a) Pre-ENP: now until 31 March 2013

- Agree on process and team.
- TA needs to determine which rights and platforms should be extracted from Seven's current grant of rights, and the optimal (and other possible) models for splitting content across various platforms/providers.
- Scenario planning/mapping.

b) ENP with Seven: 1 April 2013 - 30 September 2013

- Commence formal discussions with Seven during ENP phase (to the exclusion of all other third parties).
- Advise Seven (based on the outcomes of (a) above) of TA's requirements and expectations for any new deal, including:
    - rights available and minimum standards/requirements for exploitation of those rights/content across each platform
    - host broadcast
    - new long form contract
    - separation of value by distribution platform.
- Hold the line regarding TA's business/strategic objectives.
- If an offer that meets all TA's business/strategic objectives is received, TA may then commence negotiations with Seven on a new long form contract. TA should only sign a short form terms sheet if that terms sheet is strictly conditional on the parties signing a long form contract by an agreed date.
- TA is under no obligation to agree a new deal with Seven during the ENP, or to accelerate the negotiations for Seven's benefit. Competitive tension could be enhanced by going slowly and/or going to market after the ENP.

c) Post-ENP – 1 October 2013 (if required)

- Depending on Seven's reaction/approach during the ENP period TA may be required to test the market via a formal bidding process.
- As for section 2(a).
- Prepare documentation including:
    - Scope document – rights breakdown across content and platforms, and minimum requirements for exploitation of rights on each platform.
    - Contract for submission to interested parties.
- The details of this can be formulated later in the year based on how the ENP progresses, but this should take the form of an in/formal tender process where interested parties are asked to indicate which rights/platforms they are interested in acquiring, and respond to:
    - a scope document that sets out what rights are available, and the basis on which they may be acquired and must be exploited; and

- a pre-prepared contract to indicate areas of compliance and non-compliance.

538 It will be appreciated that this was all about how *management* was to operate, who were doing the negotiations. This is reinforced by Annexure A. It was not about how the board subcommittee was to operate. And, of course, the board subcommittee were not doing the negotiations.

539 As to the board subcommittee processes, the section headed "3. Team" set out the following:

> A critical component of this process is to ensure TA has a united, centralised and coordinated front to ensure the business/strategic objectives are achieved.
>
> **Board sub-committee**
>
> - Steve Healy
> - Chris Freeman
> - Harold Mitchell
> - Steve Wood
> - David Roberts (Secretary)
>
> The Board sub-committee will conduct itself as follows:
>
> - all relevant information regarding the next domestic rights deal (including offers and possible meetings with interested parties) will be shared with all members of the Board sub-committee; and
> - the Board sub-committee will make all decisions by consensus.
>
> **Broader team**
>
> - TA Commercial Business Unit (particularly Media Rights team)
> - TA Media Business Unit
> - TA Legal
> - External (as required)

540 This wrongly stated that Mr Roberts was a member of the board subcommittee.

541 Finally, section 4 "Sub-committee's Management of Stakeholders" stated:

> **TA Board**
>
> - Steve Healy to keep the remaining TA Board members informed of timing, process and progress at Board meetings.
>
> **TA Executive**
>
> - Steve Wood and David Roberts to keep the remaining TA Executive Team members regularly informed of timing, process and progress.

TA staff

- TA Executive to keep relevant TA staff informed of timing, process and progress on a "need to know" basis only.

Seven

- Seven is to be engaged in the manner set out in 2(b) above.

Seven's Competitors

- Once the ENP commences TA should **not** communicate with other competitors regarding these rights
- Depending on outcome of ENP, TA may engage with these competitors in a formal, planned and systematic bidding process

External consultants

- Engaged and consulted as required

542 Query the reference to Mr Healy.

543 Generally, on any fair reading of this document, it was more addressed to management in their conduct of the negotiations than how the processes of the board subcommittee were to operate.

544 Now in examination in chief by Mr Pearce SC, Mr Freeman said the following concerning the board subcommittee paper:

> All right. Now, did you form a view about whether this paper set out an appropriate process for the subcommittee?---I thought it was very prescriptive and quite extensive.
>
> Yes?---It went beyond what I would, probably, see as a normal subcommittee charter.
>
> Yes?---And it was much more prescriptive than anything I had seen. But would I, at the time, have agreed with this? The answer is "yes", but it is, as I said – I'm repeating myself, but it, certainly, is much more prescriptive than most subcommittees, particularly in those short-term subcommittees. And I think the live period when this could have been used was about 29 weeks only. So - - -
>
> Yes. We will go forward then - - -?---So the answer is "yes". I would have said "yes".

545 Then in cross-examination by Dr Collins QC the matter was returned to:

> What does this in your mind have to do with the role of a subcommittee as you understood it based upon the resolution that was made at the 4 March board meeting?---Look, I did say yesterday that I thought this was a very prescriptive type of charter. And normally a subcommittee charters I've seen aren't as prescriptive as this.
>
> HIS HONOUR: It does seem to be headed Plan. So - - -?---I beg your pardon, your Honour?
>
> It does seem to be headed Board Subcommittee Plan, so it seems to be more than a charter for decision-making, which might be quite a short document. It seems to be a plan. And I suppose the question is what parts of the plan are the board subcommittee doing and what parts of the plan are management doing?---Well, I think that goes to

the heart of this thing, is what was the role of the board subcommittee.

Yes?---And what was the executive role. And this is – I mean, this issue was – occurs on many boards, that is, what are the board doing and what are management doing. Would you like me to continue speaking on this or - - -

HIS HONOUR: I think I would like to know what your views – looking in particular at that dot point under (a), I suppose the question is is it a board subcommittee issue, is it a management issue or is it both, but at different levels of detail?---I think that is executive management's role to deal with those types of issues and present them in a concise way that demonstrates why we should be heading down that direction and what are the benefits of going down that direction. So, as I said, this is a very prescriptive piece of document that seems to direct the subcommittee in some way about what we should be doing, whereas a subcommittee is a review commit of processes receiving executive communication, going through that in a systemic way that demonstrates not every bit of detail, because that's what their job is as management, to do that. And we would review it.

DR COLLINS: In a functioning organisation, the role of the board is to set strategic direction and hold management to account and management's role is to execute the strategy of the board; correct?---That is the vanilla – that is the vanilla answer, yes. Do you mind if I comment?

No, by all means?---And this is, I guess, from experience. I have seen other examples where in a high-performing board there has been a particular director who [has] excelled in some particular field that is above and beyond that around the table and is able to contribute in a very meaningful way to a very powerful outcome, not necessarily in getting directly involved in executive matters, but maybe sometimes crossing the line in some way. But I have seen examples where that person is able to achieve far superior outcomes. And that's where the line gets so blurred between what the board is doing and what management – executive management does. But I think in a high performing board where there's an understanding of the dynamics of that, then we all work together to get that result. That would be my personal view.

Thank you, Mr Freeman. Can I ask you about some of the other bullet points here and just get you to identify whether you see these as being matters for executive management or matters for the board subcommittee. The next bullet point, under section (a) on 4295, is scenario planning and mapping?---That's not the job of the subcommittee.

Then, under paragraph (b):

> *Commence formal discussions with Seven during ENP phase.*

?---Well, once again, they would normally – those discussions would be the – carried out by the senior executive for the team in place.

You didn't expect, as a member of the board subcommittee team, that you would be involved in formal discussions with Seven during the ENP phase?---Most definitely not. I'm too busy.

The next bullet point:

> *Advise Seven of TAs requirements.*

Was that a matter for executive management or for the - - -?---That's clearly a job that management would do.

Thank you. The next bullet point:

Hold the line regarding TAs business strategic objectives.

?---Well, I think that's probably relevant. I mean, because once we're talking about the strategic objectives, in this case they went beyond just the Seven matter; it went into how would we operate globally and how could we use the platform that we developed through the Seven arrangement and host broadcasting going forward. That is about strategy and growing this massive revenue base for Tennis Australia.

This is in relation to the ..... paragraph (b) it's headed ENP with Seven. So do you not take it from that that it's saying that during the period of the ENP Tennis Australia should hold the line in its discussions with Seven in respect of those matters?

HIS HONOUR: Or, putting it another way, in the context of the negotiation, hold the line is a fairly familiar sort of term, but I suppose the question is what you make of this?---Look, I probably have generally a more commercial, flexible approach to how we do this. I mean, would could write rules for engagement, as we've tried to do here, but these – these negotiations are dynamic; they change and move backwards and forwards. So hold the line regarding TAs business strategy – strategic objectives, I just – I can't see how – I mean, if you put that at the front of ..... I mean, I'm about to start a negotiation to get the best outcome, there may well be deviations from some of that that I could justify. I'm just giving you a hypothetical view.

DR COLLINS: Can I just put it to you this way. If you had been the chair of the board subcommittee and this plan had been presented to you as the board subcommittee plan, would you have adopted it?---I certainly would have questioned it, because I would have felt – reading this in detail and examining it, I would have felt that the subcommittee probably crossed the line in words between the role of the board and executive management. But, furthermore, I would have felt that there might have been issues in here that could unintentionally handcuff people from doing the job.

546 I would also make another point. Management knew of the Gemba report, and no doubt its strategy was well informed by its contents. Yet it was not referring the board subcommittee's attention to it at this time.

547 Mr Ayles was not subsequently asked to do any further work on the board subcommittee paper or otherwise to do anything to assist the board subcommittee.

548 On 8 March 2013 at 12.18 pm, Mr Wood emailed a copy of the board subcommittee paper to Mr Mitchell. At 2.32 pm that day, Mr Mitchell responded via email to Mr Wood and said, inter-alia:

Steve, I've [sic] quick look at this 7 pages of the paper. I'm not happy.

As Chairman of any subcommittee, any framework documentation that we might commence would only be in a manner that I suggest.

I therefore have put your paper on hold until we can speak. I'm not sure where this paper came from, but as I said its very important that subcommittee of the board, yourself of course, and the board controls the matter.

549 In my view, and in the circumstances, that was an entirely appropriate response from Mr Mitchell.

550 Shortly after receiving this email, Mr Wood had a telephone conversation with Mr Mitchell. In this conversation, Mr Mitchell said to him words to the effect:

> You should get on and do the deal with Seven.
>
> I have never heard of Gemba.
>
> The reports from Gemba were a waste of time.
>
> Ayles should be fired after commissioning Gemba.
>
> The long-standing arrangement in place for media rights in Australia that has existed for many years is that Nine has the cricket, Seven has the tennis and football and Ten gets the dregs.
>
> TA should not seek to disturb this long-standing arrangement.
>
> You should keep off the grass.

551 On 14 March 2013 at 3.17 pm, Mr Mitchell rang Mr McWilliam and they had a conversation of just under nine minutes. On 18 March 2013, Mr Mitchell and Mr McWilliam exchanged seven text messages.

552 On 20 March 2013 at 4.50 pm, Mr Wood forwarded the second IMG offer via email to Mr Ayles, Mr George, Mr Browne and Mr Perrins. That day Mr Ayles contacted Mr Guinness and thanked him for the second IMG offer. He also updated him about the outcome of the board meeting held on 4 March 2013. At 5.04 pm that day, Mr Ayles sent an email to Mr Wood in response and wrote "FYI - I thanked Chris for the offer and updated him re the outcome of the Board meeting".

553 On 23 March 2013, Mr Wood forwarded the board subcommittee paper to Mr Healy and wrote, "As discussed here is the framework I am proposing to Harold".

554 I should say at this point that as events transpired, the board subcommittee never held any meetings or conducted any business.

555 In late March 2013, Mr Wood received a phone call from Mr McLennan, the new CEO of Network Ten. He said to Mr Wood words to the effect "Don't dismiss us. We're very serious. We can pay what you need. We understand the value. Let us have a crack at your rights". In that phone call Mr McLennan and Mr Wood discussed what Network Ten may be willing to pay and Mr McLennan said to him words to the effect that they could pay about $50 million

per annum for the domestic broadcast rights. I will return to this floated $50 million per annum figure later.

556 On 26 March 2013, Mr Mitchell and Mr Wood met with Mr Worner and Mr McWilliam at Mr Mitchell's office in South Melbourne to discuss the domestic broadcast rights. At the meeting they discussed the question of host production responsibilities. Mr Wood told Mr Worner and Mr McWilliam that TA wanted to have the host production responsibilities. They told him that Seven wanted to retain it. There was no resolution of this issue at this meeting. At the meeting, Mr Worner and Mr McWilliam provided to Mr Wood and Mr Mitchell Seven's latest offer (Seven's March offer).

557 After the meeting, Mr Mitchell took Mr Wood aside and said to him words to the effect:

> TA is not going to do the host broadcast.
>
> You don't know what you're doing.

558 On 27 March 2013, Mr Wood forwarded Seven's March offer to Mr Roberts, Mr Perrins and Mr Ayles. Seven's March offer had no change to the annual rights fees. They still summed to $120 million over five years. There were some changes to the host broadcast clauses although they did not go far enough for TA. Interestingly, a draft of this offer seems to have been prepared as early as 22 January 2013, although apparently held back by Seven for a reason that I can only speculate on.

April 2013 events

559 On 1 April 2013 the ENP with Seven commenced.

560 On 4 April 2013, Mr Wood sent an email to Mr Guinness asking whether they could discuss the second IMG offer for the domestic broadcast rights. Mr Guinness replied to him on 4 April 2013 and stated that he was away with his family. Mr Wood replied to Mr Guinness on 5 April 2013 and said that they would speak the following Monday.

561 On 5 April 2013 at 9.22 am, Mr Worner sent an email to others at Seven expressing concern that the longer it took to negotiate a deal with TA, the more chance that Seven's competitors would re-focus on the tennis as the cricket situation developed. As I have indicated, at that time negotiations were also in train for a new broadcasting deal for the cricket. Seven was concerned that the loser in that bid, which would be either Nine or Network Ten, would then go for the tennis.

562 Later that morning at 10.20 am, Mr McWilliam sent an email to Mr Worner, Mr Martin and Mr Wood, copying in Mr Mitchell saying "[f]urther to our meeting I am wondering what's happening now as it would be good to get the main terms nailed down and then lock everyone up to conclude the long form". At 10.22 am, Mr McWilliam rang Mr Mitchell and they had a just under ten minute conversation. Mr Wood responded to Mr McWilliam's email at 10.50 am and suggested 30 April 2013 or 1 May 2013 as dates for an offsite meeting in Melbourne.

563 On 9 April 2013, Mr Martin sent an email to Mr Wood, copying in Mr Mitchell, Mr McWilliam and Mr Worner, concerning organising an offsite meeting on potentially 9 and 10 May 2013. Mr Martin said, inter-alia: "it is imperative that prior confirming [sic] the 'off-site', we have an agreement in principle of the short form agreement handed to you on March 26th in Harold's office." The short form document Mr Martin was referring to was Seven's March offer.

564 On 15 April 2013, Mr Wood responded to Mr Martin's email of 9 April 2013 and said "[w]e are happy to save the date for the off site on May 9th and 10th however we cannot sign the March 26th short form letter prior to the off site as we still have issues with that letter".

565 On 15 April 2013, the TA board had a meeting. Mr Healy, Mr Freeman, Mr Cooper, Mr Fitzgerald, Mr Holloway, Mr Tanner (as to part) and Dr Young were present. Mr Mitchell and Mr Davies were apologies. Mr Wood and Mr Roberts were present. Mr Ayles was not.

566 As with the other board meetings in this period, Mr Wood decided what to include in the reports and documents in the board pack. The agenda for the meeting was in standard form and it contemplated, again, that any discussion of the domestic broadcast rights negotiations would take place as part of Mr Wood's CEO's report. In his written report he said:

> From a broadcast perspective the ENP has commenced with Seven for domestic broadcast rights with our aim to lock in a long form deal at an off-site meeting in early May. From an international perspective TA's Asian rights will go to tender later this year. This will include all Asian rights with the exception of China and Japan. Rights will be offered by platform (traditional broadcast, subscription, digital, and mobile) and by each geographic region.

567 Mr Wood's reference to TA's aim to lock in a long form deal at an off-site meeting in early May was directed to locking in a deal with Seven.

568 Further, the reference to the international rights was another step by way of the implementation of the strategic plan for the better exploitation of TA's international television rights through TA achieving host broadcast control. Mr Wood had previously presented to the board on this

matter in July and August 2012. Importantly, its implementation depended upon TA gaining control of host broadcasting from Seven.

569 A commercial business unit report prepared by Mr Ayles was also before the board. It referred to there being, relevant to the host broadcast role, a "[s]ignificant appetite from Asian broadcasters to host the Australian Open on a market by market basis as opposed to a pan regional option". More generally it said that:

> **INSIGHT**
>
> Asia Pacific remains the key to unlocking continued double digit growth.
>
> Continuing the process of deconstructing categories during renewals whilst separating territories for flexibility in new partner offerings is providing commercial opportunities.

570 Further, the media unit report said:

> **BROADCAST OPERATIONS**
>
> **OVERVIEW & INSIGHT**
>
> Broadcast Operations has continued to focus on the completion of all Australian Open 2013 de-briefs (both internal and with clients) while structurally planning for Australian Open 2014 and scaling our year round operation.
>
> Redevelopment workshops have recommenced and facilities build for future remains at the top of the priority list – both through the longer term redevelopment process, the medium term strategy focus and the more immediate capital expenditure programs.
>
> The internal Tennis Australia budget process will drive much of our activity over the next month, allowing us to consolidate successes from AO2013 and achieve significant growth for 2014. This will be particularly relevant in the areas of compound build, broadcaster ratecard, in-house resourcing and top level client servicing.
>
> **DEVELOPMENTS**
>
> 01 Tennis Australia once again plans to build its own broadcast and production facility in the broadcast compound - both operationally and technically and this facility is expected to grow by a further 30% on A02013. Plans for this larger facility are well underway and full budgets being designed.
>
> 02 In depth de-briefs with our technical partner, Gearhouse Broadcast, are due for completion in the coming weeks. The maximisation of this technical relationship and their ongoing dedicated support, will allow us to quickly establish both a year round operation and a more integrated tournament solution. Budget requirements for both areas of activity are being carefully considered.
>
> …

571 Mr Wood provided a verbal CEO's report at the board meeting. He spoke briefly about the domestic broadcast rights negotiations and said that TA had received a further offer from Seven, but that the rights fees offered were the same as Seven's November offer.

572 On 22 April 2013, Mr George emailed Mr Ayles, Mr Roberts, Mr Pearce, Mr Wood and others with an agenda for a meeting to be held on 23 April 2013 to plan TA's approach to the ENP, which email included attachments relating to Seven. In this email, Mr George wrote, inter-alia:

> High level agenda for tomorrow:
>
> - Review and understand current status of discussions with Seven – to this end please refer to the two attached documents representing the most relevant correspondence between TA and Seven
> - Discuss and agree TA's objectives from the domestic rights deal
> - Discuss and agree on the process to best achieve these objectives
> - Next steps and actions

573 On 23 April 2013, there was a meeting of the relevant working group to discuss TA's approach to the ENP with Seven and TA's domestic broadcast rights in general. At the meeting, tactics and strategies for the ENP were discussed and worked through.

May 2013 events

574 On 1 May 2013, Mr Ayles sent an email to Mr Wood, copying in Mr George. Attached to the email was a document named "Issues regarding broadcast requiring resolution". The issues on the list included, inter-alia, rights fees, platforms and content to be granted, online mobile streaming, host broadcast rights and long form agreement.

575 In relation to rights fees, the following was said:

1. Rights fees	• Rights fees currently offered by Seven does not reflect the market value of TA's rights. The parties are some way apart on this issue. • Each component of TA's broadcast rights must be valued separately on a platform-by-platform basis. • TA requires a substantial increase to current contra arrangements, including a year round expenditure on sport of "tennis" and an event/sport marketing and advertising plan acceptable to TA. • Ratings bonus to be discussed.

576 It seems likely that the reference to "the market value" was, inter-alia, the $40 million figure referred to in the Gemba report. That was then the only market analysis in Mr Ayles' hands. Further, to refer to the component platforms did not entail that there would not be the one rights fee per annum reflecting all platforms.

577 Further, the issues document made it plain that, inter-alia, the long-form question and host broadcasting were also issues to be discussed.

578 On 2 May 2013, there were a number of emails between Mr McWilliam, Mr Martin, Mr Worner, Mr Mitchell and Mr Wood in respect of a proposed off-site meeting to be held between Seven and TA on 9 May 2013. At 5.18 pm, Mr Wood emailed to Mr McWilliam, Mr Martin, Mr Mitchell and Mr Worner a document entitled "Items for discussion at off site MAY 9 10 2103 [sic]". The items of discussion included:

- Rights fees
- Platforms and content being granted including minimum broadcast standards
- Online mobile streaming
- TA's reserved rights
- Archive
- Host broadcast and redevelopment including broadcast compound
- A long form agreement.

579 On 7 May 2013, Mr Wood's personal assistant forwarded an email to Mr Wood which listed the attendees for the off-site meeting on behalf of Seven. The attendees listed were Mr McWilliam, Mr Martin, Mr Saul Shtein and Ms Renee Quirk, Seven's Commercial Manager – Sports and Investments, with Mr Worner's attendance not yet confirmed.

580 On the same day, Mr Wood met with Mr Martin at a middle of the road restaurant in Toorak for breakfast. Mr Wood had a long standing professional and personal relationship with Mr Martin. In that meeting Mr Wood said, inter-alia, that the domestic rights had been valued at about $40 million annually and that TA was interested in becoming host broadcaster. Mr Martin said that there would have to be an increase in advertising revenue to enable Seven to pay rights fees of $40 million per annum. He also told Mr Wood that Seven might be willing to agree to TA becoming the host broadcaster.

581 In his report to others at Seven of the meeting with Mr Wood, Mr Martin wrote in respect of the possibility that Network Ten would partner with Foxtel in a bid: "If I was Ten I would leap at it – coming from nothing I'll take something – I could enter a premium sport, take it off Seven and at a manageable price supported by News [l]td press!".

582 On 8 May 2013 at 9.20 am, Mr Ayles sent the following email to Mr Browne:

> Tim
>
> I wrote this last month as a summary of Commercial business.
>
> Can you draft something similar for this board report.
>
> Thanks
>
> Steve
>
> **Commercial**
>
> The Commercial Business Unit remains on target to achieve its budgeted surplus for 2013. Broadcast, Ticketing and Licensing and Merchandise are forecast to exceed budget making up for shortfalls in corporate hospitality and sponsorship.
>
> Recommendations from the corporate hospitality review have begun to be implemented including a greater focus on sales resources, better incentivised sales agents and changes to our product offering. The changes include the sale of access to the Presidents reserve and the addition o f a high end packages utilising AO club style hospitality. The announcement of the successful catering tender will take place this month which will provide TA with more input into food and beverage offerings at the Australian Open both from a public retail and a corporate hospitality perspective.
>
> From a broadcast perspective the the ENP has commenced with Seven for domestic broadcast rights with our aim to lock in a long form deal at an off-site meeting in early May. From an international perspective TA's Asian rights will go to tender later this year. This w ill include all Asian rights with the exception of China and Japan. Rights will be offered by platform (traditional broadcast, subscription, digital, and mobile) and by each geographic region.
>
> …

583 Clearly, this is reflective of Mr Ayles' mind-set at the time. With reference to the proposed Olsen Hotel meeting, he described his and the EMT's "aim to lock in a long form deal at an off-site meeting in early May". In other words, his aim at the time was not to just go through the motions with the ENP and then go to tender.

584 On 8 May 2013 at 9.47 am, Mr Wood sent an email to Mr Roberts, Mr Perrins, Mr Browne, Mr George and Mr Ayles attaching a draft report from Gemba dated July 2006 and entitled "Tennis Australia - Broadcasting Strategy - Draft Final". In that email Mr Wood said, inter-alia:

> Tim [Worner] said they can't do $40M but are working on an increase the [sic] current offer and will put their best foot forward.
>
> Steve Ayles
>
> We need to know the exact cost of doing host production for the summer of tennis because we need to add that figure to our rights fee.

585 That last reference was in reality a reference to an estimate of the costs saved by Seven.

586 The subject line of the email was "Please be familiar with this Broadcast valuation document before this afternoons [sic] 430 meeting (maxine is setting it up)". Mr Wood incorrectly attached a draft report from Gemba that was dated July 2006. The report he intended to attach was the Gemba report that I have described earlier.

587 At 10.03 am, Mr Browne, in response to Mr Wood's email, sent an email to Mr Roberts, Mr Perrins, Mr George, Mr Ayles and Mr Wood attaching the correct report (May 2012) from Gemba that Mr Wood had intended to attach to his email, and also attaching the Gemba summary that I have previously referred to.

588 At 12.58 pm, Ms Capela sent an email to Mr Pearce, Mr Rob O'Gorman (TA's video producer), Mr Tiley and Mr Wood, copying in Mr Perrins and Mr George. Attached to the email was a document entitled "Host Broadcast - Financial Summary - AO & AOS - as at 8.5.13". I have dealt with Ms Capela's analysis and the relevant emails in a separate part of my reasons and so will not linger here on the detail.

589 Between 4.30 pm and 5 pm, Mr Wood met with Mr Roberts, Mr Ayles, Mr Browne, Mr Perrins and Mr George in Mr Wood's office at TA to discuss the domestic broadcast rights.

590 In relation to the offsite meeting proposed for 9 May 2013, at 4.44 pm on 8 May 2013 Ms Rice, Mr Mitchell's PA, emailed Mr Wood and said "Harold was hoping to come to the first bit of the meeting tomorrow morning. Please can you tell me where it is and what time?". Mr Wood later spoke with Mr Mitchell and told him where and when the meeting would be held. Mr Wood responded to Ms Rice at 10.36 pm and wrote "I have spoken with Harold".

591 Now I should note that prior to the 9 May 2013 offsite meeting, Mr Wood had said to Mr Tim Worner, Seven's CEO, that Mr Worner should not "come to Melbourne unless you have got $40 million". In response, Mr Worner had said to him that Seven could not do $40 million a year but would put its best foot forward. This exchange is recorded in Mr Wood's email of 8 May 2013 to other members of the negotiation team.

592 On 9 May 2013, Seven and TA held an off-site meeting at the Olsen Hotel in South Yarra, Melbourne. On behalf of TA, Mr Browne, Mr Roberts, Mr Perrins, Mr George, Mr Ayles and Mr Wood attended. Seven was represented by Mr Worner, Mr Shtein, Mr Martin and Mr McWilliam. Mr Mitchell did not attend. The meeting lasted all day, but no agreement was reached on the outstanding issues of rights fees, host production and whether there would be a

binding agreement without a long-form agreement. But the prospect of TA taking over the host broadcast was an option on the table.

593 Mr McWilliam in an internal Seven email reported on the day:

> Well, today was going okay with Steve wood (in melbourne) until...
>
> Till he asked for a $10 mill "sign on" fee, no first and last!!
>
> We had offered $22.6 mill escalating at 3% + a $5 mill sign on (which was for a first and last)
>
> They want to do (ie produce) the host feed (at their cost), which we estimate saves us $4 mill a year (they have a govt grant for a permanent broadcast centre -- what a gross waste of public funds). In other words us going up to $26.6 a year doesn't cost any more. From the current offer. We also said we could do $1.5 mill a year in contra.
>
> Sadly Steve wood came back, after having initially sought $40 mill a year, to say they could do
> - $34.5 mill including contra ie $33 mill cash
> - 5% escalators
> - $10 mill sign on, no first + last
>
> We think if we were to offer $33 mill a year including contra and a $5 mill first and last... We'd lose $8 to $10 mill a year, maybe less if we can ramp up second channel recoveries or keep our current fox sports deal which gives us $2 mill a year. This is an "all rights" deal which will get more valuable overtime as HbbTV develops, etc. WOL and andrew will do figures - we don't want to lose it + it is valuable promotional platform
>
> We still need to drill down a bit more into the production model and the second channel revenue estimates.
>
> But given gyngell's telling tim (down the other end of the room) cricket's a $100 mill a year proposition (he's considering matching) we have to take this off the table

594 On 10 May 2013 between 8.48 and 8.54 am, Mr McWilliam rang Mr Mitchell several times, and on one occasion they spoke for just under five minutes.

595 Further, on that day the board pack for the 20 May 2013 board meeting was distributed to TA's directors. Mr Wood prepared the board pack for the 20 May 2013 meeting. That board pack included an agenda in standard form, with the update on domestic broadcast rights contemplated by Mr Wood's CEO's report.

596 Mr Wood prepared a written CEO's report for the 20 May 2013 board meeting but it did not address the status of TA's broadcast rights with Seven because the significant discussions with Seven had only commenced on 9 May 2013. Indeed, they did not progress very far until 16 May 2013 which I will come to in a moment.

597 On 11 May 2013 there was a newspaper article which said that Network Ten had bid $500 million for the cricket. In the wake of this publicity, Gemba sent TA a further report saying that cricket negotiations presented TA with the opportunity to win a significant increase in the broadcast rights fees (the Gemba cricket presentation), which further report was unsolicited.

598 On 15 May 2013, Mr Rob Mills, the CEO of Gemba, sent an email to Mr Wood, attaching a document entitled "AO Domestic Broadcast - Cricket Implcations [sic] v4". In the email he wrote, inter-alia:

> [W]e are keen to have a discussion with you regarding the AO broadcast deal. From our analysis and conversations that we are having with the market there has been a significant shift up in the appetite for summer sports content in recent weeks / months and we wanted to run a few thoughts by you.

599 The attached document stated, inter-alia:

> Regardless of the outcome of the Cricket bid process, the current situation suggests that conditions are favourable for Tennis Australia to step change the value of it's (sic) own domestic broadcast deal.

600 As I have also said, in preparation for the meetings with Seven, the management of TA, including Mr Wood, re-circulated and reconsidered the earlier (May 2012) Gemba report. Accordingly, the management of TA had all of the detail of the Gemba report available to them when negotiating with Seven the offer that was ultimately recommended to the board by Mr Wood on 20 May 2013.

601 On 16 May 2013, Mr Wood travelled to Sydney and met with Mr Worner at his offices. At this meeting, Mr Worner showed Mr Wood a spreadsheet detailing the direct advertising revenue which Seven had received from previous AOs, and the revenue it was predicting from broadcasting the event in the future. Mr Wood asked that he be shown this information because he considered that the direct advertising revenue actually generated by a network was one of the determinants of its ability to make a rights fee offer of up to $40 million per year, which he was seeking.

602 In effect, Mr Wood was following in an informal sense the methodology used in the Gemba report, which had been recirculated among TA management the previous week. The methodology in the Gemba report was to estimate the direct advertising revenue which could be derived from exploitation of the rights, and then to apply certain international benchmarks to calculate a potential rights fee. I will discuss its methodology in a separate section of my reasons.

603 Mr Worner's spreadsheet indicated that the amount of direct advertising revenue that was being received by Seven was equal to the amount of the rights fees that Seven was wanting to offer, that is, approximately $33 million per annum. Mr Worner pointed out to Mr Wood that he was running a real business and that the advertising revenue demonstrated Seven's capacity to pay.

604 Mr Wood talked Mr Worner up from this figure, including on the basis that the direct advertising revenue to Seven did not include the indirect benefits that Seven received, namely, what is described as the halo effect. In relation to host broadcast, Mr Worner said words to the effect that "we can work something out". Mr Wood understood this to amount to a willingness by Mr Worner to relinquish the control of host broadcasting to TA.

605 At the conclusion of the meeting, Mr Worner said to Mr Wood that Seven was prepared to pay $195 million over five years. At this time Mr Wood was satisfied that the rights fee of $195 million was as good as Seven could reasonably be expected to pay. He formed this view on the basis of the figures for Seven's advertising revenue that he had been shown.

606 On 16 May 2013 at 4.23 pm, Mr Mitchell spoke with Mr McWilliam on the phone for five minutes.

607 At 5.33 pm Mr McWilliam circulated the following internal email:

> Tim met with Steve wood today in Sydney
>
> Hopefully agreed a $195 mill deal over 5 years including contra and ratings bonus, with $5 mill sign on and "first" but no "last". Basic cash is $32 mill a year plus $2.2 mill approx, in contra. Ratings bonus of $1 mill a year (if achieved) on top as usual. 4% annual escalators
>
> Terms of the production deal still have to be worked out.
>
> Naturally subject to board approval, fingers still crossed
>
> We have sent back long form (which they are insistent be signed). Without numbers as yet. Also meeting on Monday of production teams to work out extent of TA's production obligations, coverage etc., up to our unilateral coverage point, given (as you know) we are pricing in savings of at least $4 mill a year. Loss over 5 years around $60 million
>
> We are factoring in one or two channels of broadcast TV (second channel either one of our digital ones or else Fox Sports if they will play ball); we get feeds of other courts which we can play online and if we don't TA will. TA wants to beef up obligations to stream mobile tablets etc

608 At 5.35 pm, Mr McWilliam reported to Seven by email:

> Also spoke to harold (in shanghai) who thought we had been more generous than we expected and he said they were now more nervous of what production responsibilities

they were taking on. Harold said they had a board meeting of TA on monday

609 On 17 May 2013 at 10.27 am, Mr Worner sent an email to Mr Wood attaching a letter of offer for a further five-year extension of the domestic broadcast rights (Seven's final offer); for convenience I will use that expression to refer to either of the written offer or verbal offer made the day before to similar effect in terms, inter-alia, of the rights fees. The total fees to be paid to TA under Seven's final offer was $195.1 million. There was nothing in the letter about host production. The breakdown of the domestic rights fees in Seven's final offer was that there would be a sign-on fee of $5 million, a $1 million ratings bonus for each of the five years, an amount of $11.8 million for contra plus cash rights with an annual escalation payable as follows:

- 2015 – $32 million;
- 2016 – $33.3 million;
- 2017 – $34.6 million;
- 2018 – $36 million; and
- 2019 – $37.4 million.

610 The letter stated the following:

> Dear Steve
>
> It was great to see you again yesterday and thanks for dropping by. Thanks also for being so candid and for listening regarding our own challenges.
>
> As we both recognise, there is a tremendous partnership between our companies and it makes a great deal of sense for it to not just continue, but grow.
>
> I've attached a spreadsheet showing the breakdown of how we got to the $195m we agreed yesterday.
>
> I have heard what you've said on contra and tried not to add too much more. The cash rises to $32m and there is an additional $1 m in ratings bonus, as has always been part of our deal structure. The annual escalator I have split between our 3% and your 5%, as we agreed yesterday.
>
> The $5m sign on fee includes a first and exclusive negotiating period. The last is gone.
>
> As you know this demonstrates an ongoing and substantial continuation of our commitment to tennis, even though it nevertheless represents a significant hit to our bottom line. I will set about getting Board approval for it from now.
>
> I thank you for your offer of $1 m corporate hospitality over the life of the deal, which we gratefully accept. I take this as an indication of your endeavors to help us claw back value from the deal. You were kindly going to consider extending this pro rata to the 2014 deal.

We are going to need ideas like that and more and I would ask that your team really addresses some of the suggestions we have made in this area (e.g. signage, Grand Slam Oval site, official program production rights, Tennis Academy involvement etc.). I tried to say how important it is for us to be able to obtain value.

Our teams are meeting to firm up the new production parameters and we have also sent back the draft "long form" as undertaken, in order to move the new deal forward.

Steve, let's get this done so we can announce promptly. A great look for your sport and a great look for our network.

Yours sincerely

Tim Worner
CEO, Broadcast Television

New Proposal $'m	2015	2016	2017	2018	2019	TOTAL
Cash Rights	32.0	33.3	34.6	36.0	37.4	**173.3**
First / Sign on fee	5.0					**5.0**
Ratings Bonus	1.0	1.0	1.0	1.0	1.0	**5.0**
Contra	1.9	2.1	2.4	2.6	2.9	**11.8**
TOTAL	**39.9**	**36.4**	**38.0**	**39.6**	**41.3**	**195.1**

611 The same day, at 2.55 pm, Mr Wood forwarded Mr Worner's email and attachment to Mr Mitchell, via Ms Rice, and said "Harold I will catch up with you regarding this letter".

612 On 17 May 2013, Mr Wood informed Mr Healy by telephone that he had received an updated offer from Seven which he was very excited about as it had everything TA wanted, including the host broadcast. Mr Wood also told Mr Healy that Mr Worner had opened his books to Mr Wood the previous day, showing Mr Wood Seven's actual and anticipated advertising revenue from the AO. As a result, Mr Wood said that he was satisfied that Seven's final offer represented the maximum it could be expected to pay. Mr Wood told Mr Healy that he wanted to put the offer to the board. Mr Healy advised Mr Wood to put the offer straight to the board at the meeting on Monday 20 May 2013, being the next business day, as all members of the board subcommittee were on the board. Importantly, it was not practical to hold a meeting of the subcommittee beforehand given the timing of the offer.

613 Also on the same day, at 9.08 pm, Mr Wood wrote to Mr Worner, copying in Mr McWilliam and Mr Martin, in response to Seven's final offer. In the email he said:

Thanks Tim for the letter attached.

I will now discuss this with our Media sub committee and work with my team respond [sic] on your Long Form.

While our discussions were fruitful yesterday, we cannot be said to have agreed anything until the long form is agreed (as we said during the meeting at the Olsen nothing is agreed until everything is agreed) and both boards have approved it.

> Best Regards
>
> Steve

614 On the same day, Mr Wood emailed Mr Ayles with a copy of Seven's final offer in respect of the domestic broadcast rights which he had received that day. Mr Wood asked him to:

> [P]repare a PowerPoint chart deck outlining the nature of the last Thursday commitment by Seven to host broadcast and "Everything everywhere" so that I can present these to the board on Monday. Please can you reference our deal along the lines of what ESPN announced today and at Wimbledon in 2011

615 On 18 May 2013 at 1:19 pm, Mr Ayles replied to Mr Wood and outlined some points that could be presented to the board. In respect of the host broadcast issue, he said:

> Host broadcast – up to you how much you want to say given Harold is anti TA delivering this. This gives us total control of all the feeds and what is produced for our broadcasters both domestically and globally. Allows us to promote the sport as part of the coverage and deliver the highest levels of technical production including specialist cameras, virtual signage etc

616 Although Seven had not in its final offer committed to TA doing host production, Mr Wood believed, based on his conversations with Mr Martin and Mr Worner, that this was something he would be able to secure in the course of the further negotiations with Seven for a long form agreement. It would seem though that management perceived that Mr Mitchell was still a host broadcast sceptic concerning TA's capacity to perform.

617 On 20 May 2013, TA had a board meeting. Mr Wood prepared the board pack for that meeting and attended that meeting. Present at the meeting were Mr Healy, Mr Freeman, Mr Mitchell, Mr Davies, Mr Tanner and Dr Young. Mr Cooper, Mr Fitzgerald and Mr Holloway were apologies. Mr Roberts was also present.

618 The 17 May 2013 letter from Mr Worner containing Seven's final offer was tabled at the board meeting.

619 At the meeting, Mr Wood said words to the effect that he thought that the fee of $195 million was a great result and that there was an opportunity for TA to undertake the host production, which would be strategically valuable. He recommended the board accept Seven's final offer.

620 Now I note that at this time, Mr Wood knew of the level of verbal interest from Nine and Network Ten, the second IMG offer at $30 million plus some potential upside, and the Gemba valuation of up to $40 million, including its basis. And having considered all that information, Mr Wood said to the board that he thought the fee of $195 million over five years ($39 million

per year) was a "great result", and recommended that it be approved by the board, subject to finalising a long form contract with Seven. Let me elaborate further on what transpired.

621 Mr Wood updated the board on the progress of negotiations with Seven, reporting that there had been a number of meetings between the parties and that significant progress had been made in relation to many of the outstanding issues.

622 Mr Wood reported that with the prospect of every point of the AO being shown live and the opportunity for TA to undertake host broadcast and post-production responsibilities, this would be an exciting time for TA and its domestic and international broadcast partners. In relation to host broadcast, the other directors understood from Mr Wood's report that TA were taking over control of host broadcast and that no deal was authorised to be done without it.

623 Now Mr Wood said that the proposed fee offered by Seven would mean that TA would incur additional expenses to produce the host feed. And in response to a query from Mr Mitchell, he advised that the host broadcast function would cost TA around $4 million (net) per annum.

624 Mr Wood said that in the context of the host broadcast discussion, the proposed broadcast centre underpinned the Melbourne Park redevelopment. He reiterated that the broadcast product was crucial for the AO. Mr Wood reported that the Victorian Government would fund the broadcast centre as part of the Melbourne Park redevelopment.

625 Mr Tanner queried whether the proposed agreement was for domestic television broadcast rights separate from digital and international rights. Mr Wood advised that the agreement was for Australian broadcast rights including digital and mobile phone platforms.

626 Mr Wood reported that as Seven's final offer had significantly increased, he recommended that the board accept the offer. Mr Wood advised that he believed that the revised offer by Seven was evidence of the strong relationship that had been built between TA and Seven over the years and that this relationship had underpinned the growth of the AO through the broadcast product.

627 Mr Mitchell advised the board that he believed that Seven was the natural partner of tennis. He congratulated Mr Wood on securing the new offer. Mr Mitchell further advised that Mr Wood had his complete support and recommended that the board approve the offer.

628 At this point let me say something about the board subcommittee. The evidence discloses two conflicting versions as to what was said.

629 In one version, in response to a query from Dr Young as to whether the subcommittee designated to make recommendations to the board in relation to the domestic broadcast rights deal had a chance to discuss Seven's final offer, Mr Healy advised that the offer had only been received the previous Friday and had been brought straight to the board. Mr Mitchell advised that his recommendation was to accept the offer. This version is supported by the actual minutes, an extract of which states:

> In response to a query from Dr Young as to whether the committee designated to make recommendations to the Board in relation to the domestic broadcast rights deal had a chance to discuss the offer, the President advised that the offer had only been received the previous Friday. Mr Mitchell advised that his recommendation was to accept the offer.

630 In another version, Dr Young asked whether the board subcommittee had had a chance to review the offer. Mr Mitchell said that the recommendation from the board subcommittee was to accept the offer. This version is supported by the draft minutes which stated:

> In response to a query from Dr Young as to whether the committee designated to make recommendations to the Board in relation to the domestic broadcast rights deal had a chance to discuss the offer, the President advised that the offer had only been received the previous Friday. Mr Mitchell advised that the committee's recommendation was to accept the offer.

631 Mr Pearce SC asked Mr Freeman the following in re-examination:

> But do you remember what words Mr Mitchell used at the 20 May '13 board meeting?---I don't recall whether he used the words "which is my recommendation" or "it is the committee's recommendation". I don't recall exactly how that was raised.
>
> HIS HONOUR: Sorry, before you go on.
>
> MR PEARCE: Sorry?
>
> HIS HONOUR: So you've got the Channel 7 modified offer of the 17 May. You've got the board meeting on the Monday, 20 May. If Mr Mitchell had used the word "committee" what would your response have been?---Well, there was no committee meeting that addressed that Friday, the 17 May matter which came in from Channel 7. So it was not - - -
>
> So if Mr Mitchell had said it's the committee's recommendation, what would you have said?---Well, it wasn't the committee's recommendation because it didn't meet over that weekend.

632 Now Mr Freeman's evidence suggests to me that Mr Mitchell did not say that the subcommittee had recommended. If he had said this, then this would have likely been immediately corrected by Mr Freeman.

633 The draft minutes were corrected at the board meeting on 22 July 2013 and I accept, as I will explain later, that the corrected minutes reflect the true position.

634 Further, Mr Mitchell asked whether the long form agreement could be concluded within a week. Mr Roberts, concerned that this would weaken TA's negotiating position, replied that he did not think it was a good idea. Mr Mitchell then said to Mr Roberts "That's how CFOs lose their job". Mr Roberts denied that this was bullying.

635 In relation to the discussion concerning completion of the long-form agreement, Mr Roberts gave the following evidence in answer to Mr Young QC:

> Now, I want to take you to the 20 May board meeting. The minutes are under the last tab in that same folder, too. I just want to ask you a couple of additional questions on the topic of the long form agreement that Dr Collins asked you about. Now, do you agree with this, that Mr Wood's recommendation of the Seven offer was subject to the finalisation of a long form agreement?---Yes.
>
> And that was the resolution that was recorded at the bottom of page 1428?---Yes.
>
> The form of the resolution is:
>
> *Complete the necessary long form agreement as soon as practicable.*
>
> ?---Yes.
>
> And the words "as soon as practicable" reflected some discussion about timing with the board?---Yes.
>
> And that's where the board landed, was it not, "as soon as practicable"?---Yes. I think nobody knew exactly how long it was going to take, because there were so many issues to resolve. But it was actually said in that meeting that by the end of May, I think was mentioned. But I – it was accepted not to put it in the resolution that we put a hard code - - -
>
> Yes?--- - - - 31 May.
>
> These minutes record that the chief executive provided a response on this question of timing. It's in the middle of that page 1428. Can I direct you to it. It's in the paragraph that starts:
>
> *Mr Mitchell queried - - -*
>
> ?---Yes.
>
> And the second sentence says:
>
> *The CEO advised that management would use its best endeavours to have the long form agreement completed and signed as soon as possible.*
>
> Now, do you have a recollection of that?---A vague recollection, yes, of that.
>
> Yes. And Mr Freeman is also recorded as expressing a view about finalisation of timing, third-last paragraph. Do you see that?---Yes.
>
> He wanted it completed promptly?---Yes.
>
> He had been concerned about the absence of a long form agreement at the previous meeting?---Of a signed one.

636 The questioning continued:

> Mr Wood sends an email on 21 May. The principal addressee is Mr Perrins, but it's cc'd to the executive team?---Yes.
>
> So you were part of the executive team getting these - - -?---I was.
>
> - - - joint emails?---I was.
>
> Now, can I direct your attention to the first paragraph; Mr Wood says to the executive:
>
> > *Some discussion as to whether a long form was in fact needed. While the board has now determined that the long form is required, it has emphasised that the long form must be agreed and signed by 30 May if it is at all reasonable to do so. We accordingly need to make all reasonable efforts to reach a deal with Seven on the details by then.*
>
> Now, your understanding based on this was that the executives were proceeding to negotiate on the footing that if it was reasonable, making all reasonable efforts they would complete by the end of May?---Yes.
>
> But if it were not reasonable, they would say so?---I would think so, yes.

637 In relation to the meeting, Mr Roberts gave the following evidence under cross-examination by Dr Collins QC:

> Did you say to Dr Young at any time that Mr Mitchell had bullied you?---No, not that I recall. I mean, there was – there was that remark made in that board meeting, but I did not consider that as bullying. It was only one remark made on one particular day. And I didn't have the view that – that Harold Mitchell was bullying me or Mr Wood.
>
> Just in relation to the remark to which you have made reference, was that a reference to a discussion which occurred in the course of the board meeting on 20 May 2013 concerning the amount of time it might take to negotiate and finalise a long form agreement?---That's correct.
>
> And at that board meeting did Mr Mitchell ask whether the long form agreement could be completed within the space of about a week?---A week to 10 days, yes.
>
> And did you express a view in respect of that matter?---I did.
>
> What did you say?-- I said that I didn't think it was in the company's best interests that we should be forced – we, Tennis Australia, should be forced to complete the long form agreement, which was a lot of work – a lot of work to be done, as I understood it at the time – within seven to 10 days, because it wouldn't put us in a great negotiating position.
>
> So you felt that Mr Mitchell was seeking to place undue pressure on the management team to finalise the long form agreement within a short period of time?---Well, it was my view that Mr Mitchell felt that way because the board had previously discussed that the previous agreement with Channel 7 hadn't been signed in five years. And I think there was a little bit of pushback on that to say that, "Okay. You haven't signed this particular deal over five years. Let's get this one signed fairly quickly." I think that was what was pressing that remark.
>
> As things transpired, the long form agreement was negotiated in the period after the 20 May board meeting and was ultimately signed about nine days later on 29 May 2013?-

> --That's correct. That's correct.
>
> And were you involved in those negotiations?---I wasn't.
>
> No. And, as things transpired, it was possible to finalise the long form agreement within a period of about nine days?---That's correct, but whether we – whether Tennis Australia got the best deal that it probably could on those points, which weren't necessarily financial, because the financial arrangements had already been agreed, but, on those other points, whether Tennis Australia got the best result is questionable, I suppose.
>
> You don't know one way or the other?---I don't know one way or the other.
>
> You weren't involved in the negotiations?---No.
>
> It's not a matter that you have troubled yourself to analyse since that date?---No. I didn't worry about it.

638 Mr Wood said that the management team would do its best to complete the long-form agreement as soon as possible. Mr Freeman recommended to the board that management take the necessary steps to complete the long form agreement, so that the domestic broadcast rights deal could be announced.

639 Mr Healy asked what the status of the long form agreement was and Mr Wood said that there were many outstanding issues that needed to be finalised, including some interpretations which TA's and Seven's legal teams were working to agree, for example securing digital platforms.

640 At the conclusion of the discussion, the board resolved as follows:

> Pending approval from the Seven Network Board, the domestic broadcast rights offer outlined in the letter from Tim Worner dated 17 May 2013 be approved and Management be instructed to complete the necessary long form agreement as soon as practicable.

641 As to the attractiveness of Seven's final offer, Mr Tanner gave the following evidence under questioning by Mr Young QC:

> In the first paragraph, the email said that the result was to get not only the best price but the best broadcast and best synergies for our sport and our events. You agreed that it was the combination of things that made this deal attractive, did you not; that is to say, a price in the same order as the valuation that you had?---Yes.
>
> Yes?---That certainly was one of the factors that made it - - -
>
> And an assurance by having seen Channel 7's direct advertising revenues that it was at about the maximum that Channel 7 could pay?---That – that's the assurance that Steve had given me from the open book discussion.
>
> Yes. And that's the assurance he gave to the board?---Correct.
>
> And the best broadcast was a reference to the, and best synergies to the opportunities to become the host broadcaster and unlock these future benefits through international rights and international sponsorships?---Yes. Yeah. This is an organisation, so, you

know, you've got to build capability, progressively, and so, you know, one question could be, well why didn't we want to focus on, you know, getting better in the digital side. To me, that was – that was a capability that we would have to develop over time.

Did you appreciate at this point of time that for some years Tennis Australia management had been working towards controlling the host broadcast themselves, building up the broadcast team, building up their technical expertise, their relationship with technicians and so forth?---No. I didn't. I didn't – I had asked Steve – not a dissimilar question which is how are we going to manage host broadcast and Steve's comment was pretty straightforward and pretty compelling; that is that we will contract it to the same people that Channel 7 contracts it to.

Yes, people that you were used to working with too?---Yes, exactly.

Both Channel 7 you were used to working with and these particular contractors?---Correct.

Those matters – that contractual relationship had been reported to the board in late 2012, had it not?---I honestly can't remember. It was certainly a conversation I had with Steve.

There's another aspect of Mr Wood's email that I will ask you about. It's at the top of the next page of your affidavit. It's the second line:

> *In essence, the deal we got ends up around the 40 million mark and we stay with a partner who knows our business and is prepared to grow with us.*

You agreed with that assessment, did you not?---Sorry, in essence.

From the second third and fourth lines of page 11 of your affidavit?---Yeah. Yes, correct.

642 As for putting the rights out to tender, Mr Tanner gave the following evidence under questioning by Mr Young QC:

Yes. I will come to this, but your view changed as a result of the discussions at the March board meeting and then the later discussions leading up to the May board meeting?---Yes.

Is that correct?---Yes. They did.

You asked the question at the March board meeting why TA was not putting out the rights to tender, but by the May board meeting you had formed the view that if you could get a good deal from Channel 7 it would be better to accept that then to go to tender; is that right?---Yes. Correct.

And what were your reasons for that changed view?---That the analogy might not be entirely accurate but it was a little bit like we – the process of tendering the TV rights would have been slightly later in the year. These networks, as I said, there's quite a lot of volatility in terms of the perceptions around their financial health, and so if you imagine or contemplate selling your house into a market that's volatile, non-existent, it could be entirely a different situation. So if we could negotiate an outcome, my view was that that was – and that outcome was consistent with the valuation on those rights, then that was – that was probably an okay place to be.

Yes. All right. Can I move on to the – I will move on to the April board. You mentioned that in paragraph 50, Mr Tanner. Now, you say there was no discussion. Is that based

solely on reading the minutes and seeing that there's no reference to any discussion?---I don't actually – even in my section 19 I don't think I recalled.

I don't think you were asked about it?---No, well, I don't – I don't recall a conversation at the April meeting.

Yes. You did tell ASIC in the section 19 that you came to the view that if a satisfactory arrangement could be made with Channel 7, that was the best outcome during the ENP. You said you came to that view in April after several discussions on the topic. What discussions were you referring to?---Discussions with Steve Wood.

Yes?---Yes.

And the board discussions of March?---Yes. Correct.

643 Mr Wood gave the following evidence under cross-examination by Dr Collins QC:

By doing a deal with Channel 7, you remained with the number one network and the partner with whom Tennis Australia had had a relationship going back 46 years?---Yes.

By doing a deal with Seven, you avoided the risks of allowing the exclusive negotiating period to expire and then going to open market with all of the risks that that entailed?---Yes.

Because you knew, as at 20 May, that there was a risk that if you went to open market, no one would bid for the rights?---That's stretching it a bit far but, you know, there was risks if you go to open tender.

One of the risks was that Ten would get the cricket rights and Nine would not seek to bid for the tennis rights?---Yes, that was the media reports of the day, that's correct.

And there was a risk that if you allowed the exclusive negotiating period to expire and then went to open market, that Seven would swoop in with a lower offer than it had made during the ENP?---That is a business risk, yes.

And as at the time of the 20 May board meeting, Tennis Australia had never received anything in writing from either Channel 9 or Channel 10?---Yes.

And all of the conversations that you had had or that had been reported to you with representatives of Channel 9 and Channel 10 had been in guarded and qualified terms?---Because we were going into an ENP, yes.

And as at the date of the board meeting on 20 May, the Tennis Australia board already knew about Nine and Ten's potential interest because you had raised it at the 3 December board meeting?---Yes.

And their potential interest had been the subject of newspaper reporting, so it was a matter, as you understood it, of common knowledge among the members of the board?---Yes.

In relation to IMG, you had extracted an offer for the purpose of using it as leverage against Channel 7 in the course of your negotiations?---Yes.

And it had, in fact, served that purpose, hadn't it?---Somewhat.

It was a factor that you deployed in order to persuade Seven to increase the offer to the point that you received on 17 May?---Yes.

But you had never seriously entertained recommending to the board that it enter into a deal with IMG for the domestic rights because your preference was always to deal directly with a free-to-air network?---Preference was to deal direct, but having IMG there saying that they had the rights and who wants to buy them could be even more leverage for – for us at Tennis Australia because they had the international rights that gave them that horsepower to be able to stare down Channel 7.

Mr Wood, your preference was always to do a deal with a free-to-air network directly, not through a middleman?---Yes.

You knew that was the preference of the board as a result of the discussions that had occurred around the board table?---Yes.

The board knew about, and had debated IMGs interest because you had raised it at the 3 December board meeting and again at the 4 March board meeting?---Yes.

And by the time of the 20 May meeting, you were satisfied, weren't you, that the board had all of the information it needed in relation to Gemba's valuation?---They didn't have the Gemba report.

No, they knew, didn't they, because you had told them about the existence of the Gemba report and that it had valued the rights at up to $40 million?---Yes.

And your view was that was all the board needed to know about the Gemba report and the valuation it contained?---No, I think the board should have known more, but the headline was 40 million was the Gemba report, and it would have been good to educate the board more with that.

So the board knew about the Gemba offer and the amount of the interest, the amount of the valuation contained in the Gemba offer?---Yes.

The board knew about IMGs interest and the figures that were talked about in the IMG offers?---I think they just knew it was hundreds of millions. It wasn't that specific.

Sure. They knew about IMGs potential interest and they had expressed, as you understood it, a clear preference to deal directly with a network, not with a middleman?---The board didn't say that.

HIS HONOUR: Sorry, did the board, at this time, know that IMG wasn't guaranteeing host broadcast?---Well, nobody was guaranteeing host broadcast at that time. Even though Seven said, "We will do host – we will let you do host broadcast," but - - -

I thought the evidence to date from you had been to the effect that, by 20 May board meeting, it was pretty clear that Seven was going to give you host broadcast, but IMG wasn't offering it?---Not at that – not at that point, but Seven, you know, dealing with them, nothing is agreed; everything is agreed. So, you know, we had to go through the ENP. That was what I needed to get done to satisfy myself that we could do a deal.

DR COLLINS: There was no open offer from IMG as at the time of the 20 May 2013 board meeting?---I don't recall where that was up to, but - - -

You recollect there were two offers?---Yes.

There was the offer in 2012 expressed to expire on 31 December 2012?---Yes.

You recollect that?---Yes.

And there was a second offer expressed to expire on 31 May 2013. You recollect that?---Yes.

> At the time of the 20 May board meeting, there were no IMG offers capable of being put to the board for their consideration?---Well, no, because we were heading into an ENP. That was the first barrier to anybody telling us anything.
>
> So the focus of the discussions, quite rightly, at the 20 May 2013 meeting was upon the offer which had just been received from Channel 7 the previous Friday?---Yes.

644 Further, in terms of Network Ten's position, Mr Freeman gave the following evidence in answer to Mr Young QC:

> Now, having regard to Ten's financial position, were you of the view that Channel 10 was not a legitimate counterparty for Tennis Australia to consider with respect to a five-year domestic rights deal?---Well, at the time of – which would have been the December to May period – the Channel 10 viability was certainly in my mind, and particularly in view of the long-term nature of the contract, which, if it had failed, it would have been catastrophic.
>
> Yes. Now, based on your evidence you gave late yesterday and this morning, Mr Freeman, your view was, was it not, that the best counterparty for Tennis Australia for a five-year rights deal, was Channel 7?---That's my view.
>
> Yes. And was that a combination of these factors? It was the highest rating television channel?---I knew tennis rated very highly.
>
> Yes. But, of the three networks, Channel 7 was the highest rating commercial network, was it not?---Yes, they would have been, because – yes.
>
> Yes. And Channel 7 – a second factor, was that you had a long relationship with Channel 7 under which you had worked with Channel 7 in delivering a high quality product over many years?---Yes. And I would never underestimate that – the value of a relationship in this type of long-term contract.
>
> Yes. and that relationship, you thought, was particularly valuable in terms of Tennis Australia making a successful transition to control of host broadcasting?---I made that clear before, yes. Yes.
>
> And, financially, you understood that Channel 7 was in a sound financial position, whereas the same, in your assessment, could not be said of Channel 10?---That was my view.
>
> And, just for completeness, what was your view concerning Channel 9 as a possible counterparty?---My concern was that Nine may have a successful pitch for the cricket. And coming on board, which as I said, was a very long season and coming on board at the same time with Seven, I could just see a mismatch – and I've used the word we needed a champion broadcaster. I could not see how Nine could be that for tennis.

645 Mr Ayles was not present at the meeting. After the meeting, Mr Wood told Mr Ayles that the board had approved Seven's final offer.

646 Let me deal with another matter. At the meeting, Mr Wood submitted a draft budget for the 2013/14 financial year. That draft budget was heavily criticised by Mr Mitchell on the basis that he thought that TA should accumulate even larger cash reserves, more quickly. The draft

budget had been prepared in accordance with the existing TA strategy which was to invest heavily in the sport of tennis and to build its cash reserves gradually.

647 In the course of that meeting, Mr Mitchell said to the board, "I would never run a business like this". In response, Mr Wood said, "Does the board not support the way management is running the business?"

648 In order to achieve a substantially larger contribution to reserves, it would have been necessary to impose significant cuts in expenditure, including on staff tennis programs and infrastructure. Subsequent to this meeting, Mr Wood amended the draft budget to deliver a higher surplus, although not as much as Mr Mitchell was advocating, which the board adopted.

649 On 21 May 2013 at 10.06 am and 10.18 am, there were two telephone calls from Mr Mitchell to Mr McWilliam. One of these calls was for seven minutes.

650 On 21 May 2013, Mr Wood sent an email to Mr Perrins, copying in the EMT, Mr George, Ms Capela, Mr Smith, Mr Browne and a solicitor from TA's external solicitors. In that email he said, inter-alia:

> Yesterday the TA Board agreed in principle to a renewal of our broadcast deal with Channel Seven on the terms set out in the May 17 letter from CEO Tim Worner, subject to agreement on a long form. Please note that there was some discussion as to whether a long form was in fact needed. While the Board has now determined that a long form is required, it has emphasised that the long form must be agreed and signed by 30 May if it is at all reasonable to do so. We accordingly need to make all reasonable efforts to reach a deal with Seven on the details by then. This will take significant effort and compromise from the team but I believe we can do this.
>
> …
>
> I have determined that the Key Negotiation Team to get to this position will be yourself supported by Tim Browne and K&L Gates, Steve Ayles; Greg George supported by Brad Smith and Renata Capela; which is why they, along with the Executive Team, have been copied on this email. However, by copy they are each requested not to forward this email or discuss it with anybody outside the Key Negotiation Team unless I have agreed.

651 On 22 May 2013, the EMT had a workshop to discuss and draft a long form document.

652 On 24 May 2013 at 1.20 am Mr Wood sent a draft long form agreement to Mr McWilliam. On 24 May 2013 at 12.19 pm, he received an email from Mr McWilliam, which set out an agenda for the long form meeting.

653 On 26 May 2013, Mr Ayles sent an email to Mr Wood, the EMT, Mr Perrins, Mr Browne, Mr George, Mr Smith and Ms Capela with Mr Ayles' comments on Mr McWilliam's points. In

that email, Mr Ayles set out his views in respect of the 34 points to which Mr McWilliam referred in his email dated 24 May 2013. He wrote, inter-alia:

> ...I make the following comments based on Bruce's email:
>
> 1. Seven has listed several of the points as NEW. We need to be very clear up front that this entire deal is NEW and that these are simply matters that have not been discussed as part of the negotiations / deliberations to date.
>
> 2. Seven argues that this is about the commercial value of the deal. We agree and because of the low rights fee offered and the fact that we are prepared to not take this to a competitive market, in return we expect the value extracted from these outstanding points to fall in favour of TA. Particularly as they relate to host broadcast.

654 On that day, Mr Ayles also sent an email to Mr Perrins and Mr Wood saying:

> Steve / Roger
>
> Have been reading the additional emails and Bruce is simply trying it on. He is relying on the pressure being applied to us to cave on these issues. We only have one opportunity, which is this week, to achieve what we want out of this deal otherwise its five more years of the same operational pain. Seven has already had a win on the rights fee, let's not concede on the operational stuff as well.

655 That same day, the EMT met in the TA boardroom to discuss strategy and preparation for the long form agreement with Seven.

656 Over the period 27 May 2013 to 29 May 2013, the TA negotiation team met with Seven representatives to negotiate and finalise the long form agreement in respect of the domestic broadcast rights. The meeting took place at the offices of TA's external solicitors at the Rialto Building in Melbourne. On behalf of TA, Mr Perrins, Mr Browne, Mr Roberts and Mr Wood attended. Ms Capela attended part of the negotiations. On behalf of Seven, Mr Shtein, Ms Quirk, Mr Martin, Mr McWilliam and Mr Worner attended. In the course of these negotiations, Seven agreed that TA would undertake the host production.

657 Let me say something about Network Ten at this point. Sometime in the week commencing 20 May 2013, Mr Wood spoke with Mr McLennan and provided him an update of the status of TA's ENP with Seven. On 27 May 2013, Mr Wood received an email from Mr McLennan, which was copied to Mr Lachlan Murdoch. In the email Mr McLennan said, inter-alia:

> Good to talk last week. I appreciated you giving me an update on the status of your "exclusive" negotiation period with the Seven Network and I just wanted to confirm that Network Ten is very interested in bidding for the Tennis Australia rights, should you choose to take them to open market.

658 On 28 May 2013 at 8.39 am, Mr Worner sent an internal email to Seven directors updating them on the course of the negotiations with TA. The last paragraph provided:

> Yesterday there was considerably more momentum in the room than we expected and we recommend we take advantage of that and sign this agreement quickly. The cricket rights negotiations could reach an end point by this weekend and we would not welcome the prospect of a cricket-less Nine or Ten arriving on the scene.

659 In a sense this makes the point that TA was in a very strong negotiating position at that point given Seven's perception.

660 On 28 May 2013 at 11.53 am, Mr Wood sent an email to Mr Ayles, who was in Paris for the French Open, with the subject line "Finalising the seven contract in two hours from now". Mr Ayles replied to him and said "Can we see it first? Or at least the key points that will impact the delivery?" Mr Wood replied to Mr Ayles and said "Sorry we are still writing it up now and then we will sign it – 10 people in the room for 3 days working face to face in real time".

661 In an email on 28 May 2013, Mr Tiley asked Mr Perrins, "is there a way to see some of the key clauses on this before being finalised? We want to make sure we have the appropriate scheduling flexibility." Mr Tiley forwarded this email to Mr Ayles. Mr Ayles later asked Mr Tiley if he had heard anything back about this request and he responded, "No, nothing."

662 On 28 May 2013 at 8.00 pm, Mr Mitchell sent an email to Mr Freeman in the following terms:

> Just spoke to Steve wood. I authorised him to complete and sign the 7 contract. It is in line with discussions at the board meeting.
>
> Great result for Tennis and our partners.
>
> It will be announced in about the next ten days once Steve Wood is back in the country after the French Open.
>
> A great result!

663 One might query the reference to "I authorised him…". Clearly this reflected how Mr Mitchell perceived his significance at the time.

664 Late on 29 May 2013, the domestic broadcast rights agreement between Seven and TA was finalised. Mr Perrins and Mr Wood signed it on behalf of TA and Mr McWilliam and Mr Worner signed it on behalf of Seven.

665 On 30 May 2013, Mr Wood responded to Mr McLennan's 27 May 2013 email and said "we will be in touch at the appropriate time".

Events of June and July 2013

666 On 4 June 2013, the cricket rights were awarded for a five year period. The rights were divided between Nine, being $400 million (in cash) and $50 million (contra advertising) for Tests and One Day Internationals, and Network Ten, being $85 million (in cash) and $15 million (contra) for domestic T20 otherwise known as the Big Bash League (BBL). This was as a result of a competitive tender.

667 On 6 June 2013, Ms McKendrick forwarded an email to Mr Wood which included an article from Business Spectator titled "After Nine's cricket catch comes Ten's next serve". The journalist had speculated that the rights could be in the price range of $40 million to $50 million per annum. She asked, "How much was the Channel 7 deal??" Mr Wood wrote in response, "Went from 20 to 40 but we incur some extra costs for host production".

668 Ms McKendrick replied to Mr Wood and wrote "So off this article we should have got better – correct". Mr Wood responded to Ms McKendrick and wrote "Depends". What Mr Wood meant by "depends" was that it would depend on how well they executed host production and that this would be proof whether the decision was the correct one or not.

669 On 13 June 2013, the AFR published an article in respect of the domestic broadcast rights deal TA made with Seven. The article referred to meetings and contact that Mr Healy and Mr Wood had had with other television networks. The article also referred to Gemba providing a study and valuing the domestic broadcast rights.

670 On 13 June 2013, the AFR reported:

> **Tennis Australia in firing line over discounted deal with Seven**
>
> Ten Network and Nine Entertainment Co have criticised Tennis Australia for agreeing to extend its broadcast contract with Seven West Media without taking the rights to the open market.
>
> Free-to-air television networks were told Tennis Australia was planning to take the sport's broadcasting rights to the open market later this year and have been blindsided by the organisation's move to extend its existing contract with Seven West Media for about $35 million annually, less than the $45-50 million Ten is believed to have been considering.
>
> Nine Network managing director Jeff Browne said: "When I rang [Tennis Australia] to register Nine's interest, I was told their expectation was around $40 million per year."
>
> It is understood Nine's last contact with Tennis Australia chief executive Steve Wood was in March, a month before the sporting body entered its exclusive negotiating period with Seven.

"It would be scandalous if Tennis Australia sold its television rights without conducting an open tender," a Ten spokesman said on Wednesday.

"Victorian taxpayers have pumped hundreds of millions of dollars into facilities used by Tennis Australia. Taxpayers have the right to expect Tennis Australia to conduct an open, transparent negotiation process, particularly given the record prices the AFL, NRL and Cricket Australia have secured for their television rights recently."

The *Australian Financial Review* reported on Wednesday that Tennis Australia is set to agree to a new five-year rights deal worth about $175 million with Seven, up from the current contract worth $21 million annually.

Tennis Australia could have cost itself up to $50 million during the next five years by staying with Seven. However, one Tennis Australia source claimed the new contract could be worth closer to $40 million annually, subject to certain clauses in the contract being met.

Tennis Australia officials, including Mr Wood and president Stephen Healy are understood to have had met with several television networks earlier this year and in 2012, during which the networks were told Tennis Australia would take the rights to tender. Mr Healy would not comment when contacted by the *AFR* on Wednesday.

It is understood Ten wrote to Tennis Australia in late May confirming its interest in bidding for tennis rights.

The new deal with Seven, which could be announced as early as Friday, will begin in 2015. It comes during Seven's six-month negotiating period with Tennis Australia, which was not due to expire until September 30.

Claims Mitchell bulldozed deal

Sources close to Tennis Australia claim Harold Mitchell, the organisation's vice-president, "virtually bulldozed" the deal through at board level.

Informed industry sources also have said this week there is a possibility Mitchell could become a Seven West Media board member later this year, which Mr Mitchell strenuously denied to the AFR on Wednesday.

However, there is no doubt the Tennis Australia board and its executives have long been split on its broadcasting rights strategy, with its decision to not take its rights to the open market met with scorn and disbelief by some figures in the broadcasting and sports business industry.

It is understood there are also several Tennis Australia officials unhappy with the Seven deal, particularly given that Ten was believed to be willing to pay at least $10 million annually more for the tennis than Seven, plus the huge increase in the value of media rights achieved by other sports, in particular cricket, AFL and NRL, in recent years.

Seven will gain free-to-air, digital and pay-television rights, and may choose to on-sell the latter to Fox Sports Australia, as it currently does.

Negotiations kept in house

There are also question marks about Tennis Australia's strategy of mostly keeping its negotiations in-house, with the organisation choosing not to bring in outside consultants, as did the NRL last year by engaging corporate advisory firm Greenhill Caliburn. Cricket Australia also was assisted by Credit Suisse and others such as Deutsche Bank vice chairman Steven Skala earlier this year.

Both rugby league and cricket, which also assembled an in-house negotiating team were able to negotiate the doubling in value of their rights. The new deal for tennis will be worth about 45 to 75 per cent of its existing contract.

It is understood Tennis Australia's preparatory work began last year when it engaged respected sports consultancy group Gemba to undertake a study on the value of sports broadcasting rights in the open market.

Otherwise, Tennis Australia kept all decision-making in-house, with vice-president and media buyer Mr Mitchell, considered to be one of the most powerful media identities in the country, playing a key part in negotiations.

The Gemba study is believed to have valued the tennis rights significantly higher than the $21 million Seven has been paying annually for the Australian Open and various lead-in tournaments it has been telecasting on its digital channels in recent years. The study benchmarked tennis against other sports rights deals.

The value of tennis was reinforced when Tennis Australia received a preliminary offer earlier this year from at least one international sports management group worth $40 million annually. The group would then have on-sold the rights to domestic free-to-air and pay-television operators.

The Australian Open in particular as seen as an excellent property for free-to-air networks given its late January timing and prime-time coverage every evening for two weeks, which has allowed Seven to promote its new programs just before the start of the February ratings season.

$40 million seen as fair valuation

It's understood Tennis Australia chief executive Steve Wood had discussions with other consultants and with television network executives, who reinforced the view that $40 million was a fair valuation for the tennis rights.

In June 2012, the *AFR* first reported Seven was pushing hard for Tennis Australia to extend its broadcast rights without putting them to tender.

Mr Wood and other Tennis Australia executives subsequently met with Seven Ten and Nine Entertainment Co. Fox Sports, which sub-licences pay-television rights from Seven, does not deal directly with Tennis Australia.

Those talks continued into 2013, when a split at board level at Tennis Australia emerged with Mr Mitchell wanting a deal with Seven signed quickly and others demanding a tender process.

Ultimately Mr Mitchell won the argument, convincing the board and reluctant executives to agree that a $10 to $15 million increase with Seven represented a good deal.

Talks with Seven heated up once its exclusive negotiating period begun in April, just after Seven formally presented an offer to a Tennis Australia board meeting in late March.

Eventually a deal with Seven was agreed in private last week, just as Ten and Nine agreed to a huge $550 million five-year contract for cricket rights.

The price Seven is paying for tennis pales in comparison and represents good business for a network that has made a big push into sports in recent years, locking out rivals such as Ten.

671 So, the article discussed figures up to $50 million per annum. But no such figure was ever firmly put or even suggested in early 2013 by Network Ten. Further, Network Ten had not put any written offer to TA or written to TA in late May.

672 I have set this article out as it is a reasonable hypothesis that it provided the basis for Dr Young to later assert, or suggest that others had said, that there had been an earlier letter from Network Ten.

673 On 13 June 2013 at 5.37 pm, Mr Wood sent an email to board members to provide assistance to them in answering questions about the broadcast rights deal and to provide them with the best justifications for the deal with Seven so that they could meet any public criticism of the deal. He said the following:

> Dear TA Board,
>
> You may have seen some of the media interest in our latest Domestic Broadcast Rights deal, so I thought it might be helpful to both recap on our last board meeting and also elaborate on a number of points of discussion.
>
> As you are all aware, this has been a long and very thorough process. Along the way we have had many discussions with many experts nationally and internationally in the field. We have commissioned research on the value of our broadcast products and indeed, worked through strategy on the best manner in which to get not only the best price, but the best broadcast and the best synergies for our sport and our events. Alongside me at the helm of this entire process has been the foremost expert in this field in this country, your fellow director Harold Mitchell.
>
> After many many months of work and a lot of discussions and posturing from other media parties, agencies and so-called "independent experts" touting for a consultancy fee, we received an initial offer from Seven late last year. But we felt it was insufficient. We also received another potential offer from IMG to buy the rights and then resell them. Again, after measuring against what we knew and other anecdotal evidence, we opted to enter into the Exclusive Negotiation Period with Channel Seven.
>
> Keep in mind that at that point in time our intention was to keep as many options open as possible so as to, in the first instance, keep the commercial pressure on Channel 7. And, of course if they could not come up with a satisfactory offer, then those options could be fully explored.
>
> So we went into some very heavy and I have to say fruitful discussions with Channel 7. At this point, I should mention that we did go in with them as a preferred option because of more than 4 decades of history and because of the value of our co-branding in the market place. We have a very strong public association with them. We are a part of their history as much as they are a part of ours. But we certainly did not go in prepared to accept an inferior offer from them (as evidenced by our rejection of their initial offer).
>
> With that background in mind, we then received a terrific offer (that had been strengthened by Seven after a couple of heavy days of negotiating) that I brought to all of you at our meeting on 20 May. Both Harold and I were excited by the $195m offer for the next five years because it represents a major uplift. For context it is worth noting

that from 2005-9 we received $35m for our domestic rights, $90m (including a $5m sign on fee) from 2009-14 and this deal is worth $195m.

I wanted to thank the Board for their very strong support at that meeting and advise that we have since (after three solid days of fairly intense negotiations) completed and signed the long form agreement. This is an historic deal that gives us a foundation upon which to further grow the exposure and commercial success of the Australian Open.

We of course had already factored in some expected growth in this deal when we made some great decisions about prize money and funding for tennis. So you can quite rightly say that this deal has already started paying its way for future tennis success in this country.

And part of that success will be the direct control of the relationship with all of international broadcasters and the image we portray to the world. That is why we will incur extra costs in this deal to control the Host Broadcast. It sets up future exposure and revenue opportunities and allows us to extract the full value out of our event commercially and reputation-wise.

As is the norm in the ultra competitive world of commercial television there has been and will continue to be some showmanship and grandstanding on this issue. There has been some fanciful public talk about how much Channel 10 or Channel 9 etc would have offered in an open tender. Frankly, it is very much in their interests to inflate their intentions as they will never be tested. But even if they were forthcoming, I have seen it suggested that our deal was worth $30m a year and we could have got $40m. In essence, the deal we got ends up around the $40m mark - and we stay with a partner who knows our business and is prepared to grow with us.

In 2004 we received $5.9m for our domestic rights, now just 11 years later we will receive nearly eight times that amount - yes, with increased costs, but also with greater control over our final product and, as such, destiny.

This is an agreement that looks good commercially, operationally, logistically and, equally as important in my view, philosophically. We are going to continue a fabulous partnership with a broadcaster that has a strong knowledge of our sport and a commitment to its excellence proven through decades of working together.

The new agreement includes:

- An expanded coverage of tennis throughout the summer to more than 330 hours
- A commitment to broadcast Free to Air during the summer on two channels (Hopman and Brisbane)
- Live streaming of all AO broadcast courts online

The Australian Open now has locked in three long term broadcast deals with highly successful and world-leading partners, namely Channel Seven in Australia (2019), ESPN in North America (2021), ESPN in Central and South America (2016) and Eurosport in Europe (2016).

Again thank you for your support and I hope this background is helpful.

Any other queries please feel free to ring.

674 As I say, Mr Wood sent the email to provide assistance to board members in answering questions about the broadcast rights deal and to provide them with the best justifications for

the deal with Seven so they could meet any public criticism of the deal. At this point I do not propose to linger on such atmospherics. And I do not propose to discuss the internal discussion concerning draft telephone scripts. Any public criticism was not informed by the factual foundation that I have outlined. Moreover, at this point I am not interested in how some of the directors may have distorted or contorted their positions in response to any public perception or criticism of the deal. I will discuss the evidence of Dr Young and Ms Pratt later.

675 I would also note that my impression of Mr Wood's evidence before me was that he considered everything in that email to be accurate and his views at the relevant time(s).

676 On 13 June 2013, Mr Holloway sent an email to Mr Wood and the TA board and wrote, inter-alia:

> Thanks for your explanation – as I was not at the last board meeting I have not been up with where the negotiations were at, and have been concerned about the media coverage on this over recent months, much of which seemed to have no grounding as far as I could see, but the hype I am sure has only been to our advantage.
>
> I have always been concerned at taking the highest bidder as I could see a couple of years of very poor coverage as any new provider went through the process of getting on top of its game – to the public and our detriment – this is not like any normal sponsorship position – getting coverage right is vital to the well-being and public perception of the AO and tennis in general. Sometimes these decisions need to be taken in the light of the bigger picture and as the price is within the right ball park figure I think we have made the right decision. Hopefully along with this is a commitment from Seven to continue to upgrade and improve the coverage in line with world's best practice standards and more.
>
> Well done.

677 On 14 June 2013, Mr Cooper wrote to Mr Wood and copied in the TA board saying:

> I think the decision to go with Seven is the correct one. There are significant degrees of risk in changing to a new partner that cancel out the possibility of greater income.
>
> Thank you Steve for the detailed explanation, and well done those involved in the negotiations.

678 On 14 June 2013, Mr Tanner responded to Mr Wood's 13 June 2013 email and said:

> Steve,
>
> This is helpful. The key question being asked is "what did TA have to lose by taking the rights to tender?"

679 Mr Wood did not recall whether or how he replied to Mr Tanner's email.

680 On 22 July 2013, the TA board had a meeting. Mr Wood prepared the board pack for that meeting. At the meeting, Mr Wood updated the board on the finalisation of the broadcast rights

deal with Seven. The minutes of the 20 May 2013 board meeting were read and confirmed, subject to an amendment that the words "the committee's" were replaced with the word "his" in the last sentence of the tenth paragraph of item 4.1. I will discuss the significance of this later.

681 For completeness, I also note that Mr Tiley was appointed as CEO to replace Mr Wood on 1 October 2013.

KEY THEMES RELEVANT TO NEGOTIATIONS

682 Now I have set out a lengthy chronology of the relevant events up to June 2013. But it is appropriate to pause at this point and to draw together some themes concerning factors that influenced the negotiations and mindsets of Mr Wood, Mr Healy and Mr Mitchell specifically and members of the board generally during 2012 and 2013. I will deal with post-June 2013 events later. In this respect, it is convenient to discuss some themes concerning three external parties who had expressed an interest, namely:

(a) Seven itself;

(b) Network Ten; and

(c) IMG.

683 I will discuss Nine in another section of my reasons given that its interest was fleeting and flimsy. And as for the position concerning Gemba, it was not a potential negotiating party. Its so-called valuation of the domestic broadcast rights is something that I will discuss later when dealing with the specific case against Mr Healy.

(a) Seven

684 Obviously the existing relationship with Seven as its long-standing broadcast partner was an important factor to TA in the negotiations of the domestic broadcast rights. The long history with Seven and its experience with coverage over many years was clearly an advantage that Mr Wood and the directors perceived in continuing with Seven. Further, Seven was the highest rating network as at 2013 and had the largest share of TV advertising revenue. Further, it had conducted successful AOs, including achieving high domestic ratings for its broadcasts. These matters were well known to and appreciated by Mr Wood and the directors.

685 Moreover, there were risks in moving from Seven to a broadcast partner who had no experience in broadcasting the AO. As the defendants correctly submitted, those risks included the following matters.

686 First, the new partner might not achieve similarly high ratings and audience share.

687 Second, the new partner might experience financial difficulties. On the evidence before me, contracting with Network Ten in particular involved the risk of financial failure which would clearly have been disastrous for TA. ASIC persisted with insisting that Network Ten might have offered to pay up to $50 million per annum. Now put aside the unreality of that for the moment. Such agreed figures, if that had been the case, would not have had much value to TA if Network Ten became insolvent or at least lacked the capacity to pay such an amount in, say, year two or year three of a five year contract. The disruption and risk to TA would have been very substantial to say the least.

688 Third, the new partner might not have produced the type of quality of service that TA had experienced with Seven. Further, the transition to TA taking control of the host broadcast might not have been as smooth, potentially compromising the necessary quality of production. There is little doubt in my mind that it was smarter for TA to transition to host broadcasting using the assistance and expertise of the incumbent, Seven, rather than experimenting and taking the risk with a new operator.

689 Fourth, the new partner might have had a different audience demographic that did not traditionally follow the tennis. This would have impacted on viewership. Indeed Mr Wood knew that a characteristic of Network Ten's audience demographic at the time was that it was a younger audience that had many other distractions and amusements than the more traditional tennis.

690 All of these matters clearly influenced Mr Wood and the directors in terms of who to go with.

Exclusive negotiation period

691 Let me now discuss the ENP, the significance of which ASIC sought to downplay.

692 A difficulty confronting ASIC's case theory, to the extent that that theory suggested that TA should have pressed to take its rights to market, was that TA had a contractual obligation to genuinely engage in the ENP with Seven from 1 April 2013 for six months.

693 The notion that TA should simply just have gone through the motions with Seven in the ENP is untenable. Any implied contractual obligation or duty would have required TA, at a minimum, to make a bona fide effort to negotiate with Seven in the ENP and to do all such things as were reasonably necessary to enable Seven to have the benefit of the ENP such as it was.

694 Clearly, the effect of the ENP was such that even before 1 April 2013, TA could not deal with or entice suitors in a way which would deprive Seven of the benefit of the ENP such as accepting an offer or substantially progressing negotiations on the understanding that a contract would be entered into with the suitor at the expiry of the ENP.

695 The ENP prevented TA from actively enticing or negotiating with potential rivals prior to the ENP. And the ENP prevented TA accepting any deal from a rival before the ENP had run its course. More generally, the ENP entailed that TA could not engage in any conduct that would prevent Seven from being given a genuine opportunity to arrive at a deal.

696 In my view Mr Wood properly approached the ENP on the basis that TA had to provide Seven with a genuine opportunity to arrive at an agreement during the course of the ENP process. Moreover, if a suitable deal could be reached during the ENP, then it was clearly in TA's interests to accept that offer, rather than to take the type of risks that ASIC was advocating.

697 Further, Mr Wood and the directors knew that if TA had sought to actively enter into any negotiations with counterparties other than Seven before or during the ENP, then that would likely have breached the ENP contractual entitlement. Indeed, it is obvious that Seven would have treated such conduct as a serious breach of the Seven agreement. And Mr Wood accepted that it would have been a breach of his own duties as CEO if he had gone to market whilst the ENP was on foot. Further, it was also reasonable to take the view, as Mr Healy did, that TA could not solicit offers from Seven's competitors before or during the ENP.

698 Further, there were considerable risks of not doing a deal during the ENP and then trying to engage in some further open process on and after 1 October 2013. And those risks were known to Mr Wood and the directors. I will discuss these risks in more detail in a later part of my reasons.

Host broadcast

699 An essential part of TA's strategy was to gain control of the host broadcast of the AO. Under the Seven agreement, Seven had been the host broadcaster. I have touched upon this earlier, but let me deal with it in more detail. The following matters are substantiated by the evidence.

700 As was explained, the host broadcast is the basic coverage of matches, interviews and all other content related to the AO. It is a generic offering of the AO matches and onsite activities that broadcasters can then augment with their own style.

701 Now the AO was an Australian sporting asset with international appeal. Accordingly, TA perceived that there was an opportunity to significantly increase international broadcast revenues above what was being achieved domestically. It perceived that gaining control of host broadcast was the key to realising this opportunity and unlocking international broadcast revenues and international sponsorship.

702 Further, it was well known within TA that international broadcasters did not like the feed coming from Seven. It was and was perceived to be too Australian-centric, particularly in the Asia Pacific region. So for TA to obtain the host broadcast was a key aspect of TA's Asian strategy.

703 Let me elaborate on the problems international broadcasters had with Seven's coverage. First, without a clean feed it was difficult for international broadcasters to put their imprint on top of the feed and produce it locally for their country. Second, broadcasters were concerned about the camera angles in the existing feed. Third, Seven's content unsurprisingly focused on Australian players with its coverage being directed towards its domestic Australian audience. Fourth, if a player from a particular country was playing on a court which Seven did not film or did not include in its feed, that match could not be broadcast. Fifth, Seven's feed was infected by its promotional messages, which were usually and distractingly displayed at the bottom of the screen.

704 Given this context, and in order to maximise future revenues from international broadcasters and sponsors, TA wanted a host feed that could be tailored to suit the needs of a particular country. Accordingly, a central component of the strategic plan which Mr Wood and the EMT prepared and presented to the board in mid-2012 involved increasing international revenues by capturing and controlling AO content.

705 At the July and August 2012 board meetings, Mr Wood presented his 2012 strategic plan for TA. This was presented at the 20 July 2012 board meeting in a strategic plan summary paper in the form of a set of slides, particularly those dealing with revenue income growth, broadcast revenue source and media and communications; I do not need to reproduce these. The key initiatives identified in the strategy paper were to develop optimal broadcast sales structure to maximise rights fees for key renewals, to produce and to manage AO content, and to commercialise multiple distribution platforms. By these means one could maximise revenues. This strategy was endorsed by the board in July and August 2012 and was thereafter sought to be implemented.

706 In July 2012, it was also decided that the broadcast team would be reorganised. It was to increase in size and importance. This enlargement of TA's broadcast operations could facilitate TA assuming the host broadcast function. Further, at the time the Victorian Government was assisting in the planned redevelopment of the infrastructure facilities at Melbourne Park, which included a media centre. Such a program including the installation of broadcast infrastructure facilitated TA's objective of assuming the host broadcast function.

707 In this context, it is unsurprising that Mr Wood approached negotiations with Seven in 2012 and 2013 with the priority of obtaining the control of host broadcast. But he was met with predictable resistance from Seven. And as I have explained in the earlier detailed chronology, it was not until May 2013 that Mr Wood received a real commitment from Seven that it would relinquish control of host broadcast to TA. The specific terms on which that transition would occur were then agreed as part of the long-form agreement.

708 Contrary to ASIC's downplaying of this factor, this was a very important win for TA. Further, TA's experience as host broadcaster vindicated the strategy pursued by Mr Wood. It transformed TA's business.

709 First, TA was able to significantly improve the quality of the international feed of the AO and make available valuable content not previously provided by Seven. TA was able to increase its coverage of the AO to include all 20 courts in the Melbourne Park precinct. This enabled it to capture over 800 matches played during the course of the event. Further, by expanding the number of cameras covering the event to around 150, TA captured content derived from player practice, player arrivals and behind the scenes content.

710 Second, TA's international broadcast rights to the AO and the lead-up events increased in value. As a result, TA gained a significant uplift in fees under international broadcast rights agreements. As TA was able to provide a tailored or individual feed that was attractive to individual international markets, this enhanced its ability to directly sell its rights to every individual market in the world. As a result, there was a significant increase in rights fees achieved from international broadcasters from 2015 onwards.

711 Third, the value of TA's domestic broadcast rights increased. The choices available for programming to a domestic broadcaster were expanded by the additional hours of coverage and courts covered. This provided additional value to the domestic broadcaster for which it could then charge its own advertisers.

712 Fourth, as a result of the increased exposure of the AO via an improved world feed, TA's sponsorship contracts increased significantly in value, both domestically and internationally. By improving the coverage available to broadcasters, TA grew the audience and exposure of the AO event, which then enhanced the interest of sponsors in sponsoring the AO and so the value of its sponsorship contracts. Further, and as was pointed out, the proportion of international sponsors for the AO relative to domestic sponsorship partners increased given that global partners with a greater financial capacity took up these sponsorship opportunities and paid greater sums for the benefits delivered.

713 Fifth, from the increased revenue streams produced from the host broadcast function, TA was also able to provide greater prize money to players. This of course enhanced the global reputation of the AO and provided a positive feedback mechanism which then further facilitated and enhanced each of the above benefits.

714 Let me now say something about the cost of being host broadcaster.

715 At the 20 May 2013 board meeting, Mr Wood reported that the net costs to TA of taking on the host broadcast production of the AO would be about $4 million per annum.

716 Now it is necessary to make some observations at this point about the evidence with respect to the cost of the host broadcast production, given that this was the subject of a misunderstanding on the part of Ms Pratt and Dr Young. I will discuss their evidence later, particularly as it concerned 2014 communications, which were of course well after the key events the subject of ASIC's allegations.

717 The $4 million net figure reported by Mr Wood to the TA board on 20 May 2013 was his estimate of the net costs that TA would incur in assuming the role of host broadcaster of the AO. This was based upon 2013 to 2014 estimates of Seven's then costs and an estimate of what Seven would save from not being host broadcaster of the AO.

718 At the 20 May 2013 board meeting the minutes record that:

> In response to a suggestion from the President a copy of the Network Seven offer was tabled. In response to a query from Mr Mitchell, the Chief Executive Officer advised that the host broadcast function would cost TA around $4 million (net) per annum. The Chief Executive Officer further advised that the proposed broadcast facility underpinned the Melbourne Park redevelopment, bringing Melbourne to the world and reiterated that the broadcast product was crucial for the Australian Open. He reported that the Victorian Government would fund the broadcast centre as part of the Melbourne Park redevelopment, provided the Australian Open remained at Melbourne Park and continued to generate significant economic benefit to the State of Victoria.

719 Seven's final offer as set out in its 17 May 2013 letter made no reference to the costs of host broadcasting.

720 Let me say something further. On 8 May 2013, Ms Capela, who was a manager in broadcast operations and reported to Mr Pearce, prepared a summary of the cost of host broadcast. This was prepared during the course of negotiations with Seven in order to estimate the cost of host broadcast *to Seven*. And this was all in the context where TA and Seven were working on an understanding that Seven would pay or allow to TA, by way of an increase to the rights fees, an amount negotiated in good faith which represented the amount of costs *saved* by Seven as a result of having the host feed supplied to it if TA was the host broadcaster rather than Seven producing it itself.

721 Let me elaborate on her analysis and its background.

722 On 7 May 2013, Mr Wood sent an email to the EMT wanting to know the value of doing the host broadcast.

723 On 8 May 2013 at 12.02 pm, Mr Pearce sent an email to Mr Wood and the EMT in the following terms:

> I know Renata is collating this stuff and will have some excellent, well researched numbers on this for you all shortly (if she hasn't got them to you already). I do want to make a point in terms of your negotiation that this is really NOT something you should share.
>
> We have a strong advantage here. The impetus should be on them to tell us what they think it is valued at. If they put a very high price on it, then that is great, because they will need to add that to the annual fee. If they put a low price on it, we will know

because we have our own costings and it could be handy later in terms of our own rates.

As you say Steve in negotiations, we don't want to be the first to put a price on something. We know what it is worth, they know what it is worth but what they say it is worth could be helpful in terms of giving you more insight into their negotiation tactics generally.

724 Ms Capela then produced the following table:

AUSTRALIAN OPEN & AO SERIES

Host Broadcast - Cost Summary

EVENT	DURATION	APPROX. COST [AUD excl. GST]
Brisbane International	8 days/nights	$600,000.00
Sydney International	7 days/nights	$600,000.00
Kooyong Classic	4 days/nights	$300,000.00
Australian Open	14 days/nights	$4,450,000.00
AO World Feed	14 days/nights	$550,000.00
GRAND TOTAL	REDACTED	$6,500,000.00

REDACTED

NOTES:

** costs are estimates of what current HB spends - solely on HB operations, technical, production*

** Tennis Australia already contributes to HB at each event - over & above these costs*

** current HB collects some funds to off-set these costs, however they also have their own domestic coverage costs over & above these amounts*

** Davis Cup production costs NOT included above but currently fall within HB contract*

** Tennis Australia also currently bundles into the HB/domestic TV contract many other benefits that attract significant yearly cost - including but not limited to sponsor/corporate ticketing & hospitality, commentary spaces, venue rental, scoring interfaces, etc*

725 Let me make a number of points. First, I am concerned with the AO and AO world feed figures. Second, these are all estimates of Seven's costs for the 2013 AO, and with no add-ons. Third, the third note refers to off-set amounts. Fourth, for Mr Wood to get his net $4 million figure, he seems to have added the last two items in the table and discounted by 20% to get what he thought was the net cost to Seven. Of course, this was all for negotiation purposes to see what the net cost to Seven was of host broadcasting.

726 Ms Capela sent this analysis to the EMT on 8 May 2013 at 12.58 pm with an email stating:

> As requested by Steve below, please find attached a cost summary of HB production for AO & AO Series. This is what we anticipate Channel 7 currently spends on producing HB at each of our events. It does not include Davis Cup at this stage, as that has fluctuated heavily over recent years (with TA absorbing coverage costs for non-World Group ties, Ch7 only impacted during World Group). Everything else is included.
>
> Whilst the table seems simplistic, all numbers have been carefully calculated, assessed and measured against our other productions. For example, Brisbane and Sydney costs are heavily based on our recent Hopman Cup coverage (which cost a total of $770k of

> which $170k was domestic coverage, $600k was HB). The AO costs were taken through a very detailed analysis at this time last year and recently updated with 5% CPI across the board. Kooyong is based on Series coverage for a reduced number of days.
>
> Again, reiterate Darren's sentiment that we should not put these numbers on the table until numbers are offered by the other side. But hope having these as background assists the upcoming negotiations. I guess our argument is that we currently "discount" the domestic rights fee by somewhere in the vicinity of $6.5 million to account for production outlay/costs of HB and World Feed.

727 But none of this is, of course, an analysis of what the true cost of host broadcasting would be to TA.

728 The estimate calculated by Ms Capela did not take into account the economies of scale in TA's costs that came through its third party contracting arrangements. More importantly, it did not take into account TA's plans to increase its investment in host broadcasting in future years in order to be able to provide improved content to both domestic and international broadcasters. Clearly, it was envisaged that TA would incur greater costs than those experienced by Seven. And indeed it was always intended by TA that its host broadcasting costs would increase over time as it expanded its content offering so as to realise the revenue opportunities presented by the international market.

729 Further, and contrary to ASIC's case, I agree with the defendants that it was a misconception to think that the cost of host broadcast should be allocated solely against the rights fees generated under the domestic broadcast rights agreement. In terms of cost allocation, clearly regard had to be had to international broadcast revenues as well. Indeed this was where most of the benefit of being host broadcaster was going to be realised, as TA so intended and in fact achieved. This was made clear to the directors by the host broadcast strategy that was presented to TA's board in July and August 2012. Further, it was also confirmed by the five year host broadcasting plan that Mr Pearce presented to the board at its April 2014 board meeting. Further, at the April 2014 board meeting, Mr Tiley advised the board in response to queries from Ms Pratt and Dr Young that with respect to the budgeted cost of host broadcasting in 2015, those costs were expected to be between $5 and $6 million per annum (net of rate card revenues). I will return to this issue later when dealing in detail with Dr Young's evidence and Ms Pratt's evidence concerning their misconceptions relating to the costs of host broadcasting.

730 Let me now say something about the question of transitioning to host broadcasting, as this was supportive of continuing with Seven.

731 The transition to host broadcasting was clearly and rightly anticipated to be more challenging if TA had gone with a different FTA broadcaster than Seven. Given their over 40 year relationship, TA was satisfied that operationally it could deliver the host broadcast in conjunction with Seven.

732 Further, TA had engaged Gearhouse as an expert production crew for several years. But this was the same production crew employed by Seven to run the technical elements of Seven's host broadcast, which crew had been successful in delivering the AO broadcast for some time.

733 Further, during the transition to host broadcasting, the executive producer employed by Seven to previously produce the AO remained as the executive producer producing Seven's coverage when TA took over host broadcasting. So there was a continuous relationship concerning the sharing of information and ideas, which assisted TA in its transition to host broadcaster. More generally, Seven shared information and insight with TA throughout the transition period. And this was all perceived by TA ex ante as being the significant advantages of transitioning utilising Seven.

734 Generally, in my view it was a sensible commercial step for TA to continue with Seven to assist in transitioning. To use Seven presented TA with an opportunity to significantly mitigate the risk that it faced in taking on the role of host broadcast.

735 In my view if TA had transitioned to host broadcasting and at the same time had a new domestic broadcaster, that is, other than Seven, then during the first AO for which TA was host broadcaster there would have been a real risk of significant operational difficulties. And at the least, TA's perception ex ante of that significant risk was reasonable.

(b) Network Ten

736 It is now appropriate to elaborate further on the evidence concerning Network Ten's interest and its financial capacity, particularly as demonstrated from some of its own documents.

737 But before I go to the documents, let me say something further about two witnesses called by ASIC, namely, Mr Marquard and Mr McLennan.

738 I thought that Mr Marquard was an honest and reliable witness. There were differences between his evidence and the evidence of other witnesses as to whether numbers were mentioned at various times. For example, at his meeting with Mr Wood and Mr Ayles on 23 May 2012, he thought that it had been said by either him or Mr Warburton that:

> We would be very interested to bid at the right time and would not be scared of numbers in the mid to high thirties.

739 Neither Mr Wood nor Mr Ayles recalled numbers being mentioned at that time. Further, if Mr Marquard had said it at this time, it may have on one view been contrary to his instructions from Mr Warburton who in late March 2012 had said "I want to open batting at $35 mill (production is $10 mill) – closing at $40 mill".

740 I am inclined to accept the evidence of Mr Wood and Mr Ayles on that aspect that numbers were not mentioned at that meeting, but it may not matter much.

741 Further, he was challenged on his conversation with Mr Healy in a conference room at Gadens in mid-February 2013. I am inclined to accept Mr Marquard's version on this aspect. But again, nothing much may turn on this.

742 More generally and on any view, Mr Marquard gave credible evidence that he was only ever floating figures in a non-committal way. They were always equivocal. And they were always highly qualified.

743 Mr McLennan gave evidence that was generally reliable. I have discussed his evidence in those parts of my reasons discussing Network Ten floating various figures. There was a doubt in his evidence concerning what Mr Marquard had said to him concerning figures floated with TA. In my view Mr Marquard gave the more reliable evidence on that aspect. And as for figures Mr McLennan floated to Mr Wood in March 2013, I have discussed elsewhere what weight could be or was given to them.

744 I will return to some of their evidence later. Let me first discuss the documentary evidence concerning Network Ten's interest.

Network Ten's interest

745 On 22 March 2012, an internal Network Ten email was sent by Mr Mark Zeiderman to Mr Marquard attaching some "draft financials for the 3 sports", namely, tennis, NRL and V8 racing. In relation to tennis, there was a reference to internal estimates of "$10m production costs" and "revenues of $41m (may be slightly on the high side, which we may want to pair back)". This email appears to have been forwarded to Mr Warburton. Mr Warburton responded in relation to tennis referring to an estimate of "$37 mill in revenue" and said "I want to open batting at $35 mill (production is $10 mill) – closing at $40 mill". He requested

that a paper be prepared. Mr Marquard attended to preparing what he described as a 2012+ Sports Strategy paper.

746 On 11 April 2012, a directors' meeting of Network Ten was held. Mr Lachlan Murdoch was present as chairman; so too was Mr Warburton. Mr Marquard was present for some of the meeting. Agenda item 33 concerned sports rights. Mr Marquard's 2012+ Sports Strategy paper of April 2012 was presented and discussed.

747 The following was resolved and noted:

> **RESOLVED** that the 2012+ Sports Strategy Paper, prepared by Mr J Marquard dated April 2012, be received and it be additionally noted that:
>
> (a) it was intended at this time that this presentation be for purposes of backgrounding generally in relation to the forthcoming negotiations which might be associated with each of the VB Supercars, Cricket Australia's Twenty20 Series, NRL and Tennis Australia broadcast rights;
>
> …
>
> **Tennis Australia**
>
> (j) Management considered that there was a huge advantage to the network that holds the rights to the Australian Tennis Open due to the timing of this event associated with the commencement of the new ratings period in each calendar year;
>
> (k) Seven Network has held the existing broadcasting rights since 1973 and had achieved 44% of the free-to-air television revenues in January 2012;
>
> (l) Seven was understood to currently pay approximately $22 million in rights fees associated with the broadcast of the Australian Tennis Open, with an additional $10 million in production costs; and
>
> …

748 Let me say something about the strategy paper. The paper demonstrates that Network Ten was keen to get a locally based premium sport into their main channel schedule.

749 It was said:

> The relevant key sports which are now up for renewal or will shortly become available are:

NRL	Broadcast rights period expiring 2012	Currently held by 9 FTA and Fox Sports STV
Tennis Australia	Broadcast rights expire at end of Australian Open 2013	Currently held by 7 FTA and outside court package Fox Sports STV
Cricket Australia	Broadcast rights expire at end of season 2012/13	Currently held by 9 FTA (live tests ODI and T20 internationals and Fox Sports STV (Big Bash and domestic one day)

V8s	Broadcast rights period expiring 2012	Currently held by 7 FTA and replay package Fox Sports STV

Attached are separate papers on each of NRL, Tennis Australia and V8s with financial overview and acquisition approach. We have also met with Cricket Australia but they are not at the point of being able to engage with us.

Given some of the long standing relationships other broadcasters have with these codes and the existing contractual provisions such as some first and last rights in favour of the incumbents, it is going to be very difficult to overturn some of these broadcasting arrangements. But, with a smart strategic approach we can disrupt those arrangements and maximise the possibility that Ten becomes a partner of some of these sporting codes.

It is important we engage all of these sporting bodies now, and simultaneously, as it will require each of our competitors to step up or pull back in relation to their commitments, which should in turn create a strategic opportunity for us to finalise arrangements with one or more of these sports. Conversely, if we do not show we are serious, our competitors will be able to lock these sports away, at prices which are sub-current value, and will then be able to perpetuate their sporting advantage relative to the Ten Network.

750 Further, it was said:

> Accordingly, management is of the strong view that it is essential that we commit the resources and efforts to acquire all of these sports, even if we are pragmatic and realistic enough to realise that we will not be actually successfully acquire all of them. In particular, it is likely that the NRL arrangements are going to be hard to unshackle, unless we can align ourselves with another broadcaster.

751 Each of the sports and the prospective financials were discussed. I only need say something about the tennis, which was analysed in a separate section of the paper.

752 Under the overview in that separate section it was stated:

- The Seven Network currently holds the FTA and new media rights to the Australian Open, which rights expire at end of the 2014 tournament.
- Seven has been the incumbent Australian Open tennis broadcaster since 1973 and uses the summer of tennis as a massive launchpad for its annual programming slate.
- We estimate that tennis is worth 8 share points across January and helps it secure around 44% of FTA revenue in the month.
- The way the tournament is structured, Seven can schedule the event throughout the day and then ensure it has high rating primetime programming in the evening across 14 consecutive nights.
- Seven partly sub-licenses the new media rights, and partly retains them to drive traffic to Y7! and associated services such as its new Fango app.
- Seven has never seriously had a competitor bid for these rights mainly because Nine has the cricket, Ten has not bid, and no pay operator has been actively involved because the event is on the anti-siphoning list.

- A once in 5-6 year opportunity therefore exists for Ten to disrupt the status quo and seek to acquire the rights. Alternatively, if we are unsuccessful, we will ensure that Seven pays full rate, rather than the discounted rights fee it currently enjoys.

753 The last dot point is not insignificant. It refers to an alternative strategy of Network Ten in floating figures to TA of ensuring that Seven, Network Ten's competitor, "pays full rate". Such a potential strategy was something that TA personnel appreciated as a strategic goal by Network Ten if it could not get the rights, that is, to drive up the price that its competitor had to pay.

754 In terms of Network Ten's perception of the tennis rights and Seven's position, the Acquisition Overview set out the following points:

- We estimate that Seven currently pays around $22M for rights plus has a $10m production contribution.
- However, we understand that Seven may also get a rebate back off the production of $2.5M relating to international distribution, meaning that its net cost is approximately $29.5M.
- We anticipate that Seven writes approximately $37M revenue in 2012 directly in the tennis, and also leverages the tennis to gain a disproportionate share of linked revenue throughout January and into February.
- Fox Sports currently holds STV rights but has no centre court live coverage. As a result, its profile and ratings are much smaller than Seven's.
- The Australian Open is and remains listed on the anti-siphoning list. The men's and women's final are a tier A event under the new list meaning they must be shown on the main channel, while all other matches are Tier B events, meaning they can be shown on a multichannel.
- Perhaps the biggest opportunity associated with the tennis is the incredible marketing opportunity it provides to promote programming and franchises from February onwards. Seven has very successfully done this recently with My Kitchen Rules, Please Marry my Boy and Revenge, following a long tradition leading back to Lost and Desperate Housewives.
- There are a number of marketing inclusions which we could incorporate in an agreement. These include Ten signage, engagement at venue and around Melbourne, ability to do other broadcasts (e.g. Breakfast) on site etc.

755 The third point refers to linked revenue and the sixth point refers to what has been described as the "halo effect".

756 Then there was a financial analysis which made the following points:

- We anticipate that a significant increase will be required to wrest the rights away from Seven. However, due to the revenue opportunity, even at a rights fee of $35M-$40M, we believe the fee is sustainable.

- If we acquired the rights, we would save some displaced programming cost and could limit the other runs we give to some programming. However, this would be countered by the existing revenue displacement
- We attach a financial analysis relating to these rights. We have include a rights fee of $35M rights plus some production. We have assumed CPI increases thereafter.
- Direct revenues are anticipated at $41M (2014) and promotional impact at $5M.
- At these numbers, a direct loss of $8.1M would be incurred, but this does not factor in the linked revenue, or halo effect that we would achieve.
- In addition, it does not factor in any STV or online sub-license.

757 I should stop here and observe the following.

758 First, even assuming anticipated direct revenues of $41 million per annum and promotional impact of $5 million per annum, there was still a direct loss of $8.1 million per annum; I should also note that the 22 March 2012 email suggested that the $41 million per annum for direct revenue "may be slightly on the high side".

759 Second, the calculation of the direct loss of $8.1 million per annum was based on a rights fee of $35 million per annum. Obviously if that rights fee was higher, the direct loss figure would be higher.

760 Third, it would seem that Network Ten could countenance a rights fee of $35 million to $40 million per annum, although it would seem on these figures not higher. $35 million per annum produced a direct loss of $8.1 million per annum, yet other indirect benefits such as the halo effect may have warranted them going to $40 million per annum. But it would seem on Network Ten's own figures and estimates that $40 million was the upper limit. Indeed, such an upper limit is consistent with the Gemba analysis upper limit of $40 million per annum in rights fees referred to in the Gemba report.

761 Fourth, it must be appreciated though that the direct loss of $8.1 million per annum did not factor in linked revenue or the halo effect. But in my view, a sensible reading of the analysis would suggest that if these were taken into account, only an upper bound estimate of $40 million per annum for the rights fee was realistic. Certainly, there is no analysis to suggest that Network Ten could have or would have realistically gone above $40 million per annum for the rights fee.

762 It is convenient now to go to Network Ten's tabulated figures:

AUSTRALIAN OPEN TENNIS

Overall TV Rights Fees

	Current	New
FTA	$22.0m	$35.0m
STV		
	$22.0m	**$35.0m**

KEY ASSUMPTIONS

- Ten currently books $22m in the 2 weeks
- Anticipate incremental $19m to total $41m
- Ten current aud. share for 2 weeks is 26% of which Ten gets a 23% share of revenue
- Expect aud. Share to increase to 34%
- Aud. Share taken from 11am - midnight
- Revenues based on 2014 year
- Assumes 100% revenue achievement in first yr
- Program cost savings based on 1 week of 7PM strip

Total P&L			p.a	Inc. p.a	Yr 1	Yr 2	Yr 3	Yr 4	Yr 5	Total
Gross Media Revenue			**$41.0m**	3%	**$41.0m**	**$42.2m**	**$43.5m**	**$44.8m**	**$46.1m**	**$217.7m**
Linked Revenue			-	3%	-	-	-	-	-	-
Promotional Impact			*$5.0m*	3%	*$5.0m*	*$5.2m*	*$5.3m*	*$5.5m*	*$5.6m*	*$26.5m*
Existing Revenue Impact (2 weeks)			*($9.0m)*	3%	*($9.0m)*	*($9.3m)*	*($9.5m)*	*($9.8m)*	*($10.1m)*	*($47.8m)*
Gross Media Revenue	-	-	**$37.0m**		**$37.0m**	**$38.1m**	**$39.3m**	**$40.4m**	**$41.6m**	**$196.4m**
Less: Agency Comm			($3.7m)		($3.7m)	($3.8m)	($3.9m)	($4.0m)	($4.2m)	($19.6m)
Net Media Revenue	-	-	**$33.3m**		**$33.3m**	**$34.3m**	**$35.3m**	**$36.4m**	**$37.5m**	**$176.8m**
Rights Fees (incl STV & Online Rights)			$35.0m	3%	$35.0m	$36.1m	$37.1m	$38.2m	$39.4m	$185.8m
Contra			-	0%	-	-	-	-	-	-
Other Costs (incl Selling)			$11.9m	3%	$11.9m	$12.2m	$12.6m	$12.9m	$13.3m	$62.9m
STV/Online Sub Licence Rebate			-	3%	-	-	-	-	-	-
Southern Cross Rebate			-	3%	-	-	-	-	-	-
International Distribution			($2.5m)		($2.5m)	($2.5m)	($2.5m)	($2.5m)	($2.5m)	($12.5m)
Existing Prog Cost Savings			($3.0m)	3%	($3.0m)	($3.1m)	($3.2m)	($3.3m)	($3.4m)	($15.9m)
Profit/Loss	-	-	**($8.1m)**		**($8.1m)**	**($8.4m)**	**($8.7m)**	**($9.0m)**	**($9.4m)**	**($43.5m)**

Hours of programming	264 hrs
CPH (000)	**$178k**

Ten Overall Position

- Ten loses $8.1m on cash basis
- Share gains are out of ratings period, however significant opportunity for program promotion

Note

- Excellent opportunity to gain traction leading out of summer
- Current Seven deal expires at end of 2014 tournament
- Assumes STV has no access to Rod Laver Arena

763 Let me say something about this table.

764 First, it shows direct losses for each of the projected five years, with total accumulated direct losses of $43.5 million.

765 Second, its direct revenue projections start at the high figure of $41 million for the first year and go even higher for each successive year. But even then, the projected direct losses are substantial. Further, to put the $41 million figure in perspective, it was based upon Seven's approximately $37 million revenue figure for 2012.

766 Third, the projected rights fee is $35 million in the first year increasing steadily to $39.4 million for the final year. This points to an ambiguity in the first dot under the heading "Financials" that I referred to earlier. Does "$35m-$40m" refer to $40 million per annum? Or is it simply the ratchetting up over the five years reflected in the table?

767 Fourth, I accept that there is no amount for "linked revenue" shown, such that there is potential upside (reduced loss) if this occurred. Further, there is little allowance for the halo effect. This is potential upside.

768 Fifth, the analysis seems to assume that Network Ten would be the host broadcaster. But if it was not, that is, TA was, the costs would be halved but some other items would reduce.

769 In summary, the table shows that Network Ten would be challenged financially offering more than $35 million per annum and even at that level. But it is conceivable that with other potential upsides including linked revenue and the halo effect, Network Ten may have gone to $40 million per annum. I also note that a slide presentation in the board materials stated:

> Financials indicate that while [there] may be a direct loss against attributable revenue, this would be more than offset by the linked revenue and other ratings success that would flow through

770 Now at this point I should say that this table represents the only "detailed" financial analysis ever done by Network Ten concerning what it may be able to or should pay for the rights. It was never updated. This suggests to me that from April 2012 to May 2013 it was never seriously contemplated by Network Ten that it would go above $40 million per annum and that its realistic position was somewhere around $35 million per annum.

771 ASIC has said, well Network Ten could and would have paid more because it may have been desperate to get the rights. But the material that I have referred to above does not bear this out. Moreover, why on earth would TA deal with Network Ten on that basis? If Network Ten was

over-paying in the context of it being in financial difficulties, it would not have been a smart move for TA to have engaged Network Ten. TA needed a viable network partner over the five years of the contract, not one that had such a vulnerability and could fall over in, say, year two or year three of the contract.

772 Now after this time there is little in evidence concerning Network Ten's detailed internal deliberations as to what it could or should pay let alone any updated and serious financial analysis on that question.

773 On 18 October 2012, Network Ten announced a net loss after tax of $12.9 million for the year ending 31 August 2012. Its announcement had a statement from Mr Warburton saying:

> Undoubtedly we are operating in challenging market and competitive conditions, which have impacted our revenue performance. We have responded and secured significant cost savings in the year. We are now undertaking a Strategic, Operating and News Review to further reduce costs.

774 As for its review, it stated:

> As result of the Review, the guidance for television cost growth in the 2013 financial year has been reduced from mid to high single digits to less than CPI, while still protecting our investment in programming.

775 As for capital management, it was stated:

> On June 6, 2012, TEN announced an underwritten 3-for-8 accelerated renounceable entitlement offer of new shares at $0.51 a share. The offer comprised an institutional and retail component.
>
> The institutional component was completed on June 19, 2012, and involved the placement of 315 million shares, with gross proceeds of approximately $161 million. The retail component was completed on July 11, 2012, and involved the placement of 76.7 million shares, with gross proceeds of approximately $39 million.
>
> The funds received from the equity raising were used to strengthen TEN's balance sheet, provide financing flexibility and continue the investment in content.

776 On 5 December 2012 (updated on 6 December 2012), the AFR reported on the "troubled Ten Network" and the launch of a "heavily discounted $225 million revenue raising", apparently less than two months after Mr Warburton had ruled out the need for fresh equity.

777 It was also said:

> Ten continues to bleed share in the TV market. Its metropolitan TV ad market share dropped to 21 per cent in October, almost half the market leader Seven's share. The overall market declined by 5 per cent in the month.
>
> Ten's TV revenue slumped 14.5 per cent in the 2012 financial year while TV earnings before interest, tax, depreciation and amortisation dived 46.5 per cent.

Mr Murdoch last month admitted Ten's performance had been "unacceptable" but stood by Mr Warburton, who became CEO in January.

Ten is scheduled to host its annual general meeting tomorrow. Mr Warburton's $2.2 million pay packet is expected to draw the ire of investors.

778 On 7 December 2012, concerning the cricket rights The Advertiser reported:

Chastened by losing the AFL rights to the Seven Network and after missing out on the free-to-air component of the $1.025 billion NRL deal to Nine, cash-strapped Ten is preparing to try to steal the traditional jewel of Nine's sporting crown in a major TV sporting war.

"We are very interested in all of the cricket rights and we will be engaging with Cricket Australia," Network Ten's chief operating officer Jon Marquard said.

"One of the best things to happen to a code, cricket in this case, can be a change of broadcasters."

"We have always said we are interested in premium sport and we are very interested in the cricket rights." Industry sources say that Nine has now realised it is in for the fight of its life to retain the cricket, with Seven also showing an interest.

The looming Network Ten bid, possibly in conjunction with Fox Sports who could show some limited overs internationals and the Big Bash competition, has the potential to change the face of cricket.

All senior Nine cricket commentators are yet to be re-signed by the network which can't re-contract them until the rights are decided.

779 On 25 January 2013, Mr Marquard sent an email to Mr Warburton and others stating:

To feed into our strategic thinking on tennis going forward (and impact on cricket thinking in the interim), I thought it would be worthwhile to give you a top line overview based on a number of informal discussions I have been having/relationships developed in relation to this, and also following a catch up meeting with TA this week:

- Most importantly, there is **no** last right that Seven have in their current contract- only a period of EFN (exclusive first negotiation). Seven have been peddling that there is a form of last to scare others off and try to do a deal in the short term.
- My intell. tells me that EFN officially runs April- September. Thereafter, TA in the clear to negotiate a new deal.
- The current deals with Seven, Fox Sports and Seven's sublicence of mobile rights to Optus all end immediately post 2014 tournament.
- Overseas rights - the big two are Eurosport year 2 of 5 year, ESPN in US- has a long term 10 years through to 2021. Value of the Eurosport deal almost the same as current Seven deal.
- Pay rights currently relatively inconsequential. Interestingly, Fox have downgraded their own site presence this year, and have been told they don't feel they get value relative to FTA.
- There is a divergence on the board- one board member promoting that they should do a deal now with Seven as it is the best they can get, but management

and some other board members very confident that they will do better if they go to market.

- Steve Allen is promoting the "this is as good as it gets line" now which obviously plays into Seven's hands
- TA appear to have a concern that if we don't bid, then there will be no serious alternative bid to Seven because cricket deal will be wrapped before they go. There is a repeated rumour about a quid pro quo b/w Seven and Nine which assumes Nine gets cricket as is.
- As a result, Ten can be in a strong leverage position as the potential counterbidder.
- The operational relationship is not strong between 7 and TA- there are repeated disagreements about a number of issues. They have never even managed to negotiate a long form.
- They are very frustrated with the lack of innovation relative to international partners, and over promotion on Seven's properties.
- TA board very interested in-ways to deliver off centre court coverage and using digital and multichannels to deliver more coverage during the tournament and lead-in.

Other things I have picked up on:

- Money clearly the priority key determining factor above all else.
- Second to money is commitment to streaming on all devices. Big focus on ways to cover other matches across devices- and commitment to undertake to get that done
- Summer of tennis lead in promotion important.
- They really liked what we did with Hopman this year, other than us delaying on TV in Perth and delaying on streaming. They are very keen to see live in all markets using combination of main/secondary channel.

Important to remember that none of this until budget [13]/14 as still one more cycle to go through. So no short term impact on cost or share growth.

780 Then in February 2013, Network Ten had dealings with IMG concerning the tennis rights that I have set out in the next section of my reasons dealing with IMG. But they were all predicated on a figure of $35 million per annum.

781 On 13 February 2013, Mr Howcroft emailed Mr Warburton and Mr Marquard stating:

Had an hour with Steve Wood.

He spoke for 45 minutes about the growth and success of TA and the Open.

He is very pleased with his 8 years as CEO and the successes achieved.

He made it clear that they are in the business of collecting eyeballs. 202 Countries around the world, 350mill viewers.

I believe TENs interest is loud and clear with Steve. He knows we are keen to see him

> Sept 1 with a deal.

782 He made no reference to figures being discussed with Mr Wood.

783 On 14 February 2013, Mr Howcroft sent a message to Mr Warburton saying that he was going to have a "cup of tea" with Mr Mitchell and asking if there was any "script" for Mr Howcroft. Mr Warburton messaged back saying:

> Nope. We want Tennis and we will pay whatever it takes. Thanks for your support of Ten.

784 It is unclear from the evidence whether any such message, that is, in the second and third sentences, was ever passed on by Mr Howcroft to Mr Mitchell. Further, any such message did not necessarily reflect the reality that Network Ten would in fact pay whatever it took.

785 On 22 February 2013, Network Ten announced that it had secured a new $80 million revolving cash advance facility.

786 On 23 February 2013, Mr Marquard sent an email to Mr Murdoch in the following terms:

> 1. Cricket tender- response was originally due this coming week. I have asked for and obtained another week's extension. Now due on March 7. Have also been regularly meeting with CA and Credit Suisse to work through all the documentation and structure. In relation to the options presented in the board paper, have been progressing a number of discussions with third parties. Perhaps it would be better to take you through that status/developments and current thinking over the phone given detail involved. Also, was due to catch up with Seven this week and probably no harm in still trying to do that to gauge their thinking?
>
> …
>
> 3. Tennis- I had a very good meeting with Steve Healy who is the president of TA last week. Am told other than Harold he is the key director. Russel also met with Steve Wood a couple of weeks ago which sounded like it went very well too. Obviously dependant on cricket, but strategy here to try and ensure that the TA board don't commit to doing an early deal with Seven at their early March board meeting and to get TA to run the exclusive negotiation process. I have also had an approach from IMG to work together but they want a non-binding letter from us ASAP-They need to go back to TA this week- this idea has some pros and cons- think I sent you something on this a few weeks ago.

787 On 26 February 2013, the Sydney Morning Herald reported:

> CRICKET was the rock on which Kerry Packer built his Nine television empire. Incoming Ten Network boss Hamish McLennan has confirmed he will bid to take the broadcasting rights to the sport, worth more than $400 million over the next five years.
>
> Mr McLennan, who starts at the network next month, said "cricket is the next cab off the rank" in terms of his strategy. Ten will also bid for the broadcasting rights to the Australian Open tennis, which are held by Channel Seven.

> By bidding for cricket, the new CEO hopes to attract a "broader audience" for Ten. It will also create a bidding war with Nine and Seven that will be much welcomed by Cricket Australia. With Nine's contract expired, the cricket body is hoping to get $100 million a year over five years.
>
> One source said Ten could jointly bid with Fox Sports for the rights, which include Test matches, one day matches, Sheffield Shield matches and the Big Bash.

788 On 1 March 2013, Mr Marquard sent an email to Mr Howcroft and Mr Anderson in the following terms:

> As discussed yesterday, IMG have contacted me again about the tennis. They have told me they are at 11th hour on deciding to make a bid for domestic rights.
>
> The tennis note I sent to Lachlan and James on tennis a month ago is on the email chain. Have also attached the original note.
>
> **Topline**
>
> 1. There is a Tennis Australia board meeting next Monday
> 2. IMG have been asked by TA to consider putting a bid in for domestic to show the TA board there is sufficient market interest. That offer will therefore have to go in over the weekend
> 3. IMG have told me their international board need to know there is at least real possible interest besides Seven in the rights before they will do so.
> 4. Something from Ten in written form would give the IMG board significant comfort that we are potentially interested.
> 5. They have requested from Ten a non- binding, no precedent email subject to board (i.e. no obligation) that we see value around TA rights at $35m p.a.
> 6. They state This will enable them to put in their bid to TA.
> 7. I have previously tried to secure that if we worked with them and gave them an email that we would get a guarantee. They are unable to do this most notably because they will be under an obligation as TA's agent to max value. However, there is an element of trust and good faith in working together.
>
> **My recommendation** – while they might still bid without us providing an email, there is not much downside in giving them one, as I will draft in a way that is 100% clear that no obligation to actually bid at that level or do a deal or a floor and it is part of the overall strategy of keeping these rights in play/ensuring that Seven pays fair market value/or helping us get if cricket outcome doesn't eventuate. It will also build relationship if they do actually get the rights.
>
> Also FYI- I have done this before with IMG in a previous role to no detriment.

789 Clearly, Network Ten was not putting in figures north of $40 million per annum. It was going for the cricket first. Moreover, the figure that Network Ten was discussing with IMG was $35 million per annum. Further, Network Ten's fall back strategy of "ensuring that Seven pays fair market value" was also referred to. So, at this time, Network Ten's strategy was to keep the rights in play and go for the cricket first.

790 On 4 March 2013, the AFR reported:

> Ten Network Holdings has raised the prospect of sharing television broadcast rights for cricket with the rival Nine Entertainment Co as it looks to secure its first major sports franchise.
>
> The revelation comes as Cricket Australia (CA) has extended the deadline for tender documents regarding the TV broadcast rights by a week to this Thursday.
>
> It is understood CA has encouraged the three free-to-air TV broadcasters – Ten, Nine and Seven West Media – as well as Fox Sports Australia to consider bidding for different types of cricket games separately and to look at forming partnerships.
>
> The sport's governing body, led by chief executive James Sutherland, is keen to get a higher price than the $315 million Nine paid for its seven-year FTA TV deal, which has just expired.
>
> Nine has "last" rights for the new agreement, which is expected to run for five years, meaning it has the right to match rival bids. The incumbent is the favourite to retain the rights but Nine insiders say it would be open to partnerships if the price "got out of control".

791 On 9 April 2013, Network Ten made an announcement concerning its half year results, being six months to 28 February 2013. It reported a net loss after tax of $243.3 million. There were non-recurring charges of $304 million including a television licence impairment charge of $292.1 million. The announcement stated:

> Ten Network Holdings' Chief Executive Officer, Hamish McLennan, said the company's results reflected its poor ratings and revenue performance during the six-month period and significant non-recurring charges.

792 This was elaborated on in the following terms:

> TEN's reported net loss was impacted by one-off non-recurring charges of $304.0 million. These included a non-cash television licence impairment charge of $292.1 million and one-off restructuring charges of $11.9 million.
>
> The television licence impairment charge reflects the company's view that the free-to-air television advertising market is at a low point of its growth cycle, and that the company is at a low point in the cycle of its share of that advertising market.

793 Given that perceived environment, it was hardly likely that Network Ten would go beyond the $35 million to $40 million per annum range analysed in the April 2012 paper, particularly given that there had been no up to date analysis.

794 On 10 April 2013, the AFR reported:

> Ask Ten Network Holdings chairman Lachlan Murdoch why he is confident about the turnaround at the troubled free to air network and he will tell you it is all about new chief executive Hamish McLennan.
>
> McLennan, who worked in advertising for most of his meteoric career apart from a

stint in the office of News Corp executive chairman Rupert Murdoch, is a driven individual who deserves the nickname "Hammer".

He won't tolerate the sort of waffle that fills most meetings in TV land and he gets rid of people who don't perform. But the trait that will appeal most to Ten shareholders is his ability to provide leadership and direction.

That has been sorely missing from a company that has suffered multiple downgrades, multiple capital raisings and multiple chief executives in a short space of time.

McLennan will have to inspire staff at a time when morale is being tested by a cost-cutting campaign that has slashed staff numbers. Costs fell 10.6 per cent in the first half and are forecast to fall 6 per cent in the full year.

The operating metrics are awful. The company is burning cash and looks suspiciously like it is relying on funds from last year's capital raising for working capital. The dividend remains in suspended animation.

It is always worrying when a CEO describes a company's financial position as "fragile" but at least Ten is in a sector of the media that has managed to hold its advertising revenue pool around $3 billion.

Ten's core problem is that its share of that revenue pool has plunged because of poor programming choices, a misreading of its own demographic and lack of key sporting content.

McLennan recognises the need to expand Ten's sporting offering beyond formula one and Rugby Union. Sporting rights have underpinned the success of rival channels, Nine Entertainment and Seven West Media. Sport is the lifeblood of pay TV.

David Gyngell at Nine showed the way to go when he pulled off a major coup with the gutsy purchase of the National Rugby League rights last year while his company was at the door of insolvency.

McLennan has shown he is willing to pay top dollar, or about $350 million, for the Australian cricket rights but Gyngell has last-bid rights that most likely will be exercised. That sets up the possibility of Ten and Nine collaborating on a deal.

The alternative is bidding for the tennis rights, which are now held by Seven West Media. It has a six-month exclusive negotiating period before it is opened up to the market. Tennis Australia is said to have received offers of about $40 million.

McLennan said on Tuesday that Tennis Australia probably was not aware of the value of its broadcasting rights. His quest for that sport should be helped by the fact Seven does not have last-bid rights.

Lachlan Murdoch has said privately that the acquisition of the cricket or the tennis would boost Ten's fortunes. It certainly would introduce some stability to audience numbers through summer and balance the winter offerings.

795 On 16 April 2013, the AFR reported:

Cricket Australia has entered exclusive negotiations with Ten Network over the embattled broadcaster's $350-million bid to wrest cricket rights away from incumbents Nine Entertainment and Fox Sports.

796 On 11 May 2013, the Herald Sun reported:

> There is an even-money chance Nine Entertainment Company will walk away from its 36-year relationship with Cricket Australia, industry sources say.
>
> The broadcaster is willing to cut ties, they say, amid speculation Ten Network has dramatically upped the stakes in the battle for cricket rights.
>
> Under new chief executive Hamish McLennan, Ten is believed to have made a bid worth $500 million for rights over five years.
>
> Ten's offer is to broadcast all Tests and matches in major domestic competitions such as the Big Bash League.
>
> The price is well above the amount Nine and Fox Sports pay under the current deal, of almost $60 million a year.
>
> BusinessDaily revealed Mr McLennan would ramp up Ten's push for premium sporting content a day after he took the job at the broadcaster in February.
>
> An industry insider with knowledge of the rights negotiations said Nine was still evaluating whether it would offer a counter bid.
>
> Nine needed to assess if a counter offer were "justified and viable", the source said.
>
> One insider said that if Nine did walk away, it would instead plough the cash into "big-end Australian television".
>
> There was a "50-50" chance Nine would walk away, he said.
>
> A key ratings winner for Nine last year was its drama, Howzat! Kerry Packer's War, portraying the media group's role creating the one-day format.

797 On 27 May 2013 at 2.33 pm, Mr McLennan sent an email to Mr Wood in the following terms:

> Good to talk last week. I appreciated you giving me an update on the status of your "exclusive" negotiation period with the Seven Network and I just wanted to confirm that Network Ten is very interested in bidding for the Tennis Australia rights, should you choose to take them to the open market. As I mentioned, Network Ten has vigorously participated in Cricket Australia's recent rights process, which will ensure that CA achieve an optimal outcome for their sport. Should you choose to bid the Tennis Australia rights on the open market, I can assure you that our company will participate with great vigour. Steve, both Lachlan and myself are very interested in developing an extensive relationship with Tennis Australia and we'd be more than happy to meet with you at your earliest convenience.

798 There was no mention of any figure. As I have already said, on 30 May 2013, Mr Wood responded saying that he would "be in touch at the appropriate time". Of course, the day before TA had signed a new contract with Seven.

799 On 30 May 2013, Mr Marquard sent an email to Mr McLennan. In part it stated:

> As discussed just now, a quick follow up to your note to Steve Wood the other day, - just wanted you to have full picture of what have done already in past few months to help our strategic thinking.
>
> In general I have been trying to ensure that:

1. tennis doesn't do a deal with Seven without going to market and

2. keeping tennis in play while we know what is happening with cricket.

> As you know, some directors- mainly Harold, have been pushing for a deal to be done with Seven. There was a crucial meeting back in February where TA decided not to do a deal with Seven but actually put the rights formally into an exclusive negotiating period (ENP). To get them to that point though took some work from us and also IMG.
>
> I had a meeting with Steve Healy who is the President of Tennis Australia just prior to the meeting and expressed our strong interest if rights became available and urged them to test the market before doing a deal. He is a key participant and counter to Harold.

800 Now it makes no reference to Mr Marquard discussing any figures with Mr Healy. And perhaps one would have expected that if he had he would have said so in his report to Mr McLennan. Indeed he referred to figures later in the email:

> Where we got to with IMG was that we agreed it was in both of our interests to work together if they acquired the rights overall- domestic and overseas. Figure everyone was talking was around a couple of months ago was $30-$35m for all rights including digital although TA thinks they are worth more. Either way vastly more than the rights fee Seven is now paying.

801 So on one view, if Mr Marquard had mentioned a figure of $40 million or more to Mr Healy that Network Ten was willing to pay, it seems incongruous in the light of what was later said in the email that Mr Marquard did not mention it.

802 But Mr Ayles gave the following evidence:

> In late 2012 or early 2013, Marquard said to me during one of our discussions words to the effect that he had "door-stopped" Healy at Healy's office and told him that that Network Ten was looking to offer in excess of $40 million per year for the Domestic Broadcast Rights.
>
> Healy later said to me words to the effect that he had met with Marquard and that Marquard had said to him that Network Ten was looking at an offer in excess of $40 million per year for the Domestic Broadcast Rights. I cannot recall when or where this conversation occurred. To the best of my recollection, others were present when Healy said this, but I cannot recall whom.

803 And although this was challenged by Mr Young QC in cross-examination, I accept Mr Ayles' version of this conversation. In substance then, I accept Mr Marquard's version of his conversation with Mr Healy.

804 Let me deal with the $50 million per annum figure that had been thrown around concerning the rights and the suggestion in communications between Network Ten and TA that this might have been offered. ASIC heavily emphasised this part of the case.

805 I should first say something about the "before the event" references, that is, before 29 May 2013.

806 Mr Wood said that in early 2012, Mr Ayles had relayed to him that Mr Marquard had said that Network Ten was willing to pay between $40 and $50 million per annum.

807 Mr Wood also said that at a meeting on 23 May 2012, Mr Marquard said that Network Ten was "very interested" in the broadcast rights and that it "would be willing to pay a significant amount for them". But he didn't mention a figure. Mr Wood was cross-examined by Mr Young QC about this:

> And at that meeting with Warburton and Marquard, neither of them mentioned any figures to you, did they?---I'm not sure if they did or they didn't in that meeting, but Marquard had mentioned something to Steve Ayles.
>
> Yes, Marquard had not mentioned anything to you; correct?---Right. No. I was only meeting Marquard for the first time then.
>
> Yes. And when you met with Warburton and Marquard, Marquard referred to paying a significant amount but he never specified any figure, did he?---I already knew that figure from - - -
>
> Just answer my question. He never specified any figure in the meeting?---Marquard?
>
> Yes?---I don't recall.
>
> Now, in paragraph 53 you don't suggest that Marquard referred to any particular figure when you met with him and Warburton, do you?---No, I don't.
>
> Yes. You must have concluded that Marquard was not prepared to mention figures in the presence of his CEO, Warburton. Did you conclude that?---No.
>
> Now, you had no direct personal knowledge of what Marquard may have said to Ayles on some previous occasion, did you?---Other than what Ayles told me?
>
> Yes, other than what Ayles told you, you had no direct knowledge of what Marquard actually said. You weren't there?---No.
>
> For all you know, Mr Marquard may have mentioned a completely different figure than 40 or 50 million dollars to Mr Ayles on that previous occasion; that's correct, isn't it?---I don't know, because why would Ayles tell me that number if it wasn't true?
>
> All right. Now, do you have a clear recollection of your conversation with Mr Healy about what Network 10 would say, would pay?---Other than I had that phone call with him to say, "Hey, Ten are interested."
>
> Yes, you don't have any clear recollection of putting any particular figures to Mr Healy, do you?---I think I said, you know, they might be willing to pay 40 or 50 million.
>
> Yes, and that was totally dependent on what you had been told by Ayles; is that right? ---Yes.
>
> Did you tell Healy in this conversation that you had no direct personal knowledge of

these figures being communicated?---No.

…

The view you formed after this, Mr Wood, was none of these figures attributed to Network 10 were reliable enough for you to mention at a board meeting. That's the case, is it not?---I don't recall that, whether I mentioned them or not.

808 Further, under cross examination by Mr Young QC, Mr Marquard gave the following evidence:

> This is a later discussion with Ayles at the Olsen Hotel, and your recollection is that no numbers were mentioned at that meeting?---I can't recall at all, yes.
>
> Now, through until this point, 5 October 2012, you never participated in any discussion at any point that mentioned a range of 40 to 50 million dollars, did you?---No.
>
> No. And to the best of your knowledge, a range of 40 to 50 million dollars was never mentioned by Ten to Tennis Australia up to this point?---Yes.
>
> And you knew that a range of 40 to 50 million dollars was not financially justifiable based on the work that you had done, did you not?---We hadn't modelled that, yes, so we hadn't. Yes.

809 Mr McLennan gave evidence of a conversation with Mr Marquard on 24 February 2013 where Mr Marquard is said to have told him that he (and possibly Mr Warburton) had "put a number [to TA] of between 40 – 50 million". Apparently this was also said again by Mr Marquard to Mr McLennan a few days after the latter had commenced as CEO of Network Ten.

810 Further, I have referred to the door stop conversation between Mr Healy and Mr Marquard in early 2013 and accepted Mr Marquard's version of that conversation.

811 Further, Mr Wood gave evidence that in late March 2013 Mr McLennan said that Network Ten could pay about $50 million per annum. Mr Wood said that he passed this on to Mr Healy. But he expressed it as "Network Ten are very serious and could offer *up to* $50 million".

812 I note that Mr Healy gave evidence that he was unaware of all of these figures. He said:

> Before the deal with Seven was signed, I was unaware that Network Ten had indicated that they might be willing to pay $35 million, or $40 million or in excess of $40 million per year for TA's broadcast rights. Wood never mentioned to me any figure at which Ten had said they were interested. The first time I recall a figure being mentioned in connection with Network Ten's interest was when the Australian Financial Review published a story on 12 June 2013 that included comments from an unnamed source and McLennan to the effect that Network Ten was willing to pay between $45 million and $50 million per annum. … The deal with Seven had been signed at this point, although it had not been publicly announced.

813 He also said that he "never knew of any figures that may have been mentioned or discussed between representatives of TA's management and representatives of either Channel Nine or

Network Ten". But it seems to me that he was aware of the Network Ten figure of $40 million per annum from his door stop discussion with Mr Marquard in early 2013.

814 Let me deal with the "after the event" references to $50 million.

815 In the AFR article that was published on 13 June 2013 there was reference, inter-alia, to "the $45-50 million Ten is believed to have been considering".

816 On 19 May 2014, Mr Roberts was said to have said to Dr Young:

> Management had expected to receive $50 million per year for the rights.

817 I doubt that this was said in these terms. Dr Young had a note of the conversation, but she could not recall when she wrote it. Mr Roberts denied that he said it. And if it was said, it is unclear who within management had this view and at what time. On the evidence, it was not the perception of Mr Wood and the EMT in May 2013. Their expectation was around $40 million per annum.

818 Further, it is a reasonable inference that Dr Young sourced the $50 million per year figure to the AFR newspaper article. I will deal with Dr Young's evidence later and its unsatisfactory aspects.

819 Let me make some general observations from the foregoing evidentiary references.

820 It seems to me that in late March 2013, Mr McLennan may have mentioned a figure of $50 million to Mr Wood. But it was merely being floated and it was an "up to" figure in reality. And this was all with Mr McLennan having done no up to date analysis after the April 2012 paper. It seemed to be a reflection of his enthusiasm as the newly minted CEO of Network Ten, rather than a seriously considered figure.

821 Mr Wood was cross-examined by Mr Young QC about the strength of the $50 million figure:

> And Mr McLennan rang you to discuss the tennis rights. Now, when he referred to what Network Ten could pay, do you agree with this: his language was very equivocal and qualified?---Yes, it was quite summary type talk.
>
> Yes, well, it was very, very guarded what he said, was it not?---Yes.
>
> Did he speak about a figure that may be Network 10 could pay; in other words, maybe about 50 million?---Yes.
>
> Now, your view was that his language was so equivocal that you couldn't place any particular reliance upon the figure that he mentioned, was it not?---Could I say that again, please.

> His language was so equivocal that you formed the view that you couldn't place any reliance on the figure that he mentioned?---Well, he could have paid but the other things that are going on with Channel 10 would be – needed to be taken into account.

822 Further, Mr Wood was cross-examined about what he had passed on to Mr Healy:

> Now, your answer a moment ago, when I asked you what was said, you said you recall saying, "Hey, Channel 10 have offered up to 50 and there's a lot of activity in the market." Now, you knew full well that this was not an offer from Mr McLennan, didn't you?---Yes.
>
> It was just floating very vaguely a figure with you, was it not?---Yes.
>
> Why did you – did you describe it as an offer to Mr Healy?---I don't recall.
>
> It's unlikely that you used the words "Channel 10 had offered up to 50", isn't it?---Well, you know, during all these - - -
>
> No just answer my question. It's unlikely that you used the words Channel 10 have offered up to 50?---I just don't recall if I said "offered" or "indicated" or - - -
>
> Floated?---Floated. I mean that's what happens with all these TV executives.
>
> Yes?---They're often ready to tempt you with – with, you know, these sort of - - -
>
> Yes?--- - - - discussions.
>
> Yes, and there was a risk that they were just being mischievous and just trying to push you up in your discussions with Seven. You realised that?---Yes.
>
> Did you tell Healy that that was a real possibility?---I don't recall.
>
> If you mentioned it to Mr Healy it is likely that you mentioned your reservations about just how firm the figure was, isn't it?---Yes.

823 Further, Mr McLennan was cross-examined by Mr Young QC about his flimsily floated reference to $50 million to Mr Wood, but the more he was cross-examined the less convinced I was that it was a serious figure. There had been no up to date analysis since April 2012.

824 Let me set out some extracts of this cross-examination:

> Yes. Well, the only financial assessment that was done, assumed a single base case of an outlay of $35 million increasing by a couple of million dollars over the five years; that's right, isn't it?---In 2012 that was the case.
>
> Yes?---But we didn't get an opportunity to update it.
>
> No, I understand that. But given that that modelling indicated a direct revenue loss in the order of eight to 10 million dollars per year, you were heavily reliant upon a halo effect to generate some kind of positive contribution out of an investment in tennis, weren't you?---Not just the halo effect but I would have expected that it would have brought new advertisers to Network Ten as well.
>
> Well, that was taken into account in your revenue estimations that were part of this analysis that led to a direct revenue loss of eight million increasing to 10 million over the course of the five years, was it not?---Of 2012, yes, that was.

Did you go back and make some kind of assessment of the only financial analysis that was undertaken from 2012?---No, I consulted other executives in the business just to - - -

Yes, so you just had a feeling that an investment of 40 to 50 million dollars in tennis would produce a positive result; is that right?---It was more than just a feeling. I had a strong view that it would have a major beneficial effect for Network Ten.

Yes, but without any analysis?---We didn't update the analysis from 2012.

All you had was the 2012 analysis?---That's correct.

HIS HONOUR: Which was only an analysis, as I understand it, only a base case model of $35 million?---That's correct.

Yes, per year?---And there was an additional data point from John Marquard that he had heard that Network Seven had been getting $37 million worth of advertising revenue.

…

MR YOUNG: Now, aside from that analysis I have just taken you to that was done in 2012, there was no assessment at all about the sustainability of an acquisition of tennis rights at a figure of 40 to 50 million dollars; correct?---Correct.

Nor was there any consideration or analysis of whether, in 2013, an investment of 40 to 50 million dollars could be justified having regard to a wider analysis of Ten's financial position and operational performance, was there?---That's correct.

So can I come back to paragraph 33. You would agree with me, would you not, that your statement about financial capacity does not address the question whether an investment of 40 to 50 million dollars in tennis rights would produce an acceptable return to Ten, does it?---I believe it would have.

But that was not a matter that had been analysed at all, had it?---Because we hadn't received a brief from Tennis Australia, so we were unable to sort of update our modelling.

Yes. Well, and you had made no analysis, I put to you, in 2013, as to whether an investment of 40 to 50 million dollars would, over time, be a profitable investment for Ten?---At the same time in parallel, we had done an analysis for cricket at a much higher rate and knowing that they were two high-profile premium sports, our feeling was that tennis would have returned – would have been a good return for Network Ten.

Well, they're very different products aren't they because cricket occupies an entire season right through the summer?---I would say tennis is better because it was highly concentrated.

For two weeks?---Yes, and that was the beauty of it.

Yes. Two weeks and directly conflicting with the programming of the Big Bash; correct?---We had the right – when we negotiated the Big Bash for Network Ten we had the right to move games onto our secondary channel, and that's not widely known, for the year where tennis would start. So at the time we were thinking that if we were successful with Tennis Australia we would be able to accommodate it.

…

If you still have the volume, Mr McLennan, you can return it. I want to go to your

affidavit now. Can I take you to paragraph 10 of the affidavit. Now, you refer there to a conversation with Mr Marquard on 24 February. Do you see that?---Correct. Yes.

And that is a conversation in which Mr Marquard is speaking of words spoken by Mr Warburton, your predecessor?---It was James and Jon, yes, together.

Well, what does it mean, Marquard speaking of James Warburton? Isn't this saying that Marquard was telling you that James Warburton said words to the following effect?---My recollection was that they both met with Tennis Australia and they had socialised the number between 40 and 50 million.

Socialised the number between 40 and 50 million?---That's correct.

By socialising you mean floating, do you?---Yes, I do.

Now - - -?---Or putting a market down, yes.

Sorry?---Putting a marker down for Tennis Australia.

…

All right. Can I take you to another – you can return that folder. Can I take you to another paragraph of your affidavit. This refers – the paragraph is paragraph 20. This is a conversation in March of 2013?---Yes.

…

All right. Thank you. You can return that folder. Now, your account of what you told Mr Wood includes the statement at the end of paragraph 20:

Network Ten could pay a figure north of $40 million.

?---That's correct.

Yes. Now, do you agree with me that that was a rather non-committal statement by you?---No, because I was serious that I thought we could pay.

But you expressed it as a figure that Network Ten could pay, not a figure that it would pay, didn't you?---That's correct.

Yes. You were simply saying Network Ten had the capacity to pay a figure north of $40 million; correct?--- That's correct.

You were not communicating that you would, in fact, pay that figure, were you?--- That's correct, subject to a brief from Tennis Australia.

825 I have not set out all of this cross-examination, but I must say that Mr McLennan's answers seemed to reflect little more than his intuition and the like to float a figure north of $40 million per annum.

826 Finally, Mr Tanner seemed to have recalled that a $50 million per annum figure had been mentioned outside a board meeting concerning one of the IMG offers. But his evidence was confused in relation to when and concerning what. In any event, he did not attribute this to something specific concerning Network Ten.

827 It is also telling that, in addition to the qualified nature of the verbal expressions that TA did receive from Network Ten, TA never received anything meaningful in writing from Network Ten.

828 So, what conclusions should be drawn from the above? First, Network Ten had only done an analysis supporting $35 million per annum. Second, it may have gone to $40 million. Third, the figure floated of $50 million was inflated, devoid of analysis and not to be taken seriously.

829 Let me now say something further concerning Network Ten's financial woes.

Network Ten's financial problems

830 Leaving to one side the highly qualified and equivocal nature of the interest expressed by Network Ten, the evidence revealed facts which cast serious doubts about Network Ten's capacity to pay for the rights whilst delivering the necessary quality of service. In 2012/2013, Network Ten was in financial difficulty. Moreover, it was the lowest rating of the three FTA networks, and had the lowest share of TV advertising. Each of these matters were known to Mr Wood and the directors at the time.

831 In terms of the financial position of Network Ten, there was a significant doubt to say the least that Network Ten had the capacity to pay for the broadcast rights. As the defendants have correctly pointed out, Network Ten's financial situation, as rightly perceived by TA management and the board, presented significant counterparty risk. TA's executives and directors regularly read the financial press and were aware of articles referring to Network Ten and its financial problems, including those that I have already referred to. Mr Healy's evidence was that he was aware of serious concerns attending Network Ten's financial viability and that this created significant counterparty risk. Mr Wood agreed that he would not want TA to enter into a five year agreement with a financially unstable company that paid too much and that might go broke during those five years. Mr Ayles accepted that it would be disastrous for TA to enter into a five year domestic television rights deal with a company which was at risk of financial failure. Mr Freeman considered that Network Ten was a high risk counterparty in the sense of its long-term financial viability. Mr Tanner said that it would have been unhelpful if TA sold the rights to a financially unstable entity that overpaid for the rights and then collapsed during the course of the agreement. Mr Fitzgerald said that he recalled that there was a question about Network Ten's financial state and its ability to bid for the domestic rights.

832 Further, if ASIC's thesis was that Network Ten may have been very anxious if not desperate to obtain the rights, assuming that it substantially lost out to Nine on the cricket, then this may have heightened TA's concerns rather than alleviated them.

833 But there was another problem with Network Ten.

834 Network Ten had the lowest share of television advertising revenue of the three FTA networks. Indeed, Mr Wood described Network Ten as having very poor ratings. This was significant. Mr Wood and the directors acknowledged that one of TA's objectives was to have the tennis broadcast on a channel with high ratings to promote and develop the sport. So, Network Ten's potential interest needed to be considered against that background in the sense that TA's objectives would not necessarily be satisfied by partnering with Network Ten even if they had offered the most money for the broadcast rights.

835 Further, there was a quality concern. Mr Wood and the directors were also concerned about a potential drop in the quality of the broadcast if the AO was shown on Network Ten. Mr Tanner said that if Network Ten paid a large amount for the television rights and were struggling to get a return on them, then they might start cutting back in various ways. Mr Fitzgerald recalled at the time that there were question marks about how Network Ten would deliver the product. Further, Mr Wood explained that one general risk with changing broadcast partners was that the new partner might not be able to produce the type of quality that TA had seen from Seven.

836 In summary, it would seem that most of the directors of TA were underwhelmed by the idea of going with Network Ten. Yet as ASIC's arm-chair theories would have it, TA should have rejected Seven's final offer, allowed the ENP to collapse or elapse, then gone to market and treated with Network Ten. The more one analyses this, the more one is tempted to say that taking such a risk may have placed the directors in jeopardy of a different breach of duty case.

(c) IMG

837 Let me now analyse IMG's position and its offers in more detail, and let me begin with the first IMG offer that was discussed at TA's board meeting on 3 December 2012.

The first IMG offer

838 The first IMG offer was unsatisfactory in numerous respects.

839 First, it combined two proposals that could not be accepted separately being:

(a) Proposal 1: Tennis Australia Domestic Media Rights 2015-2021; and

(b) Proposal 2: Tennis Australia International Media Rights 2015-2021.

840 Second, Proposal 1 was for seven years rather than the five years TA was looking for.

841 Third, Proposal 1 did not give any commitment that TA would be the host broadcaster. It had the following waffly phraseology concerning production:

> IMG will work with TA to produce a detailed technical and editorial specification for the production of the audio-visual coverage of the Events, (the primary concern being the AOT, and including but not limited to the production of a world feed, coverage of additional courts), and other terms and conditions to provide TA with a greater level of editorial involvement and/or control over the production of audio-visual coverage of its Events by the relevant Host Broadcaster.
>
> These production requirements will be a key aspect of the bidding process for all parties that are interested in acquiring the Domestic Media Rights as lead licensee/Host Broadcaster,

842 Further, as to revenue protection the following was said:

> While IMG is committed to pursuing enhanced production, broadcast coverage and retained rights for TA, it need not incur material monetary costs or financial disadvantage or other material adverse effects in order to secure the agreement of prospective licensees to these objectives (e.g., IMG shall not be obligated to accept a lower licence fee from such licensee in order to obtain the licensee's agreement to more extensive Retained Rights).
>
> However, TA shall have the option of asking IMG what the lower licence fee would be in exchange for the achievement of one or more of such objectives, and reducing the amount of IMG's Minimum Guarantee by an amount equal to difference between this lower licence fee and the original licence fee without provision for such objectives in the contract.

843 Fourth, the rights fees, which in form were described as revenue share, with a minimum guarantee revenue share, were expressed in the following terms:

> **AU$210m (two hundred and ten million Australian Dollars) Minimum Guarantee** in aggregate, allocated equally across the 7 year term, ie, **AU$30m (thirty million Australian Dollars) per year**, with a Revenue Share on annual Domestic Revenues received in excess of the Minimum Guarantee each year as follows:
>
> | | |
> |---|---|
> | AU$30-31m: | 100% IMG |
> | AU$31-35m: | 95% TA/5% IMG |
> | AU$35-40m: | 90% TA/10% IMG |
> | AU$40m plus: | 85% TA/15% IMG |

844 So, there was some potential for uplift.

845 Fifth, Proposal 2 involved an *early* extension of the existing international rights. The existing rights expired in 2016 whereas Proposal 2 involved the time frame 2015 to 2021.

846 Sixth, at the end of the first IMG offer the following six process points were stipulated:

> 1. These Proposals are made subject to IMG board approval, and as such are not capable of acceptance by TA until IMG has notified TA in writing that it has the requisite board approval.
>
> 2. These Proposals remain open until 5 pm Melbourne time on 31 December 2012, WHEREUPON, if no legally binding agreement has been reached by TA and IMG on the International Media Rights 2015-2021 Proposal, both of IMG's Proposals set out herein shall be automatically withdrawn and shall not be capable of acceptance. However, if by that time TA and IMG have concluded a legally binding agreement for the International Media Rights 2015-2021 Proposal, IMG's Domestic Rights Proposal set out above shall remain open for a further period to be determined by IMG at that time.
>
> 3. Without prejudice to the preceding paragraph, IMG's Domestic Rights Proposal shall only be capable of acceptance if TA also accepts and enters into a legally binding agreement for IMG's International Media Rights 2015-2021 Proposal.
>
> 4. If TA accepts (i) IMG's International Media Rights Proposal only, or (ii) IMG's Domestic Media Rights Proposal and its International Media Rights Proposal, the parties shall negotiate a long form agreement incorporating the terms set out herein (as amended in line with any changes mutually agreed during negotiations) and on other terms not materially dissimilar to the terms and conditions of the agreement between TA and IMG dated 9 July 2007.
>
> 5. Please note that the offer and negotiating period in respect of TA's International Rights is without prejudice to IMG's exclusive negotiation rights as set out in clause 9.3 of the TA/IMG agreement dated 7 July 2007, and clause 4 of the Variation and Extension Agreement dated 10 December 2008, which, if a binding agreement isn't concluded in respect of such extension pursuant to this letter, TA agree shall take place in accordance with the terms of those provisions.
>
> 6. Please also note that the existence and content of the this letter and related discussions (including but not limited to the strategies, ideas, know-how, commercial, financial and technical proposals and other business information disclosed as part of them):
>
>> (i) are of the strictest confidence and shall not be disclosed by or on behalf of TA or any of its officers, board members, employees, agents, advisers and/or contractors to any third party; and
>>
>> (ii) shall only be used internally by the TA board in its consideration of IMG's proposals and as part of the process of TA deciding how to exploit the Media Rights, and for no other purposes.

847 The following points may be noted.

848 As to the first point, this was an unsatisfactory aspect for TA, but at Mr Wood's request this was fixed up by no later than 30 November 2012, as communicated to Mr Wood by email from IMG on 30 November 2012.

849 As to the second and third points, the international rights extension was inextricably tied in to the domestic rights proposal. But TA was not interested in dealing with any international rights extension at this time. This meant that the domestic proposal could not be accepted. Further, the second point had an unrealistic date of 31 December 2012 in any event.

850 In short, the first IMG offer did not involve a commercial free standing offer in terms of the domestic rights. Moreover, in any event it could not be accepted at this time by TA as TA was bound to let the ENP process unfold with Seven from 1 April to 30 September 2013.

The 3 December 2012 meeting

851 It is clear from the evidence that at TA's board meeting on 3 December 2012, Mr Mitchell talked down, to say the least, the first IMG offer. This was communicated to Mr Ayles, who on 4 December 2012 sent an email to Mr Guinness stating "Harold raised it and basically damned the entire IMG offer".

852 Mr Wood does not seem to have kept Mr Guinness informed in a timely fashion, for on 20 December 2012 Mr Guinness emailed him in the following terms:

> First of all congratulations on your reappointment as CEO. Secondly I am a little surprised that I have not heard anything from you directly regarding the offers we have submitted to TA. Can I assume you have already renewed with Seven or, if not, is this likely to happen shortly? You will appreciate the effort and time that I have spent to assist you in your domestic process by getting offers worth in excess of US$400M approved by my Board hence my request for some feedback.

853 Mr Wood responded by email the next day:

> Due to certain unforeseen circumstances during the last Board meeting the whole TA Board was unable to properly consider the various broadcast deals on offer to TA. Given this broadcast deal will be the single biggest revenue transaction TA will make the Chairman has subsequently decided that management must put forth some recommendations so that the whole TA Board can become fully appraised in order to provide Board authorisation to sign off the deal. I have asked Steve Ayles to work with you to reshape a some of the elements of the current IMG offer so that it can genuinely be put in the best position in front of the TA Board. In particular the decoupling of Domestic and International rights, the length of term, the extension of the deadline to meet our March Board meeting and the finalisation of the contract.

854 On 10 January 2013, Mr Wood sent an email to Mr Guinness suggesting a restructuring of the offer(s). This was of course after the first IMG offer had expired on 31 December 2012. The email stated:

> Further to our recent discussions, I can confirm that we feel that your attached offer has genuine merit. As we discussed, however, this issue is one that we will need board approval on and the board may well express concern over the length of the proposed

> deal and the linkage of the domestic agency agreement to a new long-term international agency agreement. Rightly or wrongly there may be fears of cross subsidisation.
>
> We would like to present to our board a "clean" agency deal for the domestic agency only. Can you please reconsider your position on this point and let us have an offer along the following lines:
>
> - 5 year domestic agency (reduced from 7 as proposed in the attached)
> - No linkage of the domestic agency to a further appointment of IMG as our international broadcast rights agency. We will address any renewal of the current international deal in the usual way when it arises
> - Domestic standalone offer to be open for acceptance until 30 September 2013
> - Recognition that the domestic broadcast rights agency & guarantee agreement must be documented in a long form by the same acceptance date (i.e. 30 September 2013). There will be a number of issues we must address and agree in order to develop a guarantee which will be enforceable in the foreseeable circumstances. While resolution of these issues will obviously be subject to agreement between us, we will be looking for recognition that the domestic offer as currently proposed will need some work before it will be in a form our board is likely to accept
> - Otherwise on the terms in the attached.
>
> If the above works for you and IMG, can you please issue an amended offer to us for consideration as soon as possible. There will be discussions on this (particularly with our board) during the AO and it would be helpful to have a current offer on foot with IMG (rather than an expired deal which has not been extended) as well as the Seven offer.

855 Clearly, a standalone proposal for the domestic rights was being sought. Further, five years rather than seven years was being sought. Further, the domestic offer was sought to be open for acceptance until 30 September 2013, being the end of the ENP. Further, the last paragraph of the email is revealing. Clearly, Mr Wood wanted a free standing offer so that he could inject competitive tension into the process.

856 Further, Mr Guinness' emailed response to Mr Wood on 16 January 2013 is revealing. He said:

> In response to your email we understand your concerns but firstly and most importantly it is absolutely not the case that our domestic offer is capable of being cross subsidized by our international offer or vice versa. We have carefully valued both the domestic and international rights resulting in a very clear and separate financial structure for both proposals.. I thought that, in our offers and subsequent discussions with yourself and Steve, we have illustrated that the only linkage is that our domestic offer will have IMG board approval on condition that an extension is agreed on our international representation agreement. Despite being steered by Tennis Australia to make a 7 year domestic proposal, to distinguish itself from the Seven offer, we would of course reconsider the term. In fact we would be happy to make all of your required changes to the domestic offer apart from your second requirement outlined below.

> To be clear, given the risk profile of the domestic offer, I will be unable to secure approval from the IMG board unless an extension of our international deal has been agreed. I have suggested to you in our recent telephone conversation that if a proposed extension to 2021 is too long then we can discuss a shorter term. With this in mind could we not simply extend our international agreement through to 2019 on the same commercial terms as currently (i.e .10% commission)? You told me on the phone that there is no reluctance from Tennis Australia to extend our agreement and that the relationship between IMG Media and Tennis Australia has never been stronger. With deals into Asia, Middle East, Sub Saharan Africa, New Zealand and the live streaming betting rights coming up for renewal in the next 12 months, a simple extension through to 2019 would give you the comfort of IMG Media managing these potential long term deals notwithstanding the trailing commission mechanism that we are entitled to. Frankly we could conclude this extension when we meet next week and I could secure a board approved domestic offer that takes into account all of your requests before the conclusion of the Australian Open.

857 The expression "Despite being steered by Tennis Australia to make a 7 year domestic proposal…" indicates that Mr Wood was using IMG in essence as a stalking horse. Mr Ayles denied that IMG had been so "steered". But it seems to me likely that Mr Wood did something of this type.

858 Mr Wood responded on 17 January 2013:

> Thanks for your email. Can you please make the changes to the domestic deal we flagged below.
>
> As to the second requirement below (linkage of the domestic and international deals) we genuinely believe the board will resist this on the basis of perceived subsidisation, however in the circumstances we are prepared to resubmit the revised offer linking the deals on the basis of an extension of our current international deal on the same commercial terms (i.e. 10% commission) to 2019. We cannot however agree to extend the international deal ahead of us agreeing the terms of the domestic agency and rights guarantee agreement (i.e. the long form). In other words, we are comfortable with the offer regarding the domestic rights being conditional on us simultaneously extending the international rights when we accept the domestic offer (which will be by way of a long form) but we won't extend the international deal early unless and until we agree the domestic deal.
>
> Please issue an amended offer to us on this basis for consideration as soon as possible - as we noted before there will be discussions on this (particularly with our board) during the balance of the AO and it would be helpful to have a current offer on foot with IMG (rather than an expired deal which has not been extended) as well as the Seven offer.

859 On 18 January 2013, Mr Guinness emailed Mr Wood and said:

> We have considered the points made in your email of January 17th. We have tried to come up with a proposal that not only assists TA in this process, but that will also satisfy IMG corporate scrutiny.
>
> We note your request that our offers stay open and capable of acceptance until 30 September 2013. It is not possible from a corporate perspective to have an offer containing a Minimum Guarantee of this magnitude open for that length of time; it is

contrary to sound and sensible commercial practice and we will not get board approval for it.

What we are prepared to put to our board for approval (and would be hopeful of obtaining such approval) is the following:

The TA Domestic Rights and TA International Rights elements would both remain open until 5 pm Melbourne time on 1 April 2013.

Further, the TA Domestic Rights offer would remain open until 5pm Melbourne time on 1 October 2013, provided (and strictly on condition) that by 1 April 2013:

(i) We have concluded a legally binding signed extension of our representation of TA's International Rights 2017-2019

(ii) We have in place a fully negotiated and agreed long form agreement in relation to TA's Domestic Rights (acknowledging that TA will not be able to sign this before 1 October 2013) and our offer will remain open and capable of acceptance up to 1 October 2013 only on the terms and conditions set out in that long form agreement with no amendment.

As you will recall, our original proposals expired on 31 December 2012. Even if our international rights element had been accepted and concluded by that time, the length of time for which the domestic rights element would have been kept open was left to be determined by IMG at that time. Accordingly, we hope you recognise that we have moved a considerable distance from that position.

If agreeable, we will send you a formal proposal incorporating these terms as soon as possible.

860 On 24 January 2013, Mr Wood responded:

Please proceed to prepare your combined offer expiring on 1 April 2013 and let us have it once you have board approval. We can then proceed to prepare the domestic long form terms for discussion and agreement.

Thanks for the further offer of an extension to 1 October (to our option to accept the domestic representation and minimum guarantee offer), provided the international representation extension has been executed and the domestic long form terms have been agreed by 1 April 2013. However, at this stage we would prefer to put a "cleaner", simpler deal to our board. In practice we are extremely unlikely to renew the international deal early unless we are happy to accept the domestic deal so the extension on terms as offered also does not represent a realistic option and may distract the board.

861 On 25 January 2013, Mr Guinness further replied:

We are not sure why you would be unlikely to extend our international rights representation early unless you accept our domestic rights offer.

Subject to that, we would be prepared to seek board approval for the following:

1. 5 year TA Domestic Rights offer 2015-2019

2. 3 year TA International Rights extension 2017-2019

3. The Domestic Rights offer will remain open and capable of acceptance until 1 April 2013. At that date our Domestic Rights offer will be automatically withdrawn, and will

> no longer be capable of acceptance.
>
> We note that you want to place before the board what you refer to as a "cleaner" offer. The above proposal is what you have requested. However, please note that if by 1 April 2013 we have both (i) concluded a legally binding signed extension of our representation of TA's International Rights 2017-2019 and (ii) agreed a fully negotiated long form agreement in relation to TA's Domestic Rights, we may still be prepared to keep our Domestic Rights offer open for a further period to be determined by IMG in its discretion. If those conditions are not met, we will not be in a position to make TA a Domestic Rights offer after 1 April 2013. However, needless to say we would be happy to discuss assisting TA in its negotiations with Seven post 1 April 2013.

862 Clearly, such a proposal was not satisfactory. The date stipulated "until 1 April 2013" for the domestic rights proposal was before the ENP. Accordingly it could not possibly be accepted without putting TA in breach of its contractual obligations with Seven. Further, the conditions for any possible extension of that time frame were also unrealistic.

Network Ten's dealings with IMG

863 It is appropriate that I say something more about IMG's dealings with Network Ten at this point.

864 If TA entered into an arrangement with IMG, then as IMG would only be acting as an agent, IMG would need to enter into a back to back arrangement with a network in essence on-selling the rights. IMG's profit would then be, simply put, the amount it received for "on-selling" the rights to a third party minus the fees it had to pay to TA.

865 Mr Guinness gave the following written evidence:

> On around 21 January 2013, Charlotte Brigel, head of IMG Media's Australasian business at the time, and I met with Jon Marquard, the then chief operating officer of Network Ten Pty Ltd to discuss whether Network Ten was interested in acquiring TA's Domestic Broadcast Rights from IMG Media, should IMG Media be successful in obtaining those rights. I met with him because I wanted to find out if Network Ten had an appetite to acquire the Domestic Broadcast Rights and therefore to obtain some degree of assurance that there was a domestic broadcaster who was prepared to make an offer over and above the minimum guarantee. I do not recall the specifics of the conversation, but I recall asking Marquard whether Network Ten would be prepared to make an offer for the Domestic Broadcast Rights of around $35 million per annum. I recall that Marquard said to me that Network Ten was happy with a valuation around the $35 million per annum mark, but that he was reluctant to put anything in writing. After this conversation with Marquard, I felt confident that there was sufficient appetite for the domestic broadcast rights that a broadcaster would be willing to pay above the minimum guarantee.

866 In this context, Mr Guinness of IMG sent an email to Mr Marquard of Network Ten on 4 February 2013 in terms putting a proposal to Network Ten. IMG was seeking an indication

that, if successfully awarded the rights to the AO, Network Ten would be prepared to make an offer in excess of $35 million per annum.

867 The first part of the email sets out eight points by way of background:

> I wanted to follow up on our conversations two weeks ago regarding the Australian Open and other tennis rights and your subsequent conversation with Charlotte. As I explained to you when we met the situation is as follows:
>
> 1. Seven Network have made an unattractive offer to Tennis Australia to extend their current broadcast agreement for a further five years.
>
> 2. TA have asked IMG to assist in the process, by making a direct offer to TA for their domestic rights to provide TA with leverage in rejecting the Seven offer or at the very least delaying a decision.
>
> 3. Having received confirmation from TA in writing that they are contractually entitled to receive offers from third parties (this is important because IMG does not want to be accused of triggering a breach in the agreement between TA and Seven), IMG made an 7 year offer for TA's domestic rights on condition that IMG's international representation rights were extended for five years until 2021.
>
> 4. These offers expired on Dec 31st 2012 but had the desired effect of allowing TA (in spite of extreme pressure from certain parties) to inform Seven that no decision would be made until TA s next Board meeting in early March 2013.
>
> 5. TA have now asked IMG to put a domestic offer 'back on the table' to give leverage to TA's board to reject Seven's offer and at the very least wait until the start of Seven's official exclusive period of negotiation which begins on April 1st and expires on Sept 30th 2013.
>
> 6. TA wish IMG to reduce the term of it's domestic offer to 5 years but to maintain the financial structure which is on the basis of a minimum financial guarantee per year slightly in excess of AUS$ 30m. TA have also reduced the term of IMG's proposed international representation extension to 3 years until 2019.
>
> 7. The consequence of this is to significantly increase the risk profile of the prospective offers for IMG and will make it more difficult for me to get approval from my Board.
>
> 8. If I get approval IMG would put a domestic offer back on the table until April 1st 2013 (i.e. the start of Seven's exclusive period of negotiation). The offer will expire on that date unless TA have agreed a long form contract with IMG for the domestic rights subject only to signature (which can't be effected. until Oct 1st 2013 at the earliest because of Seven's ENP) and have signed a three year extension to IMG's international representation agreement.

868 Points 2 and 4 in essence are consistent with Mr Wood's evidence, and as was the fact, that he was using IMG as leverage in the negotiations against Seven.

869 Point 6 is also important in that it reflects that the proposed second IMG offer was still intended to guarantee to TA only an amount slightly above $30 million per year.

870 The email then goes on to pose and answer the question "Why is all of this relevant to Ten Network?".

871 The email then states:

> 1. It is clearly TA's desired objective (in the absence of a compelling offer from Seven) to take their rights to market beginning Oct 1st 2013.
>
> 2. If no deal is concluded with Seven by that date, it is likely that TA will accept IMG's offer and IMG (in conjunction with TA) will proceed to oversee a tender process.
>
> 3. IMG and Ten Network's interests are very much aligned as IMG, given it's [sic] dominant position in the representation of premium tennis rights, can help Ten become THE tennis network/destination built around the Australian Open as the core ingredient of this strategy.
>
> On the basis of all the above, what we would ideally need from you in writing is an indication (obviously not legally binding) that, if successfully awarded the rights to the AO, Ten Network would be prepared to make an offer in excess of AUS$ 35m per annum. This will help me get approval from my Board to resubmit our domestic offer which in turn will assist TA in making the right decision at their March board meeting.
>
> What are the risks?
>
> 1. TA accept a revised offer from Seven before April 1st (unlikely).
>
> 2. TA accept a revised offer from Seven before the end of their ENP (possible).
>
> What are the benefits?
>
> 3. No deal is done with Seven before the end of the ENP and TA with IMG go to market.
>
> 4. IMG will in effect represent the domestic rights and therefore a deal with Ten Network is in IMG's interest for all the reasons mentioned above.
>
> In summary:
>
> l. IMG is trying to help TA get the best deal from it's domestic rights.
>
> 2. IMG in return does expect some financial upside on it's domestic bid plus the extension of it's international rights.
>
> 3. Ten will NOT be used as a stalking horse (the contents of this letter and any discussion must be kept confidential between Ten and IMG).
>
> 4. Ten will still have a direct relationship with TA.

872 So, IMG's profit per annum would come from the difference between the amount received from Network Ten per annum being $35 million and the amount paid to TA of $30 million. Of course, all of these figures are well south of $40 million per annum.

873 On 8 February 2013, Mr Marquard of Network Ten responded, although it could hardly be said with alacrity. And he did not specify any different figures. He said:

We have discussed your proposal internally and while there is some interest in working together, there are a number of elements which require some clarification and clear understanding between us.

It seems from our perspective that the best outcome in working together would be to deliver:

- To Ten, the domestic rights; and
- To IMG, the international extension; while having Ten as partner would also boost interest in your other tennis properties because Ten would make tennis the sporting hub across the network.

To achieve these outcomes, we would want certainty that if Ten aligned its interests with IMG in the way you have suggested and IMG is successful in acquiring the domestic rights from TA, those rights will flow through to us. Equally importantly, we want to make sure that, to maximise the chance of the IMG offer being accepted, whatever sum Ten may consider paying for the domestic rights, 100% of that amount will flow through to TA. The alternative is obviously that we put an offer directly to TA without going through IMG.

So, with that in mind, the language I have highlighted in your email below indicates areas we need to collectively work on.

I suggest changes to make it clear that:

- Whatever the figure is from Ten, it flows to TA without any deduction (i.e. no IMG commission or rebate)
- if IMG is awarded the domestic tennis rights, Ten will get those rights; it appears to us that the tender process you have proposed would not deliver us the certainty we need.
- Both parties will approach the arrangements in good faith
- There will be transparency in all communications

We also need to put in place an NDA.

874 On 19 February 2013, Mr Guinness responded, but hardly with any haste. He re-iterated that IMG was seeking a non-binding indication. He said:

In answer to your email:

1) We agree with your perspective that the best outcome in working together would be to deliver to Ten the domestic rights and to IMG an international extension.

2) We also agree that having Ten as a partner would boost interest in our other tennis properties in Australia.

To be upfront with you, TA has accepted the principle of IMG commissioning any domestic broadcast deal in exchange for its work and minimum guarantee commitment. This should be of no concern to Ten because, if IMG are awarded the domestic rights any offer from any broadcasters would be commissionable and therefore treated the same. It seems clear to us that unless TA's board has an offer from IMG for its domestic rights "back on the table" by its board meeting in early March, the board will have no choice but to accept Seven's current offer. We don't want to

> overplay our importance but I'm not sure that without our offer TA's board can rely on market conditions, fees paid for other domestic sports etc to reject Seven's proposal. Because of the change in contract terms for both our domestic offer and international extension, the risk profile is such that I will not get approval from my board to resubmit our domestic offer unless I can get an indication of value from Ten or anybody else. As a result if TA does not have an offer from IMG and consequently renews with Seven, then both IMG and Ten lose out.
>
> With this in mind my view on your suggested changes are:-
>
> - For the reasons stated above, your concern about the net amount flowing to TA from any offer from Ten is not relevant.
> - What we are asking from you is a non binding indication and therefore it would be challenging for us to provide you with the certainty of being awarded the rights should IMG be successful with its domestic offer. At the very least, TA will impose as one of their primary conditions of awarding us these rights that they have ultimate right of approval on any domestic deal. However, as discussed, we will use our best endeavours to negotiate some preferential language.
> - Approaching the arrangements in good faith and transparency in all communications is fundamental for IMG.

875 On 1 March 2013, IMG sent a follow up email advising that TA's board meeting was due to take place the following Monday, and requesting that a non-binding indication be sent that day. On the same day, Mr Marquard responded in the following terms:

> I confirm that subject to the assumptions and reservations set out in this email, Ten would be interested in acquiring the exclusive Australian TV rights and associated digital rights for Tennis Australia properties, should those be acquired by IMG as set out in our emails and in our meetings. Based on what we currently know about those rights, we would be prepared to bid up to $35m p.a, for this package.
>
> This email is made on the following basis:
>
> - It is non-binding on Ten
> - Any offer we ultimately make is subject to Ten board approval
> - The amount does not operate as a "floor" - any ultimate valuation is subject to the rights actually on offer and our assessment of the full package;
> - It is not to be shared by IMG with any other party. We note your agreement to keep it strictly confidential and both parties can request the other to enter in a formal NDA.
> - Ten may ultimately bid separately for these rights, or other rights which may impact any bid.
> - The parties will work together in good faith with full transparency and open communication.
> - Should IMG be granted rights, you will use best endeavours to include preferential language as we have discussed.

876 A number of features may be noted that hardly sit well with ASIC's case in terms of Network Ten's interest, appetite and ability to pay figures well north of $40 million per annum.

877 First, Network Ten was saying that it "would be prepared to bid up to $35m p.a.". So $35 million per annum seemed to be a ceiling, not a floor. Indeed, the third dot point emphasised this. Moreover, it was well under the $40 to $50 million per annum figures that ASIC was suggesting or others were floating as to what Network Ten might pay.

878 Second, Network Ten's proposal was so heavily qualified and conditional such as to be commercially useless.

879 I have lingered on this email as it seems to me that this is the only tangible evidence in early 2013 of what Network Ten might have been seriously willing and responsibly able to pay, whatever figures may have been floated with TA by Network Ten in the $40 to $50 million per annum range, genuinely or mischievously in early 2013.

The second IMG offer

880 It is now appropriate to say something about the second IMG offer made to TA on 1 March 2013. There were two letters and it is convenient that I make some general observations about the letters before going to their precise terms.

881 The first letter appeared on its face to be a free-standing offer for five years for the domestic rights. So in form it had that structure. The second letter was for the international rights. But the major part of that letter also dealt with the proposal for the domestic rights under the heading "Process for Domestic Media Rights Proposal and International Media Rights Proposal". In substance then the domestic rights offer was linked back in to the international rights offer, although a reader would not appreciate this if he just had the domestic rights letter. What then was going on?

882 There is no better explanation than the words used by Mr Guinness in his email to Mr Wood of 1 March 2013 attaching the two letters. He stated the following:

> I have pleasure in enclosing our revised board approved offer for Tennis Australia's Domestic Media Rights 2015-2019 and separately a letter which sets out our proposal for Tennis Australia's International Media Rights 2017-2019 as well as explaining in more detail the terms relating to both proposals. The Domestic proposal should be in a form which you can present to your Board as it makes no reference to a link to the International offer as you have requested. However, the separate letter sets out the exact terms on which we are making these offers which have changed from previous correspondence for the following reasons:

1. As TA has rejected IMG Media's original offers of a seven year deal for Domestic Media Rights and a five year extension of the International Media Rights representation agreement, the risk profile of the revised proposals has consequently increased in the opinion of my Board.

2. My Board is also a little concerned by the current softening of the TV ad market in Australia and the continuing troubles at Ten Network which we have assumed is the most likely alternative broadcast partner for TA should it decide to go to market.

With that in mind, please note that the Domestic offer will expire on 31 March 2013 and any extension of that offer will be subject to the conditions set out in the "Process" section of the International Media Rights letter; in particular my Board reserves the right to amend the Domestic offer and the terms applicable to it and/or not to extend the offer at all.

Steve, I have assumed the main purpose of IMG re-submitting its Domestic offer is to enable your Board to reject Seven's current offer and either renegotiate a deal with Seven on more favourable terms between the Board meeting and the start of the formal ENP with Seven on April 1st or to simply proceed with further negotiations with Seven during the ENP. IMG has already demonstrated its strong support for TA having helped (with its previous Domestic Media Rghts proposal) to delay a decision on Seven's current offer until the Board meeting on March 4th. We hope therefore that IMG's continuing support for TA is recognized when considering the terms and conditions of IMG's revised proposals.

883 There are several points to be made. The true purpose of these letters and the structure was explained in the last paragraph. They were to assist Mr Wood in his dealings with the board and Seven. I did not get to the bottom of whether Mr Wood or Mr Ayles asked for this or communicated this purpose to Mr Guinness. I suspect that Mr Wood did, although he could not recall discussing this. Further, the domestic rights proposal was useless. It expired on 31 March 2013. But of course it could never have been accepted until the ENP ran its course with Seven. And if the domestic rights offer was to be extended beyond 31 March 2013 this required an agreement to be entered into before that time concerning the international rights. But this was all wholly unrealistic as I will explain.

884 Let me go to the domestic rights offer letter first.

885 The revenue sharing mechanism/rights fee was similar to the first IMG offer in substance. It stated:

AU$150m (one hundred and fifty million Australian Dollars) Minimum Guarantee in aggregate, allocated equally across the 5 year term, ie, **AU$30m (thirty million Australian Dollars) per year**, with a Revenue Share on annual Domestic Revenues received in excess of the Minimum Guarantee each year as follows:

AU$30-31m: 100% IMG

AU$31-35m: 95% TA/5% IMG

AU$35-40m:	90% TA/10% IMG
AU$40m plus:	85%TA/15% IMG

886 Again, there was no promise of any host broadcast. For production it was said:

> IMG will work with TA to produce a detailed technical and editorial specification for the production of the audio-visual coverage of the Events, (the primary concern being the AOT, and including but not limited to the production of a world feed, coverage of additional courts), and other terms and conditions to provide TA with a greater level of editorial involvement and/or control over the production of audio-visual coverage of its Events by the relevant Host Broadcaster.
>
> These production requirements will be a key aspect of the bidding process for all parties that are interested in acquiring the Domestic Media Rights as lead licensee/Host Broadcaster.

887 For revenue protection it was said:

> While IMG is committed to pursuing enhanced production, broadcast coverage and retained rights for TA, it need not incur material monetary costs or financial disadvantage or other material adverse effects in order to secure the agreement of prospective licensees to these objectives (e.g., IMG shall not be obligated to accept a lower licence fee from such licensee in order to obtain the licensee's agreement to more extensive Retained Rights).
>
> However, TA shall have the option of asking IMG what the lower licence fee would be in exchange for the achievement of one or more of such objectives, and reducing the amount of IMG's Minimum Guarantee by an amount equal to difference between this lower licence fee and the original licence fee without provision for such objectives in the contract.

888 And for process, points 1 and 2 said:

> 1. This Proposal shall remain open and capable of in principle acceptance (strictly subject to paragraph 2 below) until 5 pm Melbourne time on 31 March 2013. At that time and date, this Proposal and the contents hereof will automatically (and without the need for any notice or other formality) be withdrawn.
>
> 2. For the avoidance of doubt, this Proposal and the contents hereof shall not give rise to any legally binding obligations, and IMG shall **not** be otherwise liable to TA in any way, unless and until a long form contract incorporating the terms and conditions of this Proposal has been executed by both TA and IMG.

889 Let me turn to the international rights proposal, which was offering an extension on the pre-existing arrangements.

890 Under the heading "Process for Domestic Media Rights Proposal and International Media Rights Proposal", points 1 to 3 stated the following:

> 1. As noted in the letter regarding the Domestic Media Rights Proposal, that proposal shall remain open and capable of in principle acceptance until 5 pm Melbourne time on 31 March 2013, when it will automatically (and without the need for any notice or other formality) be withdrawn.

2. However, if by that time and date:

   (i) TA has accepted IMG's International Rights Proposal and TA and IMG have concluded a legally binding agreement for the extension of IMG's representation of TA's International Media Rights 2017-2019 on the terms set out in IMG's International Media Rights 2017-2019 Proposal set out above; AND

   (ii) TA and IMG have fully negotiated and agreed a final form of long form agreement incorporating IMG's Domestic Rights Proposal (acknowledging that no legally binding obligations can arise in relation to that agreement and Domestic Rights Proposal until the long form agreement is duly executed by both TA **and** IMG)

   IMG may, in its absolute discretion, extend the period for which the Domestic Rights Proposal remains open and capable of in principle acceptance beyond 1 April 2013 for a further period to be determined by IMG (again, in its absolute discretion), it being acknowledged that any such extension shall be subject to IMG obtaining a further board approval for the extension.

3. For clarity, even if both of the conditions set out in paragraphs 2(i) and 2(ii) are satisfied by 5pm Melbourne time, 31 March 2013, IMG expressly reserves the right:

   (i) not to extend the period for which the Domestic Rights Proposal remains open;

   (ii) to amend the terms of its Domestic Rights Proposal as a condition to extending the period for which the Domestic Rights Proposal (as amended) would remain open beyond 31 March, and indeed imposing any other conditions in relation to such extension.

…

891 If I might say so, there was an element of farce about these provisions. As I have said, the domestic rights proposal could not be accepted before 31 March 2013 because of the ENP. Therefore it was an illusory offer during that term. Further, the clause 2(i) and (ii) extension conditions were also not only not feasible, but were an illusion as well. Moreover, I note that as a matter of fact no steps were ever taken to try and meet those conditions. Further, even if the conditions in clauses 2(i) and (ii) were satisfied, IMG still had an absolute discretion whether to extend. Further, if any of these farcical elements were in doubt, clause 3 put the whole thing beyond doubt.

892 In summary, in my view when one carefully considers these two IMG offers, there was no meaningful offer that IMG was making to TA for the domestic rights that could be accepted by TA in any meaningful time frame. And in any event none of IMG's offers guaranteed host broadcasting rights. Moreover, the fees offered were only around $30 million per annum, albeit with potential upside concerning the revenue sharing mechanism.

Summary

893 ASIC's case seemed to elevate the position of IMG to an alternative potential buyer of the domestic broadcast rights. But this ignores the circumstances and the strategy Mr Wood had in mind when he procured the IMG offers. Further, it ignores the fact that TA's board had expressed opposition to the concept of granting the domestic broadcast rights to IMG because it was merely an agent.

894 Further, I agree with the defendants that ASIC seemed to conflate IMG's experience as an agent for the international rights, where TA had traditionally not had direct relationships with broadcasters, with the suitability of IMG as an agent for the domestic broadcast rights in respect of which TA had had a direct relationship with its broadcaster for over 40 years.

895 Further, ASIC failed to recognise that TA's strategy was to move away from agency arrangements even with respect to the international rights. TA wanted to have direct relationships with international broadcasters. Indeed, the idea of agreeing to an early extension of IMG's international rights was at odds with TA's host broadcasting strategy. One of the main benefits provided by host broadcasting was TA's ability to negotiate more lucrative international rights deals by customising the coverage to the individual viewing tastes of audiences in individual international territories. And by so customising, TA could deal *directly* with international broadcasters on an individual territory basis for a product suited to that territory. Clearly, interposing IMG as an agent across multiple international territories was hardly conducive to TA's strategy.

896 Further, the only local television network which IMG was actually dealing with at the relevant time was Network Ten. But Network Ten was only ever willing to commit itself in writing to IMG to a possible interest in dealing with IMG at a level of up to $35 million per year. So, IMG had to offer less than what Network Ten would commit to IMG.

897 Further, IMG's position as an agent also meant that TA would lose elements of control that it would have if it had a direct relationship with a network, including the ability to secure the position of being host broadcaster.

898 Finally, the reality is that the IMG offers were never more than an indication of value in the order of $30 million per annum which Mr Wood procured and deployed as leverage to demonstrate that Seven's earlier offers were inadequate. In my view, TA could not seriously

contemplate accepting the first IMG offer or the second IMG offer. They were deficient on their face. And in any event, the offers had expiry dates before the commencement of the ENP.

899 Let me now turn to what I will describe as the post-contravention events and in that context address in some detail Dr Young's and Ms Pratt's evidence.

POST CONTRAVENTION CONDUCT

900 ASIC adduced considerable evidence concerning events after June 2013 and through to the end of 2015. It did so for the purpose of endeavouring to show that by later conduct Mr Healy and Mr Mitchell had demonstrated a consciousness of wrongdoing, that is, something analogous to a consciousness of guilt in the criminal law. It also did so for the purpose of endeavouring to show that Mr Healy had made admissions. And more generally it did so for the purpose of showing that there had been wrongdoing by the defendants which had been the subject of a cover-up. Indeed, one of its key witnesses, Dr Young, thought that there had been some form of conspiracy, although its boundaries and content always remained elusive so far as I was concerned. Before getting into the detail, let me make some general observations.

901 First, it was said that Mr Healy removed Mr Wood as CEO as payback for Mr Wood's refusal to follow Mr Mitchell's repeated instructions to do an unfavourable deal with Seven. But none of this was substantiated by the evidence.

902 Second, it was said that Mr Healy knew that the net financial benefits of Seven's final offer were substantially less than $195 million over five years. And he knew that the cost of host broadcasting presumably referable to domestic broadcasting could be higher than the estimated amount which Mr Wood reported at the May 2013 board meeting; I say presumably to that context because the international costs side had nothing to do with the domestic broadcast rights for which Seven was paying. But when one analyses the evidence, none of these points were made good.

903 Third, it was said that Mr Healy knew and admitted that Mr Mitchell had a conflict of interest. But I note that by the end of the trial ASIC expressly disclaimed putting any case of a conflict of interest against Mr Mitchell in the sense of a material undisclosed interest in the outcome of the broadcast rights negotiations. Let me make a few observations at this point.

904 In July 2013 Dr Young raised a concern with Mr Healy about a potential conflict of interest involving Mr Mitchell that she had come across in a newspaper article, which mentioned that Mr Mitchell since at least 2011 had had a business partnership concerning the ownership and

operation of several cattle stations in the desolate regions of Western Australia with Mr Doug Flynn, a non-executive director of Seven. Obviously this was not related to tennis and Mr Flynn was not involved in any event in the Seven negotiations with TA. Further, Mr Mitchell had no direct or indirect benefit in or flowing from TA's contract with Seven; and neither was Mr Flynn shown to have had any personal interest. Further, none of this had anything to do with Mr Mitchell's media buying interests through his corporate vehicles which had in any event been disclosed to TA's board. Indeed, his notable if not pre-eminent expertise and experience in that area was no doubt one of the reasons why he was on the board of TA in the first place. But in any event, Mr Mitchell's media buying and business relationships with Seven were, as the December 2015 independent review said, "not materially different (in terms of volume or significance given their relative position in the market) from the relationships with other televisions groups [Nine or Network Ten] and media outlets"; in other words there was no reason to prefer Seven over Nine or Network Ten. Further, none of this had anything to do with the negotiations between Seven and TA involving, inter-alia, Mr Mitchell and Mr McWilliam.

905 Now ASIC at no stage could gainsay and did not seek to gainsay the accuracy of any of these propositions.

906 Further, ASIC failed to come up with any plausible motive as to why, on its case, Mr Mitchell would prefer Seven's interests over TA's interests. Indeed, the absence of such a motive more suggests that Mr Mitchell's conduct in the negotiations with Seven, which I will come to later, was more indicative of a man who thought he was acting in TA's interest, but was seeking to dominate the negotiations and represent himself as TA's leader to impose his will, at least until the end of 2012. But of course such a state of mind would not exculpate him from a finding that he contravened his director's duties.

907 Fourth, it was said that Mr Healy admitted that he was overborne by Mr Mitchell and failed to stand up to him on the broadcast rights. But I reject those assertions, both on the question of whether admissions were made and as to the underlying reality.

908 Fifth, it was said that Mr Healy caused the member associations to requisition a special general meeting at which the constitution was amended to give the chairman a casting vote on the reappointment of directors and that this was all a pretext. In my view, such a characterisation is erroneous.

909 Sixth, it was said that Mr Healy commissioned an independent review which was a whitewash. That latter suggestion had no substance to it. Moreover, the finding of that review that Mr Mitchell did not have any undisclosed conflict of interest is one with which ASIC now agrees.

910 Seventh, it was said that Mr Healy used the findings of the independent review as a basis to remove Dr Young and Ms Pratt from the board. ASIC described this as purging critics from the board. I do not think that this is a fair characterisation.

911 Eighth and generally, ASIC has said that the post-contravention conduct demonstrated the defendants' consciousness of wrong-doing in purging their critics from the board. But ASIC has made no convincing attempt to distinguish between the alleged post-contravention conduct of Mr Healy and that of Mr Mitchell. This is significant because they were not alleged to have acted in concert and there was no allegation or evidence that Mr Mitchell and Mr Healy agreed on a course of action to protect Mr Mitchell. And in my view there is not a scintilla of evidence for saying that their actions were connected in this respect by later conduct. Further and in any event, the alleged contraventions of which they were said to be conscious are different.

912 Further, there is another difficulty for ASIC concerning this post contravention conduct in relation to its case against Mr Healy. The only contraventions alleged against Mr Healy concerned his negligent failure to ensure that certain information was put before the board at its meetings between 3 December 2012 and 20 May 2013. But the later conduct is not relevantly connected with those alleged contraventions. ASIC says that the alleged relevance of the later events is that Mr Healy is said to have participated in a shameful episode because he had some knowledge of alleged wrongdoing which resulted in a breach of duty. Yet the only allegations of wrongdoing against Mr Healy relate to a lack of reasonable care and diligence in failing to ensure that the particularised information alleged by ASIC was placed before the board at its meetings between 3 December 2012 and 20 May 2013. So, there is no rational connection between these alleged contraventions and this post-contravention alleged conduct.

913 Ninth and even more generally, ASIC has also contended that the post-contravention conduct is probative in that it casts very significant and important light on the conduct which Dr Young and Ms Pratt sought to have exposed and "got shafted for doing that, in a quite shameful episode" to use the colourful language of Mr Pearce SC for ASIC. This contention took various psychedelic rhetorical forms in the course of ASIC's opening. But there is no allegation of any

contravention in relation to the "shafting" or "purge" of directors from the TA board or any "cover up" or "pretext".

914 Let me now analyse in detail the forensic foundation or lack thereof for some of ASIC's assertions.

(a) Dr Young's evidence

915 I will start with Dr Young's evidence concerning the post-contravention events. I should say at the outset that some of her evidence was not as reliable as one might have hoped for given the serious nature of some of her complaints. Dr Young is a very talented and serious individual. And I accept that she has at all times acted bona fide and with the interests of TA and tennis at heart. But there is little doubt in my mind that some of her suspicions were not well founded and conceptually she grabbed the wrong end of the pineapple on many issues.

916 Dr Young was a former professional tennis player. She obtained a doctorate in sports psychology and was employed as a senior lecturer at Victoria University.

917 She had commenced serving as a director of TA on 27 October 2008 and had ceased to be a director on 15 January 2016.

918 Whilst a director of TA, she was also a member of:

(a) the investment advisory committee from 1 July 2008 until 15 January 2016;

(b) the nominations committee until 2013;

(c) the contract approval committee, together with Mr Tanner and Mr Healy, which had been established during 2013/2014; she remained a member of it until January 2016; its role was to review all commercial contracts over $5 million.

919 For December 2014, Dr Young also served as a member of TA's governance working party, whose first meeting was held on 3 December 2014. The primary purpose of that working party was to consider whether TA's then governance structures were continuing to meet the changing needs of TA's business.

920 I should note that the establishment and operation of the contract approval committee and the governance working party all post-dated the key events relevant to the present matter in and prior to May 2013. I will refrain from wistfully engaging in a retrospective hypothetical as to whether various process issues and misunderstandings the subject of my present analysis might

have been avoided if these bodies had been in place earlier and populated by the appropriate individuals with hard-edged experience in such matters.

921 Now as to her evidence, after a false start late one afternoon, the next day she gave more confident evidence. But there were various difficulties with her evidence. I might say that where her evidence has conflicted with that of other witnesses, for example, Mr Tiley, Mr Roberts, Mr Wood and Mr Healy himself, I have preferred their evidence.

922 First, many of her notes that she used to refresh her recollection of various conversations were not contemporaneous. Further, in relation to many of the key notes, she did not recall when they were prepared. Indeed, many of them may have been prepared as late as October 2015. Further, most of the notes did not record what was said.

923 Second, there is some force to the suggestion that Dr Young gave evidence that was tailored to assist ASIC's case. For example, she repeatedly denied under cross-examination that she had obtained the idea that Network Ten had sent a letter to TA from an article she had read in the newspaper. But her affidavit at [58] said:

> During that call, I also said to Healy words to the effect that the recent media reporting confirmed that I had not been the source of leaks (as Mitchell had alleged) because that reporting referred to things (such as a valuation of the broadcast rights and a letter received from Network Ten) that had not been given to the board and which I therefore had not known about. In response, Healy said to me words to the following effect:
>
> > I commissioned Gemba to do a report on the valuation of TA's broadcast rights as part of their retainer.
> >
> > There had been a letter from Network Ten expressing interest, as had been reported in the media.
> >
> > The board had not been provided with either the Gemba report or the letter from Network Ten.
> >
> > The problem was that we did not have the expertise around the board table.

924 Indeed, she gave further unsatisfactory evidence under cross-examination by Mr Patrick Flynn SC for Mr Healy:

> So in your affidavit, you said that as at 15 July 2013 you had read in the media that a letter had been received by Tennis Australia from Network Ten; correct?---Could you repeat that question, please.
>
> In your affidavit you said that as at 15 July 2013 you had read in the media that a letter had been received from Network Ten; correct?---Correct.
>
> And so the answer you just gave me a moment ago that you didn't recall whether you had read in the media that a letter had been received from Network Ten was false, wasn't it?---Yes.

> And why did you give that false answer to his Honour?---I couldn't – it was unintentional. I – I don't know.
>
> Dr Young, I want to suggest to you that you are tailoring your answers as you sit there to what you think suits ASIC's case; do you agree?---No.

925 Third, Dr Young appeared to considerably dislike Mr Mitchell. This seems to have first arisen in March 2013 when Mr Mitchell accused Dr Young of leaking confidential information. Moreover, it would seem that Dr Young ran a campaign from around that time seeking to remove Mr Mitchell from the board on the basis of allegations of conflict of interest. I would say now that such allegations have been shown to have lacked any substance. Suspicion and conjecture seem to have poisoned her perception.

926 Fourth, Dr Young seemed willing to jump to conclusions of wrongdoing when the circumstances did not warrant them. She considered that there was a conspiracy or cover-up around 20 May 2014 and continuing until the July 2014 board meeting. This appears to have been based on what Ms Pratt had told her concerning the audit and risk committee meeting on 12 May 2014 and the fact that Ms Pratt had not been given a copy of the new Seven contract or a summary of it prior to the 20 May 2014 board meeting. But on an analysis of the evidence, her assertions and beliefs were misplaced.

Statements allegedly made by Mr Tiley and Mr Roberts

927 Now ASIC led evidence from Dr Young about what Mr Tiley and Mr Roberts had said to her. It was said that all of this implicated the defendants. But several statements that Dr Young said were made by Mr Tiley and Mr Roberts were not the subject of any evidence in chief from those witnesses. This is significant given that their affidavits were prepared and filed by ASIC, although in all the circumstances I would not draw any inference analogous to a *Jones v Dunkel* inference from such a failure to adduce their evidence in chief thereon. But in any event, such statements were denied or not accepted by those witnesses when cross-examined.

928 Mr Tiley's alleged statements, which were set out in Dr Young's affidavit, were denied by Mr Tiley. Dr Young said that Mr Tiley had said to her and Ms Pratt on 18 May 2014 after a dinner with Tennis NSW board members at the Hilton hotel:

> Healy knew more than what the board had been told. A letter of interest from Network Ten had been received but was not tabled at the board. There was a one-page summary of the contract and, when you see the details of the contract, you would be shocked by the bottom line of what TA was actually getting, and not in a good way.
>
> The contract was too rushed, and we had left out the Hopman Cup and other items.

929 But under cross-examination, Mr Tiley said that he may have said words to the following effect in relation to the budgeted cost for the host broadcast: "You would be surprised" or "You need to note that the cost is going to be significantly higher". Further, there was no such Network Ten letter.

930 Mr Roberts' alleged statements, which were set out in Dr Young's affidavit, were denied by Mr Roberts. Dr Young said that Mr Roberts had said to her on 19 May 2014 at breakfast prior to the TA board meeting at the offices of Gadens in Sydney:

> Mitchell rushed through the negotiation and long form agreement process to avoid running through the "exclusive negotiation period" with Seven. TA would have then gone to open market.
>
> Management had expected to receive $50 million per year for the rights.
>
> I have concerns that certain critical information was not presented to the board and I had advised Healy of my concerns at the time.
>
> Mitchell had bullied Wood and him.
>
> I did know of a letter from Network Ten expressing interest in acquiring the rights which was not presented to the board.

931 But Mr Roberts denied this.

932 Now Mr Tiley and Mr Roberts were called as witnesses in ASIC's case. And I see no reason not to accept their evidence on all matters. In my view, there is no reason to doubt that Mr Tiley, the present CEO of TA and who was not involved with the negotiation of the Seven contract at the time, or Mr Roberts, the then company secretary and chief operating officer but now retired, gave objective and reliable evidence on all matters.

933 Further, many of the statements that Dr Young attributed to Mr Tiley or Mr Roberts were not supported by other objective facts.

934 First, the attributed statements refer to a letter as having been received from Network Ten expressing interest in acquiring the rights, which letter was not presented to the board. But there was no such letter, as ASIC belatedly now accepts.

935 Now in Mr Roberts' re-examination, ASIC pointed to an email from Mr McLennan to Mr Wood received on 27 May 2013. But this was after the 20 May 2013 board meeting. Further, Mr Roberts denied being aware of the email. And it was never suggested that Mr Tiley was aware of it. I will return to this 27 May 2013 email later.

936 Interestingly, the fact that Network Ten had "written to" TA was reported in the AFR in June 2013. It is likely that Dr Young apparently took this as a letter of interest having been received by TA.

937 Second, the attributed statements refer to the fact that management had expected to receive $50 million per annum for the rights. But this fact is also likely to have been sourced from an AFR article. Now I accept that Mr Ayles gave evidence that figures, including one floated at up to $50 million, were mentioned to him by Network Ten. But he never put that figure in the Ayles paper. Further, Mr Roberts gave evidence that whilst figures were mentioned, there was no expectation to that effect. Indeed, the evidence that I have set out earlier referable to Network Ten was that there was never any such figure put as a serious offer.

938 Third, the attributed statements refer to the fact that Mr Mitchell had rushed through the negotiation and long form agreement process to avoid running through the ENP with Seven. But as I have already said, as to the pre-20 May 2013 negotiations, Mr Wood conducted the negotiations without Mr Mitchell's involvement from about 7 May 2013.

939 Further, as to the post-20 May 2013 negotiations, there was no rush imposed by Mr Mitchell on the long form agreement. Whilst Mr Mitchell expressed his desire to get the long form agreement signed quickly, Mr Wood's response was that he would use his best endeavours given that there were many outstanding issues to resolve. Further, the board at the meeting of 20 May 2013 resolved only that management should complete the long form agreement as soon as practicable. Mr Wood understood this and later relayed this to the EMT. The long form agreement was signed on 29 May 2013.

940 Fourth, the attributed statements refer to the fact that the final form of the contract with Seven left out the Hopman Cup. But it did not.

941 Fifth, the attributed statements refer to the fact that Mr Mitchell had bullied Mr Wood and Mr Roberts. But Mr Roberts denied ever being bullied by Mr Mitchell. He did not consider that the conversation at the 20 May 2013 board meeting and the statement "that's how CFO's lose their jobs" amounted to bullying. Let me set out some of Dr Collins QC's cross-examination of Mr Roberts:

> Did you say to Dr Young at any time that you had concerns that certain critical information had not been presented to the board?---Not that I recall.
>
> Did you say to Dr Young that you had advised Mr Healy of concerns that certain critical information had not been presented to the board?---No.

> Did you say to Dr Young at any time that Mr Mitchell had bullied Mr Wood?---No. I had no knowledge of any of that, so - - -
>
> Did you hold a view, a personal view, that Mr Mitchell had in fact engaged in bullying of Mr Wood?---No.
>
> Did you say to Dr Young at any time that Mr Mitchell had bullied you?---No, not that I recall. I mean, there was – there was that remark made in that board meeting, but I did not consider that as bullying. It was only one remark made on one particular day. And I didn't have the view that – that Harold Mitchell was bullying me or Mr Wood.
>
> Just in relation to the remark to which you have made reference, was that a reference to a discussion which occurred in the course of the board meeting on 20 May 2013 concerning the amount of time it might take to negotiate and finalise a long form agreement?---That's correct.
>
> And at that board meeting did Mr Mitchell ask whether the long form agreement could be completed within the space of about a week?---A week to 10 days, yes.
>
> And did you express a view in respect of that matter?---I did.
>
> What did you say?-- I said that I didn't think it was in the company's best interests that we should be forced – we, Tennis Australia, should be forced to complete the long form agreement, which was a lot of work – a lot of work to be done, as I understood it at the time – within seven to 10 days, because it wouldn't put us in a great negotiating position.
>
> So you felt that Mr Mitchell was seeking to place undue pressure on the management team to finalise the long form agreement within a short period of time?---Well, it was my view that Mr Mitchell felt that way because the board had previously discussed that the previous agreement with Channel 7 hadn't been signed in five years. And I think there was a little bit of pushback on that to say that, "Okay. You haven't signed this particular deal over five years. Let's get this one signed fairly quickly." I think that was what was pressing that remark.

942 Sixth, the attributed statements refer to the fact that certain critical information was not presented to the board and that Mr Roberts had advised Mr Healy of his concerns at the time about this. But Mr Roberts denied such matters, including advising Mr Healy of any such concerns.

943 Further, and as I will explain later when dealing with the specific case against Mr Healy, there is no substance to the suggestion that the board was denied critical information as at 20 May 2013 or indeed at any earlier time.

944 Seventh, even if I had accepted that such statements that Dr Young had attributed to them had been made by Mr Roberts and Mr Tiley, their probative value is limited. They hardly trump the probative force and relevance of the contemporaneous documents and evidence of the witnesses as to what was said and done up to the end of May 2013.

Statements allegedly made by Mr Healy to Dr Young

945 ASIC says that statements were made by Mr Healy to Dr Young that constituted admissions. But I do not consider that Mr Healy made the statements attributed to him that ASIC says constitute admissions. Mr Healy denied that he made the relevant statements to Dr Young.

946 First, his affirmative evidence of his conversations with Dr Young accords with the objective evidence and in my view was reliable. I will expand on the reliability of his evidence later.

947 Second, several of the alleged admissions contained clearly incorrect statements.

948 Dr Young said:

> On 15 July 2013, I telephoned Healy to raise my concerns over Mitchell's undeclared business relationship with Doug Flynn. He called me back a short time later and we had a conversation in words to the following effect (among other things):
>
> > Me: I have read an article which reported that Mitchell has a business partner, Doug Flynn, who was employed as a Seven West Media director. TA has just completed a contract with Seven. Just a month or so later, the newspaper reports that Mitchell has a business partner, Doug Flynn, who is employed as the Seven West Media director. I am really concerned. Were you aware of that business relationship?
> >
> > Healy: I had my own concerns about Harold's conflicts of interest. In fact, I was concerned and went to see him and asked him to step aside from the negotiations, but he refused to do so.
>
> In response to my question, Healy did not suggest that he was aware of Mitchell's relationship with Flynn.

949 Now the evidence is that in late December 2012, Mr Wood complained to Mr Healy about Mr Mitchell, whereupon Mr Healy telephoned Mr Mitchell and told him not to interfere. Mr Mitchell acquiesced in this request. Thereafter Mr Mitchell had little involvement in the detailed negotiations, although he was still in communication with Mr McWilliam, the significance of which I will discuss in a separate section of my reasons.

950 Further, Dr Young said:

> During that call, I also said to Healy words to the effect that the recent media reporting confirmed that I had not been the source of leaks (as Mitchell had alleged) because that reporting referred to things (such as a valuation of the broadcast rights and a letter received from Network Ten) that had not been given to the board and which I therefore had not known about. In response, Healy said to me words to the following effect:
>
> > I commissioned Gemba to do a report on the valuation of TA's broadcast rights as part of their retainer.
> >
> > There had been a letter from Network Ten expressing interest, as had been reported in the media.

> The board had not been provided with either the Gemba report or the letter from Network Ten.
>
> The problem was that we did not have the expertise around the board table.

951 But again these alleged statements refer to a phantom Network Ten letter. Moreover, they refer to an incorrect fact about who commissioned the Gemba valuation. Mr Ayles commissioned such a valuation, not Mr Healy, although in early 2012 Mr Healy may have suggested in general terms that a valuation be obtained. Further, this alleged admission appears to be based on Dr Young's note which was not contemporaneous. Indeed her note appears likely to be of a discussion with Mr Ayles in October 2015. She denied this. But Mr Flynn SC's cross-examination of her exposed that this was likely. Her assertions are highly questionable.

952 Further, Dr Young said:

> Following a meeting of the GWP on 11 December 2014 at KPMG's offices in Melbourne, I discussed with Andrew one of the agenda items, being 'conflicts of interest'. Andrew said to me that he considered TA's domestic television rights negotiations had been "severely compromised" and that Mitchell should not have received any papers or advice about the negotiations. I asked Andrew why he considered Mitchell had a conflict of interest. Andrew told me that it was because of the relationship between Mitchell and Seven, specifically because Seven was Mitchell's biggest client in his media business.
>
> I reported Andrew's comments to Healy within a week or so later. Healy repeated his previous advice to me, using words to the following effect:
>
> > I had asked Harold to stand aside.
> >
> > Procedures will be changed next time around.
>
> Healy also said to me words to the effect:
>
> > TA did not have the necessary media expertise at board level at the time of the negotiations.

953 Now the alleged admission of Mr Healy is alleged to have arisen out of a conversation between Mr Michael Andrew and Dr Young. But in one sense Seven was not Mr Mitchell's biggest client. Rather, in reality Mr Mitchell was Seven's client. This throws a little doubt on what precisely was said.

954 Further, Dr Young said:

> In the course of that discussion, Healy said to me words to the effect:
>
> > I tried to get Mitchell to step aside from the broadcast rights negotiations.
> >
> > I knew about Channel 10's letter to be in negotiations.
> >
> > I asked Steve Wood to get a valuation, which was received but not taken to the board.

955 ASIC said that this was recorded by Dr Young in a note taken that day or the next. ASIC said that counsel for Mr Healy sought to discredit the note by suggesting that the "letter" from Network Ten did not exist. But ASIC said that Dr Young, never having seen the letter, candidly said she didn't know. And in any event ASIC said that it did exist in the form of an email from Mr McLennan to Mr Wood on 27 May 2013. Now I have referred to this email in the factual background; clearly it is not any Network Ten letter; I will turn to discuss it in a moment. Further, ASIC said that if I were to reject Dr Young's account, I would have to find that she had lied under oath and forged her note.

956 But again her assertion and her note recite an incorrect fact about a phantom Network Ten letter. Her evidence and her note are wrong; it is preferable that I do not speculate as to why it was so wrong. I should say that Mr Healy had no motive to make up the existence of such a phantom letter.

957 Further, Dr Young said:

> At that meeting, I said to Healy words to the effect that I had heard that he had received an offer for the broadcast rights from Nine Network and had not reported it to the board. He said words to the effect of, 'There was interest expressed when an executive from Channel 9 approached me outside the elevator at my office, but it was only a brief discussion'.

958 But the evidence does not establish that anyone from Nine ever met Mr Healy. And Mr Healy denies doing so. Nevertheless, Dr Young continued to insist that Mr Healy had told her something which never happened.

959 Generally, I must say that the inconsistencies between the statements Dr Young attributed to Mr Healy and the objective facts throws significant doubt on whether the statements were made. Of course, it is conceivable that Mr Healy made incorrect statements to Dr Young. But why would he make incorrect statements about, say, a phantom letter? Moreover, all of these supposed statements have the taint of Dr Young's cover up or conspiracy theories. In my view the nature of these discrepancies more points to Dr Young's evidence being unreliable on these attributed statements.

960 But in any event, even if I were to accept that Mr Healy made statements to Dr Young in the terms asserted by Dr Young, I am not sure where these statements take ASIC.

961 First, one of the alleged admissions attributed by Dr Young to Mr Healy is:

> I had my own concerns about Harold's conflicts of interest. In fact, I was concerned

> and went to see him and asked him to step aside from the negotiations, but he refused to do so.

962 Now Mr Healy spoke to Mr Mitchell at Mr Wood's request, and asked Mr Mitchell to cease interfering. Mr Mitchell agreed. And after that time Mr Mitchell was no longer involved in any meaningful negotiations as such, particularly from 7 May 2013. So far, so good.

963 But there is no pleaded case that Mr Mitchell had any undisclosed conflict of interest. And as a corollary, there is no pleaded case that Mr Healy knew about any conflict of interest which Mr Mitchell had. Further and more generally, there is no pleaded case that Mr Healy failed to ensure that Mr Mitchell stepped aside from the negotiations with Seven. But in any event and as I have said, the evidence is that Mr Healy spoke to Mr Mitchell in late December 2012 and he asked Mr Mitchell to cease interfering with Mr Wood's conduct of the negotiations with Seven. Mr Mitchell agreed to this request. There was no *refusal*. Moreover, none of this was about any perceived conflict of interest. The so-called admissions are spurious.

964 Second, Dr Young attributed to Mr Healy the statement "I commissioned Gemba to do a report on the valuation of TA's broadcast rights as part of their retainer". But this is factually incorrect. He is also alleged to have said, "There had been a letter from Network Ten expressing interest, as had been reported in the media". But again this is incorrect.

965 In a similar form, he is also alleged to have said, "The board had not been provided with either the Gemba report or the letter from Network Ten". Now it is not disputed that the board did not receive a copy of the Gemba report or the Gemba summary, although it was made aware of the $40 million valuation figure by Mr Wood. But the board could not have received a copy of the letter from Network Ten because no such letter existed. It was a phantom.

966 And similarly, he is alleged to have said, "I knew about Channel 10's letter to be in negotiations". But there is no probative evidence of any such letter. He is alleged to have said, "I asked Steve Wood to get a valuation, which was received but not taken to the board". But it is not disputed that a copy of the Gemba report or the Gemba summary was not provided to the board, although Mr Wood told the board of Gemba's key conclusion that the rights had a value of up to $40 million per annum. Further, Mr Healy did not ask for the Gemba valuation as such. Mr Wood asked Mr Ayles to procure this, although as I have said, at the start of 2012 Mr Healy had discussed with Mr Wood getting a valuation.

967 These so-called admissions go nowhere.

968 Third, Mr Healy is alleged to have said, "The problem was that we did not have the expertise around the board table". But even if such a statement was made in these terms, it does not relate to any pleaded contravention. Relatedly, he is alleged to have said, "TA did not have the necessary media expertise at board level at the time of the negotiations". But the competence of the board in this respect is not an issue in the case. And one can query its veracity in any event.

969 Fourth, he is alleged to have said, "Procedures will be changed next time around". Now it is unclear what "procedures" are being referred to. Further, there is no evidence linking the "procedures" to the information which Mr Healy is alleged to have failed to disclose to the board.

970 Fifth, Dr Young attributed to Mr Healy the statement "There was interest expressed when an executive from Channel 9 approached me outside the elevator at my office, but it was only a brief discussion". But there is a lack of detail around the timing or nature of any such interest from Nine. Further, it would seem that Dr Young has confused herself with a statement that Mr Healy made about a Network Ten executive at the board meeting of 4 March 2013. Further, the board was aware of Nine's and Network Ten's interest by reason of being informed by Mr Wood. Accordingly, this alleged admission goes nowhere, even if it were made.

General

971 In summary, Dr Young's evidence was less than reliable on these matters.

972 First, her conflict of interest allegations concerning Mr Mitchell lacked substance.

973 Second, her conspiracy and cover up theories were devoid of foundation and content.

974 Third, some of her assertions and recollections were inconsistent with the contemporaneous documents and the evidence of other witnesses. Relatedly, her version of conversations with Mr Tiley and Mr Roberts were not accepted by these witnesses.

975 Fourth, I have a real concern over Dr Young's evidence with how she sought to weave into her communications with Mr Tiley, Mr Roberts and Mr Healy the phantom Network Ten letter. Let me say something more general about this phantom Network Ten letter.

976 Obviously there was no such letter. But Dr Young had Mr Healy, Mr Tiley and Mr Roberts referring to it nevertheless in communications well after the event. This was a fake factual foundation. And I cannot think why any of them would have had a motive to make up such a

phantom letter. And indeed it is unlikely that they all would have inadvertently committed the *same* basic error.

977 Further, it seems likely to me that Dr Young saw reference to this phantom letter in the 13 June 2013 AFR report, and erroneously then attributed reference to its existence to others. Now ASIC cannot simply escape the difficulties with this phantom letter by accepting that she must have picked this up by reading the 13 June 2013 AFR report. The trouble is that she was falsely attributing this to everyone else as having said it. It is most unlikely that all three would have made the same error. And particularly those who were involved at the earlier time.

978 Further, and as I have already mentioned, ASIC at one stage seemed to float the idea that Mr McLennan's email to Mr Wood of 27 May 2013 at 2.33 pm fitted the bill of in substance "a Network Ten letter". But this submission was untenable.

979 This email was little more than commercial fairy-floss. It simply said:

> Good to talk last week. I appreciate you giving me an update on the status of your "exclusive" negotiation period with the Seven Network and I just wanted to confirm that Network Ten is very interested in bidding for the Tennis Australia rights, should you choose to take them to the open market. As I mentioned, Network Ten has vigorously participated in Cricket Australia's recent rights process, which will ensure that CA achieve an optimal outcome for their sport. Should you choose to bid the Tennis Australia rights on the open market, I can assure you that our company will participate with great vigour. Steve, both Lachlan and myself are very interested in developing an extensive relationship with Tennis Australia and we'd be more than happy to meet with you at your earliest convenience.

980 This email was also after the 20 May 2013 board meeting and the board's decision in principle made at that time. Further, when Mr McLennan's email was sent, Mr Wood at the time was finalising the negotiations with Seven concerning the long form agreement. Mr McLennan's email in essence was waffle; perhaps it was sent merely to disrupt the conclusion of the negotiations with Seven that Network Ten may have heard were reaching fruition. Mr Wood may have been alive to such a strategy. At all events, the long form agreement with Seven was finalised by 29 May 2013. And unsurprisingly perhaps, Mr Wood waited until 30 May 2013 to respond to Mr McLennan's email, and then said:

> Thanks Hamish for the note.
> We will be in touch at an appropriate time.

981 In summary, reference by Dr Young to this phantom Network Ten letter in her evidence and so called notes casts doubt on the reliability of her evidence. And ASIC's endeavours to patch this up were not plausible.

982 Fifth, let me say something about Dr Young's handwritten notes.

983 In evidence were handwritten notes of Dr Young concerning her 18 May 2014 conversation and her 19 May 2014 conversation. It is unclear when precisely these were made.

984 Puzzlingly, the notes for both days are mostly in pencil, except for the note of 18 May 2014 where there is also a larger sized note in biro "SH knew more than the Board", which she seems to be attributed to "CT" or Mr Tiley. Clearly it was written at another time. I have little confidence in the reliability of this note.

985 Further, for the 19 May 2014 note there is confusion as to what is being or could be attributed to Mr Roberts in some respects.

986 The note referring to "Media Reports" with three points and then "Steve" with three points concerning "Tried to ask Harold to step aside" and "…met with Channel 10 executives in January…" seems to be a conversation with Mr Ayles rather than Mr Healy. Further, it seems that this was a conversation in October 2015 where Dr Young may have been gathering ammunition against Mr Healy. Its date and who she was speaking to have problematic aspects. It does not seem reliable. I am not able to accept that it is dated to May 2014.

987 There is another note "Steve" and then points (i) to (iv), but again I am not able to source this to May 2014. Moreover, there was a handwritten post it note attached to the larger note which said "On or around 15/16 July 2013", although 2013 had originally read 2015. It is also a grab bag of points and thoughts.

988 There were other notes clearly dated of a board meeting on 5 October 2015 and also of 16 October 2015 which have little probative value and where the date appears to have been altered; further, under the heading "Television Negotiations", this appears to be little more than what Dr Young herself said or thought.

989 There also appears to be another note of 16 October 2015 of what she asserted to Mr Healy and what he is alleged to have said. The three points recorded under "SH's response" seem demonstrably wrong.

990 In summary, it seems to me that Dr Young's notes do not significantly enhance the reliability of her evidence.

991 Finally, Dr Young's strategy seems clear from an email she sent to Ms Pratt on 18 October 2015 stating:

KP - have a letter dated 17 May 2013 from Tim Worner given to Board that states "I have attached a spreadsheet showing the breakdown of how we got to the $195m we agreed yesterday". Will email through the letter tomorrow morning.

Key question for your meeting this week - what responsibility did SH as Chair of the Board have to act on concerns from a Director that another Director has breached his fiduciary duties. Specifically I consulted Steve about:

HM - Television Negotiations (potentially cost TA $millions)

- Withheld information (eg Channel 10 interest, valuation of rights)
- Misrepresented information (Channels 9 and 10; broadcast cost $4m)
    - Massive conflicts of interest not declared (Channel 7 biggest client; business partner Seven West Media director Doug Flynn)
    - Did not follow due process - ignored committee set up to evaluate offer(s)
    - Bullied Directors to agree
    - According to David, threatened him with his job if contract not done within 2 weeks - rushed thru to avoid missing exclusive negotiation period with channel 7
    - Recommended Board accept $22m offer
    - Value of Channel 7 deal $195 grossly overstated

Steve has agreed with these issues and said the process will be different next time. As steward of TA surely his responsibility is to do more that recommend that Director for a further 3 year term of office!

Can you please get advice here? This may be the critical turning point in all of this KP. What responsibility did SH have to act, given his agreement with the issues?

Thanks as always J

992 If one analyses the facts, the dot points under the heading "HM - Television Negotiations (potentially cost TA $millions)" are incorrect statements. Further, the assertion "Steve has agreed with these issues…" is not credible.

(b) Ms Pratt's evidence

993 Let me say at the outset that Ms Pratt was direct and definite in her evidence. There was no reason to doubt her bona fides. Moreover, she had commendably sought to engage in her role as a director and member of the audit and risk committee, albeit that in my opinion her background did not fully equip her to deal with some of the matters that troubled her, particularly concerning the audit and risk committee. But there is no doubt that Ms Pratt is a talented individual, and in her areas of expertise would have added significant value to TA's board.

994 Now if I did not find some of her evidence to be reliable, it was because she had no personal knowledge or involvement in the relevant key events in and prior to May 2013. Further, much of her later involvement and perceptions were influenced by her communications with Dr Young, whose own perceptions of the key events and characters were coloured to say the least. Further, Ms Pratt did not have a strong commercial background.

995 Ms Pratt was a former professional tennis player, having competed on the WTA tour and in various other international events. She represented Australia in official junior teams internationally up to under 21s level and was a senior representative at state level.

996 She holds a bachelor's degree in sports studies from the University of Canberra, majoring in journalism and administration. She was an inaugural scholarship holder at the Australian Institute of Sport. She served as a director on the Australian Sports Commission board from 1991 to 1995.

997 She was employed as a sports journalist at both Seven and Nine, including on commentary, sports news, sports features, sports documentaries and hosting roles at multiple Olympic and Commonwealth Games and tennis Grand Slam events. From about 1995, she worked as a producer of the television program 60 Minutes for about three to four years. From the early 2000s, she was a television commentator at the AO and other Australian tennis tournaments. In this role she was initially engaged by Seven. But when TA took over the host broadcast responsibilities for the tournament, she was contracted directly by TA.

998 In early 2013, Mr Healy approached Ms Pratt to join the board of TA. Mr Healy told her that she could add value to the board, given her background as a former player, her media experience and because of her former role as a director of the Australian Sports Commission.

999 Ms Pratt was elected to the board of TA as a non-executive director on 28 October 2013 for a three-year term. During her tenure as a director, she was also a member of TA's audit and risk committee. She ceased as a director of TA on 15 January 2016.

1000 Let me begin with the so-called admissions made by Mr Healy.

1001 In that context it is necessary to set out some of Ms Pratt's affidavit evidence concerning an 18 May 2014 Tennis NSW dinner:

> On the evening of Sunday, 18 May 2014, I attended a dinner at the Hilton Hotel in Sydney with some of the TA directors and Tennis NSW directors. In a break during the dinner, Janet Young (Young), then a TA director, and I had a discussion with Tiley

about the domestic broadcast rights contract with Seven.

I asked Tiley why he had not yet given me a copy or a summary of the Seven contract as I wanted to review it before the following day's board meeting. I said to Tiley words to the effect "am I going to see the contract before the meeting?" Tiley told me to speak to Healy for further details of the contract as it was "sensitive" and he said to me words to the effect that "Steve does not want it circulated'.

During further discussion, Tiley told me that the deal did not reflect well on Healy because processes were not followed properly. Tiley said to Young and me words to the effect "You would be shocked when you read the details of the contract, but not in a good way."

To the best of my recollection, I said to Tiley that I wanted to discuss the domestic broadcast rights deal at the board meeting the next day and Tiley said to me words to the effect that "It is pointless to raise the number in the contract now as nothing can be done. The organisation's processes broke down. It will never happen again."

Roberts was present during some of this discussion but I do not recall what he said.

I did not have an opportunity to ask Healy about the contract during the evening.

1002 Further, Ms Pratt also gave the following affidavit evidence concerning the TA board meeting the next day:

The 19 May 2014 meeting of the TA board took place at the office of Gadens Lawyers in Sydney. Healy was a partner of Gadens. On the morning of 19 May 2014, I walked with Tiley, Roberts and others from the Sydney Hilton to Gadens' office. During the walk, Roberts said to me that I should not raise the contract figures for the domestic broadcast rights deal as an issue at the board meeting; he said it was "pointless".

The TA board meeting was due to start at 9:00 am. Immediately prior to the meeting, Healy called me into his office and said to me that he was "uncomfortable" with the negotiation process undertaken with Seven. He said to me words to the effect:

> Please do not raise the issues about the media broadcast contract with the Seven Network at the board meeting. It will create disharmony and issues for me and others.
>
> There is nothing we can do about it now.
>
> I will supply the information about the deal to you but you cannot circulate it.
>
> Roberts and I were bullied into the deal by Mitchell.
>
> Mitchell rushed the executive team to conclude the negotiation with the Seven Network. When Roberts questioned it, Mitchell said to Roberts "That's how CFOs lose their jobs".

I did not raise the domestic broadcast rights deal at this board meeting because Healy asked me not to.

After the board meeting, Healy apologised to me for the haste of the request he had made to me prior to that meeting. I said to him words to the effect:

> I am very concerned about Harold's conflict of interest in the deal, with his mate Bruce McWilliam, and how the integrity of the board was compromised.

Healy said to me words to the effect:

> Yes. This is terrible. It will never happen again. I should have stood up to Harold and got independent advice.

1003 To bolster its position ASIC said that this was all recorded in a note taken by Ms Pratt on an iPad the same day. It said that the dating of the note was confirmed from the iPad in court. This was correct. I was shown a page on her iPad which showed the relevant entry made at 6.01 pm on 19 May 2014.

1004 Now I have difficulties with some of her evidence.

1005 First, and importantly, Ms Pratt was only appointed a director on 28 October 2013. Accordingly, she had no first-hand knowledge of the negotiation process. Her evidence is indirect and informed by discussions she had with other directors, principally Dr Young, whose evidence on various aspects I found not to be reliable.

1006 Second, Ms Pratt gave evidence of a conversation with Mr Tiley on the evening of 18 May 2014 that he denied saying in those terms. Similarly, she gave evidence of a conversation with Mr Roberts before the 19 May 2014 TA board meeting. But Mr Roberts had no recollection of this having occurred.

1007 Third, she deposed to Mr Healy saying to her before the 19 May 2014 board meeting that "Roberts and I were bullied into the deal by Mitchell". But there is no objective evidence to support any such bullying. Mr Roberts' evidence was that he was not bullied into anything by Mr Mitchell. Likewise Mr Healy gave evidence that he was not bullied by Mr Mitchell. Further, neither Mr Roberts nor Mr Healy were directly involved in the negotiations for the deal with Seven; the "bullied into the deal" phrase is suspect.

1008 Fourth, as was pointed out by Mr Young QC, Ms Pratt's account of her conversation with Mr Healy at the time contained colour not contained in her note of the conversation.

1009 Fifth, Ms Pratt explained in cross-examination that partially because of what she had read in the newspaper, she made the statements concerning a discussion with Mr Healy after the 19 May 2014 meeting to the effect that she thought that Mr Mitchell had a conflict of interest with regard to "his mate Bruce McWilliam". But there is no evidence of any newspaper reports between June 2013 and May 2014 which suggested that Mr Mitchell had a conflict of interest because of his relationship with Mr McWilliam. No articles from the relevant time have been identified by ASIC which suggested any relationship between Mr Mitchell and Mr McWilliam.

Further, the relevant newspaper reports focused upon by Dr Young concerning conflict of interest related to Mr Mitchell's relationship with Mr Flynn.

1010 In any event, ASIC eschews any conflict of interest case, and no case is put against Mr Healy that he knew that Mr Mitchell had a conflict of interest and failed to do anything about it. Further, as I have said, the evidence is that Mr Healy spoke to Mr Mitchell in late December 2012. In other words, Mr Healy did stand up to Mr Mitchell to the extent there was any need for it. Further, what is the "this" and the "it" in the statements "This is terrible. It will never happen again"? It is all too vague to amount to anything. Generally speaking, I accept Mr Healy's account of his conversations with Ms Pratt rather than her account.

1011 Sixth, and more generally, some aspects of Ms Pratt's evidence concerning admissions allegedly made by Mr Healy was unreliable for other reasons. Although she gave evidence that she made notes of the conversations, her notes were not made at the time the conversations were occurring, but rather at the end of the day. And those notes also contained matters which were impressions of what had occurred, rather than the words others said.

1012 Let me make the following observations on Ms Pratt's note concerning 19 May 2014. First, it was prepared hours later at around 6.01 pm. Second, some of it noted her impressions, for example, "[t]ension before the meeting". Third, some of the statements were not attributed, such as:

> Both David and Steve Healy were "bullied" into the deal by Harold.

1013 In any event, none of this was correct from the detailed chronology I have already gone to. If one considers at the least the events from early May 2013, such a characterisation of the events is false. Mr Wood was the lead negotiator in any event. Mr Healy was not involved in the negotiations. Further, what occurred at the board meeting on 20 May 2013 is the antithesis of this suggestion. Further and in any event, Mr Roberts was not a director. Fourth, much of what is recorded seems to be her spin or interpretation of what was said or done, and it seems to me likely to have been through a lens distorted by her communications with Dr Young. ASIC's bold assertion that I must prefer her credibility given this note is not something that I accept. It is only one matter to be taken into account.

1014 And apart from this note and the notes dealing with the audit and risk committee meeting of 12 May 2014, all of Ms Pratt's other notes that were drawn to my attention and said to have significance to the present case appear to have been made in or around October 2015 and appear

to be a mixture of recollection and her own views on various matters. They are hardly reliable contemporaneous notes as to anything said or done in 2013 and 2014. Indeed, they make reference to conflict of interest themes involving Mr Mitchell, and also Network Ten offers not taken to the board, that were baseless. Not coincidentally, these were all the types of themes that Dr Young was also pushing.

1015 Generally speaking, some of Ms Pratt's evidence was not that reliable given that her mindset seems to have been infected to some extent by Dr Young's distorted perspective. And as for Ms Pratt's evidence concerning the host broadcast costs question, which I will come to in a moment, this was less than reliable because she had imperfect and only second-hand knowledge. Moreover, she did not have any accounting literacy. Indeed, it would seem to me that neither did Dr Young for that matter.

1016 In any event, I agree with Mr Young QC that even if the alleged admissions were made, they do not assist ASIC's case.

1017 The alleged admission made before the 19 May 2014 board meeting "Please do not raise the issues about the media broadcast contract with the Seven Network at the board meeting. It will create disharmony and issues for me and others" is vague. There is no identification of the issues about the media broadcast contract with Seven which are said to be the subject of the admission.

1018 Further, to the extent that the issues about the media broadcast contract with Seven can be discerned to relate back to anything specific, they seemed to relate back to the "contract figures for the domestic broadcast rights deal" referred to by her in her alleged discussion with Mr Roberts before the 19 May 2014 board meeting.

1019 The only plausible inference is that this relates to Ms Pratt's concern about the costs of host broadcasting and, in particular, the difference between the budgeted cost for 2015 of $5 million to $6 million and the figure of $4 million (net), which Mr Roberts had told the board at its April 2014 meeting had been mentioned in May 2013. This was the issue that concerned Ms Pratt at the time rather than the amount paid by Seven.

1020 Ms Pratt seemed to be concerned between 12 and 20 May 2014 about the "concession" which Seven had afforded TA for taking over host broadcast, an amount which Ms Pratt may have believed was stated in the Seven contract at $4 million. Her belief appears to have been based on what Mr Roberts told the board at its April 2014 meeting and an email sent to her by Mr

Roberts on 14 May 2014. Now that email could be read as suggesting that one could find the $4 million figure in the Seven contract. But Mr Roberts confirmed in his evidence that he was intending to refer in that email to the course of the negotiations with Mr Worner, rather than any figure contained in the contract.

1021 More generally, it would appear that Ms Pratt's concern at the time was that the budgeted 2015 cost of host broadcasting to TA was going to be more than the $4 million figure, and that therefore the net benefit to TA from the Seven contract was less than what the board had been led to believe on 20 May 2013. But ASIC has never alleged any contravention in that regard.

1022 In any event, this was a misconceived concern. Ms Pratt was not a director in May 2013. She was unaware of the basis on which the $4 million figure given to the board on 20 May 2013 was calculated, and she was unable to ask Mr Wood any questions about it. Further, Ms Pratt did not seem to recognise the distinction between TA's estimated costs as host broadcaster and the amount that Seven would save in relinquishing host broadcast, and possibly add to the rights fee.

1023 Further, what appeared to underlie Ms Pratt's concerns was that there was a significant difficulty with the Seven deal unless Seven agreed to compensate TA for the full cost of host broadcast. But ultimately Ms Pratt appeared to accept that the entire cost of host broadcasting should not be allocated to the Seven contract in the sense of being allocated all to its financial benefits. This was because the assumption of host broadcast responsibilities and the associated costs was projected by TA in April 2014 to allow TA to derive substantial additional *international* revenue from *international* broadcast rights deals.

1024 Finally, as to the phrases in her conversation with Mr Healy before the 19 May 2014 board meeting "It will create disharmony and issues for me and others" and "There is nothing we can do about it now", these alleged admissions can go no further than the subject matter of the preceding sentence "Please do not raise the issues about the media broadcast contract with the Seven Network at the board meeting". Now it would have created disharmony for Ms Pratt to raise at the board meeting that was just about to occur, with no notice, issues to the effect that TA had undertaken host broadcast without being sufficiently compensated by Seven. But in any event this would have been a point being made on the false premise that I have just referred to.

1025 Let me deal with two other matters at this point.

1026 First, as to the phrase "I will supply the information about the deal to you but you cannot circulate it", Ms Pratt accepted in cross-examination, in the context of the email to her from Mr Tiley on 13 May 2014 containing a similar statement, that Mr Healy's wish not to circulate the contract arose only out of concerns of confidentiality.

1027 Second, as to the phrase "Mitchell rushed the executive team to conclude the negotiation with the Seven Network. When Roberts questioned it, Mitchell said to Roberts 'That's how CFOs lose their jobs'", this seems to be nothing more than a confused account of the 20 May 2013 board meeting. And it takes no account of the resolution of the board that management negotiate a long-form agreement as soon as practicable.

1028 In summary, I do not consider her evidence concerning 18 and 19 May 2014 events to be that reliable.

(c) A conspiracy? A cover-up?

1029 Let me now deal with ASIC's cover up and conspiracy theories that it floated through its witnesses, although I have already touched on some of them above.

1030 In this respect, ASIC sought to suggest that the commercial benefits of the Seven contract were less than the board had been led to believe on 20 May 2013. It also asserted that the Seven contract had less than its stated value. It is also asserted that host broadcast additional costs had not been properly recouped. And to add to this narrative, it said that there had been a cover up within TA of such matters. It used the evidence of Ms Pratt and Dr Young to press such themes.

1031 Now a document being a one page summary which was tabled at a board meeting of TA on 21 July 2014 loomed large in ASIC's evidence to support its misconceived themes.

1032 Let me at this point reproduce the one page summary, a copy of which had been provided to Ms Pratt in May 2014 although it then appeared in the board papers for the 21 July 2014 meeting.

SEVEN NETWORK	Previous Contract	New Contract					TOTAL
	2014	2015	2016	2017	2018	2019	2015 - 2019
Rights (includes VIK)	21,106,708	32,000,000	33,300,000	34,600,000	36,000,000	37,400,000	173,300,000
Sign on	900,000	1,000,000	1,000,000	1,000,000	1,000,000	1,000,000	5,000,000
VIK Income	-	1,900,000	2,100,000	2,400,000	2,600,000	2,900,000	11,900,000
VIK Expense	-	(1,900,000)	(2,100,000)	(2,400,000)	(2,600,000)	(2,900,000)	(11,900,000)
Broadcast Operations	(2,928,191)	(2,948,242)	(3,036,689)	(3,127,790)	(3,221,624)	(3,318,272)	(15,652,617)
TA Host Broadcast (Net)	-	(5,846,634)	(6,022,033)	(6,202,694)	(6,388,775)	(6,580,438)	(31,040,574)
Hopman Cup Host Broadcast	-	(681,000)	(701,430)	(722,473)	(744,147)	(766,471)	(3,615,521)
Corporate Hospitality Expense	(305,357)	(308,006)	(317,246)	(326,764)	(336,566)	(346,663)	(1,635,246)
Corporate Hospitality Rebate	-	(200,000)	(200,000)	(200,000)	(200,000)	(200,000)	(1,000,000)
Hot Shots - Cash	56,631	58,330	60,080	61,882	63,739	65,651	309,682
Hot Shots - Contra Income	250,000	250,000	257,500	265,225	273,182	281,377	1,327,284
Hot Shots - Contra Expense	(250,000)	(250,000)	(257,500)	(265,225)	(273,182)	(281,377)	(1,327,284)
Yahoo - Contra Income	90,500	170,000	175,100	180,353	185,764	191,336	902,553
Yahoo - Contra Expense	(90,500)	(170,000)	(175,100)	(180,353)	(185,764)	(191,336)	(902,553)
Hawkeye Rebate	125,000	-	-	-	-	-	0
Legend Lunch 50% Contribution	38,447	-	-	-	-	-	0
TOTAL	**18,993,238**	**23,074,448**	**24,082,681**	**25,082,162**	**26,172,627**	**27,253,805**	**125,665,723**

* Ratings bonus $1mil per year
* CPI 3% used for yearly increases from 2016 onwards
* Does not include Davis & Fed Cup Events

1033 The one-page summary contained a mixture of cash and profit items. It did not correlate with any recognised accounting metric as to the value of the Seven contract. And it seemed to have been prepared to enable management to estimate the cash effect of the Seven contract over its five year term. But when analysed correctly, the alleged cover-up and conspiracy theories concerning the one-page summary show such theories to have lacked any substance.

1034 And even Dr Young, the principal peddler of such theories, considered that when the one-page summary was tabled at the board meeting in July 2014, the conspiracy was at an end. Under cross-examination by Mr Flynn SC she gave the following evidence:

> I just want to understand who you say was party to the conspiracy or cover-up on 20 May 2014?---Okay. Well, it was not forthcoming from Steve Healy. Management was not forthcoming. There was obstruction of - - -
>
> Sorry, could I just stop you there?---Yes.
>
> So when you say "management", who do you mean?---Well, in – she had asked Craig Tiley and David Roberts, I believe.
>
> Right. And so does that mean that Mr Tiley and Mr Roberts were party to the conspiracy?---They were – they were part of it, yes.
>
> They were part of the conspiracy?---Yes.
>
> Did you take up with Mr Tiley and Mr Roberts that you thought that they were party to a conspiracy to cover up the cash value of the contract?---Would you repeat that question.
>
> Did you take it up with Mr Tiley and Mr Roberts that you thought that they were party to a conspiracy to cover up the cash value of the contract?---No.

Why not?---Because the cash value was then presented to the board. The one-page summary - - -

Yes?--- - - - that you showed me yesterday was subsequently presented to the board.

So the conspiracy ended at the July 2014 board meeting when that document was presented to the board, did it?---Yes.

1035 Let me set out a short chronology of the events leading to the production of and misconceptions concerning this one page summary.

1036 On 3 March 2014 there was a board meeting of TA, with all directors present and Mr Tiley and Mr Roberts present. The issue of host broadcasting was discussed. For this purpose in the board papers was a report on host broadcasting authored by Mr Pearce.

1037 The paper contained the following extracts:

Why do it?

To improve the service to more than $60m worth of domestic and international broadcast clients by having an unwavering focus and a direct relationship. The feedback to the decision has already been overwhelmingly supportive. This should certainly not be seen as a criticism of Channel Seven (who are internationally renowned) but more a recognition of the need for a structural change that allows international broadcasters to have a direct relationship with the tournament and repairs what they believe is a fractured service model (It should be noted that the co-operation and goodwill already extended from Channel Seven for this project has been tremendous and vital to planning arrangements for 2015).

To outsource the Host Broadcast service to a third party (be it a domestic rights holder or an international rights holder) ensures conflicting priorities (both perceived and real) which only naturally leaves the Host Broadcast as secondary to that network's primary focus – regardless of the network. Its priority has to be the Domestic Broadcast as that is its core business.

For several years international broadcasters have been saying they want:

- a coverage that is consistent and NOT so parochial or Australian-focussed
- greater focus just on their needs including improved facilities
- a one stop shop for all of their requirements

With such an intense demand from the internationals, it is unfair to expect a domestic rights holder to sacrifice their coverage on any level for the sake of the Host Broadcast. They are parochial because their viewers want it, so why should they have to change. Similarly it would be unfair to expect an international broadcaster to take on the Host Broadcast and sacrifice its coverage. Hence, a neutral host with a vested interested in ensuring the best possible service to both domestic and international clients is an obvious solution.

While this focus and neutrality is the primary reason, the other benefits that flow to Tennis Australia from this decision relate to ownership of content for coaching and athlete development purposes, ownership of content and archive for promotion of the sport, cost efficiencies in gathering that content and greater control over the content and reputation of the event.

How will it differ from the previous set up?

In terms of personnel and facilities provided, there will be a lot of similarities to this year's service. The majority of the staff for the Host Broadcast are freelancers and an intimate working knowledge of their operation and some excellent sharing of information from Channel 7 and all suppliers (which has already occurred) is enabling Tennis Australia to hand pick the best available technicians, camera operators, etc. with many years of experience. The biggest difference is that they will be answerable to Tennis Australia and in turn directly accountable to the wants and needs of the international broadcasters.

Does Tennis Australia have the internal capability to mount a Host Broadcast?

The Tennis Australia team has decades of experience on staff, in the international tennis broadcast space as well as an intimate understanding of the needs of the international clientele and an acute awareness of the playing group and the requirements of Australian Open management.

Renata Capela will head up the Host Broadcast and has more than 11 years of experience in broadcast with a very strong working knowledge of the international client requirements. The Head of Coverage Greg Clarke reports to Renata and has completed 15 Australian Opens in the role and has also delivered multiple Olympics and Commonwealth Games.

This team will also comprise of a group of specialists with strong technical and client-relations experience. Ultimately the team will consist of six full-time staff, supplemented by several consultancy and longer-term contractors. The bulk of the host broadcast depends on a plethora of freelance or tournament crew, as in previous years – with these being hand picked and of the highest calibre available in Australia and throughout.

…

Next steps

Whilst plans are constantly being refined, two large-scale tender processes have already commenced – including Host Broadcast Technical Services and Satellite & Off-Shore Distribution (both fields where current staff have strong experience and well placed market relationships).

Competitive briefing and pricing will soon be undertaken for On-Site Facilities, Compound Buildings and Electrical Services. These aggressive market investigations will ensure Tennis Australia can deliver the best facilities for its clients, show vast improvement on the previous (which the clients are demanding) and achieve all services at the best possible cost. All of these processes are underway and will take briefings gathered directly from each client into account.

Itemised budgeting for each event will be finalised over coming weeks and re-assessed post the current tender submissions. But in essence, Tennis Australia now has significant and detailed information on cost history and areas of potential efficiencies.

[refer to ATTACHMENT B – HB action list]

Costs

Projected cost for the 2014/2015 Host Broadcast will be discussed at the Board Meeting.

Summary

> Centralising the Host Broadcast with the sports governing body (rather than an individual TV network) gives Tennis Australia its first opportunity to follow the path of other successful and worldwide sports, including the Olympics, Commonwealth Games, NBA, UEFA, World Cup, ATP, WTA and ITF. The trend in tennis precedes Tennis Australia's move and has been successful in delivering consistency, increased revenue, improved content quality, usability across platforms, depth of coverage, control and client satisfaction across both the ATP and WTA tours. With these targets and measures in mind, Tennis Australia can harness and activate this change to its immediate benefit with the majority of broadcast clients.
>
> It will also afford Tennis Australia the opportunity to portray the Australian Open in its best light across all platforms and attract the largest audiences by providing domestic and international broadcasters with a strong base upon which they can build their coverage.
>
> As a result, Tennis Australia will be able to significantly grow its content for coaching, analysis, content and archive purposes creating further opportunities to increase its commercial return and build products to encourage participation.

1038 There were various annexures that I will not reproduce, save for part of attachment B which had the following table:

DATE	ITEM	ACTION
2009 – 2012 COMPLETED	Operational & TA Production Growth	✓ built an initial centralised TA facility for AO ✓ self-produced & crewed content with greatest ever editorial control ✓ only outsourced necessary content & planned to review further for AO2013 ✓ opened direct technical relationships with key suppliers – direct contract with Gearhouse Broadcast ✓ reduced duplication by positioning ourselves as the central MCR – full EVS network ✓ reduced spend with Channel 7 & spent more funds on our ourselves – direct supplier arrangements
	Produce More Content Than Ever Before	✓ much more content for same $$ investment ✓ giant screen live production every day ✓ maximum content on digital platforms ✓ content sharing with broadcasters – screens, AOTV, web – ENG, Open Drive, ESPN Player, on-site clients (ESPN, Fox, Eurosport) ✓ full content / messaging control across AO site – fan experience ✓ extension of content to tennis team – athlete & coach development, TD & Referee monitoring, other
	Partnership Building	✓ continued to build confidence in TA delivery – 2nd year of successful TA mini ratecard for broadcasters ✓ directly engaged with broadcasters for input ✓ grew all supplier relationships ✓ maximised true synergies between various TA platforms – one content, multiple uses
2012 – 2013 COMPLETED	Further Operational Growth	✓ applied key learnings from AO2012 to build an even more collaborative, integrated & successful TA Compound operation ✓ successfully built, expanded and delivered our own broadcast operations, client servicing & production facility – effected by TA directly both operationally & technically ✓ consolidated more TA facilities during AO – giant screens/ production/ one hub ✓ built facilities for all of our sub-contractors & ready to take on more for 2014 ✓ invested a portion of the $$ & outputted double the result
	Direct Technical Relationships	✓ engaged key HB consultants on as needs & expertise basis ✓ hugely successful & ever growing direct technical relationship with Gearhouse Broadcast (who have delivered the AO for many years) ✓ engaged directly with senior crew throughout all events – heads of production, camera deployment supervisors, audio leads, engineers in charge, technical managers (to maximize delivery, exploit learnings & build direct connections for future) ✓ completed full HB evaluation – identifying real/hard costs across multiple TA events ✓ identified more elements to do ourselves rather than via Ch7 – equaling cost savings & control ✓ partnered with other broadcasters where most relevant ✓ experimented with feed distribution & integration by delivering & connecting to clients ourselves ✓ found alternative ways to produce HB across various platforms more economically ✓ retained some of the tournament technical set up for year-round use on rental basis (eg: editing & storage system) ✓ explored direct relationships with all of the best technical partners in the business – Gearhouse Broadcast (AO & AO Series), Global Television (Hopman Cup), Video Craft (December Showdown & Qualifying), Mediatec (AO & Qualifying), Presteigne Charter (clients)
	Integrated Production	✓ employed full-time & year-round TA Production team ✓ reviewed all contractual content requirements & in-sourced further ✓ integrated best partners on project by project basis with TA editorial control ✓ evaluated most content assets & explored production ratecards ✓ identified real operational & financial synergies between various TA content platforms

1039 The minutes record the following discussion:

Host Broadcast

A report from the Chief Executive Officer was received.

The Chief Executive Officer reported that under the Rights Agreement with the Seven Network, due to commence on 1 June 2014, TA would assume the host broadcast responsibilities for the Australian Open and Australian Open Series events in 2015, historically provided by Seven. He advised that this would enable the Company to provide world class, clean and generic coverage of matches, interviews and other onsite activities to both domestic and international broadcasters, allowing them to tailor the broadcast to suit their individual requirements.

The Chief Executive Officer reported that the networks would continue to have total autonomy over their commentary, programming, promotional and editorial content however TA would have the opportunity to portray the Australian Open and Australian Open Series events to their fullest extent, providing domestic and international broadcasters with a strong base to attract larger audiences. He advised that under the new Seven Network deal, TA would own and have access to substantially more content, which could be used for the purposes of coaching and athlete development as well as archive material.

The Chief Executive Officer reported that the Company would go out to tender for technical and distribution services to assist in the provision of the Host Broadcast. He advised that assuming these responsibilities provided the Company with the opportunity to control the content and customise the feed. He advised that this would not affect Seven Network's domestic broadcast of the Australian Open and Australian Open Series events and that they would continue to engage their own commentators and have an Executive Producer on site.

In response to a query from Mr Freeman as to whether this shift would affect the ratings bonus offered under the previous agreement with the Seven Network, the Chief Executive Officer advised that the potential bonus amount would rise from $650,000 to $1 million per annum in the new contract.

Mr Mitchell advised that he had never fully supported the proposal for the Company to assume Host Broadcast responsibilities given the lack of in-house expertise in the area. He noted that Management would need to ensure that it realised additional in revenue for future contracts in order to offset the host broadcast operational costs.

Mr Tanner advised that he was cautiously supportive and understood the Company wanting to control the broadcast content of the events and reiterated the need to secure an uplift in international broadcast contracts in return for the additional costs of host broadcast.

In response to these comments, the Chief Executive Officer advised that whilst the lift in revenue under the new Seven contract had taken into account the additional expenditure TA would undertake as host broadcaster, the main benefits of assuming responsibility of host broadcast lay in the ability to protect the reputation of the events and the enhancement and enrichment of the content for international broadcasters, which would bring additional benefit (including revenue) to TA in future contract negotiations.

In response to a query from Ms Pratt as to the ownership of the broadcast material under the pre-existing domestic rights agreement where the Seven Network provided the host broadcast, the Chief Executive Officer advised that TA owned the copyright of all broadcast material, excluding the Seven Network commentators and on-air talent.

In response to a query from Dr Young as to whether there would be any costs associated with host broadcast prior to 30 June 2014, the Chief Executive Officer advised that the engagement of three to four employees had been included in the budget for the current financial year.

> It was agreed that Management would provide the Board with a five-year plan in relation to the host broadcast responsibilities including an estimate of revenue to cover the additional costs.

1040 At the 14 April 2014 board meeting, which Ms Pratt attended, the board was told that the costs of host broadcasting for the 2014/15 budget would be between $5 million and $6 million. Present at that meeting were all directors, and also Mr Tiley and Mr Roberts. The minutes record:

> Host Broadcast
>
> A report from the Director of Media and Communications outlining a 5-year plan for Host Broadcast was received.
>
> The Chief Executive Officer commented that the report showed that there were a lot of intangible benefits in Host Broadcast.
>
> Mr Mitchell said he was happy with the report, but commented that the expected revenue numbers still seemed a bit "wishy washy". He commented that it was acceptable if some of the Broadcast rights fees were potentially a bit low as the Company transitioned to Host Broadcast, but noted that gains should be realised in future contracts. Mr Mitchell said the growth opportunity was in the international market. He expressed confidence that the new Commercial Director would be able to achieve this growth.
>
> In response to queries from Ms Pratt and Dr Young regarding the costs of Host Broadcast, the Chief Executive Officer explained that the Company is currently running two tender processes, so the full costs were not yet known. He explained however that the costs were expected to be between $5-6 million per annum (net of rate card revenues). Mr Mitchell stated that the Company would need to watch the costs carefully.
>
> In response to a query from Ms Pratt as to whether there would be more permanent broadcast infrastructure onsite at Melbourne Park, Mr Mitchell explained that a new Broadcast centre was being built as part of the redevelopment.
>
> In response to a query from Mr Tanner regarding the table on page 43 of the Board Papers and whether the additional costs could impact on the Company's financial performance, the Chief Operating Officer reported that the Seven Network had factored in an increase of $4 million in rights fees annually for the Company to take over the responsibility of the Host Broadcast and as a result TA would only require approximately $1.8 million in additional international broadcast revenues per annum to break even. Given the potential upside for the Company and the opportunity for additional revenue, the Chief Operating Officer reported that he was comfortable with the initial numbers.
>
> Mr Mitchell stated that laying the foundations for commercialisation in Asia, and in particular China, would help grow the Company's media rights business.

1041 At the meeting a five year plan for discussion authored by Mr Pearce was presented setting out the host broadcast commercial upside. Ms Pratt in her hand-written note noted that it did not include any information on costs. I should set out part of this plan:

Executive Summary

The predominant purpose of delivering the Host Broadcast is to ensure the best possible direct service to a multi-million dollar domestic and international broadcast client-base.

The long-term aim on this service is a gradual and continued improvement of the service and product, leading to increased global exposure and ultimately higher returns on both broadcast and sponsorship deals. A table has been included in regard to very conservatively estimated future returns on broadcast deals for the next five years. The proportion of the rise directly attributable to an improved Host Broadcast varies from market to market. But there is some early market and anecdotal evidence that make these conservative estimates possible.

The value the international broadcasters in particular see in the change of Host Broadcast is Tennis Australia's ability to enable them to provide a more defined coverage for their market. Initial feedback strongly reinforces this view.

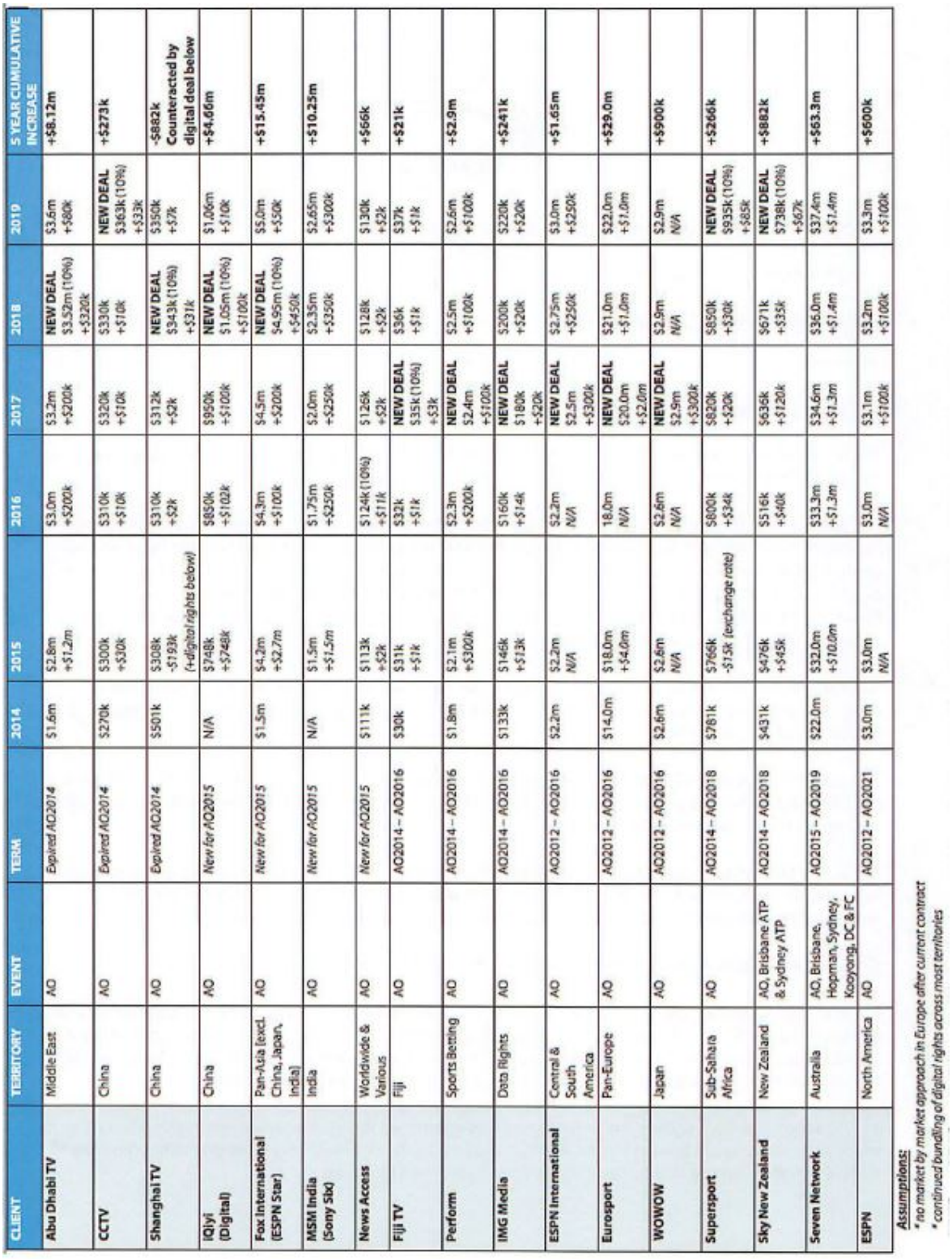
This paper also identifies the opportunities in the next five years within the direct production elements of Host Broadcast that also present a commercial upside (and internal cost efficiencies) – albeit obviously not as great as the overall longer-term outcomes.

Some areas for cost-neutral future expansion for Tennis Australia's host broadcast coverage have also been identified. In these instances, the initial expansion does not generate the revenue, but that is realised in the longer term in the aforementioned broadcast and sponsorship deals.

Commercial Upside on Broadcast Deals in the next five years

The first evidence of an improved return as a result of the change has already come through the recently completed deals for Pan Asia and India – done fully in the knowledge (and with the attraction) of the new Host Broadcast structure. Similarly, there is also a likelihood of another substantial rise in the upcoming Middle East deal, based on a number of factors including the Host Broadcast set up.

In calculating the likely rights returns for the next five years, a more conservative assumption has been made than what recent market trends would indicate is likely. The following table gives an indication of the conservative upside in broadcast rights deals in the next five years.



CLIENT	TERRITORY	EVENT	TERM	2014	2015	2016	2017	2018	2019	5 YEAR CUMULATIVE INCREASE
Abu Dhabi TV	Middle East	AO	Expired AO2014	$1.6m	$2.8m +$1.2m	$3.0m +$200k	$3.2m +$200k	NEW DEAL $3.52m (10%) +$320k	$3.6m +$80k	+$8.12m
CCTV	China	AO	Expired AO2014	$270k	$300k +$30k	$310k +$10k	$320k +$10k	$330k +$10k	NEW DEAL $363k (10%) +$33k	+$273k
Shanghai TV	China	AO	Expired AO2014	$501k	$308k -$193k (+digital rights below)	$310k +$2k	$312k +$2k	NEW DEAL $343k (10%) +$31k	$350k +$7k	-$882k Counteracted by digital deal below
iQiyi (Digital)	China	AO	New for AO2015	N/A	$748k +$748k	$850k +$102k	$950k +$100k	NEW DEAL $1.05m (10%) +$100k	$1.06m +$10k	+$4.66m
Fox International (ESPN Star)	Pan-Asia (excl. China, Japan, India)	AO	New for AO2015	$1.5m	$4.2m +$2.7m	$4.3m +$100k	$4.5m +$200k	NEW DEAL $4.95m (10%) +$450k	$5.0m +$50k	+$15.45m
MSM India (Sony Six)	India	AO	New for AO2015	N/A	$1.5m +$1.5m	$1.75m +$250k	$2.0m +$250k	$2.35m +$350k	$2.65m +$300k	+$10.25m
News Access	Worldwide & Various	AO	New for AO2015	$111k	$113k +$2k	$124k (10%) +$11k	$126k +$2k	$128k +$2k	$130k +$2k	+$66k
Fiji TV	Fiji	AO	AO2014 – AO2016	$30k	$31k +$1k	$32k +$1k	NEW DEAL $35k (10%) +$3k	$36k +$1k	$37k +$1k	+$21k
Perform	Sports Betting	AO	AO2014 – AO2016	$1.8m	$2.1m +$300k	$2.3m +$200k	NEW DEAL $2.4m +$100k	$2.5m +$100k	$2.6m +$100k	+$2.9m
IMG Media	Data Rights	AO	AO2014 – AO2016	$133k	$146k +$13k	$160k +$14k	NEW DEAL $180k +$20k	$200k +$20k	$220k +$20k	+$241k
ESPN International	Central & South America	AO	AO2012 – AO2016	$2.2m	$2.2m N/A	$2.2m N/A	NEW DEAL $2.5m +$300k	$2.75m +$250k	$3.0m +$250k	+$1.65m
Eurosport	Pan-Europe	AO	AO2012 – AO2016	$14.0m	$18.0m +$4.0m	18.0m N/A	NEW DEAL $20.0m +$2.0m	$21.0m +$1.0m	$22.0m +$1.0m	+$29.0m
WOWOW	Japan	AO	AO2012 – AO2016	$2.6m	$2.6m N/A	$2.6m N/A	NEW DEAL $2.9m +$300k	$2.9m N/A	$2.9m N/A	+$900k
Supersport	Sub-Sahara Africa	AO	AO2014 – AO2018	$761k	$766k -$15k (exchange rate)	$800k +$34k	$820k +$20k	$850k +$30k	NEW DEAL $935k (10%) +$85k	+$266k
Sky New Zealand	New Zealand	AO, Brisbane ATP & Sydney ATP	AO2014 – AO2018	$431k	$476k +$45k	$516k +$40k	$636k +$120k	$671k +$35k	NEW DEAL $738k (10%) +$67k	+$882k
Seven Network	Australia	AO, Brisbane, Hopman, Sydney, Kooyong, DC & FC	AO2015 – AO2019	$22.0m	$32.0m +$10.0m	$33.3m +$1.3m	$34.6m +$1.3m	$36.0m +$1.4m	$37.4m +$1.4m	+$63.3m
ESPN	North America	AO	AO2012 – AO2021	$3.0m	$3.0m N/A	$3.0m N/A	$3.1m +$100k	$3.2m +$100k	$3.3m +$100k	+$600k

Assumptions:
* no market by market approach in Europe after current contract
* continued bundling of digital rights across most territories

Other Opportunities

In the next five years other revenue opportunities in the broadcast sector exist outside rights fees. Ratecard revenue is the most obvious and is expected to realise in the vicinity of $2m in its first year with incremental growth beyond that. The other opportunities will be less substantial and will also require time to be developed. Where possible Tennis Australia has made some estimates (often based on cost removal) but these are indicative at best.

- **Ratecard income** – up until A02014, TA has only facilitated a small portion of broadcaster ratecard bookings (non-technical) while Channel 7 would facilitate the rest; by taking on the host broadcast and hence the facilitation of all on-site client bookings. TA has the opportunity to increase its ratecard revenue significantly in this first year, as well as in subsequent years (this will start showing a new income line of nearly $2m to TA, each year going forward)

- **Cabling income** – TA installs cabling (depreciating it over a number of years) and can now start to collect rental income for it every year (as Channel has previously done). This would be part of the ratecard income.

- **Space income** – TA invests in compound structures and facilities, depreciating these over a number of years, creating assets, whilst collecting yearly rental income via the broadcast clients (as Channel 7 has previously done). This would be part of the ratecard income.

- **Technical equipment rental** – as TA builds its year round host broadcast and production competency by purchasing selected technical equipment. This now presents an opportunity for rental income during off-peak times (much like other technical providers currently do); essentially TA buys it, rents it and it potentially pays for itself (eg: In a recent example $12,000 has been generated for renting one piece of TA kit for 3 weeks – this rental income could in essence write off of the yearly cost to nil for that piece of equipment)

- **Purchasing power** – by now being able to go to market with significant technical and facilities needs, TA will inevitably save money by attracting better rates across the market (TA's bargaining power will rise as we hire and purchase more facilities in order to deliver all of our events – we become more lean by becoming a bigger player in the broadcast market)

- **Centralised servicing** – cost savings will be found by eliminating the fractured client servicing model that currently exists (TA deliver some servicing elements, Channel 7 were delivering others – under the consolidated TA HB cost savings can be found by not duplicating efforts – one team, best service, lower cost)

…

- **Coverage upsell to existing broadcast clients** – new and additional court coverage (cameras on every court); news feeds (which could see a significant upturn in both coverage as well as news access rights income); dedicated practice coverage (which broadcasters could book access to); fully produced colour feeds (interest shown by Eurosport, if created this feed could be sold for online use); secondary and territory specific world feeds (resulting in new income from new partners like Sony Six and/or other Asian broadcasters) – all of these new elements would be bookable and most can be exploited for additional rights revenue

…

- **Inter-Slam and multi-event archive** – as part of the host broadcast, TA will be required to set up/continue a well developed logging and archiving system (for matches, press conferences and other host created content from each year's event – both for prosperity, sales and historical record keeping); this archive is also created at each of the other Slams and many other tennis events around the world; TA could ultimately look to combine its archive with that of other Slams or events (or develop a centralised Slam standard) – creating an inter-

Slam archive that can be properly commercialised and serviced, enabling footage sales year-round and easy facilitation during and across events; both broadcast partners, sponsors and other commercial entities could purchase content, all facilitated via an already existing database; this could quickly result in increased historic sales because we own and keep the archive in-house

- **Improved coverage quality & future rights** – by controlling and delivering an improved quality base coverage, TA can essentially increase the value of our broadcast rights for future negotiations; we deliver stellar base content for several years and this ultimately creates a more attractive proposition for territories like Europe and Japan where our next negotiations are due to take place around AO2016 (TA should negotiate increased rights revenue by way of advanced PR, strong host coverage reputation and high quality delivery); similarly for AO Series, strong coverage of ATP matches could equate to increased international rights sales (currently limited to quarter-finals onwards only)

Prioritisation of these initiatives during the next five years will be purely driven by the combination of client demand and potential revenue.

Summary

The obvious growth is in broadcaster and sponsorship rights fees. But the incremental growth in new assets is a real opportunity for expansion (for example, companion apps) that breaks the old paradigm of limiting our asset sales to physical opportunities like signage and on-site activation.

The other benefit to Tennis Australia will be its cost-effective ability to grow its content for coaching, analysis, content and archive purposes. But even while doing that, it will again create opportunities to increase its commercial return, build new content products and therefore exploit new revenue streams.

1042 On 7 May 2014, Ms Pratt raised with Mr Roberts the fact that that the minutes of the 14 April 2014 board meeting recorded host broadcast costs at $5 to $6 million whereas her recollection was that "an amount of up to $10 million was mentioned as a potential cost, without reference to particular income from rate cards". In her email to Mr Roberts she stated:

Thanks for the draft minutes. I have a few comments.

– re the MA incentive funding proposal: It's stated that the CEO said 50% tied and 50% discretionary within parameters… I recall Craig said it would all be tied funding and don't recall any percentages being stated.

– re Host broadcast: My recollection is that an amount of up to $10 million was mentioned as a potential cost, without reference to particular income from rate cards.

– re 3.9 and the performance 'update': I recall Peter Armstrong's request for information and a discussion about player development/performance being for more than an update.

From the last meeting, I was under the impression that we would discuss performance during the upcoming strategy session. Perhaps it should be added as an agenda item.

Today I also received my package for the Audit committee meeting, thankyou.

If we don't speak beforehand, see you this coming Monday in Melbourne.

1043 Mr Young QC cross-examined Mr Roberts concerning meetings in April and May 2014. Let me set out some of his evidence:

> I want to ask you about the April 2014 board meeting. I'm assuming you were there?---I was there.
>
> …
>
> Yes. It was one of the reports presented to the board on that occasion. And this report contains an estimate of future returns on broadcast deals for the next five years. Do you see that?---Yes.
>
> And there's a table of estimated returns on page 10,359?---Yes.
>
> Now, that indicates, does it not, that the unit responsible for broadcast operations was telling the board that we are in a position as at April 2014 to estimate some increased returns from the expenditure we're incurring on host broadcasting?---Yes.
>
> Thank you. You can return that folder. Now, at that time, the April board meeting, the board was being told that the estimated costs of host broadcasting in 2015 were estimated to be something like five to six million dollars per annum net?---Yes, about 5.8.
>
> And by about April of 2014, Ms Pratt and Dr Young were raising questions about the historical cost of host broadcasting as described in 2013?---Yes.
>
> And they were trying to compare it to this estimate of five to six million dollars for the 2015 budget?---I assume so. I can't think for them but I assume that's why they were asking about it. Their queries sounded that way, yes.
>
> Yes, you didn't think it was a valid comparison, did you?---No.
>
> Did you tell them it was not a valid comparison?---Yes.
>
> On one occasion or more than one occasion?---Many occasions. Many occasions.
>
> Many occasions. Did you tell them that or did you tell that to the audit committee when it met in May of 2014?---I can't recall what I said to the audit committee that day to be honest but I – it was my view at the time and if the subject had have been raised I would have said that.
>
> Yes?---And Mr Tanner also was querying.

1044 On 12 May 2014, there was a meeting of the audit and risk committee. Mr Freeman chaired the meeting. Mr Healy, Ms Pratt, Mr Tiley, Mr Armstrong and Mr McGregor were present. So too were Mr Roberts and Mr Petaroudas. Mr Healy and Mr Armstrong only participated by telephone. At that meeting, host broadcast costs were discussed. The minutes record:

> The costs of host broadcast were discussed by the Committee and noted.
>
> The Committee reviewed all business segments in the company on a page by page basis.
>
> It was resolved that:
>
> *The Committee complemented Management on the presentation and content*

of the budget document and recommended the draft 2014/15 Operating Budget to the Board for approval.

1045 I should say that Ms Pratt's note attached to her copy of the minutes said "This was a lengthy and robust discussion". She also made some handwritten notes that said:

> 12 MAY 2014
>
> Notes from AUDIT & RISK meeting
>
> HOST BROADCAST
>
> Lengthy discussion, most not minuted
>
> - All admitting/accepting bad deal, opportunity lost (cost)
> - Actual figures never what seemed, or even what reported to Board. I said Board needed to have all the figures about the deal & know exactly what we're dealing with.
> - David said all figures there
> - Chris & I both under impression costs of HB 9-10m, David adamant they're not.
>
> 1) Check minutes
>
> 2) Recommendations.
>
> * RECOMMENDATION with reservations.

1046 In evidence were also other notes apparently taken by her saying:

> (HOST)
>
> All accepting bad deal but stuck with it.
>
> Can't change so look forward not back.
>
> David adamant cost $5.8m net. 4m concession from 7 so $1.8m to make up.
>
> David said low rise given size of our business & opp's to make up good.
>
> I said overall 'opportunity cost' & that full board should have all figures clearly.
>
> David said all figures there.
>
> Assured Chris & I that no hidden costs.
>
> Lot of infrastructure would've done anyway coz of MOP development.
>
> (David made clear should've gone to market with deal.
>
> Harold about turn on H.B. First no, then yes to strike the deal, now distanced self.
>
> (Don't want to raise skeletons – direction from Steve Healy)

1047 Ms Pratt became concerned at the audit and risk committee meeting that host broadcast costs could be as much as $9 to $10 million, by reference to certain budgeted papers.

1048 Ms Pratt asserted that there was some discussion between Mr Roberts and her about the host broadcast costs being $5.8 million, but there being only a $4m concession provided by Seven. So, there was "$1.8m to make up". In this context Mr Roberts allegedly said that they should have gone to market for the broadcast rights deal. In that context, Ms Pratt said that she recollected Mr Tiley or Mr Healy, but did not recall who, saying "don't want to raise skeletons". Now Mr Healy denied making any such statement. Moreover, he said that he had ceased his telephone participation in the meeting before the cost of host broadcasting was raised. Further, Mr Tiley was not involved in the Seven transaction in 2013 and gave no evidence that he made such a statement. I prefer their evidence. In any event, any such statement could only have related to the cost of host broadcasting, given that Ms Pratt did not know anything further about the Seven deal at that time except for what she had read in the 20 May 2013 minutes.

1049 But it was misconceived to assert that the Seven deal ought to have compensated TA for the full cost of host broadcast. And Ms Pratt agreed in cross-examination that the total costs of host broadcasting should not be allocated to the Seven contract for the obvious reason that substantial *international* revenue would be derived from the function of host broadcasting. Indeed that was the very idea of that strategy that the board had sought to pursue from mid 2012. In essence, her pursuit of this matter in 2014 was substantially misguided.

1050 There were other difficulties with Ms Pratt's understanding that I will not linger on at this point.

1051 On 12 May 2014 at 9.43 pm, Mr Tiley sent an email to Ms Pratt saying:

> Thank you for your time and effort today on providing the feedback with regards to next year's budget. I know this would have been time consuming – both having to read the papers and make the effort today. Just thought it is important for you to know that your time and focus on this does not go unnoticed. The critique and feedback is also very helpful.
>
> We look forward to a year of more growth and opportunity to get closer to reaching our objectives.
>
> See you on Sunday.
>
> PS. The Board papers were sent today and the final budget report with additions/deletions from today will go [out] tomorrow.

1052 On 13 May 2014 at 10.30 am, Ms Pratt responded:

> Thanks for your email Craig, and thankyou for all of your high quality presentations.
>
> I appreciate the breadth and excellence of the work that you, David and the team produce.

> I have further budgeting questions about Host Broadcast. Should I talk to you or David today?

1053 At 10.52 am, Mr Tiley replied:

> We are preparing a budget sheet to clearly lay out the costs of host broadcast so that the net difference is easier to see. David also spoke to Chris about this earlier today. I agree that the change for CBE of Broadcast costs to the new budget which includes an increase in areas not host related, need to be clearer.
>
> We will get it to you today.

1054 At 10.59 am, Ms Pratt responded and made the following request:

> Thanks Craig, the more clear detail the better.
>
> I would also like to see the Channel Seven contract, or a detailed summary of it, before the next meeting please.

1055 So, she wanted a copy of the Seven contract or a detailed summary of it before the next meeting, being a board meeting on 19 May 2014. This was a fair request.

1056 At 4.41 pm, Mr Tiley responded in the following terms:

> We have sent out the final budget document. We separated the Broadcast Operations into another three sections. It will be a lot clearer to read. The areas are: Broadcast Operations, Host Broadcast AO and AOS and Host Broadcast Hopman Cup. Please let us know if you have any questions on this.
>
> I spoke to Steve and it is best concerning the full Seven contract (it is long), I bring a copy to the Sydney meeting and we can go through it. It is not our usual practice to send full contracts by email.

1057 Ms Pratt was happy with that response. She replied at 5.57 pm:

> That sounds good.
>
> When will the minutes from yesterday's meeting come to me?
>
> That's fine re the Seven contract – if we can get together perhaps before the TNSW meeting on the Sunday to look it over – is that possible for you?

1058 Clearly, Mr Tiley's concern not to circulate the Seven contract related only to confidentiality concerns. Ms Pratt seemed to be content with this and envisaged that she would look at the contract on Sunday 18 May 2014.

1059 On 14 May 2014 at 11.43 am, Mr Tiley wrote:

> …
>
> The new budget papers should be there by lunchtime. Chris has the minutes for his review and sign off. When we get those back from him we will distribute to the committee asap.

I am meeting with TNSW prior to our Board to Board meeting. Can we catch up either after the meeting or before the Board meeting?

1060 At 1.42 pm, Mr Roberts sent Ms Pratt an email setting out a summary of host broadcasting costs and copying her with a detailed email that he had sent to Mr Freeman and Mr Tiley:

Hi Kerryn,

We have just sent this summary of budgeted host broadcast costs to Chris Freeman in response to his specific request for some further detail. I thought I would forward it on to you for your information.

Regards,

David

…

Hi Chris,

The summary below provides further detail on the costs of the on-going year by year broadcast operations and the new costs relating to Tennis Australia assuming host broadcast for the Australian Open and AO Series events.

The net cost in the 2014/15 budget in each of these areas will be

Broadcast Operations (on-going)	$2.83m ($2.49m in 2013/14)
Host Broadcast – AO & AO Series	$5.85m
Host Broadcast – Hopman Cup	$0.68m

Broadcast Operations:

In the current year, Broadcast Operations CBE net cost will close at $2.493m deficit ($2.748m cost with $255k revenue). In the 2014/15 budget, this will increase to $2.83m ($3.38m cost with $0.55 revenue).

For the avoidance of doubt, this additional cost and revenue would have occurred regardless of the change in host broadcast arrangements.

The increase in expense is due to:

* Ops Manager salary and staff telephones transferred out of the Media budget ($132k),

* Catering increases for CPI/Ch7 contract/EMA increase/catering facility improvement/√IK for drinks ($111k)

* Exchange rate fluctuations for IBM VIK and Hawkeye ($58k)

* Satellites and audio equipment ($27k)

* Contracted tickets ($21k)

* Venue CPI increases ($11k)

* cost of generating the increased revenue income, including building studio gantry and facilitating nontechnical rate card bookings ($271k).

Host Broadcast:

The net cost of Host Broadcast in the 2014/15 budget has been calculated at $5.85m ($7.66m cost with $1.81m revenue) for Australian Open, Sydney International, Brisbane International and Kooyong. The cost for Hopman Cup Host Broadcast has been budgeted at $0.68m.

Detail of the costs in the 2014/15 budget for host broadcast for the Australian open and AO Series events are as follows:

> $3.39m – Technical facilities and crew
> Technical equipment hire includes cameras, microphones, mixing desks, EVS servers, cabling, Spidercam (including pilots), technical and engineering crew.
>
> $1.82m – On site broadcast facilities
> Buildings, gantries, furniture, internet and IT services, power, air conditioning, camera scaffolds
>
> $1.71m – Broadcast crew and talent
> World Feed commentators, crew travel accom and transport, production crew and talent (AOS), Host Bcast support staff
>
> $448k – Salaries and on costs
> Broadcast Ops co-ordinators, tech manager, servicing and crew personnel (full time staff), phones
>
> $290k – Other
> Graphics, consumables (office running costs), security, cleaning, talent uniforms etc

The Host Broadcast revenue ($1.82m) pertains to rate card bookings for on-site facilities and technical equipment as well as an 11k service fee for Kooyong.

By event, the Host Broadcast net deficit in the 2014/15 budget is $4.21m for the Australian Open ($6.02 cost with $1,81 revenue), $0.30 for Kooyong ($0.31 cost with $0.01 revenue), $0.68 for Brisbane (all cost and no revenue) and $0.65 for Sydney (all cost and no revenue) giving a total net cost of $5.85m. For Hopman Cup, the net deficit will be $0.68 (all cost and no revenue).

The net cost of $5.85m (excluding Hopman Cup) is consistent with the figure that has been discussed with the Board previously. It was also discussed at the April Board meeting that, although the host broadcast cost is recurring year on year, TA is receiving $4m per year from the Seven Network in consideration for host broadcast and will need to make up only a further $1.8m (plus Hopman cost) per annum in increased international media rights (a $40m business to TA per annum) as a direct result of the improved product offering to international broadcasters.

If you need anything further Chris, please let me know.

Regards,

David

1061 Mr Roberts' detailed email attempted to provide a breakdown of the budget item for 2015 in respect of host broadcast costs. He tried to separate the cost of the ongoing broadcast operations, being that category of broadcast costs that had been incurred before host broadcasting and would continue to be incurred, from the new host broadcast costs; he also sought to separate into the different events and the Hopman Cup as well. This was done to

assist the audit and risk committee. In essence, he provided a detailed breakdown and reconciliation of host broadcast costs relating to the figure which had been stated at the April board meeting. But that email gave the inaccurate impression, in a sentence highlighted at the time by Ms Pratt, that one could find the $4 million "concession" figure in the Seven contract. Mr Roberts subsequently confirmed in his evidence that he was intending to refer in that email to the course of the negotiations with Mr Worner, rather than any figure contained in the contract. He gave the following evidence in cross-examination by Mr Young QC:

> All right. Now, can I just take you to the last page of the email, the second page, 5096. In that paragraph, you refer to an amount of $4 million TA is receiving from the Seven Network?---Yes.
>
> Now, what was the basis for that statement in this email?---Where is the statement exactly?
>
> TA is receiving four million per year from the Seven Network in consideration for host broadcast?---Yes.
>
> Just that first part of it?---I knew that to be true because I was at the meeting in May 2013 when Tim Worner actually identified that four million would be credited, added on to the rights fee per year in consideration for host broadcast.
>
> And when you say credited, you are not referring to some figure that appears in the contract; rather, in the process of negotiation Worner was saying he would improve his offer because there would be a, effectively - - -?---A savings to him.
>
> - - - a saving to Seven of about $4 million?--- Correct

1062 At 3.20 pm, Ms Pratt responded:

> Thanks David. Your summary answers a few of the specific questions I had yesterday when I emailed.
>
> A couple more....
>
> Why are we keeping Hopman Cup HB costs separate?
>
> And are you available for a short catch up before the TNSW meetings on Sunday?

1063 At 6.04 pm, Mr Roberts replied:

> The host broadcast costs have been separated on the basis that, under the previous arrangements, the host costs for Hopman were borne by broadcasters other than the Seven Network on behalf of the ITF, unlike the Australian Open and other AO Series events where the costs were incurred by Seven under its contract with TA. By separating the costs in the 2014/15 budget we are able to show the net cost of replacing the Seven Network host costs at $5.85m, which is the number we have been discussing with the Board. When the Seven deal was completed mid last year, the Hopman rights were 'thrown in' at virtually no consideration and we are now obligated to incur the $0.68 cost for the host.

1064 I have referred earlier to the events of 18 and 19 May 2014. On 19 May 2014, a TA board meeting took place in the boardroom of Gadens. All directors were present including Dr Young and Ms Pratt. Mr Tiley and Mr Roberts were also present. The minutes record:

> 2014/15 Operating and Capital Budget
>
> A draft 2014/15 Operating and Capital Budget and a paper on Fledging Strategy from the Chief Operating Officer were received.
>
> The President invited Mr Freeman (Chair of the Audit & Risk Committee) to comment on the Committee's review of the draft Budget.
>
> Mr Freeman reported that the Audit & Risk Committee had reviewed the draft Budget in detail at its meeting on 12 May. He advised that the Committee had been complimentary of the direction and content of the Budget and had recommended it for approval by the Board.
>
> The Board noted a continued improvement in the net surplus over the current year, brought about by strong revenue growth, which had been partly offset by the additional costs of earning that revenue, targeted investments in tennis programs and growth in the Australian Open.
>
> In response to a query from Dr Young in relation to salary costs, the Chief Executive Officer responded that total salary cost as a percentage to turnover in the Budget had been brought back to 2007/08 levels at 13.7%. It was agreed that this figure would be benchmarked against other major National Sporting Organisations in Australia with the results reported to the next Board meeting.
>
> The Chief Operating Officer reported that the costs of the proposed MA Incentive Proposal had not been included in the draft Budget as certain elements of the proposal had yet to be finalised (eg start date). He suggested that, should the Budget be approved as presented, the costs of the proposal should be treated as an unfavourable variance to budget and be monitored as they arise during the year. This was agreed.
>
> The Chief Executive Officer suggested that the net surplus in the draft Budget ($16.8 million less the costs of the MA Incentive Proposal) would provide sufficient reserves to contribute to the 'Self Insure Australian Open/Rainy Day' needs of the company and a Future Fund for future investment in tennis programs, prize money or infrastructure needs not foreseen at this time. It was agreed that a paper on the use of a Future Fund/Infrastructure Fund would be presented to the Board at its next meeting.
>
> The Chief Operating Officer reported on various hedging options for contracted 2014/15 foreign currency amounts and recommended activating a wedged collar for $US and euro net revenues.
>
> It was resolved that:
>
> *(1) The 2014/15 contracted foreign currency net revenues be hedged through a wedged collar as soon as practicable and the draft Budget be restated to the applicable worst case rates.*
>
> *(2) Subject to the above restatement, the 2014/15 Operating and Capital Budget be approved*

1065 The minutes do not record anything said or done by Ms Pratt concerning the costs of host broadcasting or obtaining a copy of the contract.

1066 On 20 May 2014 at 4.35 pm, Dr Young emailed Ms Pratt:

> KP – letter as discussed from Channel 7.
>
> Have you received the contract?

1067 At 5.33 pm Ms Pratt responded:

> Haven't got it yet. Waiting. Have just sent an email following up.
>
> Is the contra something at our cost? What is it in this instance and how does it work? ... hospitality....tickets....placement of ads/community service .....?? $11.8 is a lot of money and I'd like to know exactly what it means.
>
> It is extra from the $1m corporate hospitality sweetener – there is a figure of over $200k for tickets etc for 7 in this budget.
>
> Hope you've recovered from the last couple of days and that your big work day went well.

1068 At 6.47 pm, Dr Young replied:

> My guess is the contract will be quite different to the letter from Channel 7 and provided to the Board.
>
> Delays and excuses to provide the contract only add to a conspiracy/cover-up.
>
> Contra items need to be shown as Income items. Advertising on Channel 7 during the tennis would be an example where no cash exchanges hand for the services provided.
>
> Let's get the contract and move from there.
>
> Have documented the issues for discussion with SHealy and also thought of what the outcomes should be.
>
> Keep me posted re contract. Have you asked CTiley for a copy or David? May be best to go direct to CTiley.

1069 At 6.51 pm, Ms Pratt replied:

> Tend to agree.
>
> I have asked CT directly and copied both David and Steve in on my reminder.

1070 Clearly Dr Young was stoking the fires of her cover up and conspiracy theories.

1071 On 21 May 2014, after Mr Healy had received a one-page summary of the Seven contract from Mr Tiley, Mr Healy emailed Ms Pratt to say the summary was available for her to look at in the offices of Gadens. The email stated the following:

> Hi Kerryn – I have received from Craig the summary of the deal.
>
> Obviously the deal is commercial in confidence but the information is available to Board members. For security reasons it would be best if you were to come here to view it rather than have the possibility of information sent going astray. Craig or David can then respond to any questions you may have.

> Please give me a call to make a convenient time.

1072 But as it happens, Ms Pratt did not immediately avail herself of the opportunity to view the summary on 21 May 2014, although she did so within a short period thereafter.

1073 In my view, there was nothing out of the ordinary or untoward in these events, aside from Ms Pratt's misconceptions about the cost of host broadcasting.

1074 Let me now return to the one-page summary. The one-page summary was tabled at a board meeting on 21 July 2014. Ms Pratt was present by telephone but did not stay for the item containing host broadcasting. The minutes provided:

> Host Broadcast
>
> An additional paper on the financials underpinning Host Broadcast for 2015 was provided to the Board and noted.
>
> The Chief Operating Officer reported that the Company was close to making a decision on the technical provider for Host Broadcast and further detail would be presented at the next Board meeting.
>
> The Board discussed the need to revisit the role performed by IMG in assisting in the negotiation the Company's broadcast and sponsorship rights.

1075 And Dr Young was satisfied with the explanation she received in relation to the one-page summary. Under cross-examination by Mr Flynn SC she gave the following evidence:

> Dr Young, when this document was tabled at the board meeting on 21 July 2014 - - - ?---Yes.
>
> - - - it's right, isn't it, that you and Ms Pratt were content with the explanations you received in relation to this document?---Don't know.
>
> Are you saying – well, I'm just asking about your own position?---Mmm.
>
> Were you satisfied with the explanations you received in relation to this document at the board meeting on 21 July 2014?---Yes.
>
> And is that why, after you received this document at the board meeting on 21 July 2014, you thought that the conspiracy had ended; is that right?---Yes.

1076 Now despite the one-page summary being a confusing document that mixes cash, accrual and profit concepts, there is nothing in it relating to the Seven contract which does not correlate either with Mr Worner's letter that was put before the board on 20 May 2013 or the additional items of value subsequently negotiated by TA that ultimately appeared in the long-form contract signed on 29 May 2013.

1077 Further, although the "contra" items are reversed out in the one-page summary, Dr Young accepted both in a contemporaneous email and in her evidence that contra items have value

and should be shown as income. Ms Pratt apparently did not initially understand what "contra" was, as her email to Dr Young at 5.33 pm on 20 May 2014 that I have set out earlier demonstrates.

1078 In summary, in my view it cannot sensibly be suggested that the commercial benefits of the Seven contract were less than the board had been led to believe on 20 May 2013. Further, it cannot sensibly be suggested that the additional costs of host broadcast were somehow inappropriately not recouped. Further, it cannot sensibly be suggested that the Seven contract had less than its stated value. Finally, it cannot sensibly be suggested that there was some attempt by any person within TA to cover up any of those matters.

(d) Board composition disputes – October to December 2015

1079 Let me go through the chronology as disclosed by the evidence of matters in 2015 that ASIC put forward as supporting its case concerning board composition disputes.

1080 At 8.00 am on 26 October 2015 a board meeting of TA was held. This was just prior to the annual general meeting. The minutes of the board meeting, which I accept as accurate, record what transpired:

> The Board met at the request of Ms Pratt to discuss a motion to be presented by Ms Pratt to rescind the resolution to reappoint Mr Mitchell as a Director. The meeting needed to be held prior to the Annual General Meeting, at which the agenda included a resolution for the Member Associations to ratify the previous resolution to reappoint Mr Mitchell for a term of 1 year.
>
> Mr Healy began the meeting by expressing his disappointment and concern at the circumstances and timing of this proposal. The President then handed over to Mr Mitchell.
>
> Mr Mitchell stated he was confident he had the strong support of the Members during his tenure and had always acted in the best interests of tennis. He added however, that in the current circumstances and to avoid any negative media coverage for the company, he had decided not to continue as a Director and tendered his resignation with effect from 9.00am on 26 October 2015.
>
> Mr Freeman expressed the view that this was not a proud day for this Board. He stated that the proposal to rescind the resolution to re-appoint Mr Mitchell was not in the best interests of the company and did not respect the significant contribution Mr Mitchell had made over a number of years. Mr Laffey stated that he was most impressed with Mr Mitchell's attitude to this difficult situation and for Mr Mitchell to be put in this position was very bad for the business of the company and very bad for tennis.
>
> Mr Tanner advised that he had not been part of any pact in relation to the circumstances leading up to this Board meeting.
>
> The President advised that he would inform the Members of Mr Mitchell's resignation and he would publically thank Mr Mitchell for his contribution at the AGM later that

morning.

1081 Now at the annual general meeting it was to have been proposed that Mr Mitchell transition from a member elected director to a board appointed director. This could be done at the time subject to member approval at the annual general meeting. But at 9.00 am at the annual general meeting, a resolution to re-appoint Mr Mitchell as a director was withdrawn and Mr Mitchell did not seek re-appointment. This was taken as his retirement and a media release was published later that day by TA thanking him for his service.

1082 Now it would seem that the member associations of TA were unhappy with this turn of events.

1083 So on 17 November 2015, the president of Tennis Victoria wrote to Mr Healy in the following terms:

> As Tennis Victoria's Member Association Representatives to Tennis Australia, Mark Da Silva and I were surprised and concerned to learn during the TA AGM on 26th October 2015 that the resolution on the agenda – of a TA Board recommendation to reappoint Director Harold Mitchell – was being withdrawn and that Harold was not seeking reappointment.
>
> In acknowledgement of Harold's outstanding contribution to tennis, the TV CEO and myself forwarded a letter of appreciation to Harold. This led to a meeting with Harold and I on the 11th November 2015 where Harold advised he would be willing to remain on the TA Board if that was the want of the tennis community.
>
> As you no doubt appreciate, Harold's standing within the Australian community is without peer and his knowledge, influence and connections across relevant areas of government relations, media and broadcasting, international business and more is invaluable. Harold's recent appointment by the Hon. Daniel Andrews as Chair of his Premier's Jobs and Investment Panel – with a Victorian State Government bursary of $508 million – is but one illustration of this.
>
> Whilst fully recognising that this is a governance matter for Tennis Australia, Tennis Victoria as a key stakeholder wishes to place on the record our support for the appointment of Harold Mitchell as a Director. Tennis Victoria was certainly going to – and would again – wholeheartedly support a recommendation and vote in favour of Harold being reappointed as a Tennis Australia Director.
>
> This correspondence is forwarded with the support of and on behalf of the TV Board.

1084 Similar letters were sent to Mr Healy by the president of Tennis NSW on 19 November 2015, the president of Tennis West on 27 November 2015, the president of Tennis Queensland on 1 December 2015, the president of Tennis ACT on 1 December 2015, the president of Tennis Tasmania on 3 December 2015 and the president of Tennis NT on 4 December 2015. Each of these member associations were in favour of, indeed in some cases urging, the re-appointment of Mr Mitchell.

1085 I should say that Mr Pearce SC put to Mr Healy in cross-examination that he had orchestrated a campaign among the member associations calling for Mr Mitchell to be returned to the board. But Mr Healy rejected such an assertion, which I might say was put with little foundation.

1086 On 5 December 2015 at 11.05 am, Mr Healy sent the following email to the directors:

> I have received a request that Tennis Australia hold a general meeting to consider amendments to clause 17.4 of Tennis Australia's Constitution before the Board meeting on Monday. The members have unanimously agreed to short notice for this meeting.
>
> Under the Corporations Act, we are required to call and hold that general meeting.
>
> I will circulate the notice of meeting and related meeting documentation shortly.

1087 At 11.16 am, Mr Healy sent the following email to the member associations:

> As you may be aware, Tennis Australia has been requested to call and arrange a general meeting on short notice to consider proposed Constitutional changes. All members have agreed to the short notice.
>
> Attached is the notice of general meeting, marked up Constitution showing the proposed changes and a proxy form.
>
> The proposed changes provide for a casting vote on Board appointed positions. This is consistent with the arrangements for the election of Member elected Directors that have been in place for a number of years.
>
> The general meeting will be held by teleconference on Sunday night commencing at 7pm AEDT (Victorian time).
>
> The dial in details are below:
>
> - Number to call – […]
> - Conference Code: […]
>
> It would be appreciated if at least one representative from each MA could dial into the call. Alternatively, a MA can complete and return the attached proxy form prior to the meeting if no representatives from that MA are able to attend the call.
>
> I appreciate your time and co-operation on this matter and apologise for the inconvenience.

1088 The attached notice of meeting for a special general meeting to be held on 6 December 2015 stated:

> **BUSINESS**
>
> To consider, and if thought fit, pass the following special resolutions:
>
> *(a) That amendments to clause 17.4 of the Constitution of Tennis Australia Limited be made to give the President a casting vote in the event of an equality of votes on Board appointed positions.*
>
> *(b) That the Constitution signed by the Chairperson for the purposes of*

> *identification (incorporating any changes necessary to give effect to resolution (a)) be approved and adopted as the Constitution of Tennis Australia Limited with immediate effect in substitution for and to the exclusion of the existing Constitution of Tennis Australia Limited.*

1089 At 11.54 am, Mr Healy sent another email to the directors in the following terms:

> Dear Board – I have been sent and received a letter from the overwhelming majority of the Member Associations requesting the reappointment of Harold Mitchell to the vacant Board position.
>
> In accordance with the will of the Member Associations I will therefore at Monday's board meeting be nominating Harold Mitchell for that position.
>
> If any other director is intending to nominate another person for that role would you please advise me in advance of the meeting.

1090 Now I should note that at this time the board was split 4:4 between what I would describe as the pro- and anti-Mitchell camps.

1091 Mr Pearce SC cross-examined Mr Healy on the constitutional change in the following terms:

> All right. Where did the idea come from to amend the constitution?---Well, that was on the basis of legal advice, because the advice was that we had to appoint a director to that position at the first board meeting after the annual general meeting. And if we failed to do so, we couldn't – we couldn't fill that position until the first meeting after the next year's annual general meeting, and, therefore, there was a possibility that on critical issues we could be [in] deadlock for a year.
>
> You couldn't fill the position as long as there was a deadlock over the position. That's - - -?---No. The constitution said the position has to be filled at the first meeting after the AGM. The advice was, unless we filled it at that meeting, we couldn't fill the position. It was an unusual clause in the constitution.
>
> But the deadlock would only have arisen if Mr Mitchell was the person being proposed, wasn't it?---No. It could be any issue that the board was facing. We would only have eight directors instead of nine, so any – any vote that we took during that next year could be unresolved, could be deadlocked and there would be no casting vote or no way to resolve it.
>
> You anticipated, if a motion was moved for Mr Mitchell to be reappointed to the board, there would be a four-four deadlock, didn't you?---Yes, I did.
>
> All right. That could have been avoided by nominating another person instead of Mr Mitchell, couldn't it?---Yes, it could.
>
> And why didn't you consider that course of action?---Well, I didn't move the motion to – at meeting. It was Mr Freeman who moved the motion to appoint Mr Mitchell.
>
> Did you consider the appointment of somebody else other than Mr Mitchell to the vacant position at that time?---No. I don't think so. No.
>
> Because you had formed the view that the interests of Tennis Australia required the reappointment of Mr Mitchell to the board?---And seven – there were eight member associations. Seven of them had written to me asking to reinstate Mr Mitchell to the board. And one of them had called and said they supported that. So I was acting in

> accordance with the wishes of the members. And I believed it was an appropriate action, yes.
>
> And you were concerned that if that action was not taken, serious damage would be done to Tennis Australia?---No.

1092 In my view, and contrary to ASIC's suggestions, Mr Healy provided credible evidence for the constitutional change. Moreover, the move to re-appoint Mr Mitchell came from the member associations. In my view, there was little basis to attack Mr Healy on any of this.

1093 At 8.31 pm on 5 December 2015, Dr Young sent an email to the member associations in the following terms:

> **Confidential**
>
> Dear Members,
>
> On behalf of Kerryn Pratt, Scott Tanner and Peter Armstrong I send you this email in relation to the Special General Meeting scheduled for 7pm tomorrow night. We would like to share with you our thoughts on several matters relating to this meeting.
>
> 1. It is of considerable concern that all TA Board members were not consulted and only today informed about the Special General Meeting (SGM) as required by our Constitution.
>
> 2. We have just been through an extensive Constitutional review with representatives from MAs involved on our Governance Committee. Whilst providing the Chair with a deciding vote in certain circumstances was discussed during this lengthy and thorough review process, your Governance Committee decided not to amend the Constitution to give the Chair/President a casting vote at Board meetings in relation to Board-appointed Directors, Vice-presidents, Presidents and Members of Committees. There is already an existing provision for the President/Chair to have a casting vote at General Meetings (#12.5). Any amendment to the Constitution should, we believe, be fully considered with due diligence by the TA Board and MAs. Advice from our Governance experts KPMG should also be sought and fully discussed by MA and TA Boards.
>
> 3. Should it arise, there will be a number of TA Directors who will not support Harold Mitchell for the vacant Board-appointed Director position. We believe there are good reasons for this. Serious concerns have previously been raised about how conflicts of interest have been handled at Board level including proper disclosure. In addition we have raised concerns in the past about Harold's general conduct at Board meetings. We believe that these concerns need to be taken very seriously. Whilst there may be a view that by giving the Chair the ability to reappoint Harold to the Board that things will be better in time for the AO – we believe that they won't. Indeed, we believe that such an action will have entirely the opposite effect.
>
> 4. Conflicts of interest are a serious issue in public companies. Failure to adhere to proper process in this area undermines confidence in our integrity as a Board, exposes us to litigation, and ultimately discourages other organisations from doing business with us. This of course has a negative impact on the value of our rights and other brand assets that we sell. Furthermore, if TA were to develop a poor reputation in this area we will not attract the quality of director we need on the Board, and potentially jeopardise future government funding and the endorsement we receive from the ASC.

> 5. A number of potential Directors have been identified who have similar strengths to Harold and are well connected with the media and with government. There is a nominations committee process that identifies high quality candidates to join your Board. Trust in this process.
>
> We ask that you hear directly from the TA Directors who oppose Harold's re-appointment before considering any resolution, given that this is clearly the immediate intent of the resolution.
>
> There is universal disappointment amongst all TA Directors that we find ourselves in this situation at this important time. The current Board and the way that issues have been resolved without the Chair having a deciding vote has served you well. We ask you to trust in the process and in your properly appointed directors to resolve this situation. The situation requires cool heads rather than constitutional change. Changing the constitution would have far reaching consequences on the quality of discussion and decision making around the Board table into the future.
>
> Thank you for your consideration of our email and we look forward to discussing it with you.

1094 Clearly, Dr Young was pushing her conflict of interest theme, which turned out to be unsubstantiated. Further, Dr Young seemed little interested, if at all, in the views of the member associations. This stood in contrast with Mr Healy's position.

1095 On 6 December 2015 at 7.00 pm, the special general meeting was held and the resolutions passed. All directors were present being Mr Healy, Mr Freeman, Dr Young, Mr Tanner, Mr Armstrong, Ms Pratt, Mr Laffey and Mr Hutchinson. The resolutions were passed unanimously by *the member associations*. The minutes accurately record:

> The President thanked the Members for providing consent to short notice and making themselves available.
>
> The President and the Chief Operating Officer outlined the proposed changes to the Company's Constitution.
>
> In response to allegations made by Dr Young on 5 December 2015, on behalf of Mr Tanner, Ms Pratt and Mr Armstrong and herself regarding a possible conflict of interest and proper disclosure by Mr Mitchell, the President informed those present that he would organise an external, independent review of the relevant Minutes and disclosures. The President also advised that, should Mr Mitchell be reappointed to the Board, the report of the external review would be issued to the Members, prior to any proposed ratification of that appointment by the Members.
>
> Mr Tanner, Ms Pratt, Mr Armstrong and Dr Young spoke in opposition to the Constitutional changes and to Mr Mitchell being re-appointed to the Board.
>
> The Members resolved unanimously to approve the following special resolutions:
>
> *(a) That the amendment to clause 17.4 of the Constitution of Tennis Australia Limited be made to give the President a casting vote in the event of an equality of votes on Board appointed positions.*
>
> *(b) That the Constitution signed by the Chairperson for the purposes of identification (incorporating any changes necessary to give effect to*

> *resolution (a)) be approved and adopted as the Constitution of Tennis Australia Limited with immediate effect in substitution for and to the exclusion of the existing Constitution of Tennis Australia Limited.*

1096 On 7 December 2015, a board meeting of TA was held. The directors present were Mr Healy, Mr Freeman, Mr Armstrong, Ms Pratt, Mr Tanner, Dr Young, Mr Laffey and Mr Hutchinson.

1097 Mr Mitchell was appointed as a director for 12 months subject to ratification. No casting vote needed to be exercised by Mr Healy as Ms Pratt abstained. Mr Mitchell was also appointed a vice-president, although the relevant resolution was only carried with Mr Healy's casting vote.

1098 The minutes recorded on the director question:

> The President stated that he had received letters from seven MAs requesting that Mr Mitchell return to the Board. The President tabled those letters and copies were circulated to the Board.
>
> Mr Freeman, in accordance with the wishes of the majority of the Members, nominated Mr Mitchell for the Board Appointed Director vacancy for a 1 year term subject to ratification of his appointment by the Members. Mr Laffey seconded the nomination.
>
> The President confirmed that he would organise an external independent review in response to allegations that Dr Young had made (with the support of Mr Tanner, Ms Pratt and Mr Armstrong) regarding Mr Mitchell having a conflict of interest in relation to the television rights contract with the Seven Network. The President noted that the relevant Minutes and disclosures made by Mr Mitchell at the time would provide information to the external review.
>
> The President also noted that he believed Mr Mitchell had been elected to the Board to assist the Company with its media rights strategy given his expertise in the area. Mr Freeman confirmed that Mr Mitchell's involvement in the Seven Network discussions was in his view, consistent with normal Company practice.
>
> Mr Laffey expressed disbelief that some members of the Board had decided to raise this issue almost 3 years after the Seven Network contract was finalised. Mr Laffey also noted that it was convenient that some Board Members had decided to raise this issue now, given they wanted to try to establish grounds to oppose Mr Mitchell's reappointment to the Board.
>
> Mr Freeman noted, in any event, that Mr Mitchell no longer had any interest in a media company and the Company's domestic media rights were not up for renewal for a number of years.
>
> Dr Young requested permission to get external legal advice in respect of the independent review. The President stated that any request should be put to him in writing. However he recommended that the Board await the outcome of the external independent review.
>
> A vote was taken on the appointment of Mr Mitchell for a 1 year term.
>
> Mr Freeman, Mr Hutchinson, Mr Laffey and the President voted in favour of the appointment of Mr Mitchell as a Board Appointed Director.
>
> Dr Young, Mr Armstrong and Mr Tanner voted against the appointment of Mr Mitchell as a Board Appointed Director.

Ms Pratt abstained from the vote.

It was resolved that:

Mr Mitchell be appointed as a Board Appointed Director for a 12 month term ending 7 December 2016, subject to ratification by the Members following the conclusion of the independent review to be organised by the President.

1099 For completeness, I should note that the 7 December 2015 board meeting was adjourned at 1.45 pm and reconvened on 23 December 2015 at 5.40 pm, being the date after the independent review had reported, which I will discuss in the next section. The further section of the minutes dealing with that reconvened meeting note the ratification of Mr Mitchell's appointment by the member associations earlier on 23 December 2015.

1100 When one appreciates the above chronology, there is nothing about any of this that supports ASIC's case against Mr Healy. ASIC has contended that Mr Healy wished to keep Mr Mitchell on the board to cover up Mr Mitchell's conflict of interest or other unspecified wrongdoing. I reject that contention.

1101 First, there was nothing to cover-up or hide relating to the cost or value of the Seven contract, as I have already explained.

1102 Second, ASIC has not alleged or pressed any conflict of interest case against Mr Mitchell. Indeed, the independent report from Mr Quentin Digby and Ms Wood, which indicated that Mr Mitchell did not have any undeclared conflict of interest, does not support any conflict of interest case. I will come to this in a moment.

1103 Third, ASIC does not allege that Mr Healy knew prior to the institution of these proceedings about the communications between Mr Mitchell and Mr McWilliam which form part of its complaint against Mr Mitchell.

1104 Fourth, there were sound reasons to keep Mr Mitchell on the board, including his ability to use his government contacts to assist in the redevelopment of Melbourne Park and the overwhelming support that Mr Mitchell had from member associations.

(e) The independent investigation

1105 Let me now analyse in detail the chronology concerning the independent review concerning Mr Mitchell's so called conflict of interest.

1106 As appears from what I have set out earlier, Dr Young had set the hare running with allegations of conflict of interest. And it had in essence been resolved to have an independent review on

that matter. Notwithstanding that, on 10 December 2015 Dr Young sent an email to Mr Healy in the following terms:

> **Review of TA processes**
>
> I refer to the review you have advised will be undertaken relating to the manner in which negotiations for the current domestic television broadcast rights contract were conducted in 2013.
>
> I understand that the terms of reference for the review, as well as the manner in which it will be conducted, are still being settled. While the review was proposed in the context of Harold Mitchell's pending reappointment as a director of Tennis Australia, my view is that restricting the review to a consideration of conflicts of interest would be unnecessarily limiting.
>
> In order to maximise the benefits to Tennis Australia of conducting the review, I recommend that the scope of the review should also cover best practice processes for conducting negotiations of this kind. The review should consider the most effective methods and strategies for achieving a successful negotiation, to maximise the return to Tennis Australia and support the Board's decision making process. The outcomes of the review would then lay the groundwork for Tennis Australia to conduct the negotiations for a new broadcast rights contract, in anticipation of the expiration of the current contract.
>
> In addition, in order for the Board to obtain an objective assessment of best practice Board processes in this context, the review should be conducted by an external, independent professional person or firm with experience in conducting reviews of this kind.
>
> I would appreciate it if you would circulate this email to the rest of the TA Board members for their consideration. It is important that there is a consensus amongst the Board members as to how the review is to be conducted and what it is to cover, given its importance to Tennis Australia's governance processes.
>
> I look forward to your response.

1107 As appears, she wanted to broaden the investigation into "best practice processes for conducting negotiations of this kind".

1108 On 12 December 2015, Mr Healy responded, copying in the other directors, in my view in appropriate and measured terms:

> Dear Janet- thank you for your note. I am circulating your question and my response as requested.
>
> As you are aware we are seeking legal advice in relation to the allegations you and others have made. This was agreed with the Members in the SGM and noted at the recent Board meeting. That matter is close to being underway and I expect to be able to bring the Board up to date next week.
>
> The broadening of the review you seek is not a legal matter and is not appropriately the subject matter of the current review.
>
> However you may of course raise this for discussion at a future Board meeting for discussion if you wish. If so it would beg the question as to why it would not include

> all of the very substantial commercial contracts that TA enters into rather than be limited to only the domestic television rights contract.
>
> Having said that I am not aware of any other contract where there is alleged to be an issue.
>
> I do believe we have sufficient expertise and experience around the Board table and at management level to carry out our duties properly and cannot see what an external review would achieve. Certainly the very large increases achieved on renewals of major contracts suggests that TA is doing very well.
>
> Ultimately this is a matter for Board discussion and as always I will be guided by the Board.

1109 Dr Young then, and ASIC now, have complained of the so-called limited scope of the inquiry. But the fact is that the inquiry was limited by reason of the context being Mr Mitchell's actual or perceived conflict of interest.

1110 Now on 14 December 2015 Ms Wood, a person with independent executive experience and who had legal qualifications, and Mr Digby, a partner of Herbert Smith Freehills, were engaged to carry out the review by Mr Healy, with a view to reporting back to the board by Christmas 2012. In the event, they reported on 22 December 2015.

1111 The scope of their review, as set out in their report headed "Consideration of possible conflicts of interest in the context of the Seven Network Rights negotiations", was expressed:

> At the request of the President of Tennis Australia we have considered the following questions with a view to reporting back to the Board by Christmas:
>
> 1 whether there is any indication that Mr Harold Mitchell AC (Mitchell) in his capacity as a director of Tennis Australia had an undisclosed material conflict of interest at the time of the negotiation of the Domestic Media Rights deal for the Australian Open between Seven Network (Operations) Limited and Tennis Australia Limited entered into on 29 May 2013 (Seven Network Rights Transaction); and
>
> 2 whether the disclosed potential conflicts of interest (in the form of customer relationships with media buying companies associated with Mitchell) were such that he ought not to have assumed the lead role at the Board level that he did in connection with the Board's consideration and approval of the Seven Network Rights Transaction.

1112 Now it would seem that Dr Young on or around 19 December 2015 contacted both Mr Holloway and Mr Davies, then former directors, concerning the investigation. She provided their contact details to Ms Wood.

1113 On 19 December 2015 at 12.44 pm, Ms Wood sent the following email to Dr Young:

> Given our review is the subject of confidence among serving members of the Board I have spoken to Steve to clear a discussion with each of Graeme and Jim. Steve is

> comfortable for us to speak to both although, like us, he is concerned about the level of discussion on this matter that is becoming apparent outside the board.
>
> Quentin's office will liaise with Graeme and Jim to arrange to speak on Monday and I will alert them to that by email today.

1114 At 1.28 pm that day, Mr Healy sent an email to all directors in the following terms:

> Dear Board
>
> I have today been formally advised by our Review team of a fundamental and serious breach of directors' duties by a director.
>
> The duty of confidentiality has been breached by contacting and involving former directors in the review process without advice or consent from me. As you would be aware as President I have been co-ordinating the requests and times to speak to our Review Team but not participating in those discussions. This process has not been followed in the circumstances referred to.
>
> On the advice of our advisors this is a serious breach of directors' duties and I have spoken to the director in question, expressed my disappointment and formally requested that these breaches of duty cease.
>
> This conduct creates a serious risk to the reputation and perception of TA.
>
> Although the MAs are aware of the existence of the review, they have not received any details of the issues or indeed who is providing the advice. Should this information get into the media the damage is incalculable.
>
> Irrespective of the advice we receive from the review, this breach of directors' duty will need to be dealt with promptly in an appropriate manner and in accordance with the Corporations Act and our own Constitution and Charter.
>
> I expect we will need to meet by phone next week but please call me if you have any questions. In the meantime I remind all directors of their duty to keep these matters confidential.

1115 Now I appreciate the sensitivity of the matter then being investigated, but to me this was all an over-reaction by Mr Healy. And Dr Young was inevitably inflamed by it, as her emails of 20 and 22 December 2015 indicate. I would note at this point that Mr Healy prayed in aid Herbert Smith Freehills' advice to support his position, and Mr Healy belatedly produced a file note of a conversation with Ms Wood on 19 December 2015 supporting his position. But reputational and confidentiality questions seemed more legitimate concerns rather than whether Dr Young had breached her duties as a director. Now the debate between Dr Young and Mr Healy also continued via email between them after Christmas 2015 and after the report of the independent review had been delivered. I do not propose to conduct a post mortem on all of this. Whether Mr Healy was right or wrong does not greatly interest me. First, I am satisfied as to his bona fides. Second, even if he was wrong, so what? It adds nothing to establish ASIC's breach case against him.

1116 Let me turn to the results of the independent review. Ms Wood and Mr Digby reached the following views:

> In summary, we are of the view that:
>
> 1 nothing was brought to our attention which indicated that Mitchell had an actual material conflict of interest in connection with the Seven Network Rights Transaction;
>
> 2 circumstances did exist which might reasonably have been perceived to give rise to a possible conflict of interest however, they were not beyond what could reasonably be expected to have been inferred from the disclosures Mitchell had made; and
>
> 3 in the circumstances that we understand existed, including the expertise Mitchell was expected to bring to the Board's deliberations, the nature of the possible conflicts of interest arising from Mitchell's business relationships were not such as to have required him to abstain from adopting the lead role he took in connection with the Board's consideration and ultimately approval, of the Seven Networks Rights Transaction.

1117 Now in my view, nothing said by ASIC has reasonably impugned those findings.

1118 ASIC now complains that Mr Mitchell was not spoken to by the reviewers. That is true, but a few points. First, they had the relevant documents before them. Second, they did get confirmation of the matters that the reviewers thought to be important through Mr Mitchell's lawyers. Third, ASIC after the exercise of all of its coercive statutory powers, including against Mr Mitchell and Seven, which was an advantage that the reviewers did not have, has not impugned any of the specific findings of that review. Indeed, ASIC has adduced no evidence whatsoever establishing any actual or likely conflict of interest involving Mr Mitchell relevant to TA's negotiations with Seven in 2012 and 2013. And nor has it specifically alleged any such conflict of interest.

1119 In my view, ASIC's complaints concerning the independent review were little more than a side-show to the main game that I am required to adjudicate on.

1120 Finally, ASIC has complained that Mr Healy demanded the resignation, not only of Dr Young and Ms Pratt, but also of Mr Armstrong, who had supported them. Further, the board voted no confidence in them, and each resigned before a special general meeting which had been called to remove them on 15 January 2016. Thus according to ASIC, the directors who had sought to discharge their duties were removed, whilst those who had breached their duties were retained. But it would seem that the member associations lacked confidence in the resigning directors. I do not need to delve further into this.

1121 Let me now turn to ASIC's specific case against Mr Healy.

THE CASE AGAINST MR HEALY

1122 Let me begin by saying something about the standard of proof applicable to ASIC's case against both Mr Healy and Mr Mitchell.

1123 The standard of proof that it must meet is informed by s 140 of the *Evidence Act 1995* (Cth) which reflects the common law principles stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Satisfaction on the balance of probabilities must take into account the nature of the cause of action, subject matter and the gravity of the matters alleged. So in *Briginshaw*, Dixon J said (at 362):

> [R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

1124 Dixon J's use of the terminology of satisfaction derived from the legislative language under consideration in *Briginshaw* which required the court to be *satisfied* of adultery.

1125 Rich J also said (at 350):

> In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion.

1126 More recently, similar observations were made in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171.

1127 Let me now turn to the case against Mr Healy who gave evidence that in my view for the most part was cogent and commercial. It particularly had the advantage of being consistent with the contemporaneous documents and a very substantial proportion of the evidence from other witnesses who had little, if any, axe to grind. Further, I thought little of ASIC's tabulated *Browne v Dunn* type points which were said by ASIC to impugn his credibility. Now before getting into the detail, it is important to say something about Mr Healy's position as president and chairman and relevant contextual matters.

(a) Mr Healy's position and its context

1128 Mr Healy was a partner of the law firm Dentons Australia Pty Ltd (formerly Gadens Lawyers), where he had been a partner in the real estate group since 1999. He had over 30 years' experience in tennis governance, starting in the 1980s with a role on the governing committee of the Chatswood Tennis Club. In 2002, he was appointed to the Board of Tennis NSW as a director with special qualifications. Tennis NSW is a member association of TA. In 2005, he was appointed vice-president of Tennis NSW and in 2007 he was elected president.

1129 In October 2008, Mr Healy joined the board of TA as a director. In April 2010, he was elected president by the member associations commencing in October 2010. As president, Mr Healy also assumed the role of chairman of the TA board and also of general meetings of member associations. According to his evidence his responsibilities as president of TA were coextensive with his responsibilities as chairman of the board. Mr Healy resigned from the board of TA on 10 April 2017.

1130 As president of TA, Mr Healy sat on the Grand Slam Board with TA's CEO, along with each CEO and/or president of the tennis associations responsible for the US Open and French Open. In addition, between 2013 and 2016 he was a director of the International Tennis Federation. The ITF serves as the parent body for the sport of tennis internationally. He also served on the ITF Davis Cup Committee from 2013 to 2017.

1131 Now in the evidence before me there was no detailed position statement for the president/chairman position. Moreover, there was no detailed position statement for the position of vice-president, one of whom was Mr Mitchell. Mr Mitchell had been a director since 2008 and a vice-president since 2010. Mr Freeman had also been a director since 2007 and a vice-president since 2012.

1132 The constitution of TA recognises the position of president (clauses 2.1, 11.5, 12.5, 14.1(a), 14.4A, 15 and 17.8), vice-president (clauses 2.1, 14.4 and 15) and CEO (clauses 2.1 and 20). There could also be two vice-presidents.

1133 But the constitutional provisions were process type at best. They did not set out the substantive roles and responsibilities of those officers, save for the chairmanship role of the president, who at the time (2012/2013) had a casting vote at general meetings but not at board meetings. Further, they did not even say that a vice-president stepped into the shoes of the president when the president was absent. It seems that the vice-president's role was little more than what I

would describe as ceremonial. Of course, titles such as "president" and "vice-president" were calculated to exude leadership and responsibility. But if that be so, such content was to be found elsewhere. It was not to be found in the constitution and its desiccated provisions and phraseology.

1134 Mr Healy was also a member of various committees including the audit and risk committee. Mr Healy, Mr Freeman, Mr Fitzgerald and Mr Holloway were on the audit and risk committee over the relevant period of 2012/2013. Mr Freeman chaired it. Dr Young was not on it at any stage. Ms Pratt became a member of it after she joined the board. Mr Holloway and Mr Fitzgerald later stepped off it and Mr Armstrong and Mr McGregor later joined it. Both the chairman and the CEO from time to time were ex officio members of that committee.

1135 Now to appreciate the role and responsibilities of Mr Healy, it is necessary to also consider the role and responsibilities of Mr Wood. It is to be noted that the CEO was not required to be a director. And as I have said, Mr Wood was not a director.

1136 As Mr Healy saw it, TA's CEO was responsible for implementing the strategic direction set by the board and for the management and administration of TA, with assistance from the EMT. Mr Wood was CEO of TA from July 2005 to October 2013. Mr Wood was very experienced in the CEO role at the time Mr Healy assumed the presidency and he remained in that position throughout the broadcast rights process that culminated in TA entering into a new five-year agreement with Seven in May 2013.

1137 Mr Wood's employment agreement (clause 4.1) provided the following in terms of his duties as set out in the attached position details forming part of schedule 1:

> **The Position**
>
> The Chief Executive Officer is responsible for the overall direction and management of Tennis Australia through the relevant executive directors and managers and their support staff and reporting directly to the Board of Directors.
>
> **Key Accountabilities of the Role**
>
> As the Chief Executive Officer of Tennis Australia, the major responsibilities include:
>
> - Providing leadership and direction to all Tennis Australia activities.
> - Providing strong leadership, guidance and direction to all Tennis Australia staff through all direct reports.
> - Making recommendations to the Board in respect of certain matters on which the Board must make decisions.
> - Overseeing the preparation of corporate strategy.

- Reporting directly to the Board.
- Liaising with the President/Chairman.
- Reviewing corporate performance against the strategic plan.
- In conjunction with the Chairman and the Board determining the appropriate staffing structure for Tennis Australia.
- Initiating and participating in the process of staff selection and employment at direct report level (appointments subject to Board approval).
- Approving staff selection and employment engaged by direct reports.
- Monitoring staff productivity, morale, teamwork, communications, job satisfaction and taking steps, as necessary, to promote an effective satisfying and productive working environment with Tennis Australia.
- Providing strategies and ideas for the future development of Tennis Australia. Being innovative, and confidently presenting plans and initiatives with conviction to the Board.
- Developing strategy, and developing and implementing short-term and long-range plans based on this strategy.
- Managing relationships with members and outside bodies such as the government, the media, the public and sponsors.
- Achievements of budgeted profit results and other financial criteria, including cash flow.
- Preparation of recommendations on, and implementation of, capital expenditure programs and developmental programs.

1138 In my view Mr Healy in performing his role, responsibilities and duties as the president, chairman and a director of TA was entitled to take into account that Mr Wood had such a role and responsibilities and, in the absence of good reason to suggest to the contrary, was adequately discharging such functions. In the present case, ASIC advanced no evidence to suggest that there was such a reason to suggest to the contrary in relation to Mr Wood.

1139 But of course for Mr Healy to so take this into account is different from saying that Mr Healy could delegate or abrogate his own responsibilities and duties inherent in or associated with his own position(s) and statutory duties. He could not.

1140 Let me now say something about TA and corporate governance.

1141 As I have said, TA is a company limited by guarantee. The objectives of TA are set out in clause 4 of the constitution. The primary objective is to govern, promote and develop tennis in Australia. I will elaborate on these in a moment. Its members are the six state and two territory tennis associations which are referred to as member associations. The board is responsible for guiding and monitoring TA, setting its strategic direction in accordance with

the objects and purposes set out in TA's constitution, setting goals for management, and monitoring management's performance against these goals.

1142 It is also convenient to set out what appeared as a corporate governance statement in the annual report of TA for the year ending 30 June 2013 which adequately summarised various key features:

> **TA - the Company and Governance structure**
>
> [TA] is a not-for-profit Company limited by guarantee and registered in Victoria. The Company's purpose is to grow, manage, promote and showcase the game of tennis domestically and represent Australia's tennis interests internationally. The Australian Open, which is the Grand Slam of Asia-Pacific, is owned and organised by TA each year at Melbourne Park. The Members of TA are the six state and two territory tennis associations also known as the Member Associations (MAs).
>
> …
>
> **Composition of the Board of Directors**
>
> The Board comprises up to nine Directors of whom seven, including the President, are elected by the MAs at a General Meeting and up to two elected by the Directors at a Board meeting. As required by the Constitution all Directors are independent of simultaneous MA affiliation while they serve on the Board. This completes the significant developments in Corporate Governance reforms undertaken over recent years and fulfils the undertakings given to the Australian Sports Commission.
>
> **Activities of the Board and Directors**
>
> The Board of Directors is responsible for guiding and monitoring the Company, its strategic direction, setting its goals for management, and monitoring its performance against these goals on behalf of the MAs. The Board met eight times during the year and received reports from the Chief Executive Officer and other members of staff where appropriate…
>
> **The role of CEO**
>
> The responsibility for the management and administration of the Company is undertaken by the CEO, who reports directly to the Board. While it is primarily the responsibility of the CEO to ensure that suitably qualified and experienced personnel are retained, the Board is made aware on a continuous basis of any changes in key personnel and the quality of replacement staff to ensure that the Executive Team is appropriately qualified and sufficiently experienced to discharge its responsibilities.
>
> **TA Audit and Risk Committee**
>
> The Board has an Audit and Risk Committee and includes Chris Freeman (Chairman), John Fitzgerald, Graeme Holloway with the President and CEO (ex officio). The role of the Committee is to assist the Board in discharging its responsibilities for financial reporting, risk management, maintaining an internal control system and addressing matters of Corporate Governance. The Audit and Risk Committee achieves this through overseeing the annual budget process, the financial reporting process and interacting with management and the external auditors on behalf of the Board.
>
> …

1143 Further, let me say something about directors' remuneration or the lack thereof. Clause 16.5 of TA's constitution provided that:

> **16.5 Payments to Directors**
>
> No payment will be made to any Director of the Company other than payment:
>
> (a) relating to remuneration for their services to the Company as a Director, as determined by the Members from time to time. For the avoidance of doubt, the Members may resolve to pay different remuneration to different Directors (or pay remuneration to one or more Directors to the exclusion of other Directors);
>
> (b) of out of pocket expenses incurred by the Director in the performance of any duty as Director where the amount payable does not exceed an amount previously approved by the Board;
>
> (c) for any goods or services provided to the Company by the Director in a professional or technical capacity, other than in the capacity as Director, where the provision of the goods or services has the prior approval of the Board and where the amount payable is approved by the Board and is not more than an amount which commercially would be reasonable payment for the goods or services; and
>
> (d) relating to an indemnity in favour of the Director and permitted by the relevant section of the Corporations Act or a contract of insurance permitted by the relevant section of the Corporations Act.

1144 There was no evidence that the clause 16.5(a) exception had been availed of during the relevant time frame. There was no evidence of such resolutions and I did not see any payments recorded in the accounts. But I note that the annual report for the year ending 30 June 2013 indicated that certain payments concerning related party transactions had been made to entities associated with Mr Fitzgerald and Mr Mitchell.

1145 Generally, it would seem that Mr Healy did not receive any substantial remuneration for his services as president/chairman. And neither did the other directors in their capacity as directors. Mr Wood was not a director.

(b) The context, timing and content of information

1146 TA's objects and purposes as set out in its constitution were to:

(a) govern, promote and develop tennis in Australia;

(b) assist each of the member associations to promote and develop tennis in each State and Territory;

(c) be the principal body for the governance of tennis in Australia;

(d) uphold and maintain the rules and regulations of tennis in Australia;

(e) organise, conduct and promote tennis matches, championships, events and activities;

(f) select and control tennis teams and squads to represent Australia and TA;

(g) assist and encourage communication between TA and the member associations, and also member associations as between themselves, on matters of mutual interest.

1147 More generally, TA is not a private company whose sole corporate objective is the pursuit of profits for its members. Rather, it is the custodian of the sport of tennis in Australia. The composition of TA's board reflected a company with objectives concerned not solely or even primarily with the maximisation of profits. The board contained a mix of some directors with a background in professional tennis, for example Dr Young and Mr Fitzgerald, and later Ms Pratt. It also had some with commercial expertise, for example, Mr Tanner, Mr Freeman and Mr Davies.

1148 Clearly, in the present context the sufficiency of the information before the board was not just to be assessed on the basis that TA's sole objective in the broadcast rights negotiations was to realise the highest possible domestic television rights fee. There were many important non-financial considerations which the directors considered to be important.

1149 The sale of TA's domestic broadcast rights had to be considered by reference to a number of financial and non-financial objectives and considerations.

1150 First, TA wanted the next domestic television rights contract to provide that TA and not the contracted broadcaster would be the host broadcaster. So, TA would be responsible for the selection, filming, editing and production of the tennis footage, and would own the intellectual property in it. By controlling host broadcasting, TA could realise higher international rights fees and increased international sponsorships by being able to provide a variety of footage of players and matches tailored to the different interests of audiences in the variety of international markets into which it was selling. Further, TA could advance its negotiations with and fulfil its promises to the Victorian Government in connection with the redevelopment and substantial funding of Melbourne Park, including a new broadcast centre. Further, TA could monetise future exploitation of the footage.

1151 Second, the successful counterparty to TA needed to be sufficiently technically adept and experienced in broadcasting major tennis events to support TA during its first term of being the host broadcaster. Clearly, Seven had that skill.

1152 Third, the successful counterparty needed to have the capability to broadcast the AO on its primary FTA channel during prime time, without being constrained by other broadcast commitments such as the cricket. Now such a difficulty clearly affected Nine, and potentially Network Ten. It did not affect Seven to the same extent. Having TA's flagship event on a FTA primary channel, including during the nightly viewing period, was the key to maximising the exposure of tennis which was in turn consistent with TA's primary objective; both Mr Wood and Mr Healy clearly had this perception.

1153 Fourth, TA desired to support the long-term viability of tennis by having its signature event on a high rating network. At the time, Seven was the highest rating FTA commercial network. Contrastingly, Network Ten was a distant last.

1154 Fifth, TA desired to deal directly with a local network. It did not want to suffer the loss of the commission and control which came with dealing with a mere agent such as IMG.

1155 Sixth, TA desired to deal with a counterparty which had a strong reputation and track record, which Seven did. Further, TA desired to deal with a counterparty in respect of which there were no doubts as to its financial viability. Clearly, that was the case with Seven. The same could not be said for Network Ten or Nine. Indeed there were serious doubts about Network Ten's financial viability around this time. This pessimism was borne out by the later reality.

1156 Seventh, there was another important contextual matter. TA's members were the various state and territory associations. Such member associations nominated representatives to be board members of TA. And the board members who were from member associations were particularly interested in the extent to which TA was promoting or supporting the development of tennis in their regions and how those regions were going to get funding from TA.

1157 Now all of the above factors were to the fore of the thinking of Mr Healy and Mr Wood concerning the negotiations.

1158 Let me at this point make some observations concerning information flow to the board.

1159 The structure and content of the board packs reflected the breadth of matters before the board at its meetings. From the board packs, it is clear that tennis related matters occupied a

substantial focus at TA board meetings, including those held on 3 December 2012, 4 March 2013 and 20 May 2013. In briefing the board throughout this period, Mr Wood was conscious of the important objectives that TA had, including the extent to which actions by TA would promote and develop tennis in Australia, which was a broader objective than the commercial objective of making a profit out of the grant of domestic broadcast rights.

1160 Relevantly to the present context, the preparation of board packs and determining what documents were to be included in them was Mr Wood's primary responsibility.

1161 Further, Mr Wood had a direct channel of communication to the board through the written CEO reports he provided as part of the board packs for each board meeting. And Mr Wood included in those written CEO reports, and also gave a detailed oral presentation to the board of, all of the information that he considered material to the particular matters under consideration. This specifically included the issue of domestic broadcast rights.

1162 Indeed Mr Wood made a conscious decision to use his CEO's report as the method for keeping the board appraised at the level he considered appropriate about the process for awarding the domestic broadcast rights. He determined what went into his CEO's report. He determined whether it was simply to be presented orally. Further, he was asked by Mr Young QC:

> And in the way in which this developed, at every board meeting that we're directly concerned with, 3 December, 4 March, April and then May, your reports, your CEO reports, were delivered orally, were they not?---I can't recall.
>
> Well, we will go through them. You don't recall doing a written CEOs report in respect of broadcast rights negotiations, do you?---I don't recall.
>
> But it was your choice as well whether you made a report in writing or whether you made it verbally?---Yes.
>
> And when you made these choices about what to include in your CEOs reports, you were doing your best to ensure that all matters of importance were brought to the attention of the board, were you not?---Yes.
>
> And you were exercising your judgment about what level of detail would best assist the board?---Yes.

1163 Now as an officer of TA, Mr Wood also owed a duty to TA under s 180(1). Further, he attended all the relevant board meetings, had more information about all the relevant matters than Mr Healy and briefed the board orally in a manner he considered to be sufficient. And he determined what documents to include in each board pack or not (as the case may be). In this regard there is no suggestion that Mr Healy told Mr Wood not to communicate relevant

information to the board that Mr Wood desired to communicate concerning the domestic broadcast rights.

1164 Further, Mr Ayles, who was the author of two of the allegedly material documents, also provided monthly written reports to the board in the form of a commercial board report. And Mr Ayles was able to include in those reports any information that he considered material, subject only to Mr Wood's views. And again there is no evidence that Mr Healy ever exercised any influence over the content of Mr Ayles' reports, or otherwise discouraged Mr Ayles from disclosing in his reports any matter that he considered appropriate.

1165 Let me express some further propositions on the question of information and the chairman's role in this respect, a theme that I will also return to later.

1166 First, the chairman is not entitled to completely delegate his function to the CEO to determine the amount and quality of information to be put before the board to deal with any one or more agenda items. But he can and should consult with the CEO. Moreover, if he is satisfied that the CEO has exercised or made the appropriate judgment, he is entitled to rely on it.

1167 Second, if it has been decided that information should be presented to the board in oral form rather than written form, for example, an oral presentation by the CEO, then the chairman must make sure through prodding or the asking of questions at the board meeting that the CEO has orally presented what is both necessary and sufficient for the relevant agenda item to be properly considered in terms of the decision *then* required by the board.

1168 Third, and relatedly, if a management person other than the CEO is the more appropriate person to present, then the chairman should ensure that that person is in attendance to present.

1169 Fourth, in determining what information should be put before the board to deal with a particular agenda item, the chairman in conjunction with the CEO should consider the context. Let me elaborate.

1170 As to the context of timing, does the agenda item require a formal decision, such as agreeing to the terms of a new contract? Or is the item only for discussion with a decision required at a later meeting? Is it a matter merely for noting? Or is it a matter on which, say, the CEO or executive management generally requires some guidance but with no final decision required? Or is it a matter on which the board must make a final decision or sign off? All else being equal, an increasing amount of information may be required to be given to the directors as one passes through each phase.

1171 As to the subject matter, what is the nature of the agenda item? Does it require detailed and precise information, for example, when one is considering approving a set of accounts? Or does it only require vaguer and more diffuse information, for example, when one is considering future economic trends and their effect on the business?

1172 Fifth and more generally, the utility of the information to be presented is all important. Is it in a comprehensible form for the directors? Does it raise more questions than it answers? Is it too much? Or is it too little? Is it the right time to present the detail? Or is that for later? All of these questions are to be considered in determining the balance to be struck to ensure that the directors are presented with the required level of accurate and meaningful information so that they can perform their function in dealing with the agenda item in terms of what they are required to consider and decide at the particular meeting in question.

1173 Further, there were other factors that affected the content of Mr Healy's obligation in respect of any particular piece of information at a particular board meeting.

1174 First, to what extent did the board already know of the information within the documents that ASIC says should have been put before the board? Further, was the relevant information stale in the sense of being overtaken by the time of the relevant board meeting?

1175 Second, Mr Healy was entitled to a significant extent to rely on Mr Wood, who was the CEO with control of the negotiation process, to inform the board of material information at the level of detail that Mr Wood considered to be appropriate. Mr Wood decided to keep the board updated by way of his oral CEO briefings. These were considered by Mr Wood to be both appropriate and more than sufficient for the board's purposes. But it must be accepted that whether an oral briefing in lieu of providing actual documents to the board sufficed to discharge Mr Healy's duty to exercise reasonable care and diligence depended on the particular circumstances.

1176 Third, board members had the capacity to ask questions at board meetings. I must say that the board of TA at the relevant time was highly skilled and had a diverse range of expertise. They were not mere passive recipients of information as ASIC seemed to suggest. If they wanted more information on a particular subject or a document, they could have asked for it. There is no debate that Mr Healy and Mr Wood properly addressed any such request if and when made.

(c) ASIC's case

1177 ASIC's case against Mr Healy concerns an alleged failure to exercise reasonable care and diligence under s 180(1) by failing to disclose certain information and documents. Its case is limited to three TA board meetings, namely 3 December 2012, 4 March 2013 and 20 May 2013. It is put in two ways.

1178 First, it is said that there was a failure to ensure that particular documents were included in the board packs sent to directors in advance of those meetings. As I have already indicated, the evidence discloses in my view that determining the content of the board packs was the domain of management, supervised by Mr Wood. The established division of responsibilities between Mr Healy and Mr Wood was that Mr Wood was responsible for the content of the board packs, and Mr Healy had no real role in the preparation of the board packs.

1179 Now it may be accepted that Mr Healy reviewed and approved the agenda for the board meetings. But the preparation of the board packs, and determining what material was to be included in the board packs, was the domain of management, notwithstanding that Mr Healy reviewed the draft agenda, and approved the final agenda, for board meetings.

1180 Second, ASIC says that Mr Healy failed to exercise reasonable care and diligence by not disclosing to the board specific information concerning IMG, the interest from other networks and the opinion of Gemba.

1181 So, ASIC says that at the 3 December 2012 board meeting, Mr Healy failed to disclose Seven's November offer, the first IMG offer, the Gemba report and the Gemba summary, and the level of interest of Network Ten.

1182 And ASIC says that at the 4 March 2013 board meeting, Mr Healy failed to disclose those documents and also the Ayles paper, the 12 December 2012 email of Mr Wood and the level of interest of Network Ten.

1183 Further, ASIC says that at the 20 May 2013 board meeting, Mr Healy failed to disclose all those documents, the second IMG offer and also the Gemba cricket presentation, the board subcommittee paper, Seven's final offer, the level of interest of Network Ten and Nine and the opinion of Gemba that TA had the opportunity to increase significantly the amount TA received for the domestic broadcast rights.

1184 Now it is not the failure to disclose the documents per se that is ASIC's case. Rather the substance of ASIC's case is that Mr Healy failed to disclose material information contained in those documents. In relation to the particular information said by ASIC not to have been disclosed, as Mr Young QC for Mr Healy identified, it could be summarised as follows.

1185 First, in relation to the Gemba report and the Gemba summary, the relevant information as particularised or identified by ASIC was limited to the valuation which Gemba gave to TA's media rights and the fact that changes in the way consumers view content were driving a greater degree of competitive tension for certain content, these changes were driving increases in the overall broadcast value, and increasing total broadcast revenue would primarily be driven by improving the yield on FTA broadcast rights.

1186 Second, in relation to Seven's November offer, the relevant details of that offer as particularised or identified by ASIC were the rights fees, which included the sign on fee and ratings bonus, and that Seven would continue as host broadcaster.

1187 Third, in relation to the first IMG offer, the relevant details as particularised or identified by ASIC were that IMG made a conditional offer to acquire the domestic broadcast rights for a seven year period for $210 million, plus a percentage of IMG's earnings from sub-licensing the rights, and a further offer to acquire the international rights for a seven year period for a minimum fee of US $202 million.

1188 Fourth, in relation to the second IMG offer, the relevant detail as particularised or identified by ASIC was that IMG offered to acquire the domestic broadcast rights for a five year period for $150 million, being $30 million a year, and essentially the same amount as the first IMG offer, plus a percentage of revenue earned by IMG for sub-licensing the rights.

1189 Fifth, in relation to the Ayles paper, the relevant details as particularised or identified by ASIC were: (a) the observation that the sale of the domestic broadcast rights "will be the single largest revenue transaction for TA so far in its history"; (b) a summary of the terms of the Seven agreement; (c) a note of what should be TA's main objectives in relation to a future agreement for the domestic broadcast rights; (d) an analysis of market conditions for the licensing of broadcast rights of sporting activities; (e) that there has been "genuine interest" in the domestic broadcast rights from a number of parties, with written offers provided by two parties and verbal interest from others; (f) the observation that there is "competitive tension" in the market place between FTA broadcasters, pay television and new media channels; (g) the provision of

a detailed analysis of Seven's November offer and the first IMG offer; (h) a recommendation by Mr Ayles that TA reject both those offers and commence the ENP with Seven; and (i) the annexures consisting of the Gemba report, the Gemba summary, the Global Media and Sports Presentation, the IMG opinion, Seven's November offer and the first IMG offer. I should say at this point that the directors were never aware of the Global Media and Sports Presentation.

1190 Sixth, in relation to the board subcommittee paper, the relevant details as particularised or identified by ASIC were: (a) a summary of the value of the domestic broadcast rights on a platform by platform basis; (b) the need to create competitive tension to maximise rights fees; (c) the fact that the contractual arrangements with Seven were outdated and did not meet TA's objectives; and (d) that TA's broadcast rights were significantly undervalued in the Seven agreement.

1191 Seventh, in relation to Seven's final offer, the relevant details as particularised or identified by ASIC were the rights fees, comprising a total of $195 million over a five-year period.

1192 Eighth, in relation to Network Ten, the relevant information as particularised or identified by ASIC was that Network Ten had said that they were "very serious" in acquiring the domestic broadcast rights and might pay in excess of $40 million per annum for those rights.

1193 Ninth, in relation to Nine, the relevant information as particularised or identified by ASIC was that Nine had said that it was "seriously interested in acquiring the domestic broadcast rights".

1194 Tenth, ASIC also alleges that Mr Healy should have ensured that Mr Wood's 12 December 2012 email and the Gemba cricket presentation were provided to the board. However, ASIC did not expressly particularise the specific information contained in those documents that it considered material such that Mr Healy should have disclosed them.

1195 Let me at this point state some summary propositions.

1196 Relevant information from each of Seven's November offer, the first and second IMG offers, and the Gemba report were disclosed at board meetings by Mr Wood. Mr Wood was an experienced CEO. He had the carriage of the negotiations. He was privy to all of the relevant information. And he was responsible for updating and informing the TA board in relation to the domestic broadcast rights. It was Mr Wood who made the relevant judgment call as to the degree of detail of the disclosure required and when.

1197 Further, as for the Ayles paper, Mr Wood had determined not to distribute it to the board by January 2013. This was because it ignored the board discussion on 3 December 2012, it was confusing to some extent and it had been overtaken by Mr Wood's arrangements to obtain a revised offer from IMG. Further, Mr Wood's 12 December 2012 email was also an inappropriate document to provide to the board. Moreover, it too had been overtaken by events by late December 2012.

1198 In my view, when it came to updating the board on management's progress in relation to the domestic rights negotiations, the evidence establishes that there was a clear demarcation between the role of Mr Wood as CEO, on the one hand, and the role of Mr Healy as chairman, on the other hand. Mr Wood was responsible for deciding what information he briefed to the board in connection with the domestic broadcast rights and the form he used to convey it. Clearly, Mr Healy was entitled to a significant extent to rely on Mr Wood's judgment on such matters, and he did so rely.

1199 Further, the specific information and documents which ASIC alleged that Mr Healy was bound to disclose but failed to disclose to the TA board were judged contemporaneously by Mr Wood to not require disclosure or were already out of date or irrelevant at the time of the alleged non-disclosure.

1200 In my view, after reviewing all of the evidence and also observing Mr Wood give evidence, it seems to me that there was no proper basis for saying that Mr Healy should have second-guessed Mr Wood's judgment calls concerning the disclosure of information to the board, albeit that Mr Wood was an officer but not a director of TA.

(d) Factual analysis – non-disclosure of documents and information

1201 It is convenient to now discuss each document and item of information which ASIC says Mr Healy was bound to disclose to the board at one or more board meetings.

Seven's November offer

1202 At the 3 December 2012 board meeting Mr Wood commenced his update on the broadcast rights negotiations by referring to Seven's November offer. Now although Mr Mitchell considered that Seven's November offer was reasonable in the then current economic environment, none of the other directors shared that view. Accordingly, it was decided that Seven's November offer was inadequate and not capable of being accepted. I will not repeat the more detailed evidence that I have set out earlier concerning this meeting.

1203 It was Mr Wood's choice not to include Seven's November offer in the board pack. Now Mr Wood had intended to table Seven's November offer at the board meeting, but chose not to do so because of the course the meeting took. But he disclosed the substance of that offer at the 3 December 2012 board meeting.

1204 In my view ASIC does not have a tenable case against Mr Healy that his failure to disclose this document at any of the nominated board meetings put him in breach of s 180.

First IMG offer

1205 It is accepted that the first IMG offer was never tabled before the board.

1206 ASIC says that the first IMG offer should have been disclosed. It says that even if it could not be accepted, it could have generated competitive tension and shown the board, if disclosed, that more could be obtained than the $24 million a year then being offered by Seven.

1207 Now it is not in doubt that Mr Wood orally briefed the board about the first IMG offer at the 3 December 2012 board meeting including as to its key details. Mr Wood informed the directors of the figures that were being put forward by IMG, but noted that the offer had conditions.

1208 Mr Wood said that the major condition was the linkage between the domestic and international rights in that one component of the offer could not be accepted without the other. Mr Wood said to the board that this was unhelpful because it raised the possibility of IMG cross-subsidising the domestic rights with what it achieved on the international rights.

1209 Further, the first IMG offer expired at 5.00 pm on 31 December 2012. But clearly it was not a live offer for TA. This was because TA could not accept any offer prior to 1 October 2013 given the terms of the ENP with Seven.

1210 Further, there is important context as to the circumstances in which the first IMG offer came to be placed before the board at the 3 December 2012 meeting.

1211 It is to be recalled that Mr Wood had contacted Mr Chris Guinness of IMG in October 2012 to obtain his advice following the receipt of Seven's revised October offer. Mr Guinness responded with a written opinion identifying several deficiencies with Seven's offer.

1212 Further, Mr Ayles asked Mr Guinness to assist TA by making a direct offer to TA for the domestic rights. This was to provide Mr Ayles and Mr Wood with leverage in rejecting Seven's offer.

1213 Further, the evidence establishes that Mr Wood's motivation in putting the first IMG offer before the board on 3 December 2012 was to lay a marker for the rights in the mind of the directors and to signify that there was a value differential between what IMG was saying the value was and the rights fee offered in Seven's various offers to that point in time.

1214 Now it was Mr Wood's decision not to include the first IMG offer in the board pack. And it was his decision to advise the board of the details of the offer in his report to the board. Mr Healy accepted Mr Wood's advice in that respect on 22 November 2012. Mr Healy gave evidence that he did not see this as an issue because he agreed with Mr Wood, on 22 November 2012, that Mr Wood would recite to the board on 3 December 2012 the basic details of the first IMG offer and the condition linking it to an extension of IMG's existing international rights.

1215 Further, Mr Wood in substance did disclose the details of the first IMG offer to the board. But in any event, the offer was a strategic device being deployed by Mr Wood to bid Seven up. It was not an offer that was, of itself, ever capable of acceptance at the 3 December 2012 board meeting. Moreover, after the board meeting, it was overtaken by Mr Wood's decision to procure the second IMG offer.

1216 In my view, ASIC's assertion that Mr Healy breached his duty by not disclosing the details of the first IMG offer to the board on 3 December 2012 simply has no substance to it.

Gemba report

1217 It is accepted that the Gemba report was never put before the board. But at the board meeting on 3 December 2012, Mr Wood communicated that TA had obtained a valuation from Gemba which had valued the rights at up to $40 million a year across all platforms. But ASIC says that this is not what the Gemba report said. Let me elaborate on what ASIC says, although it must be said at the outset that its case on this aspect was a movable feast. This is a characterisation, not a criticism.

1218 According to ASIC in its closing written submissions, the report estimated that from 2015 to 2019 the broadcasts of the AO series across all platforms would yield revenues which ASIC tabulated as follows (ASIC's final table):

Broadcast	**Low growth ($m)**	**Moderate growth ($m)**	**High growth ($m)**
Free-to-air	158.00	183.00	212.00
Indirect benefits plus 'halo effect'	34.00	40.00	46.00
Production costs	25.00	25.00	25.00

Pay TV	12.00	13.00	14.50
Online	5.05	7.55	9.15
Mobile	0.83	1.00	2.80
Total	**234.88**	**269.55**	**309.45**

1219 For the low growth figure, this is about $46.98 million per annum for five years. For the high growth figure, this is about $61.89 million per annum for five years.

1220 ASIC says that if the directors had had the whole report, they might reasonably have expected that in open competition the rights might have been bidded at least to the low-growth scenario being $46.98 million per annum, if not closer to the high-growth scenario being $61.89 million per annum, of the total revenues Gemba had estimated for 2015 to 2019. So, according to ASIC, the whole report was relevant for the board to see.

1221 Yet, so ASIC says, the board never saw it because Mr Healy, based upon Mr Wood's assessment communicated on 22 November 2012, did not think that it was necessary that the board should see it. This was elaborated on under cross-examination by Mr Pearce SC, when Mr Healy explained:

> And you've got a valuation there. It says up to 40 million, but there's a lot of detail there. There's a lot of assumptions in there. You didn't think, as chair of the board, that the other members of the board should be given as much information as possible to enable them to assess whether or not to accept the Seven offer on 20 May?---Well, on 22 November, I met with Mr Wood in relation to the first Seven offer, and I said, "What information do you think is – is appropriate to give to the board in relation to the Seven offer?" and we – we had that discussion. His view was, "The board need to know the key take-out", which was that it's $40 million across all of the platforms, and I – I accepted his view. And the way he explained it, it made good sense. I accepted his view.
>
> And you didn't exercise any independent assessment of that?---I exercised a judgment in considering and accepting his view.

1222 ASIC says that it was put to Mr Wood that he had told Mr Healy on 22 November 2012 that he would refer to the Gemba report figure of up to $40 million in what he would put forward to the board on 3 December 2012. But it was not put that he had determined that nothing else of the Gemba report should be put forward. Therefore ASIC says that Mr Healy's version of events should not be accepted. I would say now that I have no reason to doubt Mr Healy's version of events. It seems clear that Mr Wood made this judgment call and communicated as much to Mr Healy.

1223 Further, ASIC says that if Mr Healy accepted Mr Wood's judgment, he abdicated his own. I would say now that I also reject such a submission.

1224 Before dealing with this disclosure question further and the alleged breach of duty by Mr Healy, let me make some general observations concerning the analysis contained in the Gemba report before I get into the detail.

1225 First, Gemba itself recognised that its estimates and projections had limitations and that differences between such estimates and projections and what might actually occur could be material. Of course, this is no more than to state the obvious.

1226 Second, Gemba described its analysis as a valuation. But when one carefully analyses both the detailed analysis prepared in May 2012 and the summary prepared in June 2012 for a board pack, to describe its analysis as a valuation is to over-formalise the description. Rather, it was what Gemba itself described as a "value estimate". And its high point seemed to be the conclusion that "[it] is estimated that TA could realise up to $40m in rights fees across its 4 key broadcast platforms in 2015".

1227 Third, let me linger on that last statement for a moment.

1228 If there is any part of Gemba's analysis that could be said to give a total value of the rights, this is the only such statement. Now ASIC repeatedly and wrongly suggested that Gemba's analysis gave a higher valuation than $40 million per annum. It did not. This is the only statement of its type.

1229 Further, the statement was "TA could realise up to $40m". Clearly as a matter of language this was not giving a valuation of more than $40 million. Indeed, it was not even giving a valuation *at* $40 million. It was giving a valuation of *up to* $40 million per annum.

1230 Let me pause at this point and note an email communication from Mr Wood to Mr Healy on 14 June 2012 which was in the following terms:

> [A]s discussed, please find attached Gemba's final Domestic Broadcast Rights Valuation report.
>
> Their analysis and top line numbers justify our internal approach and philosophies for the next domestic broadcast rights deal. In short, their upper estimate of the value of our rights is $40m, and they provide a specific breakdown platform-by-platform. Their approach and methodologies provide the evidence based data and analysis that supports our position.
>
> You will note that there is a second document entitled "Board Pack" which is a summary of the full extended document.

1231 On my reading of the Gemba valuation that was an entirely accurate and fair description of the punch-line in terms of the expression of Gemba's ultimate conclusion. And it was a description that Mr Healy could quite reasonably rely upon as summarising Gemba's punch-line.

1232 Further, this figure of $40 million was expressed by Gemba concerning 2015 where its analysis was, relatively speaking, more robust as compared with its analysis for, say, 2019. I should say that ASIC sought to spin this the other way, by saying that in later years one could assume a higher figure than $40 milllion. But in my view, for later years the less robust any estimate would be, although the estimate could be higher.

1233 Let me now turn to the detail of Gemba's analysis and start with some general observations.

1234 Its figure of $40 million was built up from the combination of:

(a) $35.8 million, being the estimated rights fees for FTA;

(b) $2.5 million, being the estimated rights fees for STV;

(c) $1.2 million, being the estimated rights fees for AO online platforms; and

(d) $420,000, being the estimated rights fees for AO mobile platforms.

1235 These sum to just under $40 million. And as I have said, they were estimated for 2015.

1236 I propose to say very little separately about the STV, online and mobile components save to say that Gemba recognised that STV was a relatively small revenue pool, but there were limited opportunities to increase it. Further, Gemba recognised that in respect of online and mobile platforms the short term rights fee revenue was limited, but such platforms could be developed to achieve longer term value. Presumably all such matters were taken into consideration by Gemba in expressing its conclusions.

1237 Let me dwell for a moment on the methodology Gemba used to come up with its FTA rights valuation.

1238 The first step Gemba took was to estimate the direct benefits to Seven of the 2012 FTA broadcast of the AO. It estimated the direct revenues and expenses attributable to that broadcast to determine a net direct benefit. But two points. The estimate excluded Seven's production costs. And the estimate did not include the value of advertisements used by Seven to cross-promote its own content. It estimated that net benefit to be $41.6 million. I should say that this figure is derived by taking the estimate for 2012 of Seven's gross direct advertising revenue

of $46.2 million and subtracting agency commissions of $4.6 million, to give a figure of $41.6 million.

1239 Let me say something more about this $46.2 million. This is Gemba's estimate of course for Seven's gross direct advertising revenue for 2012. Gemba also indicated that as part of its analysis it considered that international benchmarking indicated that an FTA broadcaster would pay up to 75 cents per dollar of direct advertising revenue realised from premium, event based sports content. This assumption drove then its figure of $35.8 million, being the estimated rights fees for FTA for 2015; the arithmetic does not work out precisely, but the methodology is clear; perhaps the 2012 figure of $46.2 million was adjusted to 2015 ($47.8 million) upon which 75% was then used. Of course, such benchmarking had flaws. Gemba did not analyse or consider any Australian benchmarking. Further, one had to be careful with benchmarking as one had to consider whether or not seasonal content was involved.

1240 The second step Gemba took was to calculate the estimated indirect benefits. So Gemba estimated the additional indirect revenues and expenses attributable to the 2012 FTA broadcast, including increased ratings and accordingly advertising revenue from lead in and lead out programs (indirect net benefit of $716,000) and cross-promoted programs (indirect net benefit of $6.26 million). Of course the halo effect is another description of the benefits flowing from such cross-promotion.

1241 Gemba then totalled the amounts from the first and second steps ($41.6 million, $716,000 and $6.3 million) to give a figure of $48.6 million. Gemba concluded then that Seven had derived an estimated net benefit of $48.6 million from the broadcast of the AO on its primary channel.

1242 The third step involved taking the net benefit of $48.6 million and forecasting the estimated total value attributable to the FTA broadcast of the AO during the proposed deal period (2015 to 2019). Three different scenarios of advertising revenue using compounded annual growth rates (CAGR) were used, namely, minus 2% (low growth), 1% (moderate growth) and 4% (high growth) to calculate the estimated net benefit of the AO FTA broadcasting rights over 2015 to 2019, that is, five years. So:

(a) for the low growth scenario (minus 2%), the estimated net benefit was $220 million;

(b) for the moderate growth scenario (1%), the estimated net benefit was $255 million; and

(c) for the high growth scenario (4%), the estimated net benefit was $296 million.

1243 Now it could hardly be said that these figures were robust, particularly the high growth scenario. Further, it is to be noted that the estimates did not account for production costs. I will return to this issue later.

1244 The fourth step was to take these figures and to adjust them, such as to estimate the FTA broadcast rights fees over the deal period. At this point, I should set out the table which Gemba used to present these estimates:

Benchmarking suggests that a FTA broadcaster may be prepared to pay $158m-$212m in rights fees over the Deal Period

Estimate of FTA Broadcast Rights Fees over Deal Period

Component of Estimate	Low Growth Scenario (-2% Rev. CAGR)	Mod. Growth Scenario (1% Rev. CAGR)	High Growth Scenario (4% Rev. CAGR)	
Net Benefits Over Deal Period	$220m	$255m	$296m	• *See previous page for inputs*
+ Agency Commissions	$24m	$28m	$33m	• *Reflects 10% of the total net benefits received over the Deal Period*
- Indirect Benefits	$34m	$40m	$46m	• *Reflects 14% of the total net benefits received over the Deal Period*
= Net Direct Revenue Over Deal Period	$210m	$244m	$282m	
x FTA Cost of Content : Revenue Ratio	75%	75%	75%	• *Benchmarking indicates a FTA broadcaster will pay up to 75 cents per dollar of direct revenue realised for premium, event based sports content (under the current deal, Ch 7 pays approximately 43 cents in the dollar). Benchmarking suggests that the estimated rights fee **will not** be impacted (i.e. reduced) by the incurrence of production costs on the part of the broadcaster*
= **Estimated Rights Fee Domestic AO Rights**	$158m	$183m	$212m	

1245 So, this analysis enabled Gemba to make the statement at the top of the table that "Benchmarking suggests that a FTA broadcaster may be prepared to pay $158m–$212m in rights fees over the Deal Period" (five years). Dividing by five, the range is $31.6 million per annum to $42.4 million per annum. The moderate growth figure works out to $183 million. It seems that this was used as the basis for the 2015 figure of $35.8 million referred to earlier concerning the estimated rights fees for FTA.

1246 Now thus far I have only been talking about FTA broadcast rights fees. To those figures had to be added components for STV, online and mobile platforms rights fees.

1247 Of course, save for the $40 million figure this was all not a valuation as such, although ASIC persistently used such a description.

1248 In closing written submissions, ASIC sought to rely on an exercise that purportedly extrapolated the Gemba report to show that the domestic broadcast rights might be worth more. ASIC's final table, which I have set out earlier, was said to be in replacement of its aide memoire MFI A8, which ASIC had to concede was incorrect.

1249 Now ASIC's idiosyncratic and problematic final table is outside its pleaded and particularised case, which relates only to the Gemba valuation itself. Further, ASIC's final table was not supported or verified by any evidence, expert or otherwise.

1250 Further, it was not the subject of any evidence in chief from Mr Wood that this was a correct treatment of the Gemba report. And it could hardly have affected his advice to both Mr Healy and the board that the significant take out in the Gemba report was its valuation of the rights across all platforms at up to $40 million per annum.

1251 Further, ASIC's final table was never put to Mr Healy. And the version put to him in cross-examination, MFI A8, is now conceded by ASIC to be incorrect. I would reject ASIC's belated use of its purported poly-filler.

1252 Further, to the extent that ASIC sought to support its analysis with reference to the evidence of Mr McWilliam and Mr McLennan, such evidence of course did not form any part of Gemba's valuation or Mr Wood's assessment of that valuation. Rather, the question is what Gemba said as reasonably construed by Mr Wood and others at the time and informed by their knowledge and relevant beliefs at the time.

1253 In any event, I agree with the defendants that ASIC's final table was an incorrect treatment of the Gemba report in any event. Moreover, there is considerable force in Mr Young QC's contention that the fact that ASIC has, after having its team of lawyers and investigators look at the Gemba report since June 2016, now engaged in two failed attempts to extrapolate from Gemba in an endeavour to get the rights fee valuation as high as possible, demonstrates that placing the entirety of the Gemba report before the board may only have confused it. In my view, ASIC's shifting sands exercise only serves to confirm the correctness of Mr Wood's judgment in placing the $40 million bottom line figure before the board rather than the entire report.

1254 Let me say something further about ASIC's case.

1255 ASIC's cross-examination of Mr Healy proceeded by reference to ASIC's aide-memoire, MFI A8, which was as follows:

GEMBA VALUATIONS

Rights	Low ($million)	Medium ($million)	High ($million)
FTA	158.00	208.00	237.00
Production costs	25.00	25.00	25.00
Pay TV	12.00	13.00	14.50
Online	5.05	7.55	9.15
Mobile	.83	1.00	2.80
Totals	**200.88**	**254.55**	**288.45**

1256 ASIC's MFI A8 purported to deploy the ranges from Gemba's detailed report, with some additional assumptions. But MFI A8 had problems.

1257 The medium and high FTA figures were not to be found anywhere in the Gemba report. The medium to high figures in the range, namely, $208 million and $237 million, had each been inflated by $25 million, presumably on account of production costs. But the next line in MFI A8 purported to add production costs of $25 million for each part of the range. Now even if it had been conceptually correct to add production costs to the FTA valuation, ASIC's approach involved double counting.

1258 But as I have said, in ASIC's closing submissions, ASIC provided what I have set out and described earlier as ASIC's final table, which removed one amount of these double counted

production costs from MFI A8. But it introduced a new line for "Indirect benefits plus halo effect". And ASIC introduced this table by saying "The Report estimated that, from 2015-2019, the broadcasts of the Australian Open series, across all platforms, would yield the following revenues". But that statement was problematic. And what followed was ASIC's own combination of valuation range figures (not revenue), adding back indirect benefits but not commission expenses, adding alleged production costs (not revenue), and adding STV, online and mobile benefits but with no allowance for any costs or profit from those three additional platforms.

1259 I agree with the defendants that ASIC's final table misapplied the Gemba report. And it retained three errors from MFI A8, and also introduced a new error.

1260 ASIC's first error was the incorrect addition of indirect benefits as part of the rights fee valuation. This was a new error to that already existing in MFI A8.

1261 ASIC introduced into its final table "Indirect benefits plus halo effect" as a straight addition to the FTA range figures of $158 million, $183 million and $212 million in the Gemba report. But that addition was contrary to the basis of the Gemba valuation.

1262 On Gemba's methodology, the net direct revenue over the deal period to which the benchmark of 75 cents per dollar was applied was arrived at by removing indirect revenues from the total net benefits, but then adding back agency commissions that had been deducted in the course of arriving at total net benefits. The appropriateness of the 75 cents benchmark was inextricably tied to the fact that it was being applied to net direct revenues prior to the deduction of agency commissions, and that indirect revenues had been excluded. The basis of the valuation was that "International benchmarking indicates that a FTA broadcaster will pay up to 75 cents per dollar of direct revenue realised from premium, event based sports content".

1263 This may be explained as follows.

1264 First, the $34 million ($34.16 million exactly), $40 million ($39.62 million exactly) and $46 million ($46.06 million exactly) "Indirect benefits" figures were expressly noted by Gemba to be figures which "Reflects 14% of the total net benefits received over the Deal Period" being "Net Benefits Over Deal Period + Agency Commissions". So, the indirect benefits were already included in the "total net benefits", being the sum of Net Benefits Over Deal Period + Agency Commissions, as the word "total" indicates.

1265 Second, the Gemba valuation expressly subtracted the "Indirect Benefits" from the "Net Benefits Over Deal Period + Agency Commissions" to arrive at the figures of $210 million, $244 million and $282 million, to which the multiplier of 75% was applied, so as to get the range figures of $158 million ($157.5 million exactly), $183 million and $212 million ($211.5 million exactly). This can be shown by the relevant minus sign and basic arithmetic.

1266 Third, the above deduction of indirect benefits prior to applying the 75% figure did not indicate that the FTA range figures merely represented Gemba's valuation of direct benefits to an FTA broadcaster. Rather, the basis of the valuation was that "International benchmarking indicates that a FTA broadcaster will pay up to 75 cents per dollar of direct revenue realised from premium, event based sports content". That expressly required indirect benefits to be deducted before multiplying by 75% to determine what an FTA broadcaster "will pay up to", that is, the value. So, to add back indirect benefits and to suggest that this represented any figure arising out of Gemba's valuation was misconceived. In effect, the 75% benchmark when applied to gross direct revenues, that is, before commissions, took full account of indirect benefits, costs and profit margin.

1267 Now ASIC said that "benchmarking" was the practice of UK broadcasters, who would "pay up to 75 cents per dollar of direct revenue realised to broadcast premium, event-based sporting content". But it said that there was no evidence, either in the report or otherwise, that that practice had been followed in Australia, and there was some evidence that it had not been. Accordingly, ASIC said that if the directors of TA, especially the experienced businessmen on the board, Mr Tanner and Mr Freeman, had been informed of all of the revenues that were forecast to flow from the rights, they might reasonably have expected a broadcaster to bid more than at 75% of the direct revenue, and even for some of the indirect revenue, which was quantified at $34 million to $46 million over the period of the deal. And this is ultimately what Seven in fact did. When anticipating direct revenues of about $33 million per annum, it offered $39 million per annum. But this is all hindsight analysis by ASIC. I am considering what Gemba in fact did and how it was actually interpreted or could reasonably have been interpreted at the time.

1268 ASIC's second error was the incorrect treatment of production costs.

1269 Now in ASIC's final table it removed the double-counted production costs from MFI A8, yet it nevertheless continued to include them, although only once. But including them even once was problematic.

1270 First, the addition of production costs was inconsistent with Gemba's valuation of the FTA rights, which was arrived at by applying an international benchmark of 75% to FTA direct revenues before production costs. As was submitted by Mr Young QC, that is why the Gemba report explicitly stated that "the estimated rights fee **will not** be impacted (i.e. reduced) by the incurrence of production costs on the part of the broadcaster" [original emphasis]. The valuation method used by Gemba meant that production costs were irrelevant, that is, that they should neither be added or deducted with respect to FTA, although they were relevant to STV but not accounted for.

1271 Second, all of the revenue streams were estimated by Gemba on the basis that the FTA broadcaster would be retaining the host broadcast rights. But there was no basis for saying that the revenue streams would be identical if the FTA broadcaster was not the host broadcaster.

1272 Now ASIC says that if the broadcaster gave up the host broadcast, at least some of that cost, estimated at $5 million, would be passed back to the rights-holder. That would increase the broadcaster's profit, and thus the amount it would be willing to bid to make that profit. Accordingly, so ASIC says, Gemba said that the rights fee would not be "reduced" by the incurrence of production costs by the broadcaster. It did not say that the rights fee would not be increased by the avoidance of production costs by the broadcaster. But even if the assumption was made that TA would be taking over the host broadcast, that would not mean that the FTA broadcaster would incur no production costs. Yet that was a further assumption underpinning ASIC's approach. Accordingly, there is no basis to assume, as ASIC did, that the broadcaster would save the full $5 million per year and that any saving would be directly passed on to the rights holder in full, inconsistently with Gemba's approach.

1273 More generally, there are difficulties in understanding how Gemba was dealing with production costs. Certainly, many of the slides refer to production costs for Seven for 2012 estimated to be $5 million. But then some slides refer to "excluding production costs". So, the headline statement that TA "could realise up to $40m in rights fees across its 4 key broadcast platforms in 2015" commences by saying "Excluding production costs". Further, the $35.8 million for FTA is not reduced by production costs. The $35.8 million figure appears to be sourced from the moderate growth scenario later modelled that I have referred to above. Further, in terms of one of the parameters (p 38) it is explained:

> The valuation methodologies used by gemba (sic) to estimate a fee for the FTA, Online and Mobile broadcast rights mean that the estimated fee should not be impacted by the production costs of the prospective broadcaster.

1274 But on its face, this statement appears to apply "one way or the other". If that be the case, then ASIC may be wrong in saying that if Seven is *not* to be the host broadcaster, then you simply add back $5 million per year. Again in terms of the eighth parameter, footnote 1 refers to a similar point. Further, the Table that I have set out earlier makes the same point. Further, other slides refer to production costs in the profit calculation. All of this confusion suggests to me that Mr Wood was wise in not placing the Gemba report or the Gemba summary before the board. And Mr Healy was quite entitled to rely upon Mr Wood's assessment.

1275 ASIC's third error was the incorrect use of FTA range figures. There was a difference between Gemba's ranges and its valuation. The FTA figure in the valuation of $35.8 million was arrived at by applying a benchmark of 75% to direct FTA revenues. The figure of 75% allowed for the recovery of all costs and a profit margin. The methodology also explained more fully why the moderate growth figure in the FTA range figure of $183 million was a figure across the whole period. Dividing by five, it produced an average rights fee of $36.6 million per year. But Gemba's valuation did not use that average figure. Rather, it used the moderate growth figure, at the assumed percentage growth rate, that would be applicable in 2015 which it calculated to be $35.8 million.

1276 The fourth error was the incorrect addition of STV, online and mobile values to FTA range figures.

1277 In its valuation, Gemba took into account figures of $2.5 million for STV, $1.2 million for online rights and $420,000 for mobile rights. Each of those figures assumed that the whole of the net benefit from licensing STV, online and mobile rights would equal the amount of the rights fee, that is, there would be no profit from licensing any of those rights. First, in the case of STV rights, the figure taken into the valuation was the moderate growth figure of $2.5 million for 2015. That figure was equivalent to the whole of the net benefit (after agency commissions) for that year, but with no allowance for production costs and no allowance for any profit. Second, Gemba's valuation took into account a figure of $1.2 million in respect of online rights for 2015. The precise figure taken into account in the valuation was the moderate growth figure of $1.2 million for the 2015 year. That figure was equal to the entirety of the net benefit from the licensing of the rights and consequently it allowed nothing for profit. However, there was an allowance for operating expenses, including production costs. Third, the figure for mobile rights in 2015 that was taken into Gemba's valuation was $420,000. That appeared to be a midpoint analysis of the net benefit figures which showed that the entire net

benefit over the whole period fell between $831,000 and $2.8 million. Further, the figure of $420,000 per annum for mobile rights in 2015 represented a very large increase over the 2012 high-point figure of $55,000.

1278 Accordingly, it was not appropriate to combine the FTA range figures and the range figures for the other rights and to suggest that they represented Gemba's valuation.

1279 Let me conclude with some general points.

1280 First, it must be said that the Gemba analysis is not clear. All that one can realistically take from Gemba is the up to $40 million assertion, notwithstanding ASIC's counsel's efforts to finesse more out of it. I say counsel's efforts because none of its witnesses gave evidence in chief supporting ASIC's assertions in closing address. ASIC's belated recasting of the key themes and figures of the Gemba report I found suspect to say the least.

1281 Second, let me say something more about Seven's actual revenue figures. Mr Wood gave evidence that Mr Worner had shown him Seven's advertising figures at their meeting on 16 May 2013. In cross-examination, he explained that Mr Worner had shown him a spreadsheet, which showed that the amount of direct advertising revenue anticipated by Seven was approximately $33 million per year. This was equivalent to the amount that Seven was proposing to pay in rights fees at the time. Mr Wood, however, was alert to the fact that that figure did not take into account the halo effect, that is, the indirect benefits obtained by Seven through broadcast of the AO. On this basis, Mr Wood's negotiating position was that Seven should pay a rights fee of $40 million per year based on both the direct and indirect benefits. This explained why, having reviewed Seven's direct advertising figures, he formed the view that a figure of approximately $40 million per year should be achievable for Seven. This culminated in Seven's final offer of $195 million over five years, or $39 million per year over the deal period. So, the outcome Mr Wood achieved from Seven was relevantly close to Gemba's valuation.

1282 Third, Gemba in its report referred to competitive tension. It said:

> **Competitive Tension** – premium sports content is increasingly valuable to traditional & new broadcasters. Along with the potential relaxation of anti-siphoning provisions (that will enable STV to simulcast content), the increasing importance of premium sports content is driving competitive tension which will in turn drive the value of Australian Open FTA domestic broadcast rights

1283 It was less than complimentary of Nine's position. It said:

> The high levels of gross debt sitting in Nine, coupled with its weaker earnings outlook, have prompted speculation about its ability to invest in its businesses. The negotiations over one of its biggest upcoming investments – the NRL broadcasting rights – may limit their capacity to invest in further deals

1284 It was even more critical of Network Ten's position:

> Channel Ten recorded a poor performance in 2011. With profit falling 70% for the first half of 2012, forecasts are not strong. They recently remodelled One HD from an all sports channel to a channel with a mix of reality and adventure based programming. Their appetite for major sports events does not appear to be strong

1285 Indeed, it went on to indelicately say that Network Ten's first half results for 2012 were "terrible", and that profit had "crashed" 70%. This was hardly a ringing endorsement of Network Ten, and no doubt informed Mr Wood's thinking concerning potential competition to Seven.

1286 Finally let me observe the following as to how the Gemba report was used.

1287 ASIC cannot escape the fact that Mr Wood specifically referred during the course of his CEO's report at the 3 December 2012 board meeting to TA having obtained a valuation from Gemba valuing the rights across all platforms at up to $40 million. Moreover, Mr Wood reported the Gemba valuation of up to $40 million to the board on 4 March 2013.

1288 Further, although Mr Tanner did not attend the 3 December 2012 board meeting, he was aware from his conversations with Mr Wood prior to the 3 December 2012 board meeting that Gemba had undertaken a valuation of the domestic broadcast rights and that they had valued them at about $40 million at the time.

1289 Further, Mr Wood had drawn to Mr Healy's attention in his email in June 2012 the key conclusion of the Gemba report. It was also the element of the Gemba report which Mr Wood had said to Mr Healy at their 22 November 2012 meeting was the key conclusion and was the fact that he intended to disclose to the board at the 3 December 2012 board meeting.

1290 Further, Mr Wood gave the following evidence in cross-examination by Mr Young QC:

> Yes. And you received the Gemba report in May of 2012; correct? That's what you say in your witness statement?---Okay. Yes.
>
> You provided a report on or about 1 May. Now, thereafter, you could have included the Gemba report in the board packs for July or August or October or any later board meeting, could you not?---I could, yes.
>
> Yes. And it was your choice not to do so?---Yes.
>
> Yes. What you chose to do instead, and we will come to this, was that you made an

oral report to the board as to the valuation arrived at by Gemba, did you not?---I don't recall.

All right. Now, if other directors say that you referred to the Gemba report and its valuation of up to $40 million at board meetings, you would not dispute their evidence, would you?---No.

1291 But he went on to agree:

Now, one of the other things that you did early in your report, your update to the board, was you specifically referred to TA having obtained a valuation from Gemba valuing the rights at up to $40 million. That's what you said to the meeting, is it not?---Yes.

1292 And I later asked him:

Yes but before Mr Mitchell asked the question, how did you introduce the topic of Gemba. Do you have a recollection of that and if so what, what do you recall saying in terms of introducing that?---I gave a brief overview of the fact that we had an offer from Seven, from IMG, valuations and that's when that summary is where Mr Mitchell interjected and said he didn't like IMG.

When you referred to valuations, did you make specific reference to a valuation from Gemba?---I don't recall if specifically to Gemba but I talked about the fact that we've got some evidence from the market valuations.

And did you give a figure?---Yes, 40 million.

And you recall saying that at the meeting as part of your oral presentation?---Yes.

1293 Further, Mr Wood gave the following evidence in cross-examination by Mr Young QC:

I want to turn, Mr Wood, to the 3 December board meeting. Can I take you to volume 2 of the court book. The board pack for 3 December commences at tab 44. Now, Mr Wood, would you turn to 1124 which is the page where the agenda is set out?---Sorry, could you repeat that?

1124?---Yes.

Now, the agenda is largely just standard items; correct?---Yes.

The only special item might be regarded as another aspect of the strategic plan, player development this time, item 7.1?---Yes.

But there's a reference to the chief executive officer's report which is going to be an update on key business issues and priorities. And it was your intention, was it not, to use your CEOs report and in fact the oral component of it to explain the current position in relation to domestic broadcast rights negotiations?---Yes.

You did provide a written report which is at 1040. Now, do you recall how long before 3 December you prepared that report. Was it a matter of days or weeks?---I don't recall, but generally speaking it was about a week or so beforehand.

Yes?---Because the board packs were distributed by courier and many of our board members were interstate and wanted to have a chance to read them because the process of the board was take it as read. And so that's why.

Yes. Now, your written CEO report doesn't contain any explanation of the current state of the domestic rights negotiations, does it?---No.

> You made the decision that you would make an oral report to the board concerning the then status of the broadcast rights negotiations?---Yes.
>
> Including, as we discussed a moment ago, that you would give an explanation of the Seven November offer; correct?---Yes.
>
> An explanation of the IMG offer of 16 November?---Yes.
>
> You would explain the significance of the IMG offer as indicating a value point of 30-plus million dollars?---Yes.
>
> You also intended to refer to the Gemba report and its valuation of up to $40 million?---Yes.
>
> And it was your decision to do all of that orally, was it not?---Yes.
>
> Now, and it was also your choice, your decision, not to attach any of the following: the Seven offer of 1 November, the IMG offer of 16 November and the Gemba report as part of the board pack, wasn't it?---Yes.

1294 Further, although the methodology applied by Gemba in arriving at its valuation and set out in its report was useful for and deployed by management in their negotiations with Seven, I agree with the defendants that it was unnecessary detail for TA's directors. On any view they were able to proceed in and from the 3 December 2012 board meeting in the knowledge that external consultants had valued the rights at up to $40 million across all platforms. Moreover, it was that central conclusion that was reported to the board, and subsequently informed the board's evaluation of the broadcast rights.

1295 Further, management specifically reviewed the document again in May 2013 in preparation for their intensive negotiations with Seven. Indeed, Mr Wood effectively applied and improved Gemba's methodology so as to assure himself that he was receiving an appropriate rights fee when he asked Mr Worner on 16 May 2013 to see Seven's revenue figures. And in substance, the monetary outcome with Seven as recommended by Mr Wood to the board on 20 May 2013 was informed by the Gemba report, and was consistent with Gemba's valuation.

1296 Finally, it was Mr Wood's choice not to include the Gemba report in board packs. And he chose not to include it because he did not think that it was necessary for the board to have the detailed report. There is no reason to doubt that judgment. Further, there was no reason for Mr Healy to second guess it.

1297 In my view ASIC has not made out its case concerning the non-disclosure of the Gemba report or the Gemba summary.

Mr Wood's 12 December 2012 email

1298 Mr Wood's 12 December 2012 email sent to Mr Healy, which I have set out earlier in these reasons, was an internal email. It was not an appropriate document to include in a board pack, let alone for the 4 March 2013 board meeting.

1299 By the time of the 4 March 2013 board meeting, the board had considered Seven's November offer at the 3 December 2012 meeting and determined that it was not acceptable. Further, the first IMG offer had also been found to be unacceptable by the board on 3 December 2012. And in any event it was due to expire on 31 December 2012, which was prior to the earliest time at which TA could accept an offer after the expiry of the ENP on 1 October 2013. Further, by the time of the 4 March 2013 board meeting the first IMG offer had also been overtaken by the second IMG offer. Further, and in any event, Mr Wood said to the directors at the 4 March 2013 board meeting that he believed that Seven would provide a higher offer for the rights during the course of the ENP. There is therefore no proper basis for saying that Mr Wood's 12 December 2012 email should have been disclosed to the board by Mr Healy in 2013.

Ayles paper

1300 I have dealt with the chronological sequence of events earlier, but let me repeat some salient features.

1301 Mr Healy had a discussion with Mr Wood about Mr Wood's 12 December 2012 email where he said words to the effect that there should be a covering paper which compared Seven's November offer to the first IMG offer.

1302 On 19 December 2012, Mr Healy received a version of the Ayles paper that had been amended by Mr Wood.

1303 Now the version of the Ayles paper received by Mr Healy did not meet Mr Healy's request, in that it went beyond a comparison of Seven's November offer and the first IMG offer. Further, the version of the Ayles paper received by Mr Healy did not contain any attachments.

1304 Further, Mr Ayles made other changes to the draft of the Ayles paper that he had sent to Mr Wood, and he did not see the version of the paper which Mr Wood had sent to Mr Healy. But the version of the paper prepared by Mr Ayles on 18 December 2012, and the subject of ASIC's pleading, was never provided to Mr Healy.

1305 Further, the final Ayles paper with its attachments was sent by Mr Ayles to the EMT on 20 December 2012. But this was never provided to Mr Healy.

1306 Now Mr Healy by telephone provided Mr Wood with comments on and changes to the version of the Ayles paper which Mr Wood had sent to him. During that conversation, Mr Healy said to Mr Wood that the Ayles paper did not take into account what had been discussed at the 3 December 2012 board meeting, and as such appeared as if it was prepared before that board meeting. Mr Healy said that the paper, in line with his earlier request, needed to address the deficiencies with the offers which had been discussed at the 3 December 2012 board meeting. Mr Healy also queried the recommendation in the paper as it appeared to cut across TA's ENP obligations towards Seven. It appears that Mr Wood noted Mr Healy's comments by hand on Mr Wood's version of the Ayles paper, but ASIC did not produce the document containing Mr Wood's notations of Mr Healy's comments. It would also seem that Mr Wood passed his note recording Mr Healy's comments on to Mr Ayles, but he did not incorporate them into the so-called final Ayles paper.

1307 Let me elaborate on Mr Healy's concerns. Mr Healy gave evidence that a key deficiency he identified with the version of the Ayles paper that he had received was that the recommendation, that is, conducting a process with other networks during the ENP, did not make sense and would confuse the board. I must say that to my mind that intuition, based upon the version that he saw, had considerable force. The version of the recommendation that he saw was the following:

> **Recommendation**
>
> TA needs to ensure that the outcome of the domestic rights renewal meets its business objectives. As it stands both of the current offers fall short in terms of revenue and importantly in terms of exposure and control of content. It is also felt that there is competitive tension in the market place for what is generally recognised globally as one of the most sought after live sporting events at that time of year. Virtually all metrics associated with measuring the AO's commercial performance in recent years show significant increases. Premium live sporting rights both within Australia and globally have demonstrated significant increases.
>
> The recommendation is that TA rejects the current offers on the basis that neither of the written offers meets TA's business objectives and commences exclusive negotiations with Seven from 1 April 2013 as is contractually required. During this period TA would conduct a process with Seven that that is similar to the process conducted recently by the other major Australian sporting codes, including the AFL, NRL and Cricket Australia.
>
> This process would likely include going to the market and relevant providers on a platform-by-platform basis (for example, issue separate specification documents for the rights to each of FTA, Pay TV, mobile, online and other digital platforms). We

> expect that this process will ensure that TA extracts the best possible commercial outcome that will, in turn, enable us to maximise the exposure of our events and our sport, and thereby satisfy our strategic objectives. TA understands that this is the same detailed and considered tender process that has been conducted recently by the other major Australian sporting codes, including the AFL, NRL and Cricket Australia.

1308 One can appreciate here that there is textual imprecision. The second paragraph refers to "During this TA would conduct a process with Seven…". That refers to the ENP. But then the third paragraph says "This process would likely include going to the market…". There is a referential ambiguity in "This process". Textually, it is open to read it as referring to the process in the second paragraph. But that is the ENP. Hence Mr Healy's problem with the form of the recommendation.

1309 Now both the original form, which Mr Healy did not see, and the final form of the recommendation, which Mr Healy also did not see, were expressed differently. Let me set out the final form:

> **Recommendation**
>
> TA needs to ensure that the outcome of the domestic rights renewal meets its business objectives. As it stands, both of the current offers from Seven and IMG fall well short in terms of revenue and importantly in terms of exposure and control of content. It is also felt that there is significant competitive tension in the market place for what is generally recognised globally as one of the most sought after live sporting events at that time of year. Virtually all metrics associated with measuring the AO's commercial performance in recent years show significant increases. Premium live sporting rights both within Australia and globally have demonstrated significant increases. There is no reason to believe that these increases will not be repeated with the next sale of AO domestic broadcast rights.
>
> The recommendation is that TA rejects the current offers and commences exclusive negotiations with Seven from 1 April 2013 as is contractually required. If a satisfactory deal cannot be reached in this period TA should commence a tender process that recognises its business objectives. This process would likely include going to the market and relevant providers on a platform-by-platform basis (for example, issuing separate specification documents for the rights to each of FTA, Pay TV, mobile, online and other digital platforms). We expect that this process will ensure that TA extracts the best possible commercial outcome that will, in turn, enable us to maximise the exposure of our events and our sport, and thereby satisfy our strategic objectives. TA understands that this is the same detailed and considered tender process that has been conducted recently by the other major Australian sporting codes, including the AFL, NRL and Cricket Australia. We believe this is critical to the future success and prosperity of our sport and our events in Australia.

1310 As is apparent, the recommendation in the final version of the Ayles paper was that if a satisfactory deal could not be reached in the ENP with Seven, TA should commence a tender process. But contrastingly, the "recommendation" section in the version of the Ayles paper which Mr Wood amended and sent to Mr Healy removed the conditional "if a satisfactory deal

cannot be reached [in the ENP], TA should commence a tender process"; but that conditional recommendation remained in the final version of the Ayles paper.

1311 Mr Wood cannot recall why he modified the version of the Ayles paper he sent to Mr Healy in circumstances where his view throughout the negotiations was that TA should get to the ENP process and, if possible, achieve a satisfactory deal or the best deal it could with Seven during the course of that ENP process. Further, as an objective matter the amended recommendation by Mr Wood did not make sense given that following it to its conclusion would potentially cause TA to breach the Seven agreement which required TA to participate in and give effect to the ENP.

1312 ASIC says that Mr Healy's evidence was not credible when he said that the recommendation in the paper did not make sense to him because it suggested that TA should conduct a tender of the rights during the ENP with Seven. ASIC points out that the paper that Mr Healy saw said:

> **Background**
>
> Seven has … been granted an exclusive negotiation period … during which Seven shall have the right to exclusively negotiate with TA for the next domestic broadcast rights deal. This exclusive negotiation period commences 1 April 2013, and runs for 6 months. This means that Seven shall have the right to negotiate with TA, for the rights commencing in 2015, to the exclusion of all Seven's competitors …
>
> …
>
> **Cricket**
>
> …
>
> - We understand Cricket Australia … are prepared to go to market if the exclusive negotiation period with Channel 9 does not yield a result.
>
> …
>
> **Recommendation**
>
> The recommendation is that TA rejects the current offers on the basis that neither of the written offers meets TA's business objectives and commences exclusive negotiations with Seven from 1 April 2013, as is contractually required. During this period TA would conduct a process with Seven that … is similar to the process conducted recently by the other major Australian sporting codes, including AFL, NRL and Cricket Australia.
>
> This process would likely include going to the market … TA understands that this is the same detailed and considered tender process that has been conducted recently by the other major Australian sporting codes, including AFL, NRL and Cricket Australia.

1313 ASIC says that of the other major Australian sporting codes listed, only Cricket Australia was recited to have an ENP with its incumbent broadcaster; and it was not expected to go to market until after that ENP had expired. This was recited, moreover, against the "Background" that TA was not allowed to negotiate with anyone but Seven during its ENP.

1314 In that context, ASIC says that when the paper recommended that TA "conduct a process … similar to the process conducted recently by the other major Australian sporting codes, including AFL, NRL and Cricket Australia," no reasonable reader could have understood this to mean that TA should go to market during its ENP. Any reasonable reader would have understood it to mean that TA should go to market, if at all, after its ENP. ASIC says that this was not felicitously expressed, which may be why Mr Healy queried the recommendation. But ASIC says that he did not contradict Mr Ayles's evidence that he never disagreed with, or expressed any other concern about, the recommendation during any of their discussions of the paper at the AO in January 2013. I think this last point is flimsy given that concerns were expressed on some aspects of the paper and there was vagueness as to recall; Mr Healy did not need to go into detail in context.

1315 But whatever ASIC may say about the hypothetical reasonable reader, the fact is that the recommendation that Mr Healy saw was infelicitously expressed. I am not prepared to reject his evidence on this aspect. Further, and as I have said, Mr Healy was concerned about what might confuse the board; on any view that was a credible position.

1316 Let me make one other point. ASIC submitted that eventually in cross-examination Mr Healy admitted that he did not disagree with the recommendation in the Ayles paper, if and to the extent that it was recommending, first, to go into the ENP and, second, if TA did not receive a satisfactory offer during the ENP then it should go to market. But it was clear from his evidence that the part of the recommendation he was concerned about that he had been shown was the textual suggestion that some sort of "process" be conducted with the other networks during the ENP. That was not contractually permissible. Clearly though, he was accepting that TA should (indeed, had to) go into the ENP.

1317 Let me now analyse the aspects that ASIC says were in the Ayles paper and should have been disclosed to the board for its 4 March 2013 meeting.

1318 First, the Ayles paper observed that the sale of the domestic broadcast rights "will be the single largest revenue transaction for Tennis Australia in its history". But the importance of the

transaction was already well-known to the board who knew that the domestic broadcast rights were among TA's primary sources of revenue and its most valuable assets. Further, it had been noted at the 3 December 2012 board meeting that an 18% increase on the then current Seven deal seemed small relative to the reported increases enjoyed by other major sports in their new broadcasting deals. Further, Mr Wood had informed the board at the 3 December 2012 meeting that the rights had been valued at up to $40 million per year by Gemba, that is, larger than the previous broadcast transactions. This was also reiterated at the 4 March 2013 meeting.

1319 Second, the Ayles paper summarised the terms of the Seven agreement. But the board was aware of the key terms of the Seven agreement compared with Seven's November offer, namely that Seven was offering an 18% increase over the Seven agreement in Seven's November offer and otherwise on similar terms as the Seven agreement. Further, under the Seven agreement, TA was not the host broadcaster. Indeed these matters were raised at the board meeting on 3 December 2012.

1320 Third, the Ayles paper noted what should have been TA's main objectives in relation to a future agreement for the domestic broadcast rights. But the board members were aware of the important financial and non-financial objectives as stated in the Ayles paper, namely, to maximise commercial returns and to maximise exposure through control of content and distribution channels. As I have indicated in the detailed factual background, a strategic plan presented to the board in July and August 2012 had stated that it was an objective of TA's to maximise broadcast revenue both domestically and globally, and across all platforms. The key initiatives for broadcasting as a revenue source were said to be to develop optimal broadcast sales structures to maximise rights fees for key renewals, to produce and manage AO content and to commercialise multiple distribution platforms. Further, the exploitation of different platforms was also discussed by the board at the 3 December 2012 board meeting following a query from Mr Davies, with the board deciding that it did not want to separate digital and/or subscription rights from the FTA rights. Further, board members knew that a primary objective for TA, which the board had already endorsed, was for TA to take control of the host broadcast.

1321 Fourth, the Ayles paper provided an analysis of market conditions for the licensing of broadcast rights of sporting activities. But board members were aware as at 3 December 2012 that the rights had been valued at up to $40 million. Further, members of the board were aware as at 3 December 2012 that other major sports had reported substantial percentage increases in their

new broadcasting deals and that an 18% uplift offered by Seven was viewed as relatively small in that context.

1322 Fifth, the Ayles paper stated that there had been genuine interest in the domestic broadcast rights from a number of parties, with written offers provided by two parties and verbal interest from others. But Mr Wood had disclosed to the board on 3 December 2012 the fact that written offers had been provided by Seven and IMG, and that Nine and Network Ten had verbally said they were interested.

1323 Sixth, the Ayles paper observed that there was competitive tension in the market place between FTA broadcasters, pay television and new media channels. But in the board's discussion at the 3 December 2012 board meeting of the broadcast rights, the issues of FTA, internet and pay television rights were discussed. So too was the increase in rights fees achieved by other premium sports.

1324 Seventh, the Ayles paper provided a detailed analysis of Seven's November offer and the first IMG offer. But as is obvious, the board had already determined at its 3 December 2012 meeting and *before* the Ayles paper had been prepared, that neither offer was acceptable. Further, the analysis of the first IMG offer compared with Seven's November offer was out of date by the time of the 4 March 2013 board meeting. But wait, there is more. The first IMG offer had expired as at 31 December 2012. Of what possible relevance could any analysis of an expired offer be to the board on 4 March 2013? And particularly given that the second IMG offer was received on 1 March 2013, which I will discuss shortly. Further, the board was also aware on 4 March 2013 that management intended to commence the ENP with Seven on 1 April 2013. As at 4 March 2013, it was not being asked to make any commercial decision on any contract.

1325 Eighth, the Ayles paper attached the Gemba report, the Gemba summary, the Global Media and Sports Presentation, the IMG opinion, Seven's November offer and the first IMG offer. But the version of the Ayles paper that was sent to Mr Healy did not contain these annexures. Mr Healy had separately received copies of the Gemba report, Seven's November offer and the first IMG offer. But in any event, the existence of each of these documents, save for the Global Media and Sports Presentation, and the information from them that Mr Wood judged to be material and useful to the board's deliberations, had been disclosed to the board verbally on 3 December 2012. Moreover, the IMG opinion dated 31 October 2012 analysed an earlier offer from Seven which was never put to the board. Accordingly, it was immaterial to the board's consideration of the award of the domestic broadcast rights as at 4 March 2013.

1326 Let me now make some other points concerning the Ayles paper.

1327 ASIC says that the Ayles paper was never put before the board, even though Mr Wood told Mr Healy in late December 2012 that the board should see the paper and its attached documents. Now Mr Healy denied that he was told this by Mr Ayles. I am inclined to accept his denial. The likelihood is that if Mr Wood had said this to him, he would have accepted Mr Wood's suggestion.

1328 Further, and in any event, Mr Wood compiled the board pack for the 4 March 2013 board meeting. He chose not to include the Ayles paper. And he did so because he knew that there were many problems with the Ayles paper. Moreover, it had been clearly overtaken by events by January 2013.

1329 I reject ASIC's case concerning the Ayles paper. ASIC has run a case that Mr Healy breached his duty under s 180(1) by not including in the board pack for the 4 March 2013 and 20 May 2013 board meetings a version of the Ayles paper that he never received. Moreover, the only document Mr Healy received differed in substantive respects from the pleaded Ayles paper. Further, the version of the Ayles paper received by Mr Healy did not match Mr Healy's request for a document comparing Seven's November offer and the first IMG offer. Further, Mr Healy identified problems in and suggested changes to the version of the Ayles paper he received.

Second IMG offer

1330 ASIC had pressed a case that Mr Healy had failed to disclose the second IMG offer to the board on 4 March 2013. But in closing address it abandoned it. Nevertheless it appeared to continue to press its case concerning non-disclosure of the first IMG offer at the 4 March 2013 meeting; this was somewhat curious given that the first IMG offer had become obsolete by 31 December 2012 and then superseded by the second IMG offer. Notwithstanding that ASIC abandoned this part of the case, it is still useful to discuss what was said before the board concerning the second IMG offer, particularly as ASIC persisted with its non-disclosure case concerning the 20 May 2013 meeting.

1331 The second IMG offer was received on 1 March 2013, being just before the 4 March 2013 board meeting. Further, it had been received after the board pack had been finalised and distributed for the 4 March 2013 board meeting.

1332 Now it was open to Mr Wood to place the second IMG offer before the board by tabling it at the board meeting, but he chose not to. Instead, he reported on the pertinent details at that meeting.

1333 Mr Wood gave the following evidence in cross-examination by Mr Young QC:

> And that was another reason why you chose not to tender the second IMG offer at the board meeting of 4 March?---Sorry, say that again?
>
> Another reason why you chose not to tender it is that the real function, the real utility of the second IMG offer, was simply as a bargaining chip?---Yes. Yep.
>
> Not as an offer to Tennis Australia that it should – that it would contemplate accepting as such?---Not in its current form.
>
> Yes. Now, can I take you to your affidavit, please, at paragraph 167. At paragraph 167 you say in the second sentence the second IMG offer was not mentioned at the board meeting. Now, as we have just discussed, that's not accurate?---Okay. Sorry about that.
>
> All right. Now, the next sentence is not accurate either?---Why is it not accurate?
>
> You had – you made a choice not to tender the second IMG offer before Mitchell raised the question of the subcommittee; isn't that right?---I don't recall the sequence of events of when, you know, we were speaking about this and then Harold said, "I know, we will create a subcommittee to deal with this."
>
> Yes. Well - - -?---That's – that's basically my recollection of what happened.
>
> Yes, but I just put to you that you raised the second IMG offer. You described its terms. That provoked a discussion amongst the board members. You told the board members that you believed Channel 7 would come to the party with a higher offer during the ENP, and the board members, generally, agreed with you that TA should proceed to trigger the ENP to try and get a better offer from Channel 7. Now, all of that happened before Mr Mitchell proposed his subcommittee, didn't it?---No, I don't think so. You're – you're talking about the second IMG offer.
>
> Yes?---Which - - -
>
> That was the one that was current at the time of this board meeting?---Yes, but the first offer, in general terms, was similar to the second offer. So if we spoke about it at a board level, you've got enough information to know what's in – in the offer.
>
> Yes, I understand that, but in the – you had this discussion about the second IMG offer, and just as you had done on 3 December, you made a decision, you made a judgment, that it was not necessary to tender the second IMG offer, didn't you?---Yes. When you say 'tender', you mean table.
>
> Table, I'm sorry, that's legalese. Table at the board meeting, yes. Provide copies to the members?---Yeah.
>
> You made a decision, a judgment, that you would not do that?---Yeah, under advice from Harold.
>
> I suggest you made that decision at the time you were engaging in the discussion about the second IMG offer that I put to you?---Yes. Okay.
>
> Now, the – let me deal with just one other aspect of this board meeting. You had

referred previously, at the board meeting of 3 December, to Channel 10 and Channel 9 having expressed interest in the domestic rights; you recall that?---Yes.

And at 3 December, you didn't mention any figures in the context of doing that; that's correct, is it not?---I don't recall that.

You don't recall mentioning any figures?---No, I don't recall whether I mentioned them or not.

Right. All right. Now, I suggest that at the 4 March board meeting, you also referred again to the fact that Channel 10 and Channel 9 had expressed interest in the domestic rights?---Yes.

And there was a conversation amongst the directors on 4 March about the interest of the other networks, was there not?---I think so.

Yes?---I'm not sure.

1334 Will all due respect to Mr Wood, the "under advice from Harold" answer was not reliable evidence.

1335 In relation to the second IMG offer and Mr Wood's non-tabling thereof, he was cross-examined by Dr Collins QC as follows:

You didn't even provide a copy of it to Mr Mitchell, did you?---I don't think so, no.

And Mr Mitchell had not given you any advice at all in relation to the second IMG offer prior to the board meeting on 4 March, had he?---No. We already know his view.

At the time of the 4 March board meeting, you knew that Mr Mitchell had no knowledge of the existence of the second IMG offer; correct?---Yes.

Yes, he didn't know about the offer?---No.

Because you hadn't told him?---No, because he already made his position clear on the first offer and it wasn't that much different. So why antagonise Harold again?

Mr Mitchell didn't tell you, did he, at any time, not to table an IMG offer at a board meeting?---No.

Now, yesterday, Mr Wood, at transcript 389, line 46, Mr Young put to you that you made a decision, a judgment, that you would not table the second IMG offer at the 4 March board meeting. Do you remember him asking you that?---Yes.

And you responded to him:

Yeah, under advice from Harold.

Do you remember giving that answer?---Yes.

That answer was false, wasn't it?---It was based on the first offer.

Mr Mitchell never gave you any advice not to table any IMG offer at any board meeting of Tennis Australia; correct?---He had already told me he hated IMG.

Would you do me the courtesy of answering my question. Mr Mitchell never said to you at any time not to table an IMG offer at a board meeting of Tennis Australia?---He didn't say one way or the other.

> Why did you tell his Honour yesterday that you made a decision not to table the second offer under advice from Mr Mitchell?---Because he had made his advice very clear with the existing first offer of IMG. So why bother.
>
> He never told you not to table the first IMG offer either, did he, Mr Wood?---No.
>
> He didn't even know about the existence of the second IMG offer, did he?---No.
>
> And he didn't tell you not to table the second IMG offer either?---No.

1336 Contrary to Mr Wood's first affidavit, Mr Wood ultimately accepted that he mentioned the second IMG offer at the March board meeting. It would seem that he reported that the IMG rights fee figure remained at $30 million per year with the potential for some upside. So, the details he reported on were more than adequate to indicate that the second IMG offer indicated a valuation point that was higher than the then prevailing offer from Seven. At the 4 March 2013 board meeting, he referred to the then current Seven offer which had remained as it was and had been reported to the board on 3 December 2012.

1337 Further, at the time Mr Wood was concerned that IMG still wanted to link the international and domestic broadcast rights. Further, Mr Wood also appreciated that on the terms of the second IMG offer, even if TA and IMG had agreed to extend the international rights by 31 March 2013, IMG reserved the right to not extend the domestic rights proposal or to amend the terms of the domestic rights proposal as a condition of extending it. He was well aware that those conditions were unacceptable to TA.

1338 Further, given that the offer expired on 31 March 2013 and given that TA was to enter the ENP with Seven on 1 April 2013, the only significance of the second IMG offer at that point was as a tool for Mr Wood to use in his negotiations with Seven during the ENP. Mr Wood was using the second IMG offer as a bargaining chip to leverage a further offer out of Seven. This was a further reason why he chose not to table the second IMG offer at the 4 March 2013 board meeting and why the offer was not in a form that TA would contemplate accepting. There was no prospect that this offer could or would be accepted before its expiry on 1 April 2013.

1339 Clearly, the second IMG offer did not represent any offer which TA would ever accept. Further, the board had indicated on 3 December 2012 that it would not countenance an agency offer in respect of the domestic rights. So, there was no basis for thinking that an agency offer such as the second IMG offer had any greater attraction for the board as at 4 March 2013 than it had for the board when it took a negative view of the first IMG offer on 3 December 2012.

1340 Further and in any event, Mr Healy never received a copy of the second IMG offer before the March 2013 board meeting. ASIC's case concerning this document always lacked substance. Belatedly, ASIC abandoned this part of its case concerning non-disclosure at the 4 March 2013 board meeting. But ASIC persisted with its case concerning non-disclosure at the 20 May 2013 board meeting. But its case had no substance even as to that later date. The second IMG offer had by then well and truly expired. Moreover, it clearly was not competitive with Seven's final offer.

Board subcommittee paper

1341 Mr Healy received a copy of the board subcommittee paper from Mr Wood on 23 March 2013. But this paper was not intended for the board of TA, but for the subcommittee established at its 4 March 2013 meeting. Clearly, this paper was not appropriate for inclusion in a board pack.

1342 In any event, there is no substance in ASIC's criticism when regard is had to the matters alleged to be material by ASIC in the board subcommittee paper.

1343 First, ASIC says that the paper summarised the value of the broadcast rights on a platform by platform basis. But the paper did not in fact summarise the value of the rights on a platform-by-platform basis. Rather, it merely noted that the rights had already been separately valued by TA on a platform-by-platform basis.

1344 Further, it was known to the directors that the rights had been valued altogether at up to $40 million and that they could be split on a platform-by-platform basis. In this regard, the following may be noted.

1345 The strategic plan summary paper presented to the board in July 2012 noted that one of TA's key initiatives was to commercialise multiple distribution platforms.

1346 Further, the issue of how TA should deal with digital platforms was discussed at the 3 December 2012 board meeting. As I have already indicated, in response to a query from Mr Davies as to Fox Sports' broadcast of the AO and whether it was worth having a separate agreement with a secondary broadcaster to secure more exposure for users of the Internet and mobile phones, Mr Wood advised that the Seven deal would include simulcast via the Internet. In his evidence, Mr Davies said that he had asked two separate questions. Would there be a separate agreement with Fox Sports to broadcast AO matches that Seven was not going to cover in their broadcast? And what did the future hold with respect to STV, mobile, or online

broadcasts of the AO? The board also discussed whether the FTA, subscription and digital rights should be split and sold separately. Clearly, its view was not to split the rights. Further, the board had discussed the issues raised by Mr Davies and the board's view was that in the forthcoming domestic broadcast rights agreement, the rights across all platforms should be sold to a single domestic broadcaster.

1347 Second, ASIC says that the board subcommittee paper noted the need to create competitive tension to maximise rights fees. But the board well knew this. And the matters then known to the board included the offers from Seven and IMG, the interest of Nine and Network Ten, and Gemba's valuation of the domestic broadcast rights at up to $40 million. To the knowledge of the directors, competitive tension, to the extent feasible in the context of the ENP that had to occur, already existed in the process.

1348 Third, ASIC says that the paper noted that the contractual arrangements with Seven were outdated and did not meet TA's objectives. But on 3 December 2012 the board had already discussed that the existing Seven agreement did not meet TA's objectives in key respects, namely, the ability to be host broadcaster and that no long-form agreement was in place.

1349 Fourth, ASIC says that the paper stated that TA's broadcast rights were significantly undervalued in the Seven agreement. But the board already knew this and had already indicated at the 3 December 2012 meeting that it required a substantial uplift on the pre-existing rights fees.

1350 Fifth, the operative recommendation of the board subcommittee paper was that TA should enter the ENP with Seven and "[i]f an offer that meets all TA's business/strategic objectives is received, TA may then commence negotiations with Seven on a new long form contract". But that is what Mr Wood had already recommended and in fact what occurred. As Mr Wood clearly demonstrated in his evidence, he was aware of all of the matters set out in this paper and the earlier Ayles paper, he negotiated the contract with Seven during the ENP, he considered that all of TA's business and strategic objectives had been achieved, and he then recommended at the 20 May 2013 board meeting that negotiations proceed to conclude a long form agreement with Seven.

1351 Further, in the board subcommittee paper Mr Ayles did not recommend that the broadcast rights had to inevitably go out to competitive tender. Indeed, he contemplated that a genuine effort would be made during the ENP to arrive at a satisfactory deal with Seven. Further, to have

done otherwise would have placed TA in breach of its obligations to Seven under the Seven agreement as a likely implied term of the Seven agreement required TA at a minimum to make a bona fide effort to negotiate. Contrary to what ASIC appeared to suggest, TA could not simply pay lip service to the ENP or deny to Seven the benefit thereof.

1352 Let me deal with another dimension to the board subcommittee paper.

1353 There was a broader unsatisfactory aspect to the board subcommittee paper. Whilst Mr Wood said that he asked Mr Ayles to prepare a paper to outline a process for the board subcommittee to follow, the document produced dealt not just with how the subcommittee should operate.

1354 In the board subcommittee paper Mr Ayles had proposed that a process involving the negotiations be conducted by a team comprising the board subcommittee and members of management, despite the fact that the board subcommittee was not conducting the process. Rather, management was.

1355 Further, Mr Freeman, a member of the subcommittee, gave evidence that the board subcommittee paper was too prescriptive and in some respects unacceptable. He said that the role of the subcommittee was to provide advice and recommendations to the board. The board subcommittee did not have a direct operational or executive role. He said that the paper went beyond what he saw as a normal subcommittee charter, as it was much more prescriptive than what he would expect. He said that if he had been the chair of the subcommittee and this plan had been presented to him, he would have questioned it because he would have felt that the subcommittee would likely have crossed the line between the role of the board and the role of the executive management.

1356 It seems to me that Mr Ayles did not appreciate the distinction between tasks which management customarily undertook and the role of a board subcommittee. And in that context, the evidence that Mr Mitchell found the board subcommittee paper to be unacceptable was unsurprising. Further, Mr Healy expressed similar views about the paper's inappropriateness. He noted that the paper was focused on the negotiation of the deal, which was a matter for management. The paper did not properly outline the subcommittee's objectives, its process, or how offers would be evaluated and reported to the board.

1357 I will return to discuss this board subcommittee paper in more detail later when I deal with ASIC's specific case against Mr Mitchell. For the moment, all that I need observe is that, in

summary, ASIC's breach of duty case against Mr Healy concerning the board subcommittee paper goes nowhere.

Gemba cricket presentation

1358 There is no evidence that Mr Healy ever saw the Gemba cricket presentation, which in any event was unsolicited. Any criticism of Mr Healy for not drawing this to the attention of the board goes nowhere.

Seven's final offer

1359 Seven's final offer was received by TA on Friday 17 May 2013. Obviously this was the last business day before the board meeting scheduled for Monday 20 May 2013. Accordingly, it was too late to include the offer in the board pack. The assertion of ASIC concerning criticism of Mr Healy that he failed to include this document in the board pack that had been sent to the directors is also hopeless.

Interest from other networks

1360 Let me make some observations by way of pre-amble that arise from Mr Wood's evidence before I turn to the specific case against Mr Healy.

1361 Mr Wood reported at the 3 December 2012 board meeting that Nine and Network Ten had expressed an interest in the domestic broadcast rights.

1362 Further, in cross-examination Mr Wood accepted that he had referred to interest of Network Ten and Nine at the 4 March 2013 board meeting, however he was uncertain as to whether there was any conversation amongst the directors about the interest of these other networks. Mr Tanner agreed that the interest of Nine and Network Ten was mentioned by Mr Wood at this board meeting, but nothing specific in terms of dollar figures was mentioned.

1363 To the extent that Mr Wood knew of a particular figure attached to Nine's and Network Ten's interest at that time, he made a decision that it was not necessary to mention it to the board. He made that decision in the following circumstances.

1364 First, he only had contact with representatives from Nine and Network Ten in very general or qualified terms.

1365 Second, he had reservations that if he put the figures mentioned by Nine and Network Ten to the board, undue optimism might be induced in circumstances where Mr Wood thought those figures were attended by various risks.

1366 Third, he had also formed the view that any figures mentioned by Nine and Network Ten were equivocal, heavily qualified and could not be relied upon. So, for example, in cross-examination by Mr Young QC, Mr Wood gave the following evidence:

> And Mr McLennan rang you to discuss the tennis rights. Now, when he referred to what Network Ten could pay, do you agree with this: his language was very equivocal and qualified?---Yes, it was quite summary type talk.
>
> Yes, well, it was very, very guarded what he said, was it not?---Yes.
>
> Did he speak about a figure that may be Network 10 could pay; in other words, maybe about 50 million?---Yes.
>
> Now, your view was that his language was so equivocal that you couldn't place any particular reliance upon the figure that he mentioned, was it not?---Could you say that again, please.
>
> His language was so equivocal that you formed the view that you couldn't place any reliance on the figure that he mentioned?---Well, he could have paid but the other things that are going on with Channel 10 would be – needed to be taken into account.
>
> Yes?---If this was a last-ditch effort by Ten to secure a sporting – summer sporting event or - - -
>
> Yes?---So I just took that into consideration when he called and listened to what he had to say. Was very respectful and that was pretty much it.

1367 Later he gave evidence that he accepted that Mr McLennan was just floating very vaguely a figure with him, and that there was a risk that Network Ten was just being mischievous and trying to push him up (and Seven) in his discussions with Seven. Mr Wood was always conscious that the other networks could get quite mischievous.

1368 Further, in Mr Wood's meeting with Mr Gyngell in late 2012, no numbers were mentioned, only that Nine was interested in the tennis rights. Mr Wood's evidence of his conversation with Mr Browne of Nine was that Mr Browne said that "[a] number with a 4 in front of it is not out of the question". But Mr Browne did not accept that he said that. Mr Browne's evidence was that it was Mr Wood who said to him that the figure TA was looking for "had a four in front of it". In response Mr Browne said that such a number would not be "out of the question". This non-committal expression used by Mr Browne related to his acquiescence that Nine had the financial capacity to pay such a number. It was not necessarily any acquiescence to the value that Mr Wood was putting on the tennis rights.

1369 Now although I accept that ASIC's legal representative read to Mr Browne the relevant paragraph of Mr Wood's affidavit in its entirety and that he said in response that he thought Mr Wood's account was accurate, it is important to note that Mr Browne's only contact with this legal representative was a telephone conversation he had whilst driving his car. In my view, even if the legal representative read the whole of the relevant paragraph to Mr Browne, which I accept, it is easy to understand that Mr Browne would not have comprehended all of that detail in any precise way over the car phone. In the circumstances, I prefer Mr Browne's evidence before me given in more thoughtful and reflective circumstances than over a car phone.

1370 Fourth, TA could not deal with these networks at the relevant time given that on 1 April 2013, TA had to enter an ENP with Seven and would not be in a position to accept any other offers until 1 October 2013 at the earliest.

1371 Fifth, Mr Wood seemed to flip flop in his evidence that he thought that it was for Mr Mitchell to inform the board, and that Mr Healy might also chime in. He accepted under cross-examination by Mr Young QC that it was his choice not to give any details about the level of interest to the board. Moreover at one stage he accepted that he had no reliable recollection as to his state of mind in electing to not mention figures in connection with the interest from Nine and Network Ten at the relevant board meetings. And he also accepted that as he had direct personal knowledge of some of the discussions with Nine and Network Ten executives, if anyone was going to mention figures he was the person best placed to do so.

1372 The following passage of his evidence under cross-examination by Mr Young QC was illuminating:

> Can I ask you to turn to paragraph 168, please. In paragraph 168, Mr Wood, you say, in the second sentence:
>
> *I also did not mention their interest –*
>
> that's the interest of Ten and Nine –
>
> *at the 4 March board because I thought it was for Healy and Mitchell to raise and also because I thought the subcommittee would consider it.*
>
> Now, was that statement put in a draft of this affidavit for you?---No.
>
> It's not an accurate statement?---They – they didn't talk about the amount.
>
> You didn't talk about the amount?---The amount of the offer.
>
> Yes. Well, you raised the general interest, did you not, of Ten and Nine?---Yes. Yes, I – I believe I did, yes.

Yes, and you raised the general interest of Ten and Nine back on 3 December at the board; correct?---Yes.

And it was your choice that when you mentioned it, you would not mention any figures. That's what you did on 3 December?---I don't recall that.

You don't recall whether you mentioned figures or not on 3 December?---No.

You were the one who had actually been privy to discussions with the CEO of Ten, Mr Warburton; correct?---I thought it was Hamish McLennan.

Yes. Well, you had a conversation with Hamish McLennan; I think that was later in March?---Yes, that's probably later, yes.

Yes, and you were the one who had a conversation with Mr Browne of Channel 9, was it not?---Yes.

So you were the one who had direct personal knowledge of some of these discussions; correct?---Yes, off the back of those phone calls.

So having told the board about the general interest of Nine and Ten, if anyone was going to mention figures, you were a person much better placed than Mr Healy or Mitchell to mention figures, were you not?---I guess so.

Yes. So just explain to me – I withdraw that. Can you actually recall your thought processes at the time of the 4 March 2013 meeting as to why you – or whether you mentioned figures or not, and if you didn't mention them, why you didn't mention them. Have you got a clear recollection of your thought processes about that?---Not really.

No. In fact, your memory is a blank – is a complete blank – as to why you didn't mention figures, is it not?---Not really. I needed to get to the ENP.

Well, I understand that - - -?---Because nothing can be done without that.

Yes. So you wanted to get to the ENP. You mentioned interest from Nine and Ten, but you made the judgment that it would not assist anyone if you started talking about figures from those two entities prior to the ENP; is that right?---I don't recall that, but I already had the discussion about the Gemba valuation in the December board meeting.

Yes?---And, at that time, they also had the Seven – the then current Seven offer which was the 18 per cent increase. So, you know, they – they had – the board had a general knowledge of what was going on with the valuation, with – with the IMG figures and the fact that Nine and Ten were interested.

Yes. Now, Mr Wood, you have no recollection whatsoever of thinking that if figures were going to be mentioned at the 4 March board, it was for Healy and Mitchell to mention the figures, rather than you. You have no recollection of that, have you?---Yeah, I thought they were going to do it.

Well - - -?---Not Healy, Mitchell.

Not Healy?---Well, I thought Harold would lead it, and then maybe Healy would chime in, but - - -

But, Mr Wood, you were the one who raised the interest of Ten and Nine. You wanted to get to the ENP. I suggest again to you, you made the judgment, you made the choice that you would not mention those figures, didn't you?---I don't recall that.

> Well, you could have mentioned them if you wished, could you not?---I guess so.
>
> And when you gave your report, you chose not to. You chose not to mention the figures; correct?---I'm not sure.
>
> HIS HONOUR: I didn't understand one of your answers. You said that you had an expectation that Mr Mitchell, would have raised the figures?---Yes, like he did in the December board meeting.
>
> MR YOUNG: Mr Wood, you just added some words, "Like he did in the December board meeting." What precisely did Mitchell do in the December board meeting?---He made a recommendation we accept the offer that Seven made and that I close it out before Christmas.
>
> Yes, but his Honour's question and my questions have been about the different subject matter of mentioning figures expressed by Ten and Nine as to the level of their interest. Mitchell said nothing at the December board meeting about the level of interest of Ten or Nine, did he?---I don't recall. I just recall him wanting to sign the Seven deal at that point.
>
> HIS HONOUR: Sorry, to be clear, so you're not saying that you had an expectation that at the March meeting, Mr Mitchell was going to raise figures about Channel 9 or Channel 10's interest?---I thought he might, but he obviously – actually, I just don't recall that, sorry.
>
> MR YOUNG: Now, do you recall this, Mr Wood: you were asked about Channel 10 and Channel 9's interest in the course of your section 19 examination by ASIC. And the explanation you gave there was that you didn't mention figures because the broadcast parties can be quite mischievous and you couldn't talk to them anyway because the ENP was coming up. Do you recall that evidence to ASIC?---Yes.
>
> HIS HONOUR: Mr Young, I see it's about 11 o'clock. We might observe a minute's silence, I think that's probably appropriate.

Mr Healy's knowledge of Network Ten's interest

1373 ASIC says that Mr Healy had been told of the level of interest expressed by Network Ten.

1374 ASIC says that around May 2012, Mr Marquard had told Mr Ayles, that "Ten would be willing to pay in excess of 40 million annually for those [domestic broadcast] rights". This was reported to Mr Wood, who reported it to Mr Healy. Mr Wood's first affidavit stated that at around May 2012, "at a place I cannot recall, I told Healy that Network Ten had said that it was willing to pay $40 or $50 million per annum for the rights". Mr Healy denies this, but ASIC says his denial should not be accepted. I disagree.

1375 I agree with the defendants that on various occasions there was disconformity between Mr Wood's recollections in his written evidence and his recollections in giving oral evidence. In his written evidence Mr Wood recounted the substance of conversations that he had had with particular people at particular points in time, but only occasionally said that he did not recall a specific event. But in oral evidence his specific memory of key events or conversations was

vague. Clearly he had an impoverished recollection of informal discussions outside the board room.

1376 So much was established following my rejection of [162] of his first affidavit as inadmissible. When evidence in chief was led viva voce as a substitute, all that Mr Wood could recall was a conversation with Mr Healy about the Ayles paper in December 2012 in which he had no recollection of Mr Healy saying anything about the paper. He said the following as part of his evidence in chief in answer to Mr Pearce SC:

> Now, Mr Wood, I just want to ask you a couple of questions about the – a document that has been referred to as the Ayles paper. You know the document we're referring to?---Yes.
>
> And you produced a version of that document. Didn't you. You recall you got a draft from Steve Ayles, you made some changes to it?---Yes.
>
> And you recall providing that document with your changes to Mr Healy?---Yes.
>
> Do you recall having a discussion with Mr Healy at any point about whether that document should be included in a Board pack?---Yes.
>
> Do you recall what you said in that discussion?---That it should be included.
>
> Do you recall the words you used?---I don't recall.
>
> Do you recall what Mr Healy said in response to you?---I don't recall.
>
> Do you recall what date that was approximately?---That would – approximately December 2012.
>
> Do you recall whether the document was included in a Board pack?---No; it wasn't included.

1377 Now I accept Mr Wood's evidence about the manner in which he generally approached and conducted the domestic broadcast rights process in 2012 and 2013, including how he decided to keep the board appraised of that process, what he reported to the board and what he said in formal meetings. But his specific recollection of casual conversations where there was no contemporaneous document to support them was suspect.

1378 In any event, Mr Wood accepted that as at May 2012 his knowledge of Network Ten's interest was dependent on what he had been told by Mr Ayles. Mr Wood had no direct knowledge of what any representative of Network Ten had said it would be willing to pay. Mr Ayles recalled having a conversation with Mr Marquard in May 2012 and a subsequent meeting at Network Ten's offices in Sydney. In terms of the conversation with Mr Marquard, Mr Ayles was informed that Network Ten would be willing to pay in excess of $40 million. But Mr Ayles agreed that Mr Marquard's language in this conversation was very equivocal. Mr Ayles also

accepted that in the subsequent meeting at Network Ten's offices he did not recall Mr Warburton or Mr Marquard identifying any figures representing the level of Network Ten's interest. Further, neither Mr Ayles nor Mr Wood asked Mr Warburton about the level of Network Ten's interest in dollar terms.

1379 There is a further reason as to why the evidence of Mr Wood informing Mr Healy in May 2012 that Network Ten was willing to pay $40 or $50 million per annum was doubtful. Mr Marquard had been instructed by Mr Warbuton to open the batting at $35 million. Further, Mr Marquard also agreed that he did not participate in any discussion at this time where figures in the range of $40 to 50 million were mentioned by Network Ten to TA. Moreover, Mr Marquard knew that such a range was not financially justifiable or sustainable based on the analysis that he had done. He gave the following evidence under cross-examination by Mr Young QC:

> Now, can I ask you to turn the page to paragraph 23?---Yes.
>
> This is a later discussion with Ayles at the Olsen Hotel, and your recollection is that no numbers were mentioned at that meeting?---I can't recall at all, yes.
>
> Now, through until this point, 5 October 2012, you never participated in any discussion at any point that mentioned a range of 40 to 50 million dollars, did you?---No.
>
> No. And to the best of your knowledge, a range of 40 to 50 million dollars was never mentioned by Ten to Tennis Australia up to this point?---Yes.
>
> And you knew that a range of 40 to 50 million dollars was not financially justifiable based on the work that you had done, did you not?---We hadn't modelled that, yes, so we hadn't. Yes.
>
> Well, it went way beyond - - -?---Yes.
>
> - - - what you thought was sustainable?---Sustainable. It did.
>
> And what you reported to the board was sustainable?---Yes.

1380 Let me go to some events of 2013. ASIC says that around mid-February 2013, Mr Marquard quantified Network Ten's interest to Mr Healy himself. Mr Healy denies this. Let me elaborate.

1381 In mid-February 2013, Mr Marquard attended Mr Healy's firm's offices. Prior to the date of this meeting, Mr Marquard had arranged with a partner at Mr Healy's law firm to set up an appointment with Mr Healy for which there was no agenda. Mr Healy had no prior knowledge regarding the purpose of the meeting. Mr Marquard gave evidence that in a brief exchange, he told Mr Healy that Network Ten was very interested in doing a deal with TA on the tennis rights and that what they were prepared to pay was "significantly higher" than what TA were being offered. He mentioned a figure of $40 million or more per annum. Mr Marquard

accepted, however, that he did not know what amount Seven was offering TA, and that any figures he might have mentioned to Mr Healy were heavily qualified, equivocal and were floated in a non-committal sort of way.

1382 Now Mr Healy's recollection was that Mr Marquard simply said that Network Ten was interested in the tennis broadcast rights. But in my view it is likely that the $40 million per annum figure was mentioned even if fleetingly. But even if figures were mentioned, they were not of a nature that were suitable for disclosure to the board. Mr Healy recalled that in response to Mr Marquard's expression of interest, he said to Mr Marquard that TA had a contractual ENP with Seven, and as such it was not appropriate to discuss this matter with him at the time. Mr Healy did add that he appreciated Network Ten's interest, and that he would pass on that information.

1383 Mr Ayles also gave the following evidence as I have previously said:

> In late 2012 or early 2013, Marquard said to me during one of our discussions words to the effect that he had "door-stopped" Healy at Healy's office and told him that that Network Ten was looking to offer in excess of $40 million per year for the Domestic Broadcast Rights.
>
> Healy later said to me words to the effect that he had met with Marquard and that Marquard had said to him that Network Ten was looking at an offer in excess of $40 million per year for the Domestic Broadcast Rights. I cannot recall when or where this conversation occurred. To the best of my recollection, others were present when Healy said this, but I cannot recall whom.

1384 I accept Mr Ayles' version of this conversation. In short, I am satisfied that Mr Marquard, however informally, mentioned a figure of $40 million per annum or more to Mr Healy around this time.

1385 Further, according to ASIC, around late March 2013, Mr McLennan told Mr Wood that "Ten could pay a figure north of 40 million", and perhaps up to $50 million. Mr Wood then told Mr Healy, that Mr McLennan had said Network Ten "could offer up to $50 million". Mr Healy denies this, but the denial according to ASIC should not be accepted.

1386 Now in his first affidavit, Mr Wood referred to a conversation that he had had with Mr McLennan in late March 2013 regarding the tennis rights. Mr Wood accepted that when Mr McLennan rang him to discuss the tennis rights and when he referred to what Network Ten could pay, Mr McLennan's language was equivocal, qualified and quite summary. Mr Wood accepted that Mr McLennan spoke about a figure that Network Ten could pay, "maybe" about $50 million. Plainly, that language was guarded. Mr Wood knew that Mr McLennan was

merely floating a vague figure with him and said that TV executives were often ready to tempt him with these sort of discussions. Mr Wood also accepted that Mr McLennan could have just been trying to push TA up in its discussions with Seven.

1387 Further, Mr McLennan accepted that he was expressing a figure that Network Ten could pay, rather than a figure that it would pay; moreover, he was referring to the capacity to pay. Clearly he did not communicate figures that Network Ten could pay in a way in which the recipient could place significant reliance upon it.

1388 Further, Mr McLennan's views and assessment at this time seemed to be larded with speculation and intuition. The following cross-examination by Mr Young QC is revealing:

> Yes. But in the way that businesses like Ten operate, it's not normally a good basis for a business decision to rest solely on intuition, is it?---No, but I had spoken to other executives within the company.
>
> Yes, but broad discussions amongst executives is not a good basis for a decision either, is it?---No, but I had shared that number with my chairman.
>
> And you were expressing that level of interest in a way that Ten could not be held to; correct?---No, I was prepared to follow through with that number.
>
> Yes, but you were not expressing it in a way in which the recipient could place any reliance upon it; that's so, is it not?---No, but it was a number that I was prepared to follow through on.
>
> Yes, but let me just put this hypothetical to you, Mr McLennan?---Yes.
>
> If your analysis – if a full analysis of the position of Ten and what it could achieve by way of revenues direct and indirect from the rights, turned out to be such that a figure north of $40 million was not justifiable commercially, you would simply turn around and at a later point of time, if there was a bid process, you would put forward a figure that was less than $40 million without the slightest hesitation, wouldn't you?---No, I don't think that was a realistic outcome. I thought had they gone to the market, they would have definitely gone for north of - - -
>
> Just answer my question. If your analysis demonstrated the position I've just described, you would not have had the slightest compunction about making an offer that was well short of $40 million, would you?---No, I would – I would have gone for north of $40 million because I would have felt that that would have been the number required to secure the property.
>
> So you were prepared to pay more than your analysis demonstrated that the investment was worth; is that right?---That was the 2012 analysis. That was done before my time. So, in my opinion, as the incoming CEO, I felt that the rights were worth more.
>
> Yes, but if the analysis turned out that they were worth less than $40 million, are you telling me you were prepared to pay more than $40 million because of your feeling about this?---I am sure that I would have been able to justify the halo effect and the effect on the rest of the business. So - - -
>
> HIS HONOUR: You have said you would have had to have justified some sort of

> business case to the board?---Yes, we would have. Yes.
>
> So you would have needed to have done an update of the paper that had been done in April 2012?---Yes.
>
> Yes. Right.
>
> MR YOUNG: My question, Mr McLennan, is that if that paper to the board came up with a conclusion that a figure beyond $40 million could not be justified, you would not have offered a figure beyond $40 million, would you?---I – I – it depends how you analyse the rights, and so the 2012 analysis by Marquard, I don't think fully captured the type of advertising revenue that we could have secured and the halo effect on the business. So my intuition at the time, and it is important, in consultation with my chairman and other executives within the business, that by the time – had those rights gone to the open market they would have gone for more than 40 million.

1389 Now Mr Wood did not refer in his first affidavit to telling Mr Healy about this conversation. But in his second affidavit, he recalled telling Mr Healy that "McLennan called me and said that Network Ten are very serious and could offer up to $50 million". But Mr Wood could not explain the reason for the omission of this evidence from his first affidavit. Mr Healy's evidence is that Mr Wood never mentioned such a figure to him for which Network Ten had said they were interested in acquiring the rights for. I am inclined to accept Mr Healy's evidence. But even if there was a conversation between Mr Wood and Mr Healy in which such a vague number was attributed to Network Ten by Mr Wood, Mr Wood accepted that in any such conversation he would have mentioned to Mr Healy his reservations about the reliance that could be placed on any such figure attaching to Network Ten's interest at that time. In the circumstances I would not find any lack of care by Mr Healy in failing to pass on any such vague figures, particularly where Mr Wood had greater knowledge and did not think that they needed to be disclosed at the 20 May 2013 board meeting.

Mr Healy's knowledge of Nine's interest

1390 In my view there is no reliable evidence that Mr Healy was ever informed of Nine's interest outside the 3 December 2012 and 4 March 2013 board meetings.

1391 Further, there is no evidence that Mr Healy knew of any particular figure attached to Nine's interest. Consequently, there is no sound basis for ASIC's allegation that Mr Healy was bound to disclose the level of interest of Nine in the domestic broadcast rights at the 20 May 2013 board meeting.

1392 Further, in any event, in 2013 Nine was concentrating on winning the rights to domestic cricket. But this clashed with the tennis. It did not seem to me to be a serious contention that Nine

could realistically accommodate both the tennis and the cricket, let alone in a manner satisfactory to TA.

1393 The evidence of Mr Browne was to the effect that once Nine acquired the cricket rights, it would be problematic for it to be a real contender for the tennis rights. Under cross-examination by Mr Young QC, Mr Browne gave the following evidence:

> Now, can I take up one of the last matters that Mr De Young asked you about. He asked you whether it was possible to broadcast both the tennis and cricket, and you said whilst it's technically possible, you could not be sure that it was commercially feasible; correct?---Yes.
>
> And that was because – let me start again. Was that because your only option with respect to tennis, if you already had the cricket rights, would be to broadcast tennis on Nine's secondary channel?---Yes.
>
> And to do that, under the anti-siphoning legislation, you would require the consent of the Minister?---Yes.
>
> Now, do you accept this: that option of broadcasting tennis on Nine's secondary channel was very likely to be unacceptable to Tennis Australia?---Yes.
>
> Did that mean from Nine's perspective that once you had acquired the cricket rights, Nine was unlikely to be a serious contestant for tennis rights when they came up later in the year?---Yes, for the reason that we've just been discussing but also it would not have been possible for Nine to afford to buy both of the rights.
>
> Yes. And that was because you had already outlaid heavily on NRL and cricket?---Correct.

1394 Now ASIC says that Mr Healy had been told of the level of interest expressed by Nine. ASIC says that in late 2012, Mr Gyngell, the CEO of Nine, met with Mr Wood and Mr Ayles. In that meeting, Mr Gyngell said he would be interested in participating in the tennis broadcast rights process. I would note here that it is significant that Mr Gyngell did not say that Nine would definitely compete for the rights. Shortly afterwards, Mr Browne, managing director of Nine, telephoned Mr Wood. Mr Wood said that he reported his conversation with Mr Browne to Mr Healy, who never reported it to the board. But Mr Healy denied this. Now ASIC says that his denial should not be accepted. It says that it is not plausible that the CEO would not tell the chairman given that the two spoke frequently, and particularly given that a competing bidder was expressing interest worth about twice that being offered by the incumbent. Nevertheless, I accept Mr Healy's evidence, particularly as to Mr Wood's conversation with Mr Browne given that it was fleeting. Further, Mr Gyngell did not mention a figure. Moreover, in the conversation between Mr Wood and Mr Browne I have accepted Mr Browne's version of Mr Wood floating a figure which seems likely.

(e) Some legal propositions

1395 Mr Healy's statutory obligation as a director of TA under s 180(1) was to perform his duties with reasonable care and diligence. In assessing that obligation one must first consider the corporation's circumstances and, second, the person's office and particular responsibilities within the corporation.

1396 Section 180 of the Corporations Act provides as follows:

> **180 Care and diligence—civil obligation only**
>
> *Care and diligence—directors and other officers*
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> *Business judgment rule*
>
> (2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:
>
> (a) make the judgment in good faith for a proper purpose; and
>
> (b) do not have a material personal interest in the subject matter of the judgment; and
>
> (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
>
> (d) rationally believe that the judgment is in the best interests of the corporation.
>
> The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.
>
> (3) In this section:
>
> ***business judgment*** means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

1397 The standard of reasonableness to which directors must adhere is an objective standard. It is a duty which requires them to act with the skill and diligence which ordinary prudence requires under similar circumstances. In determining if a director has breached s 180(1), it is necessary to consider the corporation's circumstances and the position and responsibilities of the director within the corporation. No party questioned my summary in *Australian Securities and*

Investments Commission v Mariner Corporation Ltd (2015) 241 FCR 502 where I said that in determining whether a director has exercised reasonable care and diligence (at [440] and [441]):

> It is not in doubt that the circumstances of the particular company concerned inform the content of the duty. These include the size and type of the company, the size and nature of the business it carries on, the terms of its Constitution, and the composition of the board of directors.
>
> It is also not in doubt that in considering the acts or omissions of a particular director, one looks at factors including the director's position and responsibilities, the director's experience and skills, the terms and conditions on which he has undertaken to act as a director, how the responsibility for the company's business has been distributed between the directors and the company's employees, the informational flows and systems in place and the reporting systems and requirements within the company.

The position of chairman

1398 Let me say something about the position of chairman.

1399 The Corporations Act does not make any express reference to the roles or functions of a chairman of the board. But as Professor Andrew Clarke has distilled more generally (Clarke A, "The lacuna in corporate law: The unwritten role of the chair" (2018) 33 *Australian Journal of Corporate Law* 125 at 132) from legislative rules able to be displaced or modified by a company's constitution (s 135 and also Chapter 2G):

> The *Corporations Act 2001* (Cth) via the replaceable rules potentially provides a series of provisions which the company can adopt to suit its purposes and support the chair's role regarding oversight of the meeting process. There are several overlapping and interlocking rules available. These include the option that the directors may appoint a director to chair directors' meetings [s 248E]. If so, the chair has a casting vote at directors' meetings [s 248G(2)]. Alternatively, an individual may be elected by the directors to chair meetings of the company's members [s 249U(1)]. Furthermore, the directors must elect a person to chair the meeting if they have not previously done so prior to the meeting, or if the previously elected person is not available for the meeting [s 249U(2)]. If the directors do not elect a chair for the shareholders' meeting or the chair is unavailable, the shareholders may elect the chair [s 249U(3)]. The chair is provided with a casting vote as well as any other vote they have in their capacity as a shareholder [s 250E]. Minutes must be signed by the chair of the meeting or the chair of the next meeting [s 251A(2)]. These features of the replaceable rules promote the role of the chair from the merely ceremonial.

1400 Further, there was regulatory guidance around the relevant time in the form of the ASX's *Corporate Governance Principles and Recommendations*. Recommendation 2.5 (3rd edition, 2014) provided that the chairman of a listed entity should be an independent director, and should not be the same person as the CEO. The commentary to Recommendation 2.5 (3rd edition, 2014) described the responsibilities of the chairman:

> The chair of the board is responsible for leading the board, facilitating the effective contribution of all directors and promoting constructive and respectful relations between directors and between the board and management. The chair is also responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues.

1401 The prior version (2nd edition, 2007 with 2010 amendments) had a similarly worded but differently numbered Recommendation 2.2. The commentary to it provided:

> The chair is responsible for leadership of the board and for the efficient organisation and conduct of the board's functioning.
>
> The chair should facilitate the effective contribution of all directors and promote constructive and respectful relations between directors and between board and management.
>
> Where the chair is not an independent director, it may be beneficial to consider the appointment of a lead independent director.
>
> The role of chair is demanding, requiring a significant time commitment. The chair's other positions should not be such that they are likely to hinder effective performance in the role.

1402 In *AWA Ltd v Daniels t/a Deloitte Haskins & Sells* (1992) 7 ACSR 759, Rogers J said at 867:

> The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company. In discharging his or her responsibilities the chairman will cooperate with the managing director if the two positions are separate or otherwise with senior management.

1403 This judgment was appealed, but the Court of Appeal did not question these observations (see *Daniels v Anderson* (1995) 37 NSWLR 438).

1404 In *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189 at 225, Mahoney JA said:

> …a person who is a chairman of the board of directors has additional rights and duties and additional opportunities. Ordinarily it is the function of a chairman to settle the agenda of the meetings of the board: at least he exercises a significant influence upon it. He is in a position, in the sense here relevant, to ensure that proposals are brought forward for consideration by the directors at their meetings. And this, in a particular case, may affect the content of fiduciary duties which he owes to his company.

1405 In *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128 (*Rich I*) at [58] to [59] Austin J on a strike out application referred to both *AWA Ltd v Daniels* and *Woolworths Ltd v Kelly* when he said that some cases indicate that the chair of a listed company may have responsibilities that go beyond procedural duties.

1406 Now more generally, the content of Mr Healy's duty under s 180(1) is to be determined according to the responsibilities that Mr Healy held within TA as chairman and president. And in *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 it was explained that such responsibilities could be statutory and non-statutory. The plurality said (at [18]):

> [T]hose responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include whatever responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

1407 Further, in *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 (*Rich II*) at [7202], Austin J observed, with reference to *Rich I* and with which I would agree, that:

> [t]he word "responsibilities" directs attention to the factual arrangements operating within the company and affecting the director or officer in question, as opposed to the legal duty of care arising in particular circumstances. The "responsibilities" of a director or officer include arrangements flowing from the experience and skills that he or she brings to bear to the office, and also any arrangements within the board or between the person and executive management affecting the work that the person is expected to carry out. I rejected the notion that the word "responsibilities" refers only to specific tasks delegated to the relevant director or officer by the corporate constitution or a board or members' resolution or otherwise, holding that it was a wider concept referring to the acquisition of responsibilities not only through specific delegation, but also through the way in which work is in fact distributed within the corporation and the expectations placed by those arrangements on the shoulders of the individual director or officer.

1408 Let me delve a little deeper into the position of the chairman of the board.

1409 Clearly, he has no power or authority to manage the corporation. His primary function is to preside at board meetings and accordingly to exercise procedural control. But save for that, and his power to exercise a casting vote (if applicable), he has no greater authority than an ordinary director. He is not some sort of directorial overlord. But he does have the power and authority to manage board meetings and to that extent he may have greater responsibility for the performance of the board as a whole.

1410 But the chairman does have the power, authority and responsibility for setting the agenda items for board meetings, although these may be added to by the agreement of other directors. He can also discharge that responsibility in consultation with the CEO.

1411 He also has the power, authority and responsibility to ensure that the board has before it sufficient information, whether presented in written or oral form, such as to be able to meaningfully consider, discuss and decide on the agenda items before the board at the relevant

meeting taking into account the context of the decision required or consideration necessary by the board at that meeting. Of course, he may discharge such a responsibility in consultation with the CEO. I have elaborated on these themes earlier in my reasons.

1412 The chairman also has the power, authority and responsibility to manage the board to ensure that sufficient time is allowed for the discussion of complex or contentious matters; for this purpose it may be necessary to arrange meetings outside board meetings so that board members are thoroughly prepared.

1413 Further, the chairman is there to ensure that the board members work effectively together and to ensure that their skill sets and personalities complement each other. Moreover, he should endeavour to facilitate the effective contribution of each director.

1414 Further, the chairman is there to ensure workable and harmonious relations between the executive and non-executive directors, and more generally to ensure workable and harmonious relations between the board on the one hand and the executive management on the other hand, particularly the CEO. It should go without saying that the relationship between the chairman and the CEO, particularly where the CEO is not a director as in the present case with Mr Wood, needs to be productive and harmonious; the chairman should facilitate this.

1415 Further, as Professor Clarke points out, the chairman has an important role in dealing with disrupters on the board. Do they display very negative behaviour? Are they "net energy drainers" (Ram Charan, Dennis Carey and Michael Useem, *Boards That Lead: When to Take Charge, When to Partner, and When to Stay out of the Way* (Harvard Business Review Press, 2013) 64-5)? Do they pontificate on issues that are pretentious or irrelevant? Do they require remedial assistance or counselling? Should they be encouraged to depart? These are all questions that a chairman may have to ask himself. It should not be forgotten that disproportionate disharmony within a board can damage the corporation by unwanted media attention and damage to reputation or internal disillusionment within the organisation. But productive dissent and competitive tension between conflicting ideas and positions should be welcomed rather than hindered by a chairman who thinks that he otherwise knows best.

1416 Further, the chairman may have greater responsibility for defining and ensuring that the board sets and implements the corporate culture of the organisation in the neutral sense referred to in s 12.3(6) of the Criminal Code (Cth) meaning "an attitude, policy, rule, course of conduct or practice existing within the body corporate generally". So, in one sense, such culture may be

described as the organisation's set of shared values and assumptions. For present purposes it is not necessary to elaborate on such themes, let alone seek to infuse them with any discussion of contemporary community expectations or standards if it was ever possible to distil their essence at any particular time.

1417 Further, the chairman may have greater responsibility for defining and ensuring that the board sets and implements the appropriate corporate governance structure within the organisation. I use corporate governance here in the sense described in the ASX's publications that I have referred to above adopting what was said by Justice Neville Owen in the HIH Royal Commission report, being the framework of rules, relationships, systems and mechanisms under which authority is exercised and controlled within the corporation and under which it is accountable.

1418 Further, there are other responsibilities of the chairman including assisting to identify new directors, dealing with the induction of new directors and ensuring continuing education and development of each director. More generally, he is responsible for monitoring the performance of the board, board members and board committees.

1419 Further, the chairman is there to ensure that there is appropriate communication with and the taking into consideration of the interests and concerns of members, in this case the member associations. In the present context, the evidence concerning the events of late 2015 well demonstrate that Mr Healy properly took into account the concerns and interests of member associations when they wished to have Mr Mitchell continue as a director. In doing so, he was properly discharging his duty rather than engaging in any conduct which was its antithesis as ASIC seemed to suggest.

1420 Finally, the chairman may have a public relations role in representing the board and the organisation to outside parties.

1421 Let me now shift the focus slightly and say something about the chairman's role in the context of corporate practices. In this context, one has to look at what I would describe as two types of corporate practices relevant to an organisation.

1422 The first type is descriptive corporate practices. In other words, what were the types of actual corporate practices within the organisation? What was actually done in terms of the division of corporate structure and responsibilities? In that context, one might then identify what the

organisation expected of the chairman, and then compare it with what the chairman actually did.

1423 The second type is normative corporate practices. In other words, what should have been the corporate practices within the organisation? These may differ from the actual practices. Further, such a normative question may only be able to be answered by looking at actual corporate practices both within and outside the organisation. Now these may identify what could be described as the "usual practices". But even identifying such usual practices does not necessarily identify what *should* have been the practices. Normative corporate practices and "usual" corporate practices are not one and the same thing. I should say that in the present case, ASIC has not sought to identify by reference to expert evidence any such usual practices or indeed normative corporate practices, let alone how Mr Healy's responsibilities should have been seen in that light. So, it is difficult to compare Mr Healy's conduct and what is said to have been his responsibilities against any usual or normative corporate practices. None have been identified. All that ASIC has done has been to point to the statutory language of s 180(1) of which it says Mr Healy has fallen foul.

1424 Let me deal with another dimension. What did the chairman undertake to do or represent that he would undertake to do? The latter question may inform or be part of the foundation to assess expectation. But of course expectation may travel beyond and be informed by matters broader than the latter question.

1425 Further, the chairman's represented personal qualities and skills may affect the question of expectation (*Rich I* at [48]). There is no reason why a chairman's represented special qualifications and experience ought not be considered in this context. Indeed, they may have formed part of what the chairman represented as demonstrating his suitability for the position in the first place, which may inform expectation.

1426 So position, responsibilities and represented personal qualities all feed into the question of expectation.

1427 Of course though, one has to be careful of this notion of represented personal qualities let alone the description of "expert directors". Mr Healy was a lawyer director. But his legal experience was in, inter-alia, real estate. Of course, TA required real estate for its activities, but he was not appointed the chairman for that skill set. And nor was he there to give expert legal advice to the board on that or any other matter.

1428 Further, I have considered the position of Mr Healy as a member of the audit and risk committee and as to whether that should form part of the matrix of circumstances informing his responsibilities. But he was an ex officio member; in other words, whoever was the chairman was a member of that committee. Further, I do not think that his membership of that committee adds anything to the nature of his responsibilities relevant to ASIC's alleged contraventions.

1429 Finally, I have not talked separately about Mr Healy's role as the president. It is convenient for present purposes to make the assumption that this role added no additional dimension to his relevant legal duties that I need to consider over and above his duties as chairman. Certainly, no additional dimension was drawn to my attention by the parties.

Foreseeable risk of harm

1430 Let me now turn to the concept of foreseeable risk of harm. In this respect I said in *Mariner* at [449] to [452]:

> In order for an act or omission of the director to be capable of constituting a contravention of s 180 there must be reasonably foreseeable harm to the interests of the company caused thereby.
>
> Further, relevant to the question of breach of duty is the balance between, on the one hand, the foreseeable risk of harm to the company flowing from the contravention and, on the other hand, the potential benefits that could reasonably be expected to have accrued to the company from that conduct.
>
> Not only must the Court consider the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, but the Court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question.
>
> After all, one expects management including the directors to take calculated risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s 180.

1431 As I said, for conduct to amount to a contravention of the statutory duty, it must have created at least a foreseeable risk of harm to the company's interests (see *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449 to 450 per Ipp J). In *Australian Securities and Investments Commission v Cassimatis* (No 8) (2016) 336 ALR 209 at 298 to 305, Edelman J discussed Ipp J's test in *Vrisakis* and made the following observations. First, the reference to "harm" in *Vrisakis* is best understood as referencing harm to any of the interests of the corporation. The concept of harm should not be confined narrowly and s 180(1) does not require proof of actual loss to a company. The risk of foreseeable harm is not confined to

financial harm, but includes harm to all the interests of the corporation. Second, the reference to "balancing" is not to be taken literally, but should be understood as a reference to Mason J's judgment in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 to 48. The balancing exercise is "forward looking" as to what a reasonable person would have done, not an exercise in hindsight and "not amenable to exact calculation". Third, the consideration of the foreseeable risk of harm together with the potential benefits that reasonably could have been expected to accrue to the company from the conduct in question has to take place from the perspective of the corporation's circumstances and the responsibilities and office of the relevant director. On appeal Thawley J took a similar approach (*Cassimatis v Australian Securities and Investments Commission* (2020) 376 ALR 261 at [458] and [459]).

1432 In *Rich II*, Austin J referred to Ipp J's observations in *Vrisakis* and summarised the position in terms with which I would agree (at [7193]):

> …Ipp J (as he then was) held that the statutory duty of a director to exercise a reasonable degree of care and diligence could not be defined without reference to the nature and extent of the foreseeable risk of harm to the company that would otherwise arise. Therefore no act or omission was capable of constituting failure to exercise care and diligence under the section unless at the relevant time it was reasonably foreseeable that harm to the interests of the company might be caused by that act or omission. But the mere fact that a director participated in conduct that carried with it a foreseeable risk of harm to the interests of the company did not necessarily mean that he or she had failed to comply with the statutory standard, as the legislature did not intend to dampen business enterprise and penalise legitimate but unsuccessful entrepreneurial activity. Accordingly, the question whether a director had exercised a reasonable degree of care and diligence could only be answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question.

The "business judgment" rule

1433 I should now say something about the "business judgment" rule. Section 180(2) contains a statutory form of "business judgment" rule. But this is not to deny that implicit in s 180(1) itself is a tolerance or margin of appreciation for the business judgment of directors in relation to a particular act or omission, including a decision to act or not to act, such that so to act or not act may not constitute a breach of s 180(1).

1434 Clearly though, the plaintiff has the legal onus of establishing the elements of s 180(1), although a defendant director may have an evidentiary onus on some aspects.

1435 Contrastingly, the defendant director has the legal and evidentiary onus to establish each of the four criteria under s 180(2). So much is apparent from the express statutory language; to the extent that other single judge decisions say otherwise, I disagree. Moreover, each of the criteria

is within the purview, personal knowledge of and proof by the defendant director, suggesting that it was the statutory intent that he bears the relevant legal and evidentiary onus. The state of knowledge and belief (criteria (a), (c) and (d)) is within his purview. So too is whether he has a "material personal interest in the subject matter of the judgment" (criterion (b)). Further, it is not up to the plaintiff to disprove each such matter. Further, s 180(2) creates a presumption. It is for the defendant director to establish the criteria necessary to enliven the presumption.

1436 Let me say something about the third criterion (s 180(2)(c)) and the fourth criterion (s 180(2)(d)) which are particularly relevant to the present context.

1437 As to the third criterion, Austin J in *Rich II* at [7283] and [7284] said:

> The element of the business judgment rule set out in s 180(2)(c) is that the director or officer must inform themselves about the subject matter of the judgment to the extent that they reasonably believe to be appropriate. I agree with ASIC's submission (APS [2096(e)]) that the reasonableness of the belief should be assessed by reference to:
>
> - the importance of the business judgment to be made;
> - the time available for obtaining information;
> - the costs related to obtaining information;
> - the director or officer's confidence in those exploring the matter;
> - the state of the company's business at that time and the nature of competing demands on the board's attention (referring to the *ALI Principles*, p 178); and
> - whether or not material information is reasonably available to the director (citing *Smith v Van Gorkom* 488 AD 2d 858 at 872 (1985) (Sup Ct Del, 1985)).
>
> ASIC submitted (APS [2096(f)]) that the requirement that the director or officer inform themselves "to the extent they *reasonably* believe to be appropriate" reflects the view that regard must be had not only to what the director or officer actually knew, but what he or she should have known (citing *Re People's Department Stores Ltd* (1992) Inc [2004] 3 SCR 461 at [67]). In my view that submission distorts the statutory language, for it would deny protection unless the director were able to show previous compliance with the duty of care and diligence on another issue, namely to keep informed of material matters affecting the exercise of the powers and the discharge of the duties of office. The statutory language relates to the decision-making occasion, rather than the general state of knowledge of the director. It requires the director to become informed about the subject matter of the decision prior to making it, since the business judgment rule should not protect decisions taken in disregard of material information readily available. The qualifying words, "to the extent they reasonably believe to be appropriate", convey the idea that protection may be available even if the director was not aware of available information material to the decision, if he reasonably believed he had taken appropriate steps on the decision-making occasion to inform himself about the subject matter.

1438 As to the fourth criterion, he said (at [7290] to [7291]):

> On this view, which I favour, subpara (d) is satisfied if the evidence shows that the

> defendant believed that his or her judgment was in the best interests of the corporation, and that belief was supported by a reasoning process sufficient to warrant describing it as a rational belief, as defined, whether or not the reasoning process is objectively a convincing one. Consequently the Australian position on this matter is very close to the US position and s 180(2) has some protective work to do in cases where in its absence, there would or would arguably be a contravention of s 180(1).
>
> The director or officer's belief about the best interests of the corporation is to be formed, and its rationality assessed, on the basis of the information obtained through compliance with subpara (c). It is not to be assumed, for the purpose of applying subpara (d), that the director or officer knew everything that he or she ought to have known, but only the things that he or she reasonably believed to be appropriate to find out.

1439 I agree with Austin J's observations on the third and fourth criteria.

1440 Let me say something else. To potentially enliven s 180(2) there must be a "business judgment". Section 180(3) defines "business judgment" to mean:

> any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

1441 The question in the present case is whether Mr Healy's decision to include or not include information to be provided to the board is a "business judgment" as such. I am inclined to the view that it is not. The definition refers to a decision to "take or not take action" concerning a "matter relevant to the business operations". Of course information flow ultimately feeds into the board's decision which did concern business operations. And admittedly the words "in respect of a matter" are of broad compass. Nevertheless, I very much doubt whether Mr Healy's choices of information flow fairly fit within the description "business judgment" as a composite phrase.

1442 But I do not need to pursue this further, as irrespective of whether s 180(2) could be invoked, I am not satisfied in any event that Mr Healy has contravened s 180(1).

Reliance on information or advice

1443 Finally, let me say something about s 189 which provides:

> If:
>
> (a) a director relies on information, or professional or expert advice, given or prepared by:
>
> (i) an employee of the corporation whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned; or
>
> (ii) a professional adviser or expert in relation to matters that the director believes on reasonable grounds to be within the person's professional

or expert competence; or

(iii) another director or officer in relation to matters within the director's or officer's authority; or

(iv) a committee of directors on which the director did not serve in relation to matters within the committee's authority; and

(b) the reliance was made:

(i) in good faith; and

(ii) after making an independent assessment of the information or advice, having regard to the director's knowledge of the corporation and the complexity of the structure and operations of the corporation; and

(c) the reasonableness of the director's reliance on the information or advice arises in proceedings brought to determine whether a director has performed a duty under this Part or an equivalent general law duty;

the director's reliance on the information or advice is taken to be reasonable unless the contrary is proved.

1444 In the present case Mr Healy has sought to invoke s 189 in terms of his reliance upon Mr Wood concerning the information that should have been disclosed to the board concerning aspects of the negotiations. First, I have little doubt that criteria (a)(iii) and (b)(i) have been satisfied. Second, criteria (b)(ii) and (c) may be the more debatable questions in the present case.

(f) Did Mr Healy breach his duty?

1445 I would reject ASIC's case.

1446 In my view, in the circumstances disclosed by the evidence, Mr Healy's duty to exercise reasonable care and diligence did not require him to countermand Mr Wood's judgment with respect to the information Mr Wood decided after consideration to put before the board and the method Mr Wood used to convey such information.

1447 Mr Wood was charged with managing the domestic broadcast rights negotiations, he knew all the relevant facts affecting his negotiating strategy, and he was the person best placed to judge. He exercised his judgment as to what documents or other information would be of assistance to the board at the time of each relevant board meeting. Mr Healy was entitled to rely on, and did rely on, Mr Wood's judgment in those respects. Mr Healy formed an independent view that Mr Wood's judgment was appropriate.

1448 In *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, Middleton J observed that (at [167]):

While directors are required to take reasonable steps to place themselves in a position

> to guide and monitor the management of the company, they are entitled to rely upon others, at least except where they know, or by the exercise of ordinary care should know, facts that would deny reliance…

1449 Mr Wood exercised his own judgment in two critical respects. First, he decided what information to place before the board and the format that was most appropriate. Second, he made a judgment, in recommending that the board accept Seven's final offer, that he considered to be in the best interests of TA.

1450 Let me elaborate on the first matter.

1451 In terms of Mr Wood's judgment as to the content of and method for conveying information to the board, the evidence discloses the following.

1452 Mr Wood prepared the board packs for each of the 3 December 2012, 4 March 2013 and 20 May 2013 board meetings and decided what to include in those board packs. And Mr Wood had all of the documents the subject of ASIC's case against Mr Healy. In my view it was Mr Wood's considered judgment not to include those documents in those board packs. Further, Mr Healy was entitled to rely on that judgment.

1453 Further, Mr Wood chose to orally update the board about the relevant negotiations as part of his CEO's report. During the course of those oral reports, Mr Wood informed the board of those matters which were material to the board's decision-making on domestic broadcast rights.

1454 Of course a key component of that assessment of materiality was the timing of the relevant board meetings. Sometimes it was a question of merely updating the board as to the negotiations; this was the case on 3 December 2012, 4 March 2013 and 15 April 2013. At other times a decision was being sought from the board; this was the case on 20 May 2013.

1455 Further, TA was contractually obliged to enter into a six-month ENP with Seven from 1 April 2013. It is obvious that no decision could be taken at the 3 December 2012 or 4 March 2013 meetings that was inconsistent with TA's contractual commitments concerning the ENP. This informed Mr Wood's decision as to what to bring before the board at those times.

1456 Further, based on Mr Wood's direct conversations with representatives Network Ten and Nine, his in-depth knowledge of the domestic broadcast rights process and TA's obligation to engage bona fide with Seven in the ENP, Mr Wood chose to inform the board that Network Ten and Nine had expressed interest in the broadcast rights. He so informed them at the 3 December 2012 and 4 March 2013 board meetings. Now Mr Wood did not mention a figure in connection

with Network Ten's or Nine's interest, but unsurprisingly this was because he did not consider that any figures that had been mentioned could be considered reliable or could be regarded as a genuine expression of a willingness to make an offer in those terms. At most, the conversations that Mr Wood had with Network Ten and Nine representatives were guarded and equivocal.

1457 The evidence he gave under cross-examination by Mr Young QC concerning the 3 December 2012 meeting is revealing:

> Thank you. Can I take you to paragraph 122 of your affidavit, please. In the first sentence you say, "At the meeting of 3 December". You said words to the effect that:
>
> > *Nine Entertainment and Network Ten had expressed interest in the domestic broadcast rights.*
>
> And then you go on to say:
>
> > *This interest was not discussed in detail.*
>
> There was some discussion at the board, was there not, of the fact that Channel 9 and Channel 10 had both expressed interest, as you described it?---Yes.
>
> And the – well, part of the tenor of that discussion was the directors would expect them to be interested?---Yes.
>
> Now, in the course of that discussion, you did not mention any figures or any level of interest that had been expressed by either network, did you?---No, I thought it was up to Harold to do that.
>
> Yes. Well, you were the one, when you stated this, who made the choice not to give any details about the level of interest, weren't you?---Yes.
>
> Yes. And your judgment was that nothing that had been put forward by Nine or Ten could be relied upon, wasn't it?---Well, I had had one phone call with each of them.
>
> Yes. One phone call in very general or qualified terms; correct?---Yes.
>
> And you knew that there was a risk that those two networks were simply posturing about how much they might be prepared to pay?---Not really. I don't know what they would be prepared to pay and all this posturing that apparently is going on. What I do know is we had an ENP coming up with Channel 7 and that was the key focus.
>
> Yes. Well, in terms of, I use the word "posturing", but what I'm putting to you is you formed the view that any figures mentioned by these networks could not be relied upon, didn't you?---Well, not really, because I had the valuation report from Gemba. I had Chris Guinness from IMG evaluate the Channel 7 offer and give me some best practices of what's going on around the world for broadcast deals. And so I didn't dismiss those offers out of hand.
>
> No, but you were conscious that there was a risk that all they were doing was putting forward figures in an attempt to inflate the amount that Seven may have to pay?---That's possible, but in all of these deals there's always risk about swapping from your existing broadcast partner of 46 years to a new one.
>
> Well, can I take you to volume 8 of the court book, please. Could you turn, please, to

tab 406. In fact, tab 406 contains an email you sent to the board on 13 June 2013 - - - ?---Yes.

- - - dealing with the reasons why the final agreement with Channel 7 was, in your view, a very good agreement?---Yes.

Yes. Now, all of the matters you set out in that email to the board were accurate, were they not?---Let me just double-check. Yes, all of those were accurate.

Yes. Now, one observation you made in the last paragraph at 4781 was to reference some fanciful public talk about how much Channel 10 or Channel 9 would have offered in an open tender and you continued:

> *Frankly it's very much in their interest to inflate their intentions as they will never be tested.*

Now, that was a view that you held at the time of the 3 December board meeting, wasn't it?---No, I don't think so, not at the December 3 board meeting.

You held the view at the time of the 3 December board meeting that there was a risk that statements made by Channel 10 and Channel 9 may have simply been to inflate the amount that Channel 7 would have to pay and those figures would never be tested?---Well, that's correct if you do an ENP and you don't go to the open market.

Yes?---However, the media coverage that was underway at the time by Channel 10 in particular was helpful to Tennis Australia because it talked up the value of our rights.

Yes. No, I understand that. I'm not suggesting that the reports of Channel 10's interest were unhelpful to Tennis Australia. I'm just suggesting to you that you had reservations about the reliability of the particular figures that had been mentioned to you?---Yes, I had some reservations, but also I had reservations about swapping from Seven.

Yes. No, I understand that. I will ask you about that in a moment. But one of the reasons why you made the choice on 3 December to refer only to expressions of interest by Channel 10 and Channel 9, without going into figures, was that you had reservations about the extent to which those particular figures could be relied upon. Isn't that right?---Well, yes and no, because it was a phone call from Channel 9 and Channel 10 to tell me they were very interested in our rights and they could pay a certain figure, and whether I believed that or not needed to be tested.

Yes, but the – you made a choice not to refer to the figures because you had reservations that if you put those figures to the board, undue optimism might be induced when you thought those figures were attended by certain risks?---Yes, I suppose that's how it unfolded in the meeting.

Yes. Well – let me put to you what you said when you were asked in your ASIC examination at pages 60 and 61 of that transcript about why you provided no detail of the Channel 10 offer at the 3 December board meeting and your answer was this:

> *Often these broadcast parties get quite mischievous and that was a view that I had formed. We couldn't talk to them anyway because we had an exclusive negotiation period coming up and it was important to inform the board of that, which we did, and that's pretty much the extent of what happened.*

Now, that was an accurate statement of your reasons for not going into any detail concerning the level of interest expressed by Nine and Ten, wasn't it?---Yes.

1458 Now with Mr Wood having disclosed the interest expressed by Network Ten and Nine in these general terms, Mr Healy was entitled to rely on that disclosure. Further, there was nothing in Mr Healy's discussion with Mr Marquard in February 2013 to deny such reliance, even if an informal and on the run figure of $40 million per annum had been mentioned.

1459 Let me say something further about Mr Healy's reliance on Mr Wood. As I have said, s 189 establishes a statutory presumption as to the reasonableness of reliance by a director on information if certain conditions are satisfied. In *Mariner* I set out those principles at [530] to [533]. In effect, s 189 requires that where the director relies on information, professional or expert advice, he must do so in good faith and only after having made an independent assessment of the information or advice. In this context, independent assessment requires no more than that the director, having listened to and assessed what his colleagues have said, must bring his own mind to bear on the issue using such skill and judgment as he may possess. Further, there must be evidence that he in fact relied on the information provided. In the present case each of those criteria are satisfied on the evidence. Therefore Mr Healy's reliance on Mr Wood is presumed to have been reasonable. And ASIC has failed to discharge the onus that it was not.

1460 Let me elaborate on the second matter.

1461 Mr Wood made the judgment that it was in TA's best interests for him to recommend that the board accept Seven's final offer at the 20 May 2013 board meeting.

1462 On 20 May 2013 Mr Wood recommended that the board accept Seven's final offer and authorise management to proceed to negotiate a long-form agreement. Mr Wood made this recommendation in circumstances where he was satisfied that, first, the fee of $195 million over 5 years ($39 million per year) was a "great result" in financial terms, second, the rights fee was very close to Gemba's valuation of $40 million per year and, third, having been shown the advertising revenue that Seven had generated from the AO at his meeting with Mr Worner on 16 May 2013, Mr Wood was satisfied that the rights fee in Seven's final offer was as good as Seven could reasonably be expected to pay. Further and importantly, the deal satisfied a key objective to provide TA with the opportunity to undertake host broadcast and post-production responsibilities, which would unlock very substantial future revenue streams.

1463 Further, it should not be overlooked that the only point at which the board was asked to make a decision in relation to the domestic broadcast rights was at the 20 May 2013 board meeting.

And at that point, the board had all the information it required. And its decision was unanimous.

1464 Further, for the detailed reasons that I have already gone through concerning each item of information and document that ASIC says Mr Healy was in breach of duty for not disclosing to the board, none of ASIC's criticisms were substantiated by the evidence by the time closing addresses were reached.

1465 But there was another problem for ASIC that it is now appropriate to address.

1466 In order for an act or omission of a director to be capable of constituting a contravention of s 180 there must be reasonably foreseeable harm to the company caused by that act or omission. So, ASIC must establish that the omission of the particularised information from board packs/board meetings caused a foreseeable risk of harm to TA.

1467 ASIC says that each of the contraventions of s 180(1) by Mr Healy and Mr Mitchell caused harm to TA by depriving it of the opportunity of obtaining a higher fee in 2013 for the domestic broadcast rights. Of course, ASIC does not have to establish that the contraventions caused any loss. Proof of any such loss and of causation in the common law sense are unnecessary.

1468 ASIC says that the evidence shows that TA would most likely have obtained a superior deal by putting the rights out to competitive tender at the end of the ENP with Seven. It says that the price paid by Seven was at the bottom end of the expected valuation, was less than what both Network Ten and Nine had indicated they would be willing to pay, and was struck in the absence of clear competitive tension in the market with rival parties willing at least to bid up the price for the domestic broadcast rights. It says that the failure of TA to get the benefit of such competition was harm in the relevant sense and was reasonably foreseeable to both Mr Mitchell and Mr Healy at the relevant times.

1469 Further, ASIC says that although it is likely that the overall harm to TA resulted from a combination of the alleged contraventions, nevertheless each individual contravention contributed to that overall harm and can therefore be said itself to have caused TA harm.

1470 Further, ASIC says that it should not be accepted that there was any real risk of TA getting a worse deal from permitting the ENP to expire and then putting the rights to competitive tender. It says that the AFL, NRL and Cricket Australia all followed that strategy and, in every case, all three networks (Network Ten, Nine, and Seven) bid for the rights and high prices were secured. ASIC says that the evidence from the witnesses from each of the three networks

demonstrated that they *would* have all participated in a competitive tender; I am not sure how ASIC can sensibly say that concerning Nine, as Mr Gyngell gave no such commitment. ASIC says that it can and should be inferred that Seven would have bid following the expiry of the ENP as it would have missed the cricket broadcast rights and been left with no premium summer sport; it says that it is implausible in those circumstances that Seven would not have bid for the domestic broadcast rights.

1471 Further, ASIC says that each of the three networks had strategies to combine the broadcast of cricket and tennis if they wound up with both. It says that on the evidence, it cannot be concluded that there was any real risk of a worse result from putting the rights out to a competitive tender.

1472 Further, ASIC says that the evidence of the interest from Network Ten, Nine and IMG, and of Seven's concern about Network Ten's interest in the domestic broadcast rights, shows that there was clear potential for serious competitive tension in the market and that, given the chance, there were parties who were willing to bid more than what Seven had offered.

1473 I would reject each of ASIC's contentions save for its legal point that it does not have to prove causation or loss in the traditional sense of a common law cause of action.

1474 Now ASIC said that the foreseeable harm was the lost opportunity to inject competitive tension into the process. But the evidence demonstrates that there was competitive tension in the broadcast rights process, which pushed Seven up from an 18% increase in Seven's November offer to an 86% increase in Seven's final offer. Let me emphasise the following matters.

1475 The board was aware from its discussion on 3 December 2012 that Seven and IMG had made initial offers and the amount of those offers, that Gemba had valued the rights at up to $40 million across all platforms, and that Nine and Network Ten had expressed interest in the domestic rights. And this interest was well known to management, who had been engaged in preliminary discussions with Network Ten.

1476 Further, Seven's November offer was rejected at the 3 December 2012 board meeting because it did not reflect an offer from Seven that was commensurate with what other Australian sports were achieving in the market for premium sports rights. Mr Healy's comment at the 3 December 2012 board meeting that "18% seems small" was reflective of the view then held by the majority of directors that Seven's November offer was uncompetitive having regard to the percentage increases achieved by other major sports in Australia.

1477 Further, reports in the media across the relevant period referred to interest from other networks in TA's domestic broadcast rights, particularly Network Ten. This was known to board members at the time.

1478 Further, at the board meeting on 4 March 2013, Mr Wood informed the board of the second IMG offer. Now he did not table it because it had a number of deficiencies. But its relevance was as an indication of value. Further, Mr Wood's purpose in soliciting the first IMG offer and the second IMG offer was to use those offers as leverage in the negotiations with Seven, thereby introducing competitive tension into the process. Further, at the 4 March 2013 meeting, Mr Wood again referred to the fact that Nine and Network Ten had expressed interest in the rights. Moreover, I agree with the defendants that if any meaningful figure had been given by either network at that time, which it had not, Mr Wood would have mentioned it.

1479 Generally speaking, the market for broadcast rights for premium sports such as tennis in 2013 was a competitive one. Further, competitive tension existed at the point at which TA commenced the ENP with Seven. But that tension was as high as reasonably could be expected given TA's obligation to participate in the ENP in good faith.

1480 Let me now say something about the cricket in this context.

1481 By reason of the timing of the cricket rights, which were being run in parallel with the tennis rights, the competitive tension that existed for the tennis rights *before* the announcement of the award of the cricket rights, which was on 4 June 2013 to Nine and Network Ten, was on one view at its highest. The award of the cricket rights to either Nine or Network Ten, or both as to part, when announced would likely ease the competitive tension around the tennis rights by reducing the uncertainty around the number of potential and realistic bidders. It would also take a large amount of money out of the pool that might compete for the tennis rights.

1482 The award of the cricket rights would reduce Seven's competitors from two, being Nine and Network Ten, to one or possibly zero. The latter risk down to zero arose because as at the end of May 2013 there was a real possibility that if Nine obtained the rights to the Tests and One Day Internationals and Network Ten obtained the rights to the BBL, as in fact occurred, Nine and Network Ten would no longer be suitable or acceptable counterparties for TA or indeed interested in the tennis, let alone at an annual rights fee above the level of $39 million per annum that Seven was offering at the end of May 2013 together with TA being given host broadcasting.

1483 Further, despite ASIC clouding the issue, it is not in doubt that the cricket clashed with the tennis in terms of the availability of the primary network channel to air all matches and in terms of the focus of the network's publicity effort as being the "tennis network". Clearly it would have been unacceptable to TA to have the AO competing with the cricket for publicity and airtime on the network's primary channel.

1484 Further, Nine was at all times primarily interested in obtaining the cricket. Further, the evidence from the Network Ten witnesses as to the nature and level of Network Ten's interest in the tennis rights did not canvass in any detail the effect that the award of the BBL rights would have on the nature or level of Network Ten's interest in the tennis rights. Moreover, Mr Marquard's modelling was undertaken in April 2012, which was more than a year before the cricket rights were awarded; it was stale.

1485 As I have said, as at May 2013, there was a real prospect that Nine might get the Tests and One Day Internationals and Network Ten might get the BBL. Accordingly, as it appeared to TA as at May 2013, neither was likely to be in a position to properly service the tennis.

1486 Further, the international cricket rights cost Nine approximately $100 million a year. It was not seriously put that an FTA network could have accommodated *both* the international cricket and the AO simultaneously.

1487 And as to the domestic BBL rights, the BBL was an event telecast in prime time over January. But this directly clashed with the AO, particularly in the evening when the most high-profile AO matches were being played. Indeed, the finals of the BBL were staged during the key stages of the AO. Network Ten agreed to pay $20 million a year for the BBL. This demonstrated the premium nature of these rights. It also demonstrated that even if the broadcaster had the contractual ability to broadcast the BBL on its secondary channel, it would be reluctant to do so as it would then not be getting full value for its investment. So there was a significant risk that once Network Ten had acquired the BBL, it would be out of competition for the tennis. This was either because TA would no longer regard Network Ten as a viable alternative or because Network Ten's appetite to acquire an expensive premium Australian summer sport would have been met by the BBL, particularly given its then suspect financial position.

1488 In the light of these matters, it seems clear to me that TA did a deal with Seven at a time when the competitive tension arising between Seven, Nine and Network Ten was at its highest.

Further, the process undertaken by TA did not lead to any deficiency of competitive tension. Indeed, Mr Wood very skilfully used a combination of IMG, which he brought into the mix, Gemba's $40 million valuation and the suggestion of interest by Network Ten to maximise the competitive tension felt by Seven during the ENP. And that competitive tension resulted in TA obtaining both an appropriate rights fee for the domestic broadcast rights and the advantages of the host broadcast.

1489 Further, ASIC seems also to have disproportionately focused on the dollar amount of the rights fee and not to have properly considered the great advantage to TA of gaining the host broadcast role and the ancillary advantage of transitioning with Seven rather than a new network, let alone one that had a problematic financial position.

1490 Let me now look at this from the perspective of *risk* so far as the board of TA was concerned. ASIC seems to have studiously ignored the question of risk in the relevant calculus. ASIC has asserted that approval of Seven's final offer was not in the best interests of TA and that the domestic broadcast rights should have been exposed to the "true market" by way of a tender process. But in my view, the TA board quite properly decided, in effect, that the prospect of obtaining a better deal in a competitive tender was outweighed by the risks of getting a worse deal.

1491 Mr Wood described the risks of taking the domestic rights to tender as follows under cross-examination by Mr Young QC:

> Did you agree with his proposition that there were compelling reasons for Tennis Australia to issue a competitive tender process?---No.
>
> Can you explain why not?---We had an exclusive negotiation period coming up with Channel 7, and if a good deal could be struck there, then it would be in the best interests of Tennis Australia to take that.
>
> Yes. Were there risks, as you saw it, for Tennis Australia in extending the process beyond the end of the ENP, which was the end of September of 2013?---Were there risks?
>
> Yes?---To extend it?
>
> Well, risks of not doing a deal during the ENP and then trying to engage in some further process on and after 1 October?---Yes.
>
> And what were they, as you saw them?---The normal commercial risks you would have when you're seeking a deal in the market.
>
> Yes. And were there timing issues of – arising from the fact that the existing rights agreement expired on 30 June 2014?---Yes, there were timing issues, as well as the rapidly changing market landscape.

1492 He said further in answer to Dr Collins QC that:

> By doing a deal with Seven, you avoided the risks of allowing the exclusive negotiating period to expire and then going to open market with all of the risks that that entailed? ---Yes.
>
> Because you knew, as at 20 May, that there was a risk that if you went to open market, no one would bid for the rights?---That's stretching it a bit far but, you know, there was risks if you go to open tender.
>
> One of the risks was that Ten would get the cricket rights and Nine would not seek to bid for the tennis rights?---Yes, that was the media reports of the day, that's correct.
>
> And there was a risk that if you allowed the exclusive negotiating period to expire and then went to open market, that Seven would swoop in with a lower offer than it had made during the ENP?---That is a business risk, yes.
>
> And as at the time of the 20 May board meeting, Tennis Australia had never received anything in writing from either Channel 9 or Channel 10?---Yes.

1493 In re-examination, Mr Wood identified a further risk of going to tender in answer to Mr Pearce SC:

> So can you explain what the timing pressures would have been if you did not conclude a deal in the ENP as at 30 September 2014 – 2013. Now it's me?---One concern I had is that if we didn't renew the ENP, that they would tank the final edition of the Open under their contract and just say okay, we are not going to be the broadcaster next year, we are contracted to do it this year and, therefore, leave us high and dry for that edition of the Australian Open with their willingness to produce the event.
>
> Were there any other timing pressures you were concerned about?---The other timing pressures were that other major professional sports were signing their deals taking money in and out of the marketplace around that time, such as the cricket rights were soon to be announced around, from memory, the June 2013 timeframe.
>
> All right. Why was that a problem for Tennis Australia?---Well, that could mean that less funding was available in the market to spend on major professional sports, because somebody had bought the cricket rights at a price that meant that they were committed to that, and they potentially couldn't commit to us. That was one element of the timing pressure. And that was likewise for each of the broadcasters, Nine and Ten.
>
> What do you mean each of them?---Well that they were both negotiating the cricket rights, fighting for those.
>
> So just explain why that's a problem for Tennis Australia?---Well, one of them is going to win and depending on what price they pay – depending what price they pay means that if they've done the deal then they're out of the market for us because they've bought the cricket rights. So that was a problem for Tennis Australia to deal with. So it was important to know when these deals were going to happen and, of course, we couldn't predict that and so we were just watching what was going on with those rights in other major professional sports.

1494 Mr Tanner, who had the most financial and commercial expertise on the board, thought that taking the domestic broadcast rights to tender was not likely to result in a better outcome for TA than Seven's final offer. He was also concerned about the risk of a network overpaying for

the rights, resulting in a negative outcome for TA in the long term. Indeed he thought that if Network Ten ended up paying a large amount for the rights and was struggling to get a return on those rights, it might start cutting back in various ways which would have had a negative impact on the quality of the tennis broadcast and the sponsor experience.

1495 Mr Tanner said in answer to Dr Collins QC:

> I had been convinced there was a bit of risk in going to tender. It could be that we were tendering into a softer market, as I mentioned before, and there were a number of risks associated with that. We couldn't be assured that we were going to get a higher offer simply by putting it on the market, if I can put it that way.

1496 Further, in answer to Mr Pearce SC he said:

> I was thinking that actually if Cricket Australia got in before us, then there was a risk that the market will be drained; that is, that more rights would have been paid for and we would have been dealing with the dregs. Now, I can't really rationalise that, but they were – you know, the parties would – would bid accordingly. We're talking about a tender process, but there was – there was, you know – there was a risk that the situation would be different.

1497 Mr Freeman held similar views, and in answer to Mr Pearce SC said:

> Imagine instead of recommending that deal, Mr Wood had come to the board and recommended that the rights go out to competitive tender. Are you able to say what difference that would have made to your decision-making in the board on that occasion?---Well, look, it would have been, I will give you an opinion – it would have been an extraordinary comment or decision or recommendation from the chief executive at that point, given that negotiations had been ongoing, we know, since December and maybe even before then to some degree, to suddenly come out with a very strong offer on the table that would seem to have met both the financial issues and the counterparty issues that we could address with Channel 7, that is, the relationship and the understanding of dealing with Channel 7. And also given the discussions that we had had or generally had around IMG and to some lesser extent Channel 9 as competitors, so he would need to have produced for the board a compelling reason why, in May, with a strong offer on the table, he would like to take the matter to the market in some revised competitive process.

1498 Indeed, Mr Freeman considered Network Ten to be a high risk counterparty for TA. And he saw the prospect of taking the rights to market after the ENP as a very risky decision. He said in respect of the notion of rejecting the Seven deal in May 2013 and instead taking the rights to market:

> It would have been a very high risk and, in my mind, it would have been totally unacceptable as a director.

1499 Further, the assessment conducted by the board and Mr Wood of the risks posed by Nine and Network Ten as potential counterparties for the domestic broadcast rights were well-founded.

1500 As Mr Browne explained, once Nine acquired the cricket rights, it was unlikely to be a serious contender for the tennis rights. Indeed, as both tennis and cricket were relevantly on the Commonwealth anti-siphoning list at the time, Nine would have been prevented from showing either sport on its second channel without the consent of the Minister for Communications, which was not likely to be forthcoming. Mr Browne also said that "it would not have been possible for Nine to afford to buy both of the rights". I took "possible" to be commercially feasible. His evidence had an air of commercial reality to it.

1501 Further, Network Ten's financial position and ratings at the time were poor to say the least. In the lead up to TA's 20 May 2013 board meeting, Network Ten had recently undertaken capital raisings and asset sales and obtained a new debt facility which was only able to be put in place by the unusual step of obtaining guarantees from its three major shareholders. It is notorious that Network Ten ultimately went into administration in 2017 when the three major shareholders were not prepared to support an increase in borrowings.

1502 Further, even if Network Ten had the capacity to pay more than $40 million per annum for the rights, it is a different question as to whether it would have done so. There is no basis for inferring that Network Ten would likely have bid any more than $35 to $40 million had the rights gone to market. Network Ten had never given more than equivocal, tentative and unreliable indications of its interest to TA. Indeed, it had only given a figure of "up to $35 million" per annum on a non-binding and highly qualified basis to IMG. And it had not even meaningfully modelled anything more than a base case of $35 million per annum. No analysis had been conducted by it about whether it was sensible for Network Ten to offer to pay more than $40 million. I have elaborated on these matters in another section of my reasons.

1503 Generally and in the circumstances, had TA followed ASIC's suggestion and rejected Seven's final offer, allowed the ENP to expire and taken the rights to market, there was a real risk that TA would have been offered less than the amount of Seven's final offer.

1504 Further, putting the rights to tender would have put at risk the other benefits of the Seven deal, such as obtaining the right to be the host broadcaster and also securing a smooth transition to the host broadcast role.

1505 In summary, in my view there was no foreseeable risk of harm caused by the omission of the information and documents to which ASIC points from board packs and board meetings.

1506 Further, the treatment of the counterfactual in ASIC's evidence concerning Mr Healy consisted of no more than rolled up assertions. In Dr Young's affidavit, for example, she stated that had she been aware of "the documents", she would have been in favour of putting the rights out to competitive tender. But in my view, little weight can be placed on conclusionary statements to this effect which did not descend to the level of particular pieces of *information*. Further, in my opinion her view would not have carried the day.

1507 Further, the counterfactual against Mr Healy has as its foundation that the TA board received the particularised information the subject of ASIC's case at each of the 3 December 2012, 4 March 2013 and 20 May 2013 board meetings. But such a counterfactual goes nowhere. Mr Wood was armed with all of the information the subject of the case against Mr Healy when he had Seven's final offer in May 2013. And armed with that information, Mr Wood was emphatic in his view that Seven's final offer should be accepted and strongly recommended that course to the board.

1508 In summary, ASIC has failed to show any foreseeable risk of harm flowing from Mr Healy's acts or omissions.

1509 For all of the above reasons, ASIC has not succeeded in its case against Mr Healy.

1510 Let me deal with one final matter concerning the case against Mr Healy. Mr Healy in his defence says that he ought to be wholly relieved from any liability for any contravention pursuant to ss 1317S and/or 1318 because:

(a) he acted honestly; and

(b) having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the contravention.

1511 But he has not expressly identified any of the circumstances of the case having regard to which he ought fairly to be excused.

1512 It is hypothetical for me to deal with such a defence at this time given that I have not found that Mr Healy contravened s 180. But assuming that it came to pass that there was a successful appeal against my determination of no contravention against Mr Healy, I cannot now sensibly speculate about what "all of the circumstances of the case" would be. That matrix would consist of both any undisturbed factual findings together with guidance from the Full Court on new factual findings to replace those that had been disturbed. But who can now say what those

would be? Further, even if there was no such disturbance but my finding of no contravention was set aside because of a legal question concerning the exposition of the relevant normative standard or its application, such guidance from the Full Court may then impact on that part of the second condition dealing with "ought fairly to be excused". In the circumstances, I will wait for any such event to occur.

THE CASE AGAINST MR MITCHELL

1513 Before getting into the detail of ASIC's case against Mr Mitchell, let me say something concerning ss 182 and 183. I have already discussed s 180.

1514 Section 182 provides:

> **182 Use of position—civil obligations**
>
> *Use of position—directors, other officers and employees*
>
> (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.
>
> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

1515 Section 183 provides:

> **183 Use of information—civil obligations**
>
> *Use of information—directors, other officers and employees*
>
> (1) A person who obtains information because they are, or have been, a director or other officer or employee of a corporation must not improperly use the information to:
>
> (a) gain an advantage for themselves or someone else; or
>
> (b) cause detriment to the corporation.
>
> (2) A person who is involved in a contravention of subsection (1) contravenes this subsection.

1516 The test of whether conduct is improper is objective. In *The Queen v Byrnes* (1995) 183 CLR 501 the plurality said (at 514 and 515):

> Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in breach of the standards of conduct that would be expected of a person in the position of an alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case.

1517 Impropriety is found when a director is in "breach of the standard of conduct that would be expected of a person in his position by reasonable persons with knowledge of the duties, powers and authority of his position as a director" (see also *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18 at [35]). In a practical sense, the inquiry is whether the defendant's behaviour breached the norms of conduct thought necessary for the proper conduct of commercial life.

1518 Now the statutory provision(s) does not impose a universal standard. Impropriety needs to be assessed focusing upon the particular duties and responsibilities of the officer concerned. Further, the test of impropriety looks at the *character* of the conduct of the director in question.

1519 In *Grove v Flavel* (1986) 43 SASR 410 at 416 to 417, Jacobs J considered that "improper":

> …cannot be determined by reference to some common, uniform, or inflexible standard which applies equally to every person who is an officer, but rather must be determined by reference to the particular duties and responsibilities of the particular officer whose conduct is impugned.

1520 This passage was approved of in *Byrnes* (at 514) notwithstanding that in *Spies v The Queen* (2000) 201 CLR 603 at [95], an aspect of *Grove v Flavel* was overruled concerning whether directors owed an independent duty to creditors of companies by virtue of their position as directors.

1521 Further, as Jacobs J said in *Grove v Flavel* (at 420):

> The word "improper" is not a term of art. It is to be understood in its commercial context to refer to conduct which is inconsistent with the "proper" discharge of the duties, obligations and responsibilities of the officer concerned.

1522 Now in *Byrnes*, the High Court considered s 229(4) of the Companies (South Australia) Code, the predecessor of s 182, and followed *Chew v The Queen* (1992) 173 CLR 626, saying that s 229(4) "does not require proof that an advantage has in fact been gained by the offender or any other person or that detriment has in fact been caused to the corporation" (at 512 per the plurality). And McHugh J said, referring to Dawson J in *Chew*, that "the use of an office or employment can be improper even though it is for the purpose or with the intention of benefiting the company" (at 521 to 522).

1523 Let me say something on the question of purpose. The statutory language implicitly contains a purposive element. The word "to" is to be read as "in order to". Accordingly, purpose is an element of the contravention (*Chew* at 633 per the plurality in considering s 229(4) of the Companies (Western Australia) Code).

1524 But it is purpose which counts, not motive. It is well accepted that purpose and motive are not the same thing. The purpose of conduct is the end sought to be achieved. The motive is the reason for seeking that end (*News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at [18] per Gleeson CJ).

1525 Further, the prohibition against making improper use of a director's position to gain an advantage for the director or another person or cause detriment to the company is a reference to the purpose of the impugned action, not the effect of that action. Therefore, a contravention of s 182(1) will be established if the defendant made improper use of his position for the purpose of gaining an advantage for himself or for some other person. It is not necessary to show that the conduct brought about that advantage. The same analysis applies to s 183(1).

1526 In *Chew*, the plurality said that (at 633):

> It is a corollary of the interpretation which we favour that the accrual of an advantage or the suffering of a detriment is not an element of the offence. Thus, an officer who makes improper use of his or her office in order to gain an advantage is guilty of an offence, even if his or her purpose be thwarted as. for example, by the grant of an injunction preventing execution of an instrument or implementation of a transaction.

1527 Further, Dawson J said in *Chew* that a director "may act improperly with no intention of acting dishonestly or otherwise than in the best interests of the company as a whole" and that where a director does something by the use of his position "which is for an impermissible purpose, it must … amount to an improper use of that position, however much he believes his actions to be in the interests of the company" (at 640); see also the plurality in *Chew* at 634. In other words, conduct can amount to an improper use of position even if the director honestly believes it to be in the interests of the company and where there was no personal advantage for the director.

1528 At this point let me say something more on state of mind. Even though impropriety is to be determined objectively, as Dawson J said in *Chew* (at 641):

> … nevertheless the state of mind of the particular officer or employee may be relevant; for example, where a power may be exercised for permissible and impermissible purposes, the purpose for which it is actually exercised will clearly be relevant (citation omitted).

1529 Further, where the impropriety is said to consist of an abuse of power, the state of mind of the director may assist in determining whether the power has been abused (*Byrnes* at 515).

1530 But to say that a director's awareness of certain matters may need to be considered does not convert the impropriety question into a subjective test (*Chew* at 647 per Toohey J).

1531 Further, the plurality said in *Chew* (at 633 and 634):

> In the course of argument, it was suggested that it was not necessary to establish that [a director] perceived that the alleged advantage or detriment was an advantage or detriment. We do not read the provision in .that way. Once one concludes that there is a purposive element in the offence, it is necessary to establish not merely that the [director] intended that *a* result should ensue, but also that the [director] believed that the intended result would be an advantage for himself or herself or for some other person or a detriment to the corporation.
>
> The [director's] state of mind is relevant not only to the requirement of purpose but also to the element of improper use of his or her position.

1532 Further, the plurality said in *Chew* (at 634):

> The judge told the jury that what was improper was to be determined by reference to the powers and duties of a person in the accused's position, namely, the chairman of directors of the company. The judge also told the jury that the conduct alleged to have been an improper use of that position need not be illegal and that conduct could amount to improper use of that position even if the person concerned believed it to be in the interests of the company. No objection is or was made to what his Honour said on that score.

1533 By implication, the plurality agreed with the correctness of the trial judge's direction.

1534 Further, in elaboration of what *Chew* said, the plurality in *Byrnes* explained that state of mind may go both to the question of purpose and the question of propriety. As they said (at 512):

> In ascertaining whether an accused had one or other of the proscribed purposes in mind when he made use of his position, it is relevant to consider his appreciation of the circumstances at the relevant time. His appreciation of the circumstances may be relevant not only to the purpose for which he acted but also to the propriety of the use he made of his position in acting as he did. … In other words, impropriety in the use of a position may consist in an abuse of the power or authority which the position confers. If there be an abuse of power for the purpose of gaining an advantage for himself or another person or of causing detriment to the corporation, both elements of the offence are established albeit there is a single act voluntarily committed with a single state of mind. … the majority judgment in *Chew* points out that a single state of mind with which an act is done might establish both impropriety in the use of position and the proscribed purpose (or intention) with which the position was improperly used.

1535 McHugh J (at 521 and 522) also said:

> In determining whether the use of a position is improper, the mental state of the officer or employee is often relevant because the propriety of the use often depends on the purpose for which the office or employment is used. Many uses of an office or employment will be proper if done for one purpose and improper if done for another purpose. Purpose is as relevant on the issue of improper use as it is on the issue whether the use of the position was made to secure a gain or cause a detriment. However, the use of an office or employment can be improper even though it is for the purpose or with the intention of benefiting the company.

1536 Further, he said (at 522) that a director "cannot escape a finding of improper use of position merely because [he] believed that what [he was] doing was in the interests of the corporation".

1537 Let me now turn to ASIC's case against Mr Mitchell which as the parties have done can be conveniently divided into three general subject areas being:

(a) first, Mr Mitchell's communications with Seven and particularly his private discussions with Mr McWilliam;

(b) second, Mr Mitchell's interference with TA's senior management concerning the negotiations with Seven including undermining the authority of Mr Wood;

(c) third, Mr Mitchell withholding information from the board of TA.

1538 I will deal with each of these areas in turn, but first it is necessary to deal with some preliminary matters. It is necessary to say something about ASIC's tender of the McWilliam emails and its strategy in not calling Mr McWilliam.

The internal Seven emails and s 19 transcript

1539 Prior to the commencement of this proceeding, ASIC conducted an examination of Mr McWilliam pursuant to its coercive powers under s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). But it did not call Mr McWilliam at trial. Rather, ASIC sought to tender internal emails of Seven to establish the content of various conversations between Mr McWilliam and Mr Mitchell. Mr Mitchell objected to the tender on the basis that I should refuse the evidence under s 135 of the *Evidence Act 1995* (Cth).

1540 Further, after receiving Mr Mitchell's objection to the tender of the internal Seven emails, ASIC served a notice under s 79(1) of the ASIC Act of its intention to seek to admit select statements made by Mr McWilliam at his s 19 examination pursuant to s 77 of that Act. Mr Mitchell objected to that tender on the basis that those statements were not admissible unless ASIC called Mr McWilliam in accordance with s 77(b).

1541 Section 77 of the ASIC Act provides:

> **77 Statements made at an examination: other proceedings**
>
> Where direct evidence by a person (the absent witness) of a matter would be admissible in a proceeding, a statement that the absent witness made at an examination of the absent witness and that tends to establish that matter is admissible in the proceeding as evidence of that matter:
>
> (a) if it appears to the court or tribunal that:

(i) the absent witness is dead or is unfit, because of physical or mental incapacity, to attend as a witness; or

(ii) the absent witness is outside the State or Territory in which the proceeding is being heard and it is not reasonably practicable to secure his or her attendance; or

(iii) all reasonable steps have been taken to find the absent witness but he or she cannot be found; or

(b) if it does not so appear to the court or tribunal—unless another party to the proceeding requires the party tendering evidence of the statement to call the absent witness as a witness in the proceeding and the tendering party does not so call the absent witness.

1542 Pursuant to s 77, statements made at an examination by a person being, in essence, the absent witness can be admissible in a proceeding against another person if the following conditions are met.

1543 First, the statements must tend to establish a matter that would be admissible if the absent witness gave direct evidence of the matter. In other words, the statements would have to be admissible if they were given at trial.

1544 Second, pursuant to s 77(a), it must appear to the Court that the absent witness is dead or unfit to attend, it is not reasonably practicable to secure the attendance of the absent witness or the absent witness cannot be found, after reasonable steps have been taken. In other words, the Court must be satisfied that the absent witness cannot reasonably be called as a witness at trial. Alternatively, pursuant to s 77(b), if it does not so appear to the Court, then the statements are only admissible if the other party to the proceeding does not require the party seeking to tender the statements to call the absent witness as a witness or the party seeking to tender the statements does call the absent witness as a witness.

1545 There was no suggestion that s 77(a) was satisfied with respect to Mr McWilliam. Further, Mr Mitchell gave notice for the purpose of s 77(b) that he required ASIC to call Mr McWilliam as a witness in this proceeding. The position was therefore straightforward. Unless ASIC called Mr McWilliam as a witness, then his s 19 statements identified by ASIC were not admissible under s 77 of the ASIC Act.

1546 But nevertheless, the ASIC Act provisions are not an exhaustive code for admissibility; s 83 of the ASIC Act made this plain. Accordingly, the transcripts could have been separately admissible under s 60 of the Evidence Act. But in my view they were not so admissible in the present case as ASIC was seeking to use them for a hearsay purpose.

1547 So, in the absence of Mr McWilliam being called, ASIC could not tender his s 19 transcripts.

1548 Let me return to the question of the tender of the internal Seven emails. In my view they were admissible under s 69 of the Evidence Act. Accordingly, s 135 had to be considered.

1549 In order to apply s 135, it was first necessary to assess the probative value of the evidence, meaning the extent to which the evidence could rationally affect the assessment of the probability of the relevant fact in issue.

1550 In my view there was a substantial argument that the internal Seven emails were of low probative value as a source of proof of the alleged conversations between Mr McWilliam and Mr Mitchell. The emails contained hearsay evidence in this respect and did not purport to record what was in fact said during those conversations. Moreover, for the most part they were not written for such a purpose.

1551 The next step under s 135 was to consider whether there was a danger that the evidence might be unfairly prejudicial to a party, be misleading or confusing or cause or result in undue waste of time.

1552 In my view there was a substantial argument that ASIC's foreshadowed tender of the internal Seven emails for the purpose of seeking to establish the content of alleged conversations that Mr Mitchell had had with Mr McWilliam would have been unfairly prejudicial to Mr Mitchell for the following reasons.

1553 First, ASIC had made a forensic decision not to call Mr McWilliam to give evidence at trial. But there was no suggestion that Mr McWilliam was not available for ASIC to call as a witness.

1554 Second, ASIC knew what Mr McWilliam had said about the relevant conversations from his s 19 examination. So this was not a case where ASIC would have been calling Mr McWilliam blind.

1555 Third, ASIC had also, as I have said, sought to tender certain statements from Mr McWilliam's s 19 examination, including two of the alleged conversations with Mr Mitchell. But ASIC's proposed tender of such statements omitted key parts of his s 19 evidence on the selected topics and did not include his s 19 evidence about other conversations with Mr Mitchell. In substance ASIC sought to tender cherry picked statements, which of course I did not permit for admissibility reasons that I have just discussed.

1556 Fourth, in many respects the statements in the emails were vague and conclusionary. ASIC's decision not to call Mr McWilliam as a witness deprived me of his evidence in ASIC's case about what was said by Mr Mitchell in relation to these matters.

1557 Fifth, unless Mr McWilliam was called, Mr Mitchell would have been unable to cross-examine Mr McWilliam on the documents in question in the course of ASIC's case. Clearly, an inability of an opposing party to cross-examine the maker of a statement sought to be tendered can constitute unfair prejudice for the purposes of s 135, depending upon the nature of the evidence, the issue to which the evidence goes and other evidence going to that issue.

1558 Sixth, it was no sufficient answer to the prejudice identified to say that Mr Mitchell could have called Mr McWilliam as part of his case. Mr Mitchell may not have been permitted to cross-examine. Arguably that would have been unfairly prejudicial to Mr Mitchell on procedural grounds, which may suffice for the purposes of s 135.

1559 Seventh, ASIC's decision not to call Mr McWilliam would have prevented Mr Mitchell from properly challenging the evidence constituted by the internal Seven emails (if they were admitted) in ASIC's case which, in turn, would have prejudiced his ability to make a no-case submission at the close of ASIC's case.

1560 In summary, there was a substantial basis to exercise my power under s 135 to exclude most of the relevant internal Seven emails, which of course would have prejudiced ASIC's case if I had excluded them. I am explaining all of this as a precursor to why I exercised my power to have Mr McWilliam called.

ASIC's conduct in respect of Mr McWilliam

1561 ASIC sought to confine its case in respect of the alleged contraventions arising out of Mr Mitchell's communications with Seven to the internal Seven emails which it said spoke for themselves.

1562 But ASIC knew that there was a context to the emails, and that the author of most of them rejected ASIC's construction of them. As I have said, ASIC had conducted an examination of Mr McWilliam using its coercive powers under s 19 of the ASIC Act. ASIC knew what Mr McWilliam would say if he were called to give evidence. Further, it knew that evidence given by Mr McWilliam might damage its case. But even though ASIC's case concerned negotiations and a deal between TA and Seven, ASIC determined not to call Mr McWilliam or any other representative of Seven to give evidence at trial.

1563 Now in my view, ASIC had a duty to act fairly in the conduct of these proceedings, albeit a duty of imperfect obligation. But this did not impose any obligation upon ASIC to call Mr McWilliam even though much of its case against Mr Mitchell principally turned upon the internal Seven emails, in so far as they reflected or referred to conversations between Mr McWilliam and Mr Mitchell, and, further, ASIC also knew from its s 19 examination of Mr McWilliam that he was likely to give unfavourable evidence against ASIC's case thesis as to how his emails should have been read and interpreted in context if he was to be called as a witness by ASIC.

1564 When this matter was raised before me, I made an order pursuant to s 46 of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and other express or implied powers under the FCA Act and the Federal Court Rules that Mr McWilliam be called to give evidence. Let me elaborate further on my reasons.

1565 Now no doubt before the trial commenced, ASIC thought that it had three realistic strategic options in terms of the internal Seven emails and the calling of Mr McWilliam.

1566 First, it could have chosen not to tender the internal Seven emails. But that was not a realistic option as then a substantial part of its case against Mr Mitchell would fail.

1567 Second, it could have chosen to tender the internal Seven emails and to also call Mr McWilliam. But then it was at risk that I might not declare him to be hostile on the basis of, inter-alia, any prior inconsistent statements. Accordingly ASIC would then be at risk of Mr McWilliam giving evidence that it could not successfully challenge, which evidence was consistent with his s 19 examination. This would have been a rather unhelpful outcome for ASIC.

1568 Third, it could have chosen to tender the internal Seven emails but to not call Mr McWilliam. Advantageously for ASIC, as it would have perceived it, this would have placed Mr Mitchell in jeopardy. If Mr Mitchell called Mr McWilliam as his witness, he might not have been able to cross-examine him. Contrastingly, ASIC would have had the advantage of cross-examining at large. And such an advantage would have all been in the circumstances where ASIC had had the advantage of committing Mr McWilliam to a version of events in his s 19 examination.

1569 Now unsurprisingly, ASIC chose door three. And this was, at first blush, a clever strategy. Mr Mitchell's team was placed in jeopardy. What were they then to do?

1570 Their one and only play was to object to the admissibility of the internal Seven emails.

1571 This was where I came into the picture. In summary, I imposed a solution that was fair to all. I permitted the tender of the internal Seven emails and I ordered that Mr McWilliam appear to be examined exercising my powers under s 46 of the FCA Act and also other express or implied powers. And I permitted both ASIC and Mr Mitchell to cross-examine Mr McWilliam. Indeed, this was doubly advantageous to ASIC although it might not quite perceive it that way. First, this solution avoided the risk to ASIC that I might reject the admissibility of the internal Seven emails or make an order under s 135 of the Evidence Act if they were otherwise admissible under s 69. Second, ASIC was able to cross-examine Mr McWilliam, and as it turned out at large. Of course, Dr Collins QC for Mr Mitchell was also able to cross-examine, although for the most part he exercised admirable restraint in asking many non-leading questions.

1572 Further, my solution did not entail a zero sum game. Judged ex ante, everyone had a win. But judged ex post facto, the fact that ASIC's cross-examination of Mr McWilliam did not go as well as it might have wished for was the result of its forensically impoverished position on the facts, rather than an inevitable outcome of my solution which had been imposed to get around the strategic posturing of the parties and to get to the forensic heart of the matter.

1573 Did I impose a Continental solution? Or is there nothing to see here? I will leave those competing meta-questions for others to ruminate on.

1574 Now I accept, as the plurality said in *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345 at [145], that:

> First, the proposition ignores that even a criminal trial "is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing upon the question of guilt or innocence". Each side in a criminal trial "is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility". Proceedings for declaration of contravention or pecuniary penalty order engage no more stringent requirements.
>
> (citations omitted)

1575 But even accepting such guidance, nothing in *Hellicar* precluded me from exercising what powers I had to ensure that the trial was conducted justly, including requiring Mr McWilliam to be called. Let me now turn to the first of ASIC's breach cases concerning Mr Mitchell.

(a) ASIC's breach case - Mr Mitchell's communications with Seven

1576 ASIC says that Mr Mitchell wrongly co-operated with Seven and that his communications with Mr McWilliam were nefarious.

1577 Now it is not in doubt that Mr Mitchell and Mr McWilliam had numerous telephone conversations and several meetings throughout 2012 in respect of the negotiations for the domestic broadcast rights. They also had telephone conversations in the early part of 2013 on that topic. But were they nefarious? More blandly, were they in breach of duty?

1578 Let me first say something at the outset concerning the reliability of Mr McWilliam's evidence.

1579 Mr McWilliam in giving his evidence came across as savvy and smart. Essentially he was an honest witness, even if on occasion he sought to glean or anticipate the purpose of the cross-examiner and to tailor his answer accordingly. Occasionally he became irritable under questioning from Mr Pearce SC, but he can be forgiven for this. But generally speaking, I found his evidence to be reliable.

1580 First, to the extent that Dr Collins QC asked him questions on various of the relevant emails, he gave answers that were plausible.

1581 Second, I have rejected the notion that somehow Mr McWilliam was in Mr Mitchell's camp in terms of giving evidence before me. I will return to this theme later to dispose of some of ASIC's points on this aspect.

1582 Third and relatedly, clearly at all times Mr McWilliam was all for Seven. Moreover in his negotiations with TA, although he perceived Mr Mitchell to be the one to speak to and perhaps the de facto leader for TA, he had little doubt that Mr Mitchell was acting in TA's interests. But he did perceive Mr Mitchell to be a "friendly face" who was supportive of TA continuing with Seven. So, there was a mutual goal in that respect, but no collusion or conspiracy as ASIC would have it. No doubt he sought to enlist Mr Mitchell's assistance to put Seven's position to the TA board. No doubt he thought that Mr Mitchell was more commercial than Mr Wood. No doubt he thought that Mr Mitchell would not get bogged down in details. So, in that context he astutely used his communications with Mr Mitchell to advance Seven's interests. But apart from him being aware that Mr Mitchell preferred to go with Seven, he knew that Mr Mitchell was seeking to advance TA's interests. And he also knew that at the end of the day he had to deal with Mr Wood and TA's board.

1583 Fourth, I have little doubt that from time to time Mr McWilliam flirted with a divide and conquer strategy. This was because he perceived that although both Mr Wood and Mr Mitchell were acting as they perceived it in TA's interests, each of them had different strategies and objectives in mind to achieve what they considered to be best *for TA*. So, Mr McWilliam

sought to play off those differences and to finesse advantage from each of their different emphasis. But none of this justifies jumping to conclude some form of conspiracy or collusion between Mr Mitchell and Mr McWilliam as ASIC sought to do. There was none. Moreover, ASIC advanced no motivational reason whatsoever during the theatre of trial as to why Mr Mitchell would engage in any such collusion. At the end of the day you simply had a man who was neither shy nor retiring, and used to getting his own way, pushing his own views on what he perceived to be in the interests of TA. Mr McWilliam knew this, and his gamesmanship was tailored to take advantage of it to the extent that he could use Mr Mitchell to put pressure on Mr Wood. Now of course, as between Mr Mitchell and Mr Wood a good cop/bad cop strategy would have justified manifesting different approaches to Mr McWilliam. But this is not what was really going on.

1584 Generally speaking, and assessed in the above light, I thought that Mr McWilliam's evidence was reliable and had the ring of truth to it when he was explaining his emails and his communications with Mr Mitchell.

1585 Let me now go through the sequence of some of these communications. I have mentioned some of them earlier in the factual background section, but it is as well to further distil them in this specific context save that I will not refer to telephone communications under one minute. I will then deal with ASIC's specific allegations.

The relevant sequence of communications

1586 In January 2012, Mr Marquard approached Mr Wood and Mr Ayles and told them that Network Ten would be interested in acquiring the domestic rights. Mr Mitchell learned of Network Ten's approach at this time.

1587 At 2.39 pm on 31 January 2012, Mr McWilliam called Mr Mitchell and the two of them had a phone call that lasted seven and a half minutes. Mr Mitchell reported Network Ten's interest to Mr McWilliam. The contents of the phone call were then reported by Mr McWilliam to Mr Stokes in an email sent by Mr McWilliam to Mr Stokes and others at Seven. Apparently, Mr Mitchell had said to Mr McWilliam in effect that "Ten has been down trying to disrupt the apple cart". Mr McWilliam also recorded that he had read to Mr Mitchell the email that he sent to Mr Wood at 2.42 pm on the same day before he had sent it. ASIC says that this shows that Mr Mitchell was giving Mr McWilliam advice about how to deal with Mr Wood.

1588 On 10 February 2012, Mr Mitchell rang Mr McWilliam and they had an eight and a half minutes conversation.

1589 On 2 March 2012, Mr Mitchell called Mr McWilliam and they had a seven minutes conversation.

1590 On 27 April 2012, Mr Mitchell called Mr McWilliam and they had a five and a half minutes conversation.

1591 On or around 18 May 2012 there was a meeting at Mr Mitchell's office in South Melbourne attended by Mr Mitchell, Mr Wood, Mr Ayles, Mr McWilliam and Mr Martin in Melbourne. Possibly there was a similar meeting at Mr Mitchell's office in June 2012, but as I have said the evidence is murky as to this. At one of those meetings, according to Mr Ayles, Mr Mitchell and Mr McWilliam went into another room at the back of Mr Mitchell's office, whilst the others stayed in the meeting room. Mr McWilliam said that he did not have a specific recollection of doing this. In each of those meetings, according to Mr Ayles's evidence, Mr Mitchell said in effect, "We need to get this deal done as soon as possible".

1592 After the first of those meetings, on 18 May 2012 Mr McWilliam wrote an email to others at Seven stating:

> Have just returned from Harold's office. …
>
> Sadly our friends at Ten have been speaking $40 mill a year in rights fees and whilst Harold has pooh poohed that, management of TA is aware. … We are meeting again with Harold next week.

1593 Mr McWilliam said that Network Ten's "speaking $40 mill" had been reported to him by one of Mr Mitchell, Mr Martin or Mr Gyngell, though he could not remember which.

1594 According to ASIC, I should infer that it was Mr Mitchell who told Mr McWilliam at the 18 May 2012 meeting about Network Ten mentioning $40 million. It says that I should infer this given that Mr Mitchell was told this figure in May 2012, Mr McWilliam admitted that Mr Mitchell had previously reported Network Ten's interest to him and Mr McWilliam and Mr Mitchell discussed something together without the others present on 18 May 2012. Further, the contemporaneous email of Mr McWilliam reporting on the 18 May 2012 meeting included that Network Ten had been "speaking $40 million".

1595 Now on Mr McWilliam's account, when Mr Mitchell had "pooh poohed" Network Ten's "speaking $40 mill", Mr McWilliam had questioned the credibility of Network Ten's approach. He gave the following evidence when questioned by Dr Collins QC:

> You've gone on and said:
>
> *And whilst Harold has pooh-poohed that.*
>
> ?---Yes.
>
> Are you able to recollect what Mr Mitchell said to you that caused you to write those words?---I think I said to him, "It's easy to say that, Harold. It's, you know, one thing to say it and another thing to pay it." My father-in-law is Hungarian and he always says, "I've never been so poor I couldn't promise."
>
> You have written here that it's Mr Mitchell who pooh-poohed, it not you, that dismissed it. What did Mr Mitchell say?---I think he would have said, "Yes. Yes. We know. We know." He would have just sort of patted me on the back and said, "I know what your message is."
>
> Did you take it from that that Mr Mitchell was conveying that you needn't worry about Channel 10 as a serious competitor for the domestic rights?---No, to the contrary.
>
> Why to the contrary?---Well, because it has been raised as a spectre and, you know, there's someone out there who has got nothing who is desperate to get something. So Nine – I mean, if this is going too wide. Nine, obviously, at that time when no one wanted to be on the second channel couldn't have had cricket problems. So Ten was our main source of competition. Fox Sports, because of the anti-siphoning rules, was not allowed to take the primary rights. So Ten was the main cause of nervousness and particularly with our chief executive staff.
>
> I think you said Mr Mitchell had said something like, "I know. I know." Why did you not take that as reassurance from Mr Mitchell that Channel 10 was not a serious competitor?---Well, I didn't want Mr Stokes to say, "I hope you didn't sit back and just let them say that to you. I hope you fought your corner a bit." So it was sort of trying to inject an element of reality compared to, you know, the clear fact is people are spruiking that they would pay more.

1596 But according to ASIC, it was not Mr Mitchell who had "pooh poohed" the approach on that account. Rather, it was Mr McWilliam. ASIC says that this was exaggerated under further cross-examination, when Mr McWilliam insisted that Mr Mitchell had in fact been warning him that Network Ten was competitive. ASIC says that the evidence that Mr Mitchell had been warning Mr McWilliam that Network Ten was competitive is not credible at all and should be rejected. I think that Mr Pearce SC's submissions on this aspect were distorted. The real point is that Mr McWilliam was aware that Network Ten was possible competition. No doubt Mr Mitchell tried to make him feel better about that. But that hardly speaks to some strategy agreed or collusion between Mr Mitchell and Mr McWilliam.

1597 Another meeting was scheduled to take place on 15 June 2012 at the Olsen Hotel in South Yarra, between the representatives of TA and Seven. But before the meeting, on 6 June 2012 Mr Worner emailed others at Seven and wrote that "Bruce has the details and our understanding is that Harold will support our very strong stance".

1598 On 8 June 2012, Mr Mitchell called Mr McWilliam and they had a just under five minute phone call.

1599 On 15 June 2012, a meeting took place at the Olsen Hotel, South Yarra between TA and Seven representatives, but Mr Mitchell does not appear to have been present.

1600 On 18 June 2012, Mr Mitchell called Mr McWilliam and said that they should try to wrap it up this week. On the same day, Mr McWilliam emailed Mr Martin and others at Seven saying, inter-alia:

> Lewis. Harold just rang. I said AFR article annoying but predictable
>
> He said we shld try to wrap it up this week

1601 On 19 June 2012, Mr McWilliam texted a proposal to Mr Mitchell; this was recorded in Mr McWilliam's email to others at Seven. According to ASIC, this was evidence that Mr McWilliam was again seeking advice from Mr Mitchell about how to deal with Mr Wood. The text read:

> Harold do you reckon we can get $24 mill for 2015 going up by a mill a year. Increase ratings bonus to a million, start on the sunday? We really worry about giving up rights as host broadcaster too, fine for steve to want to make permanent facilities but we don't want to have to sign up to some awful rate card + be restricted as host broadcaster. Steve is many things but he is not Cecil b de milne

1602 On 9 July 2012 between 2.48 pm and 3.12 pm, several phone calls of varying durations took place between Mr Mitchell and Mr McWilliam.

1603 On 30 August 2012, Mr McWilliam sent an email to Mr Mitchell seeking "guidance" and Mr Mitchell's response was "talk soon".

1604 On 10 October 2012, Mr Mitchell emailed to Mr Wood, "We better fix Channel 7. … We are ready to do it all". Mr Mitchell then forwarded this email to Mr McWilliam and Mr Martin and added "Let's wrap this up next week. Leave it with me".

1605 On 12 October 2012, Mr McWilliam replied, "It would be fantastic to wrap up; I know we are negotiating between ourselves". Mr McWilliam purported to explain this statement away by

saying "it was more concerned about … bidding against yourself". Under questioning by Dr Collins QC, he gave the following evidence:

> And then you've said:
>
> > *It would be fantastic to wrap up. I know we are negotiating between ourselves in making this point.*
>
> ?---Yes.
>
> What did you mean to convey by that?---Well, that I was just reinforcing my own message.
>
> Well, did you mean to convey by it that you and Mr Mitchell were somehow on the same side of the negotiations between Tennis Australia and Seven?---No, it was more concerned about what Mr Stokes said about you're only bidding against yourself. Don't – don't, you know, undermine your earlier offers.
>
> Then you've said:
>
> > *But clearly the climate is dire.*
>
> Was that a reference to the Channel 9 position?---And the general industry. I mean everyone was suffering, I think. Sales.
>
> You've said:
>
> > *We love tennis as you know but best to strike whilst the iron is hot to ensure a long-term deal before the industry descends into a spiral of cost-cutting.*
>
> ?---Yes.
>
> What were you seeking to convey by that?---We have always lived in the deluded hope that sports rights would go down and if you look at the next sentence down which was the V8s where we did actually manage to get them to take a haircut, there was some sort of ground for why that might be the case.
>
> But did you hold the view that there was the prospect of the industry descending into a spiral of cost cutting because of matters such as Channel 9's financial position and the industry generally?---Yes.
>
> So why then was it in Seven's interest to strike while the iron is hot rather than to wait things out until the spiral of cost-cutting had begun and then pick up the rights more cheaply?---Good point except I'm impatient and insecure and don't like leaving stuff out there.

1606 In cross-examination by Mr Pearce SC, Mr McWilliam gave the following evidence:

> You said that the climate is dire?---The climate is dire for all TV networks, because we're facing challenges from the internet, disruption, Netflix, everything else. So you read the papers every day, and they will tell you the challenges facing our industry; so I'm never going to be complacent about the status.
>
> You said everyone was suffering at that time?---Sure.
>
> And didn't this make the competition for premium sports rights even greater?---Yes and no.

> Well, let's focus on the "yes". There was such competition for advertising-revenue, not just among the existing networks, but then with the new digital platforms that were emerging, that you all desperately needed premium content. Didn't you?---We all needed premium sport. We didn't need premium content, because premium content was taken by Foxtel and the online platforms that were the subscription platforms.
>
> Well, I'm happy to be corrected on that, but you all needed premium sport?---Correct.
>
> And you knew that Ten's financial difficulties made it an even more serious competitor than it would have been, had it not been in financial trouble?---No. With respect: Ten was the biggest competitor we ever had when it was the most-profitable network and they had money to throw at everything and did.

1607 According to ASIC, this explanation was not credible, but I disagree.

1608 On 12 October 2012, Mr Mitchell rang Mr McWilliam and they had a just under eleven minutes conversation.

1609 On 19 October 2012, Mr Mitchell called Mr McWilliam and they spoke for approximately seven minutes. The same day, at 10.08 am, Mr McWilliam reported to others at Seven that he had just spoken to Mr Mitchell and that Mr Mitchell told him that Mr Wood was a bit jumpy.

1610 On 1 November 2012, Seven sent its November offer to TA. On 2 November 2012 Mr McWilliam rang Mr Mitchell and they had a just under eight minutes conversation.

1611 On 7 November 2012, TA returned a marked-up version of the letter to Seven. This produced a blunt response from Mr McWilliam, who wrote to Mr Wood the same day and accused Mr Wood of sending the marked-up version "completely [in] bad faith", that it was "amateur hour" and derided TA's response to the offer as a "piece of rubbish" and a "piece of crap".

1612 The next day, Mr Mitchell and Mr McWilliam spoke by telephone for five and a half minutes.

1613 On 16 November 2012, after Seven had delivered its November offer, Mr McWilliam wrote to Mr Worner and Mr Martin, "We had the call from Harold … saying it would be okay and that they would sign our document".

1614 According to ASIC, as Mr McWilliam confirmed under cross-examination, there was "a lot of stuff in the Steve Wood response that was not very good for [Seven]" and that Mr Mitchell had said: "Don't worry. We will sign your document". Mr McWilliam purported to explain this away by saying that Mr Mitchell had "wanted to keep us bidding". Under questioning by Dr Collins QC, he gave the following evidence:

> And you responded:
>
> *We had the call from Harold as we were leaving the AGM saying it would be*

okay and they would sign our document.

?---Yes.

Could you tell his Honour what Mr Mitchell had said to you that provoked you to write that?---He just said, "Yes. Yes. It will be all right. Thank you for your offer."

Well, you've - - -?---I mean, there was a lot of stuff in the Steve Wood response that was not very good to us for a number of reasons. And we were pretty clear about why they didn't work. But, yes, so Harold said, "Yes. Don't worry. We will sign your document."

Did you understand that to be an assurance from Mr Mitchell that he was going to deliver a signed copy to Tennis Australia of the offer – to Channel 7?---No.

No. Why not?---Well, Harold is a salesman and he, obviously, didn't want us storming out; he wanted to keep us bidding. And he sort of told – you know, with the best will in the world, he, obviously, would have done anything to help us, but he also did want to tell us what we wanted to hear to keep us – it had been a long drawn out process. It's November already. He wanted us to keep us going.

You've emailed Mr Worner and Mr Martin - - -?---Yes.

- - - in effect, telling them that Mr Mitchell had said that Tennis Australia would sign your document?---Yes. I passed the message on. And you see that they greeted with it some scepticism.

Mr Worner responded:

Okay. That's good, if we actually believe that.

?---Yes.

Did you believe it when Mr Mitchell said to you - - -?---I believed we would get somewhere. I didn't believe we would get everything we wanted.

And you responded at the top of the page:

Yes. Authority disconnect.

What was the disconnect?---Well, the disconnect between the two negotiators.

Being Mr Wood and Mr Mitchell?---Yes.

1615 On 19 November 2012, Mr Mitchell called Mr McWilliam and they had an eight and a half minute conversation.

1616 On 23 November 2012, Mr Wood gave Mr Mitchell a copy of the first IMG offer.

1617 On 25 November 2012, Mr Wood emailed Mr Mitchell and wrote that the first IMG offer was subject to an NDA, which was attached to the email. The NDA allowed the first IMG offer to be shared with Seven if certain conditions were met.

1618 On 30 November 2012, Mr Guinness told Mr Wood that the first IMG offer had been approved by the board of IMG. Mr Wood reported this to Mr Mitchell.

1619 That same day, there were two phone calls from Mr Mitchell to Mr McWilliam, one lasting about 10 minutes, the other about five and a half minutes. In my view, it is likely that in those phone calls, Mr Mitchell disclosed and discussed the first IMG offer with Mr McWilliam. Further, that Mr Mitchell told Mr McWilliam about the first IMG offer and that he had "jumped on" Mr Wood in respect of IMG is apparent from Mr McWilliam's emails sent to others at Seven on 2 December 2012.

1620 Now there is no evidence that Mr Mitchell sought either IMG's consent or TA's consent to disclose the first IMG offer to Seven or that Seven gave any confidentiality undertaking in respect of the first IMG offer. I have discussed this elsewhere and do not consider it to be a big point for ASIC. After all, the very purpose of the first IMG offer was to use it as a negotiation lever with Seven; that entailed some form of disclosure to Seven. Let me return to the chronology.

1621 Now because of Seven's repeated insistence that a deal had already been concluded, Mr Wood wanted a clause to be included in any Seven offer that it was not binding until the conclusion of a long form agreement. In that context, on 1 November 2012 Mr Wood had proposed a form of a non-binding clause to Seven. On 1 December 2012 he sent a copy of the clause to Mr Mitchell. Mr Mitchell told Mr Wood it was "a lawyer's way of saying "I don't trust you." Bad sign! Won't fly with them … Or me!!!".

1622 On 1 December 2012, Mr Mitchell provided to Mr McWilliam the emails between Mr Mitchell and Mr Wood about the long-form clause. I have set out the details of this in the factual background. Mr Mitchell also reported to Mr McWilliam that he had "stamped on" Mr Wood's proposal for a non-binding clause and had also "jumped on" Mr Wood appointing IMG to sell the rights.

1623 Mr McWilliam said in cross-examination that he was "sure that Mitchell used words like 'stamped on'". This led to Mr McWilliam on 2 December 2012 telling others at Seven, including Seven's CEO: "We have to hope Harold can carry the board". By "carry the board", Mr McWilliam meant "persuade the board of Tennis Australia to sign the Channel 7 deal the following day". Under questioning by Dr Collins QC, Mr McWilliam gave the following evidence:

> The next sentence you said:
>
> *We have to hope Harold can carry the board.*

What did you mean by that?---Well, no agreement could be done without the board's consent, and it would be pretty naive to think that if the CEO is standing up saying don't do this deal that the board is still going to vote in favour of doing it. So we're still, what, here, 2 December, four months out from doing a signed agreement. So it was obviously a forlorn hope.

But you knew there was going to be a board meeting of Tennis Australia on 3 December?---It sounds like it.

And you were writing internally that you were hoping Harold could carry the board. Didn't you mean to convey by that, persuade the board of Tennis Australia to sign the Channel 7 deal the following day?---Yes.

And had Mr Mitchell said something to you to cause you to think that that was going to be something that he would be pushing for at that meeting?---I believe so, yes, I think he would, obviously, just a progress report and what's the point of putting it up if you are going to speak against it. It's not inconceivable that you put it up and speak against it, I guess, and say we can do better.

Was a deal, to your knowledge, put to the board?---I really – I am assuming there was a discussion. I don't – I personally doubt that any actual deal was put to the board because why would you do it? Why would any director do it when he had the chief executive going to stand up and speak against it.

Did you consider Mr Mitchell to be, in effect, someone who would serve Channel 7's interests or act as Channel 7's representative on the Tennis Australia board?---No, I would have thought he would say that we were good rights-holders but he's clearly a director of Tennis Australia, not of Channel 7.

1624 Mr McWilliam also gave the following evidence in answer to Mr Pearce SC:

And you know there's a meeting coming up on 3 December and you say, "We have to hope Harold can carry the board" and then you speak for him for thirteen-and-a-half-minutes before the board meeting?---Right.

So it's inevitable, isn't it, or unarguable that what you said to him at that meeting is "Harold, please try and get Tennis Australia's agreement to our current offer"?---Well, I certainly wouldn't have said to him, "Tell them that's a load of crock and that they should get - - -

Of course?---So I'm sure I was - - -

No one is suggesting that?---I'm sure I was advocating for our offer, yes.

But you were advocating for Mr Mitchell to carry the board on it, weren't it? That's what you were putting to him?---No, I was just advocating about our offer which he obviously had to present to the board.

All right, then. In the period December '12 to March '13, the phone records show that you had a number of phone calls with Mr Mitchell, and I will just run through them briefly. On 10 December, six minutes; 11 December, 12 minutes; 14 January, 7 minutes; 14 January, another three minutes; 6 February, another four minutes. So just accept the correctness of those records. In that period during those phone calls it's likely that you were discussing the tennis rights with Mr Mitchell, isn't it?---I wouldn't have been calling him about Christmas pudding.

Correct. But you would have been calling him about the tennis rights?---Sure.

1625 According to ASIC Mr Mitchell had said something to make Mr McWilliam think that he would be able to do that.

1626 On 3 December 2012 at 9.11 am Mr Mitchell and Mr McWilliam spoke for 13 and a half minutes on the telephone. They discussed the broadcast rights. On that same day, TA had its board meeting at noon which I have discussed elsewhere.

1627 On 10 and 11 December 2012, Mr McWilliam and Mr Mitchell had five telephone calls, one of which was just under six minutes duration and another of which was six and a half minutes.

1628 Let me say now that, generally speaking, I accept that any telephone conversation between Mr McWilliam and Mr Mitchell throughout this entire period would likely have been a conversation about the domestic broadcast rights.

1629 On 13 December 2012, Mr McWilliam requested a Sunday brunch meeting with Mr Mitchell at his apartment in Melbourne to discuss the broadcast rights. Mr Mitchell proposed that Mr Wood also be invited. However, when Mr McWilliam proposed that he send Mr Wood some points in advance of the meeting, Mr Mitchell replied, "Think we should hold it until Sunday! He talks to the people on his staff [a]nd gets pushed into a corner! To [sic] much thinking time!".

1630 On 16 December 2012, Mr Mitchell and Mr McWilliam met, but without Mr Wood.

1631 That same day, Mr McWilliam reported on the meeting to Mr Worner and Mr Voelte: "Steve wood wasn't at the meeting, just Harold, who insists it is all going to plan".

1632 Mr McWilliam gave the following evidence concerning the "plan" under cross-examination by Mr Pearce SC:

> And it's Mr Voelte, Mr Worner:
>
> > *Don, just back. See you down there. Steve Wood wasn't at the meeting, just Harold who insists it is all going to plan.*
>
> ?---Yes.
>
> Now, you understood that that plan – sorry, let me just ask you first; were those Mr Mitchell's words? Did he say "It's all going to plan"?---Obviously, words to those – to - - -
>
> I can't hear you?---Sorry, I think I am interpreting that it's going to plan because I've started off with a big statement the CEO wasn't at the meeting.
>
> But it's quite emphatic, isn't it? It's "insists", he has insisted that it's all going to plan?---Well, that's my wording "insists". I mean - - -

Well, you wouldn't say "insist" if Mr Mitchell hadn't been emphatic about it, would you?---Well, Harold is always pretty positive about everything.

All right. And was he emphatic in that meeting that everything is going to plan?---He always said everything was going to plan. And I think your proposition is cut – undermined by what I have said. I've told him how we could best meet Steve Wood's concerns and what we obviously couldn't do.

But the plan was for Seven to get the rights, wasn't it?---Correct.

And that was a plan that you had agreed with Mr Mitchell?---Well, Mr Mitchell was charged with the negotiations. The plan was for the negotiations to be successful.

Yes, and part of the plan was for Mr Mitchell to get the Seven deal through the Tennis Australia board, wasn't it?---Well, we couldn't get the rights without getting it through the board so, yes.

That was the plan for Mr Mitchell to get the deal - - -?---No, the plan wasn't for Mr Mitchell to do it; the plan was for our offer to be accepted which needed board approval.

Well, you told ASIC something different in your section 19 exam?---What page?

130.

…

So if we could go, please, to page 130; you were asked this very question, what the plan was?---Where?

No, it's all right. You will see at line 25, Mr Bastian asked you a question. If I take you to the email above that?---Yes.

You can take it from me that that's the email that says - - -?---Yes.

- - - "going to plan"?---Yes. It's actually on page 131, but go on.

1633 At this point it is convenient to set out the extract from the s 19 examination rather than to further proceed with Mr Pearce SC's cross-examination at this point. The relevant extract was as follows:

Q. What plan?

A. For us to get the rights, you know, for the agreement - the document we put forward to be accepted, the deal we expressed in that document.

Q. How was he insisting that it's all going to plan? What was he telling you that convinced you that it was all going to plan?

A. I don't know but it's clear from what he said - and I think my sentence, we had some wriggle room and the question always was, do you go up at the last minute to get a deal done or does that just, like, set expectations that you'll keep going up? So I think it's pretty clear.

Q. And you were saying this to Mr Mitchell?

A. Yes.

Q. So what was the plan that you and Mr Mitchell were discussing, in relation to

getting that deal that you just referred to over the line?

A. Well it was just, you know, he had to get it through the board and recognising if the CEO didn't love it, how could we address some of his concerns, which just mentioned, how we could meet some of Steve Wood's concerns and what obviously we couldn't do. So I think it's pretty - shows that we were trying to help him get it through, try and meet Steve Wood where we could and remember, he hasn't argued with the pricing. There's some annoying stuff that he's argued with which a lot doesn't hang on or, sorry, not a [lot] hangs on it and, lastly, his whole thing about getting the long form. Now, provided the long form didn't take away our rights that was in the rest of the document, fine. So I think we were being good partners --

Q. Yes, I think you --

A. -- and I think we were trying to make Harold, who is not a detail man, I think we were trying to make his task to get it through and get it approved by the board as easy as possible.

Q. So is your recollection that Wood wasn't pushing back on the price, it was all the other sundry issues?

A. Well, just look at all Wood's emails.

Q. Yes.

A. He never touches the price.

1634 Now it is clear here that at this time no price had been agreed and the price might go up. So on any view the "plan" did not involve Seven's November offer at the then price or indeed at just any price.

1635 Let me return to Mr Pearce SC's cross-examination:

> Now, do you adhere to what you said on that occasion, and that describes the plan – sorry, you need to say yes. You're nodding but you need to say yes because it's not picked up by the transcript?---Yes. That was the plan. The plan as defined that the price might go up, that the terms might change. Yes, that was the plan.
>
> And plan involved Mr Wood - - -?---And the board had to approve it.
>
> And the plan involved Mr Mitchell getting it through the board?---No.
>
> Well, that's what you just - - -?---The deal had to get through the board.
>
> Yes. And - - -?---It didn't matter who got it through, it had to get through the board.
>
> The plan was for Mr Mitchell to get it through the board, wasn't it?
>
> DR COLLINS: My learned friend should, with respect, clarify what he means by "it".
>
> MR PEARCE: The plan. No, sorry, the deal. The plan was - - -
>
> DR COLLINS: What deal?
>
> MR PEARCE: The plan was to get the November offer accepted by the board, and for Mr Mitchell to ensure that that happens?---I disagree with the last bit, sorry. We always wanted to get the deal approved. We didn't care who got it approved but it needed the

> board to approve it.
>
> But you were relying on Mr Mitchell to get it through, weren't you?---I don't know who I was relying on. It had to get through the board. A majority of directors had to vote in favour of it. Well, presumably all the directors had to vote in favour of it, which is what happened in the whole May process when we finally got there.

1636 Also on 16 December 2012, Mr McWilliam emailed Mr Mitchell and outlined the points that were discussed at the meeting and wrote "thanks for your help on this".

1637 Mr McWilliam said in cross-examination that it was just a general normal sign off. Mr Mitchell was not pushing Mr McWilliam to take on Mr Wood's points but that Seven was trying to let Mr Mitchell know how Seven proposed to overcome the areas of disconnect. This is consistent with Mr McWilliam trying to make Mr Mitchell's task to get it through and approved by TA's board as easy as possible.

1638 On 14 January 2013, there were two phone calls between Mr McWilliam and Mr Mitchell being a phone call from Mr Mitchell to Mr McWilliam lasting about seven minutes and a phone call from Mr McWilliam to Mr Mitchell lasting about three minutes.

1639 On 16 January 2013, Mr Worner emailed Mr Mitchell complaining about a press article which discussed the possibility of the TA board giving the rights to Seven without a tender and that Network Ten should put its best foot forward with the rights.

1640 On 6 February 2013, there was a just under four minute phone call between Mr McWilliam and Mr Mitchell.

1641 On 22 February 2013, Mr Mitchell called Mr McWilliam to tell him that Mr Warburton was out at Network Ten and Mr McLennan was in. When asked in his s 19 examination why Mr Mitchell would call Mr McWilliam with this news, Mr McWilliam answered "he's our major media buyer".

1642 On 23 February 2013, Mr Stokes emailed others at Seven including Mr McWilliam stating:

> Make no mistake they are after the tennis — they will pay a big cheque to start with a marque even they desperately need something big — that cheque dosnt have to be paid till later … [we] need to make sure we are there at this board meeting — lets not take any chances.

1643 Mr McWilliam responded to Mr Stokes that he agreed with him and said:

> I will call Harold again about this. I am also worried. The nightmare is if we throw more money out the board says this is working we shouldn't renew early. Harold swears we r safe but I will get onto him again.

1644 Under cross-examination Mr McWilliam denied that Mr Mitchell had told him anything to make him say that "Harold" had sworn "we are safe". He gave the following answers in questioning by Dr Collins QC:

> You've written:
>
> *Harold swears we are safe.*
>
> Had Mr Mitchell said something to you that caused you to write that?---No. I really meant Harold meant, you know, we're in the right process. I mean, I think I was probably – there's an element of him, Mr Stokes, saying to me, "Do you know what you're doing?" So I guess I am clinging on to Harold a bit and saying, "Harold says we will be all right, as well."
>
> And had Harold said you would be all right?---He never said we would be all right, but he always said, you know, we had a good offer; we were the natural home of tennis, we had done a good job over the years, we were the best people to be able to make the best offer, we were the least likely to go into receivership at that time.

1645 Mr McWilliam agreed in cross-examination that Mr Mitchell would have said "Yes, Bruce; it will all be okay. Keep going; keep going". Mr McWilliam also agreed that at the time of writing this email he was aware that there was a TA board meeting coming up.

1646 Mr McWilliam gave the following evidence under cross-examination by Mr Pearce SC:

> So I want to go forward then to February, to late February 2013?---Yes.
>
> And at that point were you aware that there was a Tennis Australia board meeting coming up?---Look. I wouldn't argue; not specifically, but since it would have been the first one after the Australian Open – it would be entirely predictable, that there would have been. So – yes. Yes.
>
> But this was the time by which – well, I think we, probably, need to clarify this, and we need to go to volume 7, 292. We've already talked about this; so there's nothing more to say. We won't dwell on it, but I ask you again to go to 292 in volume 7?---Yes.
>
> And there's – in the middle of that page, 4205, there's the passage in your email to others at Seven, "Harold swears we are safe", but your evidence is, as I understand it, that Mr Mitchell never swore to you that you, Channel 7, are safe, in respect of the broadcast rights?---I think I was giving my impression rather than that he took out a Bible and swore; yes.
>
> So had he said things to you which gave the impression that he was very clear in his mind, that you were safe?---Harold would have said, "Yes, Bruce; it will all be okay. Keep going; keep going".
>
> All right. And when Mr Stokes in the email at the bottom of the page said "We need to make sure we're at this board meeting" – you knew then there was a board meeting coming up, it was 4 March?---I did – look. I don't think I knew the exact date with respect, but it sounds perfectly correct, that there was a board meeting around that period.
>
> Sure. Coming up soon. Yes, and your response was to call Harold. You said in answer:

I will call Harold again about this.

?---Yes.

Yes. And this was because you were anticipating that Mr Mitchell, in the upcoming board meeting in March, would still be acting in accordance with the plan that we talked about in respect of the December meeting?---He would still be on track to try and get a new rights deal done.

Yes?---Correct.

As part of that plan that had been talked about in December?---That very imprecise plan; yes.

1647 On 4 March 2013, TA had a board meeting at 9.00 am. The meeting finished at 1.50 pm. The same day at 1.11pm and 4.37 pm, Mr Mitchell rang Mr McWilliam. The second call was for ten and a half minutes.

1648 In the second phone call, as Mr McWilliam accepted, he was told by Mr Mitchell what had transpired in the board meeting that morning, including in all likelihood that the board had resolved that a subcommittee would deal with the broadcast rights, which Mr Mitchell would chair. He gave the following evidence under cross-examination by Mr Pearce SC:

All right. Now, the telephone records show – just assume – just accept from me, please, Mr McWilliam, that there was a board meeting on 4 March, held in the morning?---Yes.

And the telephone records show that you spoke to Mr Mitchell for 10 minutes in the afternoon after the board meeting. Do you accept that you discussed the broadcast rights?---I totally would accept that.

Do you accept that Mr Mitchell reported to you on what had happened in that board meeting in respect of the broadcast rights?---Well, I – yes. I don't know what reported to me means. I'm sure he would have like updated me on where we were going; yes.

Did he tell you that Tennis Australia had passed any resolutions or taken any action in respect to the broadcast rights?---Not that I specifically recall, but given we were on the way to the meeting at the Olsen, which, I'm sure, came out of that, I'm sure he did.

Did he tell you that the Tennis Australia Board had resolved to appoint a subcommittee to deal with the broadcast rights and that he was to chair it?---He could have.

You knew that, though. Didn't you?---Look. It was always my understanding, that he was the chairman of the rights committee. Yes. So if it was only set up then – I accept your word.

And you accept that he told you about that in the phone call on 4 March after the board meeting?---No; not – look. I don't ridicule your proposition, but I don't specifically recall him saying that, and I always thought he was the chairman of the rights committee anyway.

Yes. Did you think he told you that maybe on another occasion?---I always thought he was the chairman of the rights committee, to tell you the truth.

1649 Although Mr McWilliam said that he did not specifically recall Mr Mitchell telling him that he was the chairman, he always thought that Mr Mitchell was the chairman of the subcommittee. Given that Mr McWilliam said that he always knew that Mr Mitchell was the chairman of the subcommittee and that Mr Mitchell was appointed as chairman at the 4 March 2013 board meeting, according to ASIC I should infer that Mr Mitchell did say to Mr McWilliam that a subcommittee had been formed and that he was the chairman. I am inclined to agree.

1650 Further, there were subsequent telephone calls between Mr Mitchell and Mr McWilliam. There was a two minute call on 5 March 2013, a just under nine minute call on 14 March 2013, and seven text messages on 18 March 2013. I infer that these calls were about the broadcast rights.

1651 The ENP with Seven began on 1 April 2013.

1652 On 5 April 2013 at 9.22 am, Mr Worner sent an email to others at Seven including Mr McWilliam expressing concern that the longer it took to negotiate a deal with TA the more likely Seven's competitors would focus on the tennis "as cricket situation develops". This was a reference to the fact that negotiations were then also in train for a new broadcasting deal for the cricket. Seven were concerned that the loser in that bid, either Nine or Network Ten, would bid aggressively for the tennis.

1653 At 10.20 am the same day, Mr McWilliam emailed Mr Wood and Mr Mitchell and said, "it would be good to get the main terms nailed down and then lock everyone up to conclude the long form".

1654 Mr McWilliam also rang Mr Mitchell at 10.22 am and they spoke for just under ten minutes. ASIC says that it is reasonable to infer that in this conversation, Mr McWilliam passed on to Mr Mitchell Seven's concerns about delay and the outcome of the cricket negotiations.

1655 On 9 May 2013, there was a meeting between Seven and TA at the Olsen Hotel.

1656 On 10 May 2013, there was a just under five minute phone call between Mr Mitchell and Mr McWilliam, which was a discussion about the broadcast rights. In that discussion, Mr McWilliam told Mr Mitchell what had happened at the meeting the previous day.

1657 On 16 May 2013, Mr Wood travelled to Sydney and met with Mr Worner. He told Mr Worner that TA needed at least $40 million per annum. Mr Worner replied that Seven could not do that. Mr Worner showed Mr Wood some advertising figures then said that Seven was prepared

to offer $195 million over five years. Mr Wood said that TA wanted the host broadcast. Mr Worner replied that they could work something out on that.

1658 Later that day Mr McWilliam called Mr Mitchell and they spoke for five minutes. I infer that Mr McWilliam told Mr Mitchell about Mr Worner's offer to Mr Wood. Mr McWilliam then emailed others at Seven:

> Also spoke to harold (in shanghai) who thought we had been more generous than we expected and he said they were now more nervous of what production responsibilities they were taking on. Harold said they had a board meeting of TA on monday.

1659 Mr McWilliam confirmed under cross-examination that Mr Mitchell had said of Seven's foreshadowed offer that it was "very generous". It was more generous than "we expected". The following exchange took place between Mr McWilliam, Mr Pearce SC and myself:

> So you will see page 4467; you got that?---Got it.
>
> So there's an email from you to others at Seven.
>
> > *Tim Worner met with Steve Wood today in Sydney, hopefully, agreed 195 million deal and then some more detail.*
>
> And then two minutes later, you follow up, and you say with another email to the same people:
>
> > *Also spoke to Harold in Shanghai, who thought we had been more generous than we expected.*
>
> ?---Yes.
>
> Now, there's a little bit of confusion about the second word – "we" there?---Yes; there is. Yes.
>
> Have you given some thought to whether there's a typo there or whether you just - - -?---No more thought. I believe that the – it's fully answered in the section 19 thing where it's gone through.
>
> Well, are you saying – let's just try and work this out. Let's try and work out what words Mr Mitchell used to you. "Channel 7 had been more generous than Channel 7 expected." Is that what, you say, Mr Mitchell said to you?---Probably. We had gone up more than we wanted, but it's always what happens.
>
> It's more likely, isn't it? That he said to you "Channel 7 had been more generous than I expected"?---No. I don't – I – you've asked me that before, and I don't accept it.
>
> Or "Channel 7 had been more generous than Tennis Australia expected". Did he use the word "we", meaning "Tennis Australia"?---Yes.
>
> So that's it. So Mr - - -?---No. I'm not saying yes.
>
> Sorry?---It's possible. It's possible, but I'm just – I wrote the words, and we're stuck with the words.
>
> All right. All right. So we will, probably, just have to live with that?---Yes.

HIS HONOUR: I think there are four possibilities at last count.

MR PEARCE: I thought there were three.

…

HIS HONOUR: It could be "he", "than he expected"; so it could be "he expected". It could be "I expected". It could be "we as Channel 7" or could be "we as Tennis Australia".

MR PEARCE: "He" in the sense of Mr McWilliam.

HIS HONOUR: In the sense of Mr Mitchell.

MR PEARCE: And "I" in the sense of - - -

HIS HONOUR: Mr McWilliam.

MR PEARCE: I see. I see.

HIS HONOUR: There's four possibilities.

MR PEARCE: Yes; your Honour is correct.

HIS HONOUR: Yes.

MR PEARCE: Thank you for that [and then continued with the witness].

Are you able to say which of those four possibilities is correct?---Well, I would say it's, certainly, not more generous than Tennis Australia had expected, since they had asked for more, but I just don't think anything turns on it, because the figure was agreed. So it was a pleasant surprise to someone and a disappointment to someone, but we got the deal done.

1660 On 17 May 2013, Seven put in writing its offer of $195.1 million over five years. Seven's final offer left open for further negotiation the question of host broadcast.

1661 Seven's final offer was reported to the board of TA on 20 May 2013 and a resolution was passed that the board approve the offer and move towards a long-form agreement with Seven.

1662 Mr McWilliam also gave the following evidence under cross-examination by Mr Pearce SC:

All right. Okay. The figure that was agreed on, at least between Mr Worner and Mr Wood, on 16 May and accepted by the Tennis Australia board on 20 May - - -?---Yes. Yes.

Of 195.1 million - - -?---Yes.

Was not the maximum amount that Seven would have been prepared to pay. Was it?---With respect: how could I ever say?

Well, if Channel 7 – if Tennis Australia, rather, had not accepted that offer and had allowed the exclusive negotiation period to conclude and there has been a competitive tender, you would have bid in that tender at least 195.1. Wouldn't you?---I don't see – with respect: I don't see how you can say that. With all these things, like with a house auction, there's a position that – are you going to take the deal on the day, or are you going to defer and hope that they're still there or hope that someone even better is

there. You never know that you're not going to be left with it and – I'm talking about the rights-holder – and that actually you couldn't get – the guy is no longer offering 3 million for your house; he is only offering 2.8. "And why didn't I accept it on the day." With respect: Mr Pearce, you never know. You've got to back your own judgment. My role was to get the rights for as good a price as possible. My role was also not to lose the rights. You've just got to form a view and back yourself on the day.

You're not saying this. Are you, Mr McWilliam. You're not saying that that was the maximum amount that Seven would ever have been prepared to offer for those rights at that time?---With respect: that's a theoretical concept. I don't know, because – we might have held out and got the rights cheaper, or we might have held out and had to pay more for the rights. You just don't know. You just have to see on the day, given the situation, given who the competitors are, given the credibility of the competitors; you just have to see.

There was a possibility, you accept, that Seven in the end would have offered more?---Possibility. I have no problem with the word "possibility".

You, in fact, thought that the offer of 195.1 million was less generous than it actually appeared, didn't you?---Could you tell me why I thought that, because I'm reaching into my mind and I can't remember that.

Yes. I will take you to the transcript. We have just got to get that page?---Is this the section 19?

Section 19; I've just got to get the right page. I think it's 128?---128?

HIS HONOUR: Just before you do that. There was an answer that interested me. You said:

You may have got the rights cheaper.

It seems like you hadn't done the deal and the ENP expired. What sort of circumstances would have existed under which that was a realistic scenario that you could have got the rights cheaper?---Nine – if – your Honour, Nine was already set with cricket. Ten had got Big Bash and Ten was no longer pushing.

1663 On 21 May 2013, there was a seven minute phone call from Mr Mitchell to Mr McWilliam at 10.06 am. The same day at 10.18 am there was a further 50 second phone call from Mr Mitchell to Mr McWilliam. Mr McWilliam accepted that it was highly likely that in the first phone call, Mr Mitchell told him what had happened at the TA board meeting the previous day. Mr McWilliam also accepted that he thanked Mr Mitchell in that phone call for his assistance, and that Mr Mitchell said that he would be in Sydney and they should have lunch. Mr McWilliam also agreed that it was very likely that in the second phone call Mr Mitchell was confirming that he could have lunch with Mr McWilliam. The lunch that was held that day was a celebration of finally getting there. It would seem that Mr Wood was not invited to the lunch. For present purposes it is sufficient to end the chronology at this point.

1664 Let me now say something as to Mr Wood's evidence concerning his knowledge of the Mr Mitchell/Mr McWilliam communications.

1665 Mr Wood was shown documents by ASIC that comprised emails between representatives of Seven, and between representatives of Seven and Mr Mitchell, during the time of negotiations for the domestic broadcast rights. Mr Wood was not aware of these communications at the time. Further, at none of the board meetings that he attended did the TA board authorise Mr Mitchell to tell Seven about interest in the domestic broadcast rights from third parties or about TA's deliberations.

1666 I should say here that there was an element of artificiality about some of this evidence given that it was decontextualized and Mr Wood did not have the benefit of all the evidence before me including Mr McWilliam's evidence. I will return to this later.

1667 Mr Wood was shown emails from Mr McWilliam to Mr Stokes dated 31 January 2012 and 18 May 2012. In the January email, Mr McWilliam reported to Mr Stokes that, among other things, "Harold says in the meantime Ten has been down trying to disrupt the apple cart" and "Harold assures us all will be okay but thinks we shouldn't leave the gate open". In the May email, Mr McWilliam advised Mr Stokes that he had just returned from meeting with Mr Mitchell, reported to him about TA's negotiating position and observed:

> 6. I feel the above outcome, whilst more expensive, puts off a major jump in 2017 (or 2015) and locks us into a strong contract. Sadly our friends at Ten have been speaking $40 mill a year in rights fees and whilst Harold has pooh poohed that, management of TA is aware
>
> 7. We are meeting again with Harold next week

1668 Mr Mitchell did not tell Mr Wood that he had provided any of the information set out in these emails to Seven, or that he had private meetings with Mr McWilliam regarding the domestic broadcast rights on or about 18 May 2012 or on any subsequent dates. Mr Wood was unaware that Mr Mitchell was communicating with Mr McWilliam and advising Mr McWilliam on correspondence with Mr Wood regarding the broadcast rights.

1669 Mr Wood was shown an email from Mr Mitchell to Mr Martin and Mr McWilliam dated 10 October 2012 at 4.03 pm. That email forwarded the email that Mr Mitchell had sent to Mr Wood at 4.01 pm the same day. In the email, Mr Mitchell wrote to Mr McWilliam and Mr Martin, "Bruce and Lewis, Let's wrap this up next week. Leave it with me". Mr Mitchell did not tell Mr Wood that he had forwarded his email to Mr Wood to Seven's executives on 10 October 2012.

1670 Mr Wood was shown an email from Mr McWilliam to Ms Quirk, Mr Shtein and Mr Martin dated 19 October 2012. That email disclosed that, subsequent to the meeting that Mr Wood attended with Mr McWilliam, Mr Mitchell and Mr Martin, Mr Mitchell spoke with Mr McWilliam and advised him of TA's negotiating position regarding online and mobile streaming of the AO. According to this email, Mr Mitchell also told Mr McWilliam that Mr Wood was "a bit jumpy". Mr Wood did not ask Mr Mitchell to make this communication with Seven, and Mr Wood had no knowledge before seeing this email that he had done so.

1671 Mr Wood was shown an email from Mr McWilliam to Mr Voelte, Mr Worner, Mr Lewis and Mr Burnette dated 2 December 2012. That email noted that Mr Mitchell had forwarded emails between Mr Wood and Mr Mitchell dated 1 December 2012. In the email Mr McWilliam said "We have to hope harold can carry the board. We should know tomorrow". Mr Wood did not authorise Mr Mitchell to disclose these matters to Seven and did not know about this at the time. Mr Wood said he was shocked to learn, as he understood the email, that Seven anticipated that Mr Mitchell would be advocating for them at the TA board meeting.

1672 Mr Mitchell did not disclose to the TA board at the 3 December 2012 TA board meeting that he had provided Seven executives with a copy of Mr Wood's email dated 1 December 2012 in which he outlined a request for a non-binding clause before a long-form agreement was finalised.

1673 Mr Wood was shown an email chain between Mr Mitchell and Mr McWilliam dated 13 to 14 December 2012. In that email chain, Mr McWilliam suggested forwarding to Mr Wood some points in respect of the negotiation. In response, Mr Mitchell told Mr McWilliam to hold off sending materials to Mr Wood, that Mr Wood would talk to his staff who would push him into a corner and that providing materials would give Mr Wood too much time to think about them. Mr Wood was concerned that by telling Mr McWilliam on 13 December 2012 not to send materials to Mr Wood in advance of a meeting, Mr Mitchell undermined Mr Wood's negotiating position.

1674 Mr Wood was shown an email chain between Mr McWilliam, Mr Voelte and Mr Worner dated 15 to 16 December 2012. In those emails, Mr McWilliam recounted a meeting that he had with Mr Mitchell and that Mr Mitchell has said to him how Seven could meet Mr Wood's concerns and that "it is all going to plan". Mr Wood did not know about the meeting on 16 December 2012 or that Mr Mitchell told Seven at the meeting that "it is all going to plan".

1675 Mr Wood was shown an email from Mr McWilliam to Mr Mitchell and Mr Martin with an attachment dated 16 December 2012. That email was not copied to Mr Wood. In it, Mr McWilliam outlined the "main points" in respect of the negotiation with TA. Mr Mitchell did not tell Mr Wood that Mr McWilliam had emailed Mr Mitchell separately on this date. Mr Mitchell did not forward this email to Mr Wood. Mr Wood was concerned that the lack of disclosure by Mr Mitchell of Mr McWilliam's email undermined Mr Wood's negotiating position and was information that should have been provided to Mr Wood and the TA board.

1676 Mr Wood was shown emails between Mr McWilliam, Mr Stokes, Mr Voelte, Mr Worner and others dated 23 February 2013. In the email dated 23 February 2013 from Mr Stokes, he said "We need to make sure we are there at this board meeting – lets not take any chances. I reckon the delay has been so Ten and Foxtel can ready with a bid!". Mr Wood gave evidence that he was shocked that Seven believed it could have a presence at the TA board meeting. In an email from Mr McWilliam dated 23 February 2013, he said "Harold swears we r safe". Mr Mitchell did not tell Mr Wood that he said to Mr McWilliam that Seven was "safe". Mr Wood was concerned that by Mr Mitchell communicating to Seven that it was "safe", he was undermining Mr Wood's negotiating position and that any conversation between Mr Mitchell and Mr McWilliam where Mr Mitchell said that Seven was "safe" should have been disclosed by Mr Mitchell to the board.

1677 Mr Wood was shown an email from Mr McWilliam to Mr Stokes, Mr Voelte, Mr Worner and Mr Burnette dated 16 May 2013 and sent at 5.35 pm. Mr Mitchell did not tell Mr Wood that he had spoken with Mr McWilliam and said to him that Seven had been more generous than TA expected, that TA was now more nervous about what production responsibilities it was taking on, and that TA had a board meeting on the following Monday. Mr Wood was concerned that by Mr Mitchell communicating these matters to Seven, he was undermining Mr Wood's negotiating position and any conversation of this nature should have been disclosed by Mr Mitchell to the board.

1678 Let me deal with another matter. Before turning to the alleged contraventions, let me say something about the significance of Mr Mitchell not giving evidence.

1679 In *Weissensteiner v The Queen* (1993) 178 CLR 217 at 227, Mason CJ, Deane and Dawson JJ said:

> …it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge

> which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it.

1680 Their Honours went on to say (at 229):

> The failure of the accused to give evidence is not of itself evidence. It is not an admission of guilt by conduct. It cannot be, because it is the exercise of a right which the accused has to put the prosecution to its proof. In some other circumstances, silence in the face of an accusation when an answer might reasonably be expected can amount to an admission by conduct. But when an accused elects to remain silent at trial, the silence cannot amount to an implied admission. The accused is entitled to take that course and it is not evidence of either guilt or innocence. That is why silence on the part of the accused at his or her trial cannot fill in any gaps in the prosecution case; it cannot be used as a make-weight. It is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given and which the jury is required to consider, that they may take it into account, and they may take it into account only for the purpose of evaluating that evidence.

1681 The *Weissensteiner* inference has been applied in civil proceedings and is, of course, related to the *Jones v Dunkel* inference, which may also be drawn in civil penalty proceedings. As Kitto J said in *Jones v Dunkel* (1959) 101 CLR 298 at 308:

> … [A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.

1682 In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [63] Heydon, Crennan and Bell JJ said:

> The rule in *Jones v Dunkel* is that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case. That is particularly so where it is the party which is the uncalled witness. The failure to call a witness may also permit the court to draw, with greater confidence, any inference unfavourable to the party that failed to call the witness, if that uncalled witness appears to be in a position to cast light on whether the inference should be drawn.

1683 In *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at [447], Santow J drew an inference that one of the directors failed to exercise reasonable care and diligence even though that person did not give evidence and said that the inference is simply strengthened by his absence. Further, as he said (at [448]), the adverse inference may have greater significance where it is the party himself who has not given evidence in circumstances where he had a personal involvement in the transactions in question.

1684 Mr Mitchell says that there is no call for the operation of any *Jones v Dunkel* inferences in the circumstances of this case.

1685 First, he says that ASIC has eschewed any need or even capacity to identify any subjective improper motive on his part, or to allege that any such motive actuated the conduct by him that is said to give rise to the alleged contraventions. He says that because of the manner in which ASIC's case is pleaded, and the way in which ASIC's case was articulated and then refined in the course of the trial, his motive for the conduct said to give rise to the alleged contraventions is not in issue. Further, he points out that he has not relied upon the business judgment rule to excuse conduct that would otherwise have constituted a contravention. So, he says that any evidence he could have given as to his subjective purpose for engaging, or not engaging, in particular conduct would have gone to a false issue.

1686 Second, he says that nothing in ASIC's case relevant to the contraventions alleged against him gave rise to any matter requiring an explanation or contradiction. He says that the contraventions alleged by ASIC fall into and can be analysed by reference to three discrete categories:

(a) acts and omissions by him in relation to the TA board;

(b) communications between him and Mr Wood; and

(c) communications between him and Seven.

1687 In respect of the first category, he says that there is no material dispute as to what occurred in the course of the relevant TA board meetings, or as to the acts or omissions by him that are said to give rise to the alleged contraventions.

1688 In this regard he points out that in the course of ASIC's case, evidence was adduced from Mr Wood, Mr Freeman, Dr Young, Mr Tanner, Mr Davies, Mr Fitzgerald and Mr Roberts, each of whom were present at all or most of the relevant meetings. Mr Healy also gave evidence of what occurred at each of the relevant meetings. Further, signed minutes of each meeting approved by the board were tendered. And in relation to the signed minutes, s 251A(6) of the Corporations Act provided that: "A minute that is so recorded and signed is evidence of the proceeding, resolution or declaration to which it relates, unless the contrary is proved".

1689 So he says that there is nothing that he could have said about what occurred at the relevant board meetings, or as to the acts or omissions alleged by ASIC to give rise to his alleged

contraventions, that would have added to, contradicted or explained the evidence already before me.

1690 In respect of the second category, he says that there is no relevant dispute as to what he said or wrote to Mr Wood that is said by ASIC to constitute contraventions in the second category. He says that Mr Wood's oral evidence, understood in context, was exculpatory of him. Mr Wood and other directors also gave evidence to the effect that they shared many of the views expressed by Mr Mitchell in his communications with Mr Wood. He says that the evidence was clear that nothing said or written by him to Mr Wood was treated by Mr Wood as any form of instruction or direction. In those circumstances, there was nothing in the evidence relating to the alleged contraventions in the second category that relevantly called for an explanation or contradiction by him.

1691 Finally, in respect of the third category he says that Mr McWilliam gave evidence in respect of each of the relevant communications. And his evidence was exculpatory of Mr Mitchell. Mr Mitchell says that Mr McWilliam put the relevant communications in their proper context and explained why they did not bear the sinister connotations contended for by ASIC. Mr Mitchell says that in light of the evidence given by Mr McWilliam, and the context in which the impugned communications occurred, there was nothing that relevantly called for an explanation or contradiction by Mr Mitchell in respect of the third category of alleged contraventions.

1692 Now I agree with what Mr Mitchell has said concerning the first and second categories, but not the third category. Further, for completeness, I should say that state of mind is not completely irrelevant to ss 182 and 183.

1693 In my view the evidence of the internal Seven emails had to be viewed in the context of Mr Mitchell's failure to give evidence. Now Mr Mitchell chose not to give evidence, although no adverse inference can be drawn from that fact alone. But *Jones v Dunkel* and *Weissensteiner* inferences can be drawn against him. This is all the more so because, in cross-examination of a number of witnesses, Dr Collins QC for Mr Mitchell seemed to suggest that Mr Mitchell had an explanation for the evidence of his communications with Seven. Each of Mr Wood and a number of other directors were asked by Dr Collins QC whether, had they known about the emails between Mr Mitchell and Mr McWilliam at the time, they would have asked Mr Mitchell about the emails and taken into account what Mr Mitchell said to them in response. But Mr Mitchell did not give any evidence that might explain why he communicated with Mr

McWilliam about the domestic broadcast rights in the terms that he did, or why he forwarded internal TA emails to Mr McWilliam. Now in fairness, such questions were more going to a counterfactual matter. Nevertheless, the implicit foundation was that Mr Mitchell had an innocent explanation.

1694 Regardless, in my view it is appropriate to draw a *Weissensteiner* and *Jones v Dunkel* inference from the failure by Mr Mitchell to explain any of his communications with Mr McWilliam, him forwarding TA's internal emails to Seven and him advising Mr McWilliam on how to deal with Mr Wood. But at the end of the day that does not greatly assist ASIC in the face of Mr McWilliam's evidence and a reading of the internal Seven emails in their commercial setting.

1695 Finally, I should say that I reject ASIC's assertion that Mr McWilliam was in Mr Mitchell's camp, whatever that means.

1696 Now ASIC said that this was evident from the fact that Mr Mitchell's legal representatives had conferred with Mr McWilliam, including prior to the commencement of the trial. But this seemed to be a beat up. Further, ASIC said that Mr McWilliam had spoken with Mr Mitchell's PR representative whilst under cross-examination; but as Mr McWilliam said, not about the case. Further, when ASIC commenced proceedings against Mr Mitchell, ASIC said that Mr McWilliam spoke to Mr Mitchell and said to him that he was disappointed about the proceeding and that he thought that it was unfair. Let me set out the precise cross-examination by Mr Pearce SC:

> Have you had any discussions with Mr Mitchell about this case?---No, I haven't. I, obviously, when he was – when the proceedings were initiated I said it was – I was thinking of him and that I was disappointed and I thought it was, you know, unfair, but only – only statements of that nature. Wish him well.
>
> Have you had any discussions with lawyers for Mr Mitchell about this case?---I have had discussions with them, yes.
>
> When?---On two occasions, I think.
>
> When were those?---Saturday about two weeks ago, I think. And I think a period before that when we had a video conference call, because they wanted to ask me about some of the documents that were going to be relevant.

1697 Further, ASIC says that in Mr McWilliam's s 19 interview with ASIC, he sought to exonerate Mr Mitchell. But the fact that Mr McWilliam gave evidence at trial or in his s 19 examination that was unfavourable to ASIC's case thesis did not place him in "Mr Mitchell's camp" to the extent that such an expression has any meaningful content. Mr McWilliam was in Seven's

camp. And his evidence was fully consistent with what I would expect Seven's commercial interest to have been.

1698 In my view, ASIC's assertions in this respect have not been made good.

The alleged contraventions

1699 It is appropriate at this point to turn to the alleged contraventions and my analysis on this aspect of the case.

1700 ASIC alleges that Mr Mitchell breached his duties as a director of TA in a number of respects in relation to his dealings with Seven.

1701 In summary, in relation to events in 2012, ASIC complains that Mr Mitchell wrongly informed Mr McWilliam of the first IMG offer on 30 November 2012, wrongly forwarded his 1 December 2012 emails with Mr Wood to Seven, wrongly told Mr McWilliam on about 1 or 2 December 2012 that he had stamped on Mr Wood's proposal for a non-binding clause and had jumped on Mr Wood appointing IMG to sell the rights, wrongly told Mr McWilliam not to send materials to Mr Wood in advance of a proposed meeting on 13 December 2012 and wrongly told Mr McWilliam and Mr Martin on 16 December 2012 that it was all going to plan.

1702 In summary, in relation to events in 2013, ASIC complains that Mr Mitchell wrongly assured Mr McWilliam in January and February 2013 that Seven was safe and that TA would renew the broadcast rights agreement with it, wrongly informed Mr McWilliam of what had happened concerning the domestic broadcast rights at the TA board meeting on 4 March 2013 and wrongly informed Mr McWilliam on 16 May 2013 that Seven's final offer was generous.

1703 Let me go through the specific allegations in turn.

1704 First, ASIC alleges that on 30 November 2012, Mr Mitchell informed Mr McWilliam about the details of the first IMG offer and thereby contravened s 180(1). ASIC further alleges that Mr Mitchell contravened s 183(1) because he used the details of the first IMG offer improperly. ASIC says that the first IMG offer was confidential to TA and IMG and Mr Mitchell disclosed it without the consent of IMG and to gain an advantage for Seven by disclosing its rival's position to it. According to ASIC, this conduct weakened TA's negotiating position.

1705 I reject this part of ASIC's case.

1706 As I have said, the very purpose of TA procuring the first IMG offer was so that it could be used as leverage. Mr Wood was using IMG as a useful bargaining chip that he could deploy as leverage in his discussions with Seven.

1707 Now I accept that there is evidence that Mr Mitchell told Mr McWilliam of the details of the first IMG offer. The phone records show that there were two phone calls between Mr Mitchell and Mr McWilliam on 30 November 2012. Mr Pearce SC's cross-examination of Mr McWilliam about these conversations was limited to the following question and answer:

> The phone records show that on 30 November 2012 you had a 10-minute phone call and a five-and-a-half minute phone call with Mr Mitchell. Now, do you accept that in those telephone calls you discussed the tennis broadcast rights with Mr Mitchell?--- That would be the main reason why I would be talking to Mr Mitchell, yes.

1708 Further, when asked how he learnt that IMG had expressed an interest in acquiring the domestic broadcast rights, Mr McWilliam said, "I just think general industry knowledge. IMG may have even come to see us". He also gave the following evidence under questioning by Dr Collins QC:

> Just pausing there. How did you learn that IMG had expressed an interest in acquiring the domestic broadcast rights?---IMG has always been hovering around tennis. They sell Wimbledon. They pest and they try to take commissions. And we don't like them, because we would rather deal direct with the rights, holder rather than have them try to charge 30 per cent commission and you don't have a direct relationship with your rights holder, which is never going to work.
>
> And how did you learn that IMG had expressed an interest in the domestic tennis rights?---I just think general industry knowledge. IMG may have even come to see us.

1709 When Mr Pearce SC asked Mr McWilliam whether Mr Mitchell gave him a copy of the first IMG offer in late November or early December, Mr McWilliam could not specifically recall.

1710 In my view, on the totality of the evidence it is likely that Mr Mitchell told Mr McWilliam about the first IMG offer. But in any event, TA had permission from IMG to disclose the first IMG offer to Seven subject to conditions. Under the terms of the NDA:

> TA shall be entitled to disclose the contents of IMG's Domestic Proposal (but not, for the avoidance of doubt, the International Proposal) to its current domestic broadcaster, Seven Network, strictly subject to the following terms:
>
> (i) Seven Network must first undertake to keep such information confidential and not disclose it to any third party, on terms no less stringent than those set out herein;
>
> (ii) Such disclosure shall be for the sole purpose of discussions between TA and Seven Network regarding TA's Domestic Media Rights 2015-2021;
>
> (iii) Such disclosure shall not affect the other confidentiality and non-disclosure

> obligations hereunder, and without limitation TA must still obtain the consent of IMG before disclosing to Seven that the Domestic Proposal is from IMG, and/or before disclosing the contents of the Domestic Proposal to any other prospective broadcasters, but IMG shall consider such requests for consent acting reasonably and in good faith.

1711 Now there may be a doubt as to whether the conditions were satisfied. But even if it were established that Mr Mitchell disclosed the contents of the first IMG offer to Mr McWilliam in a manner amounting to a breach of the NDA, that conduct would not amount to a breach of directors' duties of the kind alleged by ASIC. ASIC asserts that Mr Mitchell did something that a reasonable person in his position would not do, and that he had the improper purpose of gaining an advantage for Seven by disclosing its rival's position (IMG) to it and weakening TA's negotiating position. But it was always TA's intention to disclose the contents of the first IMG offer to Seven. The very purpose of doing so was to gain an advantage for TA and to strengthen TA's negotiating position. Further, in reality IMG could not be said to be a real rival. It was a mere agent. And it was being used as leverage against Seven.

1712 In summary, ASIC's allegations of contravention are not made out. Now strictly Mr Mitchell ought not to have disclosed the first IMG offer without Mr Wood's permission. But there is no breach of s 180 if only for the reason that there was no reasonably foreseeable harm to TA. Further, the case under s 183 also fails for lack of the purposive element at the least. Further, I think little of the suggestion that somehow Mr Mitchell breached his director's duties by breaching the terms of the NDA; I have discussed this much earlier in my reasons.

1713 Second, ASIC alleges that by forwarding his emails of 1 December 2012 with Mr Wood to Seven, Mr Mitchell contravened s 180(1). ASIC further alleges that by forwarding these emails, Mr Mitchell contravened s 183(1) because he used information he obtained because he was a director of TA improperly. His conduct disclosed TA's internal deliberations to Seven to gain an advantage for Seven by weakening TA's negotiating position.

1714 Now I accept ASIC's case concerning the s 180(1) breach, but not the s 183(1) breach given, at the least, the absence of the purposive element.

1715 Mr Mitchell forwarded to Mr McWilliam Mr Wood's first email of 1 December 2012 and an email that Mr Mitchell had sent to Mr Wood on 1 December 2012 responding to a long-form/non-binding agreement clause floated by Mr Wood. Mr Mitchell's email was in the following terms:

> Steve

> This was the section Bruce rejected, saying
> That it allows the contract to be null and void
> On a range of matters that have not been
> Established!
> Basically it is a lawyers way of saying "I
> don't trust you"
> Bad sign!
> Won't fly with them… Or me!!!

1716 Now the question of whether a long-form/non-binding agreement clause should be included in any heads of agreement between TA and Seven had been the subject of discussion at a meeting on 1 November 2012 attended by Mr McWilliam, Mr Wood and Mr Mitchell. Mr Wood also proposed clauses to this effect in writing to Mr McWilliam on 1 November 2012 and 7 November 2012.

1717 Mr McWilliam's position was that any heads of agreement should be binding upon signature, although he was happy to commit to a requirement to use best commercial efforts to negotiate a long-form agreement. Mr Wood's position was that nothing should be binding until a long-form agreement was concluded. Mr McWilliam understood there to be a difference of opinion between Mr Wood and Mr Mitchell on this question as a result of things said at the 1 November 2012 meeting.

1718 As Mr McWilliam explained it, when he received Mr Mitchell's 1 December 2012 email, he knew it related to the matter that had been the subject of discussion at the 1 November 2012 meeting. Mr McWilliam said that receiving the email had not conferred on him any form of negotiating advantage. I am not so convinced. It was telling him more about TA's internal divisions which was useful information.

1719 Forwarding the 1 December 2012 emails disclosed to Seven TA's internal deliberations, which in my view could strictly be said to give rise to reasonably foreseeable harm, although that was not Mr Mitchell's purpose.

1720 Further, it was no excuse for Mr Mitchell to say that to the extent that the emails pointed to a difference of view between Mr Wood and Mr Mitchell on the question of whether any heads of agreement should include a long-form/non-binding agreement clause, that was a matter that was already to some extent known by Mr McWilliam as a result of the 1 November 2012 meeting.

1721 In my view, it was not appropriate for Mr Mitchell to forward the 1 December 2012 emails to Mr McWilliam, and in my view to do so was a breach of s 180.

1722 But I reject ASIC's case that Mr Mitchell gave Seven information with a view to assisting them to win the contract and worked together with Seven to give Seven the inside running to get this contract.

1723 Understood in context, by forwarding the emails of 1 December 2012 to Mr McWilliam, Mr Mitchell was seeking to keep the negotiations moving and to ensure that Mr McWilliam was not discouraged from continuing to engage with TA in respect of achieving a domestic rights deal by peripheral points. Mr McWilliam understood that Mr Mitchell agreed with him that "it was an academic concern [in] that we had a sort of ongoing arrangement working together". Under questioning by Dr Collins QC he gave the following evidence:

> And did you say that that was Seven's position in this meeting on 1 November 2012?---Correct.
>
> And did Mr Wood say that his position was that nothing should be binding until such time as a long form had been negotiated?---Look, he never – look, I may be being selective here, but he never said that was his position but he always used to say very strongly, "We must have a long form", which we knew – we knew what he meant. He was probably trying not to push the issue, like, straight in our face, but we knew where he was coming from.
>
> Did Mr Mitchell express a view in relation to that question?---He was more pragmatic than us, because he comes from an industry where deals are done on handshakes and, you know, large amounts of money are in binding commercial pieces of paper that are not 700 pages long.
>
> You say that - - -?---So he just had customary impatience, as I guess do I.
>
> I'm just trying to understand the dynamic in the meeting on 1 November?---Yes.
>
> So you had expressed the view that heads of agreement should be binding upon a signature, but you would use best endeavours to negotiate a long form?---Yes.
>
> Although Mr Wood didn't say it in as many words, you understood his position to be that nothing should be binding until a long form agreement has been signed?---Correct.
>
> And what was Mr Mitchell's position and what did he say to you to convey that position?---I think Mr Mitchell agreed with me that it was an academic concern that we had a sort of ongoing arrangement working together. He had limited patience to the – with the point. Ultimately, he lost the point, because we only did the 29 May final deal by – they finally went on to our long form, did their comments on it, and we had a two day intensive session in their lawyer's office in Melbourne. And at the end of it we had a long form, we all went and got board approval and then we signed at like 2 am.
>
> Just concentrating on the 1 November meeting - - -?---Yes.
>
> - - - did you understand there to be a difference of position on this question between Mr Wood and Mr Mitchell as a result of things that were said at that meeting?---Yes.

1724 And that evidence is consistent with what Mr Mitchell wrote in his email of 1 December 2012.

1725 In summary, and even though Mr Mitchell may not have acted from an improper motive, it was entirely unacceptable to send to Seven TA's internal emails. The breach of s 180(1) is made out, but not that concerning s 183(1). Even if there was objective impropriety in relation to s 183(1), the requisite purposive element was missing.

1726 Third, ASIC alleges that on 1 December 2012 Mr Mitchell told Mr McWilliam that he had stamped on Mr Wood's proposal for a non-binding clause and had jumped on Mr Wood appointing IMG to sell the rights, and that he thereby contravened section 180(1). ASIC further alleges that by using information he obtained, namely, the directions to Mr Wood not to seek a non-binding clause and not to appoint IMG to sell the domestic broadcast rights, Mr Mitchell contravened s 183(1). It is said that he used the information improperly, as it disclosed TA's internal deliberations to Seven and the disclosure was to give an advantage to Seven by weakening TA's negotiating position.

1727 ASIC relied upon an email that Mr McWilliam sent to an internal Seven audience on 2 December 2012, which read:

> Got this from harold yesterday. Tennis Australia board meeting is tomorrow. Steve wood tried to stick in a Clause saying our extension is "non binding" - as if then there's anything to gain in signing it. Harold says he has stamped on it so let's keep our fingers crossed.
>
> We have already had to jump on steve for going back on the handshake reached in harold's flat a few weeks back.
>
> The plain fact is the ceo of tennis australia does not want to do this deal. Harold had to also jump on him appointing IMG to sell the rights - which would be a wasted commission (rumour is v8s is paying Caliburn $3.8 mill minimum). It seems to be a battle against him (the ceo) and harold. We have to hope harold can carry the board. We should know tomorrow

1728 Mr McWilliam said that the basis for the statement in his email that Mr Mitchell had stamped on the non-binding clause was the emails that Mr Mitchell had forwarded to him.

1729 Further, in relation to IMG, Mr McWilliam said that he could not remember how he learned that IMG had expressed an interest in the domestic broadcast rights for tennis, although it may have been just general industry knowledge or IMG may have gone to see Seven about it. He considered IMG to be a pest that had always been hovering about tennis and trying to take commissions. But Seven would rather have dealt directly with the rights holder.

1730 Mr McWilliam's recollection was that Mr Mitchell had told him that he had jumped on Mr Wood. He gave the following evidence under questioning by Dr Collins QC:

In this email you've written:

Harold had to jump on him, Mr Wood, appointing IMG.

?---Yes.

How did you know that Mr Mitchell had jumped on Mr Wood?---Well, he told me that he had jumped on him and it was a terrible – given we had a protected first negotiating position, for him to be talking about appointing an agent was not in good faith and would have created shocking confusion in the market as well as, you know, would have put us in a position were we going to do something about it.

So Mr Mitchell had told you that he had jumped on Mr Wood in respect of IMG?---Yes.

Did you consider IMG to be a potential rival bidder for the domestic tennis rights?---No, I considered them to be pests.

Did you consider it a realistic prospect that Tennis Australia might entertain selling the domestic rights to IMG?---Never. That's why I thought it was extremely naïve for Steve Wood to even contemplate it, and I'm not sure whether he did it just to like have something to push us up against but as if he would have done it. He would have made his own selling force, his own commercial director, a – a neutered force. It just doesn't make sense that on the one hand you are trying to take all your production expertise in-house and be the master of your own feeds and everything, and on the other hand you're going to give your main revenue source over to IMG to sell and pay them 30 per cent for the privilege. And I think their letter of offer was lower than what Channel 7 offered. So it was like a crazy thing.

In the next sentence, you've said:

It seems to be a battle against him, the CEO, and Harold.

What was the source of the information you've conveyed in that sentence?---I just think that's my editorialising, my – it's my impression from what has been happening.

Had Mr Mitchell said to you "I'm in a battle against Mr Wood"?---No.

1731 Mr McWilliam said that he never considered it a realistic prospect that TA might entertain selling the domestic rights to IMG. He thought it was "extremely naive" for Mr Wood to even contemplate it.

1732 Further, Mr Wood did not perceive Mr Mitchell's views in relation to IMG as constituting a direction even if Mr Mitchell had the authority to "direct" him. Despite Mr Mitchell's statement to him, Mr Wood continued to engage with IMG in respect of the domestic rights well into 2013, including by procuring IMG to provide its second offer.

1733 Now in all of those circumstances, Dr Collins QC has contended that there was nothing improper in Mr Mitchell telling Mr McWilliam on or about 2 December 2012 that he had jumped on Mr Wood in relation to IMG. Further, nothing Mr Mitchell said to Mr McWilliam could rationally have weakened TA's negotiating position in relation to the sale of the domestic

broadcast rights. Further, Mr Mitchell did not undermine TA's ability to use an expression of interest from IMG as leverage to push up Seven's offer price, as in fact occurred.

1734 But in my view, Mr Mitchell acted in breach of s 180, although not s 183 given the lack of the purposive element, in these communications with Mr McWilliam. Again, he ought not to have disclosed internal deliberations; it cannot be said that there was not, strictly, reasonably foreseeable harm in doing so.

1735 Fourth, ASIC alleges that by telling Mr McWilliam on 13 December 2012 not to send materials to Mr Wood in advance of a proposed meeting, Mr Mitchell contravened s 180(1). ASIC said that a reasonable person occupying the position of director of TA should have agreed with Mr McWilliam's proposal to provide materials to Mr Wood in advance of the meeting so that Mr Wood was fully prepared for the meeting. ASIC also says that Mr Mitchell contravened s 182(1), because he used his position improperly. It says that withholding advance receipt of the materials could only disadvantage Mr Wood in his negotiations at the meeting and to gain an advantage for Seven by putting Mr Wood at a negotiating disadvantage.

1736 The materials that Mr Mitchell is said to have withheld from Mr Wood were outlined in an email from Mr McWilliam dated 13 December 2012 in the following terms:

> Harold
>
> Is it useful to send steve (ahead of sunday) a few points we could accept, or confusing?
>
> I guess we don't like him saying we have to sell to fox and online and forcing us with taking the rights away if we don't. When we r paying a premium amount
>
> Secondly he missed the point on production. For a start, if they build permanent facility, then we don't need to build our own, and we should pay for that. At fair rate card. But shouldn't cost us more than what it costs to do it ourselves. Second if ever they produce own production. Host feed has to be reasonable cost. Steve is confusing the total cost of our production with what we'd get from TA if they were host broadcaster. It is very hard to be specific in advance but he cant say it is unilateral $9 mill when we probably still have to spend a third of that anyway given nature of our coverage commentators etc.
>
> What do you think - send him something in advance or hold for sunday?
>
> And them wanting to cover player interviews etc will just take away from our coverage, impose different priorities etc
>
> Regards
>
> Bruce

1737 Later the same day Mr Mitchell replied, "Think we should hold it until Sunday! He talks to the people on his staff [a]nd gets pushed into a corner! To [sic] much thinking time!".

1738 Now the purpose of the meeting was "to run thru a few things we could do for Steve if it assists" and to identify "a few points we could accept". As Mr McWilliam explained, the purpose was for him to identify items that "we wanted to tell, you know, give up to get Steve Wood over the line".

1739 Now the matters identified in Mr McWilliam's email, namely, pay television and online rights, and the host broadcast role, were not total surprises. Such matters had been the subject of discussions over several months and were the subject of competing positions in Seven's November offer and TA's marked-up response of 7 November 2012. Mr Wood knew Seven's position in relation to some of the matters already, and Mr McWilliam knew Mr Wood's position.

1740 Further, Mr Wood gave detailed evidence in relation to the dynamics of the negotiations between TA and Seven in this period. When he met with Seven representatives in relation to the domestic broadcast rights, Mr Wood was at best negotiating in relation to matters of in-principle agreement. His position was always that nothing was agreed until everything was agreed. He took the view that he was free to leave any meeting with representatives of Seven and go away and reflect on what had happened and come up with a different position. He would leave meetings, go back to TA and talk about what had happened with his team, including about TA's imperatives from any renewed agreement. He had time to reflect on and think about what had happened in meetings he attended with Seven representatives and if, as a result of having more thinking time and discussing it with his team, he had a different position from that which had been discussed at the meeting, it was always open to him to reopen the matter, because nothing was agreed until everything was agreed.

1741 In my view, Mr Mitchell's conduct amounted to a breach of s 180, but not s 182 given the absence of the requisite purposive element. It was simply not appropriate for Mr Mitchell to advise Mr McWilliam to hold off on sending points to Mr Wood that Seven was going to concede and instead to present them at the proposed meeting on 16 December 2012. I accept that any reasonably foreseeable harm to TA is marginal, but nevertheless in my view a breach of s 180 has been established.

1742 Fifth, ASIC alleges that by meeting with Mr McWilliam and Mr Martin alone and without Mr Wood on 16 December 2012, and by allegedly telling them that "it is all going to plan", Mr Mitchell contravened ss 180(1) and 183(1). In respect of the alleged contravention of s 183(1), ASIC alleges that Mr Mitchell improperly disclosed to Seven TA's internal deliberations,

namely, that "TA's deliberations concerning the domestic broadcast rights were going to plan", and advantaged Seven by weakening TA's negotiating position.

1743 ASIC has now abandoned its allegation concerning Mr Mitchell wrongfully meeting alone with Mr McWilliam and Mr Martin. That was appropriate. The complaint had no substance.

1744 The source of ASIC's remaining allegations is an email sent by Mr McWilliam to an internal Seven audience on 16 December 2012, in the following terms:

> Steve wood wasn't at the meeting, just harold, who insists it is all going to plan. I told him how we could best meet steve wood's concerns, and what we obviously couldn't do. So I will send back a mark up of the extension letter and covering email and he will handle from there.

1745 I do not accept ASIC's case concerning the expression "it is all going to plan". Mr McWilliam explained that, in using those words in his email to an internal Seven audience, he was editorialising. He gave the following evidence in answer to Dr Collins QC:

> Now, the next email, at the top of the page, appears to be your report of the meeting on the morning of Sunday, 16 December. You see:
>
> > *Don just back and see you down there. Steve Wood wasn't at the meeting, just Harold –*
>
> and I want to ask you about the next words –
>
> > *...who insists it's all going to plan.*
>
> Are you able to tell his Honour what Mr Mitchell had said to you that caused you to write that?---Well, he just – all going to plan; the plan is to renew the rights in the negotiation. Even though the CEO wasn't there, which was a bit of a blow but it seemed to be a mistake rather than deliberate.
>
> Did you understand him to be saying that there was a plan within Tennis Australia to ensure that Channel 7 got the rights?---There definitely wasn't a plan in Tennis Australia to ensure we got the rights.
>
> Did you understand him to be saying that he and Channel 7 were on the same side and had a plan to get the rights?---No. I understood that he was just saying, you know, you're involved in this exercise with us and it's going one step after another.
>
> Did Mr Mitchell saying to you "it's all going to plan" tell you anything about what people within Tennis Australia were thinking about these negotiations?---No, I think – I think I'm just editorialising back to Don who was a guy from Texas who was pretty impatient with detail and would be wondering why he didn't come back with a signed agreement.

1746 It is clear that there was never any "plan" to the effect that Seven was assured of a renewal of the domestic broadcast rights. TA was engaged in negotiating a renewal of the rights with Seven in the context of a contract that contained a six month ENP. And there was no plan by anyone to renew the rights with Seven at any cost.

1747 Mr Wood was asked by Dr Collins QC in cross-examination:

> Can I put this to you: that at no time prior to the board meeting on 20 May 2013 had the board of Tennis Australia made a decision about whether it would go with Channel 7 as opposed to any other party? --- They had made a decision, no.
>
> No one ever suggested to you – I withdraw that. The board never said to you we are going to end up doing a deal with Channel 7, just do your best? --- The board?
>
> Yes? --- No. The board didn't say that. When you say the board, you've got all these different board members, the instructions and the authorisation came from the president and the media expert, which was Harold.
>
> The ultimate decision came from the board as a whole, didn't it? --- Yes, true.
>
> The authority to enter into a deal resided with the board and nobody else? --- Yes.
>
> And the board didn't tell you at any time prior to 20 May 2013 that you had better do a deal with Seven? --- No.
>
> Thank you. And the board didn't have any plan that it conveyed to you that although you should do your best in your negotiations, ultimately the board would award the rights to Channel 7 no matter what? --- They didn't say that, no.
>
> As you understood the board had no such plan; correct? --- They weren't – that wasn't contemplated, no.

1748 As I have said, there was no "plan" by Mr Mitchell to ensure that Seven was awarded the domestic broadcast rights at any cost. I agree with Dr Collins QC that if there had been such a "plan", Mr Mitchell would have badgered the board to accept a low-ball offer from Seven at one or other of the only two relevant board meetings that he attended on 3 December 2012 and 4 March 2013. The highest that the evidence rose was that on 3 December 2012, Mr Mitchell expressed the view that Seven's November offer was reasonable in the current economic environment, before telling the board that he and Mr Wood would continue working on the matter before coming back to the board. As Mr Wood conceded in cross-examination, Mr Mitchell did not say anything to the board that was remotely to the effect that he wanted to do a deal with Seven at the price offered as at 3 December 2012.

1749 Further, Mr McWilliam did not understand there to be a "plan" as alleged by ASIC. I have set out relevant extracts of his evidence earlier.

1750 In my view, no contravention is established on this aspect, whether under s 180 or s 183.

1751 Sixth, ASIC alleges that Mr Mitchell assured Mr McWilliam in January and February 2013 that Seven "was safe" and that TA would renew the broadcast rights agreement with it, and that he thereby contravened ss 180(1) and 183(1). In respect of the alleged contravention of s 183(1), ASIC alleges that Mr Mitchell improperly disclosed to Seven TA's internal

deliberations, namely, "TA's internal deliberations concerning the domestic broadcast rights", and advantaged Seven by weakening TA's negotiating position.

1752 These alleged contraventions are based on an email sent by Mr McWilliam to an internal Seven audience on 23 February 2013 in the following terms:

> Agree, although gyngell told me tonight james had said to him that the tennis was too far away + he was after the cricket.
>
> I will call Harold again about this. I am also worried. The nightmare is if we throw more money out the board says this is working we shouldn't renew early. Harold swears we r safe but I will get onto him again.
>
> Peter lewis told me (and I believe it's been announced) that Ten borrowed $80 mill from CBA yesterday or thursday
>
> Best. Bruce

1753 ASIC particularised in support of these contraventions telephone calls between Mr Mitchell and Mr McWilliam on 14 January 2013 and 6 February 2013. But there is an insufficient basis for thinking that those telephone calls on 14 January 2013 and 6 February 2013 informed the contents of an email sent by Mr McWilliam on 23 February 2013. Mr McWilliam's email of 23 February 2013 was, on its face, sent as a result of the fact that Mr McWilliam had just learned that Network Ten had terminated the services of its then CEO, Mr Warburton, and appointed in his place Mr McLennan.

1754 Mr McWilliam was asked about the source of the words, "Harold swears we r safe". I have set out his evidence earlier in questioning by Dr Collins QC.

1755 Moreover, under cross-examination by Mr Pearce SC, Mr McWilliam said:

> You denied that Harold, Mr Mitchell, had used those words to you? --- Yes. I did. It was my clumsy wording in reporting to the chairman, but – yes; what I said yesterday is quite correct. Harold never said "Don't worry, Bruce; you are safe. You don't have to put a bid in. I will get it for you". That's never been the case.
>
> You said last night ---? --- He has always said, "You know where Steve Wood is coming from; he wants to get the most money. Let's not panic, but let's just get it".
>
> …
>
> But you've attributed something to Mr Mitchell that, you now say, he never said? --- I haven't attributed anything; in my short-hand speak I've said "Harold says we are safe. There's a process going on". I've never said – I don't think it's a misrepresentation. I'm telling him "But nevertheless I will get on to him again."
>
> What had Harold told you? --- Harold had always told us that we were in the negotiation, we had the exclusive negotiating period, we would get first crack at it, we would be treated fairly, all those things.

> So he never swore to you that you are safe? --- He never swore to me that we are safe; correct.
>
> That means you've given a false report to Mr Stokes? --- Well, you can characterise it as that, if you want. I've tried to re-assure him. Maybe I should have used better words. I don't – I really with respect don't think anything turns on that in a short email, which also deals with Ten borrowing money from CBA.

1756 I do not accept ASIC's case on this aspect.

1757 ASIC has not established that Mr Mitchell said to Mr McWilliam that Seven was "safe", in the sense of being assured of getting the domestic broadcast rights for tennis. I accept Mr McWilliam's evidence in this regard. Mr McWilliam did not consider Seven to be "safe". Mr McWilliam was at all times concerned, in particular, that Network Ten could bid for the domestic broadcast rights. He knew that TA wanted to get the best deal that it could from Seven or elsewhere and that if someone was going to pay more, they would get the rights.

1758 Further, even if Mr McWilliam understood Mr Mitchell to be conveying to him that Seven was assured of a renewal of the domestic broadcast rights, that understanding was wrong, as TA's board never had any such intention. In those circumstances, I agree with Dr Collins QC that Mr Mitchell could not have provided Seven with inside information about what persons within TA were thinking about the negotiations.

1759 In summary the alleged contraventions are not made out.

1760 Seventh, ASIC alleges that Mr Mitchell informed Mr McWilliam of what had happened concerning the domestic broadcast rights at the TA board meeting on 4 March 2013 and that he thereby contravened sections 180(1) and 183(1). In respect of the alleged contravention of section 183(1), ASIC alleges that Mr Mitchell improperly disclosed to Seven TA's internal deliberations, namely, "the TA board's deliberations concerning the domestic broadcast rights" and advantaged Seven by weakening TA's negotiating position.

1761 ASIC further particularised these allegations by saying that the information alleged to have been communicated to Mr McWilliam was as alleged in the FASOC as follows:

> 96 At the 4 March 2013 meeting:
>
> (a) Mitchell recommended that the board appoint a sub-committee to consider and advise the board about the renewal or grant of the domestic broadcast rights; and
>
> (b) the board adopted the recommendation and appointed Mitchell (as Chair) and Healy, Freeman and Wood to be members of the sub-committee.

97 Mitchell, without the knowledge or permission of the TA board, informed McWilliam of what had occurred at the 4 March 2013 board meeting concerning the domestic broadcast rights.

Particulars

(i) Two phone calls from Mitchell to McWilliam on the afternoon of 4 March 2013 of over ten minutes.

(ii) Two minute phone call from Mitchell to McWilliam on the morning of 5 March 2013.

1762 It also said that the disclosure weakened TA's negotiating position as it provided Seven with inside information about what persons within TA were thinking about the negotiations.

1763 I have set out earlier Mr McWilliam's evidence in relation to what he knew about the TA board meeting on 4 March 2013. In my view ASIC has established that Mr Mitchell told Mr McWilliam after the 4 March 2013 board meeting that the board had appointed a subcommittee to consider and advise the board about the renewal or grant of the domestic broadcast rights and that Mr Mitchell had been appointed the chairman.

1764 But even if Mr Mitchell told Mr McWilliam such matters, that would not establish the alleged contraventions. In my view there is nothing improper, or that a reasonable director in Mr Mitchell's position would not do, in Mr Mitchell telling Mr McWilliam those things. And contrary to ASIC's thesis, such matters that Mr Mitchell told Mr McWilliam did not disclose any deliberations of TA that were capable of conferring an advantage on Seven by weakening TA's negotiating position. Further, the purposive element of s 183 is not made out. I do not accept ASIC's case on this aspect.

1765 Eighth, ASIC alleges that Mr Mitchell informed Mr McWilliam on 16 May 2013 that Seven's final offer was generous and that he thereby contravened ss 180(1) and 183(1). In respect of the alleged contravention of s 183(1), ASIC alleges that Mr Mitchell improperly disclosed to Seven TA's internal deliberations, namely "his assessment of the offer", and advantaged Seven by weakening TA's negotiating position.

1766 The source of ASIC's allegation is said to be two telephone calls between Mr McWilliam and Mr Mitchell on 16 May 2013 and an email from Mr McWilliam to an internal Seven audience on 16 May 2013 in the following terms:

> Also spoke to harold (in shanghai) who thought we had been more generous than we expected and he said they were now more nervous of what production responsibilities they were taking on. Harold said they had a board meeting of TA on monday

1767 As I have indicated, there was debate in the course of the cross-examination of Mr McWilliam about whether the word "we" (second appearing) in that email was a typographical error and was intended to be "he". The most likely alternative is that there was a phone call between Mr McWilliam and Mr Mitchell on 16 May 2013 in the course of which, upon learning that Seven had offered $195 million for the domestic broadcast rights, Mr Mitchell said words to the effect that Seven had been more generous than he, Mr Mitchell, had expected.

1768 I reject this part of ASIC's case.

1769 On 16 May 2013, Mr Wood had met with Mr Worner in Mr Worner's office in Sydney, where Mr Worner had offered Mr Wood a $195 million deal for the domestic broadcast rights over five years. Seven's final offer was confirmed by Seven in writing the following day and taken to the TA board meeting on 20 May 2013, where it was enthusiastically recommended by Mr Wood and unanimously approved by the board.

1770 As a matter of commercial reality, the deal between Seven and TA was unlikely to fall over between the time of its in-principle agreement and the finalisation of a long form contract. The deal in respect of the price of the domestic broadcast rights had been done by the conclusion of Mr Wood's meeting with Mr Worner on 16 May 2013. Mr Wood had satisfied himself, having met with Mr Worner and having Mr Worner open Seven's books to him, that Seven's final offer of $195.1 million was about the maximum that Seven could pay.

1771 It is unsurprising that upon learning of what had been agreed, Mr McWilliam wanted to convey that outcome to Mr Mitchell. Nor is it surprising that Mr Mitchell would welcome the outcome. Further, the notion that Mr McWilliam might have sought to negotiate the price down from that offered by Mr Worner as a result of Mr Mitchell saying that he thought Seven had been more generous than he expected is not realistic.

1772 Mr McWilliam characterised Mr Mitchell's comment in understandable terms:

> Well, [it's] like when some guy asks you at a charitable auction and you say I'm not coming but I will give you $500 and he goes, well, I really wanted 5000, but he just says to you, "That's very generous."

1773 Mr McWilliam did not understand Mr Mitchell to be conveying anything about TA's internal deliberations in respect of the rights deal, "Except that they had a board meeting to approve it on the day that we always understood". He did not understand Mr Mitchell to have strengthened Seven's negotiating position in any way: "No, because I think we thought we were basically there, subject to getting approval from each board".

1774 In his cross-examination of Mr McWilliam, Mr Pearce SC asked whether, on 21 May 2013, after the deal had been approved by the TA board, Mr Mitchell had gone to Sydney and had lunch with Mr McWilliam and others. It was put to Mr McWilliam that the lunch was "in thanks and gratitude from Seven to Mr Mitchell for delivering the deal to Seven". Mr McWilliam said the lunch was, "Isn't this great, we've finally got there" and "Of course it was a celebration; it was a great achievement". The cross-examination went nowhere; it was a napkin short of a knife.

1775 In my view this part of ASIC's case has not been substantiated.

1776 At this point, and before dealing with the next set of breaches, it is convenient to deal with counterfactual scenarios.

Counterfactual scenarios

1777 In relation to the case against Mr Mitchell, ASIC has put two counterfactual scenarios in terms of harm caused to TA by the defendants' contraventions.

1778 ASIC's first counterfactual asserted that approval of Seven's final offer was not in the best interests of TA and that the domestic broadcast rights should have been exposed to the "true market" by way of a tender process. I have dealt with this elsewhere. That counterfactual scenario fails.

1779 ASIC sought to establish a second counterfactual, which was related to its first counterfactual, to the effect that if Mr Wood and the directors of TA had known of the internal Seven emails or the underlying communications relied upon for the purposes of ASIC's case against Mr Mitchell, the TA board would not have approved Seven's final offer at the meeting on 20 May 2013, but would instead have allowed the ENP to expire and put the domestic rights to a competitive tender.

1780 Now again, strictly, no part of ASIC's case on liability has required me to determine what would have occurred but for the impugned conduct. But in any event, the counterfactual is flawed.

1781 First, none of the internal Seven emails related to the period between 23 February 2013 and 16 May 2013 being the time that the $195.1 million agreement was reached at the meeting between Mr Wood and Mr Worner.

1782 More importantly, Seven's final offer was the result of intensive negotiations between about 7 and 16 May 2013. But none of the internal Seven emails related to that period. Further, Mr Mitchell played no material role in those negotiations.

1783 Now I accept that, generally, during the negotiations with Seven in the period from late 2012 to 29 May 2013, Mr Wood was unaware of these communications between Mr Mitchell and Seven. And had Mr Wood been aware of Mr Mitchell's communications with Seven at the time, he would have raised them with the board of TA so that the board was informed and could take appropriate action, including excluding Mr Mitchell from the negotiations and also any other involvement with respect to the domestic broadcast rights.

1784 Mr Wood said that he believed that if Mr Mitchell had been excluded from being involved in the domestic broadcast rights, he would have recommended to the board that it not conclude a deal with Seven during the ENP, that it do more due diligence, including by seeking advice from external media experts, and that it put the domestic broadcast rights out to competitive tender. But I might say that this last aspect is not a credible hypothesis given that he was completely in charge of the negotiations during the critical period in May 2013 with no involvement whatsoever by Mr Mitchell at this time. Indeed Mr Wood had taken steps to satisfy himself that Seven's final offer ought to be approved by the TA board. Mr Worner had opened Seven's books to him, as a result of which he believed that Seven was offering about as much as it could afford to pay for the domestic rights.

1785 In my view, given such matters, there is little basis for saying that anything in the internal Seven emails would have rationally impacted upon Mr Wood's recommendation to the TA board concerning Seven's final offer or the TA board's acceptance of that recommendation at the 20 May 2013 board meeting.

1786 Second, the premise underlying the evidence adduced by ASIC in relation to the internal Seven emails was that they were to be taken at face value as evidencing words that Mr Mitchell actually spoke to Mr McWilliam. But the internal Seven emails did not speak for themselves in this regard. And as ASIC knew, Mr McWilliam disputed ASIC's construction of the internal Seven emails. Futher, ASIC did not put Mr McWilliam's account to any of the relevant witnesses in order to adduce counterfactual evidence that engaged with Mr McWilliam's explanations. So, the counterfactual evidence was addressed to assumptions not borne out on the evidence. Further, ASIC did not adduce evidence from any witness as to any particular inferences they in fact drew upon reading the internal ASIC emails. The pattern followed by

ASIC was to show the internal Seven emails to Mr Wood and the directors whilst preparing their affidavits or outlines of evidence, ask them what they would have done had they known about the emails at or around 20 May 2013, and then record general hypothetical statements. But no attempt was made by ASIC to adduce any evidence exposing the reasoning underlying the hypothetical conclusions expressed by Mr Wood or the directors.

1787 Various directors gave evidence as to what they would have done had they known about the communications between Mr Mitchell and Mr McWilliam. Some of their responses were credible, some not. But their written evidence consisted of retrospective hypotheticals disembodied from the context of the communications as now apparent to me from all of the evidence, including the evidence given by Mr McWilliam himself. I will come to the detail in a moment.

1788 I am satisfied that if the directors had known about these communications they would have raised them with Mr Healy to seek an explanation from Mr Mitchell; alternatively they would have sought an explanation from Mr Mitchell directly. I also accept that it is likely that they would have sought to exclude Mr Mitchell from further participating in the matter. In that respect the evidence of Mr Davies reflects what I consider to have been the likelihood. I also accept that they may have sought more information on other possible bids other than from Seven.

1789 But even if that all be accepted, the fact is that it was Mr Wood and his team that did the negotiations from early May 2013, and in a context where they had what they considered to be all relevant information in their possession.

1790 Let me delve into the evidence a little more.

1791 Dr Young gave evidence that she "would have insisted that the domestic broadcast rights be put to a competitive tender". Literally, she may have insisted. But practically that would not have happened. First, at the time one had the ENP with Seven. Her suggestion would have amounted to a contractual breach. Second, if the matter had been raised with Mr Wood he would have explained that Mr Mitchell had nothing to do with the May 2013 negotiations, that management had all the information they needed to negotiate, and that he, Mr Wood, had extracted the best realistic deal that could be achieved with Seven. In my view such an explanation would also have alleviated any concerns that Mr Tanner had. Further, if Mr Fitzgerald had enquired of Mr Wood at the time how solid the interest of other networks were,

Mr Wood would have communicated the vague and equivocal indications given by Network Ten and Nine that I have referred to earlier.

1792 In my view, in terms of these retrospective hypotheticals, there would not likely have been any change to the decision that was in fact made by the board on 20 May 2013.

1793 Dr Young was asked to assume, as was the fact, that Mr Mitchell had played no part in the negotiations between late March 2013 and 20 May 2013 leading to the making of Seven's final offer, and that Mr Wood had satisfied himself that he had extracted about the most that he could hope to get from Seven after having seen Seven's advertising revenues. On the basis of those assumptions, she was asked whether she would have accepted Mr Wood's recommendation on 20 May 2013 and voted in favour of approving Seven's final offer. She responded, "Not necessarily". She went on to suggest that on the assumptions she had been asked to make, she would nonetheless have insisted that the domestic broadcast rights be put to competitive tender. But such an insistence would not have been in the best interests of TA. And in any event, there is no reason to think that any such insistence by her would have been supported by the rest of the board.

1794 Further, other directors addressed ASIC's second counterfactual in terms that did not support its case.

1795 Mr Fitzgerald expressed his position as follows:

> Had I read these emails at the time, I probably would have asked Mitchell or Wood for more information about each of these issues. Further, I would have asked at the board meeting on 3 December whether there was any interest or bid from any other party.

1796 Mr Tanner described the internal Seven emails shown to him by ASIC as "damning", but that assessment was based on the questionable assumption that Mr Mitchell had passed on significant confidential information of TA to Seven.

1797 Mr Freeman thought that any concerns arising out of what the directors learned from the internal Seven emails were properly characterised as behavioural matters of governance, rather than matters affecting the proper consideration of Seven's final offer. Had he known about the internal Seven emails, Mr Freeman would have wanted to know why Mr Mitchell was negotiating in this way.

1798 Mr Freeman gave the following answers to the retrospective hypothetical posed by Mr Pearce SC:

HIS HONOUR: So you are only being asked, if you were aware of these communications, what would you have done, whether speaking to somebody or doing something?---Okay. I will answer that.

MR PEARCE: Yes?---I would like to qualify it, but I will answer it.

HIS HONOUR: If in answering it you need to qualify it, please do so, but perhaps not by reference to any other material at the moment?---Sorry. Sorry. My answer is that if I had seen all of this as it has been rolled out by you today - - -

MR PEARCE: Yes?--- - - - there's probably 10 of these particular emails, whatever, which some are internal, some external and in some cases the dates are relevant. My view would have been at the time, if I had seen it in that form, without having regard to anything else, I would have regarded it as a matter that I would take to the then chair and president, Steve Healy, and had a discussion with him in respect of this. And the outcome of that would have been one of two things, I would imagine, because I'm speculating. I would imagine that Steve Healy and I may have had a conversation with Harold. Alternatively – and you asked me what I would have done. If Steve Healy was not up for that, I would have requested that the board review the matter and give Mr Mitchell an adequate forum to respond to what was taking place within the realm of all these negotiations, where he was clearly in a role to steer this through. And I probably should comment on why Mr Mitchell was brought principally to the board. And there were a number of things that stood out. And that was his experience and expertise, particularly in the media rights sector. And we could see that there was a growing world market that we could exploit with tennis. And I think I might have mentioned yesterday we were at a period of expansion with the State Government providing some $900 million in funds towards the redevelopment of Melbourne Olympic Park to be one of the great centres of the world so we could see the expansion occurring. So in terms of this, Mr Mitchell was brought on because of his skills that went – and experience that I think I can say went well beyond that of any other director in the media rights business, and also would extend beyond the experience of any of the executive team. So what took place in that negotiation – and I've been involved in some very difficult negotiations myself – would be a matter for Mr Mitchell to review and consider and, as I said, advise the board on how he did it. At the end of the day, if I was looking at this as I am now, with the outcome that we achieved, and having consideration to what I think the alternatives might have been, as I said yesterday, I think this was a very strong commercial outcome with a counterparty with whom we were prepared to enter into unchartered waters with host broadcasting. That is, we would take it on ourselves and a counterparty that we understood.

If you had this knowledge of these communications at the board meeting on 20 May 2013, would that have made any difference to your decision-making about that proposed deal on that day?---This is my personal view. You've asked me the question. I would have had to consider that as another issue to deal with; that is, these bits of communication that we've got here is something we would have had to deal with to determine in our minds did they in any way bring about a direct reason why we should trash the Channel 7 offer at that point. And we're only just into the exclusive dealing period in May, but we had come to a conclusion which we thought was a very strong proposition, that had moved from 18 per cent to an uplift of 86 per cent. So we would have had to consider what would be the options for us if we now trashed the Channel 7 proposal, where would we go and what would be the reasons that we would go somewhere else. That is a decision we would have to make, given we had the offer on the table. These circumstances to me are behavioural matters of governance. And they – they may well have been matters that we would have taken up with Mr Healy, in that sense.

HIS HONOUR: Can I ask this. It was put to you by counsel that all of these emails would have been disclosed to you, say, on or around 20 May, but what if you had been told about some of these emails, say, at the end of calendar year 2012? In other words, months – months before?---Look, your Honour, I think it would have been appropriate for the board or the president and myself or whoever it was, to sit down with Harold – Mr Mitchell. I apologise – Mr Mitchell and just get an understanding of the direction that he was taking and why was he negotiating in this way. This was a negotiation. And this is not a flippant response, but it is so true that in the outcomes of these complex matters it is imperative to see the win-win outcome.

1799 As to the "win-win outcome", Dr Collins QC cross-examined further on this:

You said in answer to a question from our learned, Mr Pearce, that you regarded the outcome that was reached on 20 May 2013 as a win-win outcome. Could I just get you to explain what you meant by that?---Firstly, this is probably the third time I've made this point. Commercially, I think it was an exceptional result, that is, financially it was 195.1 million. That did include a – in these types of transactions, a relatively small amount of contra and we were able to recover and fully control the host broadcasting rights. And I think we thought – and there was a strategy around why that was important but I don't know whether we knew fully what the revenues might be in relation to that. But there was a strong direction led by management and then endorsed by the board to take control of the media content, control our customers, control our relationship, have 22 courts that could beam something anywhere in the world. So – and in that sense, it was a very – embodied in the 195 million were other matters like global rights to digital content; all those things added to a very good outcome. I personally had a strong sense of comfort with the Channel 7 outcome, given that we had commercially succeeded in what seemed to me extraordinary going from 18 per cent increase to an 86 per cent increase. But I had a very strong level of operational comfort in dealing with Seven who we had so much experience with as a counterparty, and transitioning through them into the host broadcasting. That is, if we got into difficulty, I felt that there would be some support around that. So - - -

Can I just ask you – sorry, I didn't mean to cut you off?---So you asked me the question why was it a win-win. I would assume Channel 7 would not have provided the renewal on those terms unless they were comfortable, and I thought that we were very comfortable as Tennis Australia.

Can I ask you a counterpoint to that question which is an option as at 20 May 2013 would have been to reject the Channel 7 offer, allow the exclusive negotiating period to expire and take the rights to a competitive tender; what did you see as being the risks of that approach?---I think that would have been a most – extremely risky decision by the board to do that, having – it would have been, from what I saw about the media there seemed to be leakage everywhere around the place and I'm reasonably confident in assuming that that might have leaked into the media. It would have eroded our relationship with Channel 7 bearing in mind that we had a contractual agreement with Seven that went through to September, six months – it was a six months due diligence agreed – exclusivity, sorry, not digital, exclusivity, so it would have eroded that relationship, and I don't think we could have dealt with anyone in that period anyway. Contractually, I would have thought Seven would have had a view on that. And then when we – in September, October we had come back to the market and if IMG or who we have expressed views on as to why we didn't think they were a suitable counterparty commission-based agent; they charge up to 20 per cent commission. I can't remember what the deal was on that, I didn't read it yesterday. We expressed our concern about the viability of Channel 10. We talked about – or we may not here, but Channel 9 having both tennis and cricket, that doesn't work in my – I think we needed

> a champion broadcaster that focuses and devotes their attention on tennis. So we would have been in a position then of having undermined our relationship with Seven, how would we deal with the market generally? I don't know. It would have been a very high risk and, in my mind, it would have been totally unacceptable as a director.

Other matters

1800 Let me now address some other matters.

1801 First, Mr Pearce SC asserted in opening that Mr Mitchell was "pressing very hard for a deal to be done quickly and at a low rights fee with Channel 7". There was little evidence to support that contention in terms of the suggestion of "at a low rights fee".

1802 A deal in respect of the domestic broadcast rights could only ever be done with the approval of the TA board. Prior to the 20 May 2013 board meeting at which the final deal was approved, Mr Mitchell had attended only two relevant TA board meetings, on 3 December 2012 and 4 March 2013. He did not, at either of those meetings, either recommend that TA accept the then current offers from Seven or move a motion that TA accept those offers. The highest the evidence rose was that, at the 3 December 2012 meeting, Mr Mitchell told the board that he considered Seven's November offer to be reasonable in the prevailing economic environment, and that he and Mr Wood would continue to work on a deal and come back to the board in due course.

1803 In cross-examination by Dr Collins QC, Mr Wood said this in respect of what Mr Mitchell had said at the 3 December board meeting:

> And if you go back to the fifth paragraph on the page [the confirmed minutes of the meeting of 3 December 2012], the last sentence has Mr Mitchell saying he further advised that both he, Mr Mitchell, and the chief executive officer would continue to work on the domestic rights agreement and would come back to the board at a later date. That's what Mr Mitchell had said? --- Yes.
>
> Now, no motion was moved at that meeting that Tennis Australia agree to the then current offer from Channel 7; correct? --- No, there's no mention.
>
> And, in fact, the highest that Mr Mitchell put it at that meeting was that the offer seemed reasonable in the current economic environment; correct? --- Yes.
>
> Mr Mitchell did not say at that meeting, did he, that the offer was a great offer? --- I don't know if he said it was a great offer or not, but he was supporting it. He definitely wanted to do that deal at that price.
>
> Mr Mitchell did not say anything remotely like that to the board, did he, Mr Wood? --- Remotely like what?
>
> That he wanted to do a deal at that price? --- No. Sorry.
>
> What he said to the board was he considered it to be reasonable in the current economic

> environment, but that he and you would continue to work on it and come back to the board at a later date; correct? --- Yes.
>
> And Mr Healy reiterated that that was what was going to happen: the matter would come back to the board for consideration and final approval; correct? --- Yes.

1804 By the time the domestic rights matter came back to the board on 20 May 2013, Mr Wood had succeeded in extracting an offer from Seven that had risen from about $130 million as at 26 March 2013 to $195.1 million (or $39 million per annum). And Mr Mitchell had played no material part in the negotiations that resulted in Seven's final offer. The offer was recommended by Mr Wood and unanimously approved by the board at the 20 May 2013 board meeting.

1805 Second, ASIC's more general case thesis is problematic for other reasons.

1806 As Dr Collins QC expressed the matter, ASIC's case assumed that a commercial negotiation was an adversarial contest intended to produce a winner and a loser, and in which the negotiating parties had to behave at all times as if they were protagonists. But the negotiations between TA and Seven were between two parties who had had a fruitful relationship over decades. They were parties who were exploring whether a win-win deal could be negotiated between them, particularly in a context where Seven had the benefit of the ENP.

1807 Further, as Mr McWilliam explained it, and as he perceived it, Mr Mitchell was at all times in his engagements with Seven doing no more than trying to keep the negotiations moving. Mr McWilliam gave the following evidence in questioning by Dr Collins QC:

> And you responded:
>
> > *We had the call from Harold as we were leaving the AGM saying it would be okay and they would sign our document.*
>
> ?---Yes.
>
> Could you tell his Honour what Mr Mitchell had said to you that provoked you to write that?---He just said, "Yes. Yes. It will be all right. Thank you for your offer."
>
> Well, you've - - -?---I mean, there was a lot of stuff in the Steve Wood response that was not very good to us for a number of reasons. And we were pretty clear about why they didn't work. But, yes, so Harold said, "Yes. Don't worry. We will sign your document."
>
> Did you understand that to be an assurance from Mr Mitchell that he was going to deliver a signed copy to Tennis Australia of the offer – to Channel 7?---No.
>
> No. Why not?---Well, Harold is a salesman and he, obviously, didn't want us storming out; he wanted to keep us bidding. And he sort of told – you know, with the best will in the world, he, obviously, would have done anything to help us, but he also did want to tell us what we wanted to hear to keep us – it had been a long drawn out process.

> It's November already. He wanted us to keep us going.

1808 Further, from Mr McWilliam's perception, Mr Mitchell "just wanted to get the best deal that could be obtained, from Seven or elsewhere. I mean, he was well disposed towards Seven but if we weren't – if someone was going to pay more, I'm sure they would have got them".

1809 Further, I agree with Dr Collins QC that there was nothing inherently wrong in Mr Mitchell and Mr McWilliam having discussions with one another about the best way of presenting proposals. As Mr McWilliam put it:

> I don't see anything unusual in seeking guidance on how to pitch something, where to pitch it, how to pitch it.
>
> …
>
> There's no point, me putting forward something that causes him to lose faith with Tennis because it just won't work or something. I think it's very smart to – I do it with the AFL. "We're thinking of making an offer; should we do it, or should we not do it?" Often they say "Don't turn up; it will backfire". I mean – sorry; you're concerned about that. I'm not concerned at all.

1810 In summary, and for the reasons expressed, in my view Mr Mitchell stepped over the line on several occasions in the latter part of 2012 concerning his communications with Mr McWilliam, and thereby breached s 180. But I do not accept ASIC's broader criticisms, let alone its case under s 182 or s 183 where the relevant purposive element was not established.

(b) ASIC's breach case – Mr Mitchell's interference with TA's senior management

1811 There is little doubt in my mind that certain conduct of Mr Mitchell inappropriately interfered with the senior management of TA concerning the negotiations with Seven. But whether that amounted to the *pleaded* contraventions of his director's duties is another matter.

The key themes

1812 Let me first deal with some key themes before I deal with the specific allegations concerning statutory contraventions.

1813 First, Mr Mitchell denigrated Gemba throughout 2012 and 2013. At the meeting on 18 May 2012, Mr Mitchell asked Mr Ayles where the $40 million valuation came from. When Mr Ayles said to him that it came from independent research, including the Gemba report, Mr Mitchell said "Why did you get Gemba?". When Mr Wood handed a hard copy of the Gemba summary to Mr Mitchell, Mr Mitchell looked at it quickly and told Mr Wood, "Get Ayles fired. This is garbage. This is crap. Don't bother getting reports like this again". The Gemba summary was never presented to the TA board.

1814 Second, Mr Mitchell consistently pushed Mr Wood to do a deal with Seven.

1815 On 10 October 2012, Mr Mitchell emailed to Mr Wood "We better fix Channel 7. … We are ready to do it all." Mr Mitchell then forwarded this email to Mr McWilliam and Mr Martin, and added, "Let's wrap this up next week. Leave it with me." Mr Wood said that he recalled ringing Mr Mitchell back after he had received Mr Mitchell's email of 10 October 2012, and that Mr Mitchell was more than ready to do a deal, at any time, with Seven.

1816 Mr Wood had many recollections of Mr Mitchell telling him to do the deal with Seven and said that he recollected that he talked to Mr Mitchell about Mr Mitchell's desire to do a deal with Seven and the response from Mr Mitchell was to get on and do the deal.

1817 On 1 November 2012, Mr Wood proposed a form of non-binding clause to Seven and, on 1 December 2012, sent a copy of the clause to Mr Mitchell. The same date, Mr Mitchell wrote to Mr Wood saying the non-binding clause was "a lawyer's way of saying 'I don't trust you.' Bad sign! Won't fly with them… Or me!!!".

1818 On 3 December 2012, after TA's board meeting, immediately after that meeting, Mr Mitchell told Mr Wood: "Just get the deal done with Seven, we're not doing IMG." Mr Wood said in cross-examination that he had many recollections of Mr Mitchell telling him to do the deal with Seven.

1819 In late November and early December 2012, Mr Mitchell said to Mr Wood a number of times, "Tell me again you're going to get the deal done with Seven by the new year".

1820 In around late December 2012, Mr Mitchell said to Mr Wood a number of times words to the effect, "[You] need to get a deal done with Seven, now." This was reported by Mr Wood to Mr Ayles.

1821 Third, Mr Mitchell also consistently dismissed IMG.

1822 Mr Wood gave a copy of the first IMG offer to Mr Mitchell on 23 November 2012, which was presented to Mr Mitchell by Mr Wood in his office. When Mr Wood gave a copy of the offer to Mr Mitchell, Mr Mitchell said to Mr Wood "I've always disliked IMG" and "Why would you use them?" Mr Wood said he did not raise it with Mr Mitchell until 23 November 2012, because he knew that Mr Mitchell would not like the offer. On 25 November 2012, Mr Mitchell emailed Mr Wood about IMG and said "It is their usual tactic! Fails to impress, but we will talk tomorrow! I have yet to read it again, but I have to say that they seem to be well

informed!". Before Mr Wood could discuss the details of the first IMG offer at the 3 December 2012 board meeting, Mr Mitchell interjected. Further, Mr Mitchell told Mr McWilliam that he had "jumped" on Mr Wood in respect of IMG.

1823 Fourth, Mr Mitchell also dismissed the process in the Ayles paper.

1824 Mr Wood reported the recommendations and process proposed in the Ayles paper to Mr Mitchell and that they needed to get more information on the domestic broadcast rights to the board. Mr Mitchell responded to Mr Wood:

> You're not going to do that.
>
> You're going to do it this way with Seven.
>
> This will cost you your job. When will you learn to be a good CEO?
>
> Let me handle that.

1825 Fifth, Mr Mitchell's interference with the negotiation process with Seven was such that Mr Wood complained to Mr Healy about it. After the exchange with Mr Mitchell about the recommendation in the Ayles paper, Mr Wood told Mr Healy that he thought Mr Mitchell was hijacking the negotiations. Mr Healy assured Mr Wood that he would speak to Mr Mitchell and ask him to stop interfering. Mr Healy disputed that Mr Wood used the word "hijacking". Mr Healy said that he telephoned Mr Mitchell and told him that Mr Wood should be driving the negotiations. After Mr Wood complained to Mr Healy about Mr Mitchell, there was far less interference from Mr Mitchell in his conduct of the negotiations.

1826 Let me stop at this point and say that in my view there was significant interference by Mr Mitchell with TA's senior management up and until the end of 2012. Whether this amounted to the pleaded breaches of duty is another matter and I will say something about this shortly.

1827 Let me now turn to 2013. ASIC says that in 2013 Mr Mitchell interfered with management more generally, ensured that the board subcommittee did not perform any function and he had conversations throughout early 2013 up until 16 May 2013 with Mr McWilliam about the domestic broadcast rights negotiations. ASIC says that the interference by Mr Mitchell continued even after Mr Healy had spoken with Mr Mitchell.

1828 ASIC particularly focused on the board subcommittee, so let me say something about this.

1829 ASIC says that Mr Mitchell's actions in respect of the board subcommittee and the board subcommittee paper comprised further interference by Mr Mitchell in the domestic broadcast rights negotiation process.

1830 Mr Ayles emailed the board subcommittee paper to Mr Wood on 8 March 2013. Mr Wood emailed the paper to Mr Mitchell the same day. About two hours later, Mr Mitchell replied:

> I've quick [sic] look at this 7 pages of the paper. I'm not happy.
>
> As Chairman of any subcommittee, any framework documentation that we might commence would only be in a manner that I suggest.
>
> I therefore have put your paper on hold until we can speak. …

1831 They spoke shortly after, when Mr Mitchell said the following to Mr Wood:

> You should get on and do the deal with Seven.
>
> I have never heard of Gemba.
>
> The reports from Gemba were a waste of time.
>
> Ayles should be fired after commissioning Gemba.
>
> The long-standing arrangement in place for media rights in Australia that has existed for many years is that Nine has the cricket, Seven has the tennis and football and Ten gets the dregs.
>
> TA should not seek to disturb this long-standing arrangement.
>
> You should keep off the grass.

1832 Further, Mr Wood gave the following evidence under cross-examination by Dr Collins QC:

> So, as you sit there today, you have no recollection of a discussion with Mr Mitchell in respect Mr Ayles' proposed process paper for the subcommittee?---I think I had a discussion, but not straight after which is what you're saying.
>
> I mean – well, did you have a discussion in which this document was mentioned?---The document was what?
>
> Mentioned?---Yes.
>
> Yes, take us through what you said to Mr Mitchell and what he said to you in respect of this document. What are you doing, Mr Wood? Please don't look at your affidavit. Please just address yourself to my question?---So I had a discussion with Harold. He wasn't happy, as he wrote in this email, and basically said, "You know, that's not how the market operates. Let me tell you how it operates. There's a certain pecking order in the business and you need to follow that. It has been in – in play for many years. It's called 'keep off the grass'," and that's what he told me.
>
> And that wasn't a discussion about the subcommittee plan at all, was it, Mr Wood?---That was his response.
>
> I suggest to you that what happened was – I asked you my question and you looked at your affidavit and you then answered my question by reference to something you read

> on the page; correct?---No, I was at the wrong page. I wish it - - -
>
> You wish it was?---Yeah, but it wasn't. So it was useless.
>
> All right. So you have no recollection of any discussion with Mr Mitchell about this subcommittee draft plan at all, is that the position?---No. We had a discussion later on and he was pretty firm to remind me that the way the landscape works in the broadcast world and talked about who gets what rights from each of the broadcasters, and that I should learn that and that that whole scenario was called "keep off the grass".
>
> What you understood him to mean by that was you had an exclusive negotiating period with Channel 7 which needed to be complied with?---Yes.
>
> And that there could be no discussion about – or no contemplation of going with any other counter party until that exclusive negotiating period had been allowed to run its course?---But I already knew that.
>
> Yes. That's what he was reminding you of as you understood it; correct?---No – yes, but he's also reminding me that – do the deal with Seven.
>
> He was reminding you that you, in the exclusive negotiating period, should seek to negotiate a satisfactory deal with Seven; correct?---Yes.

1833 ASIC says that the conversation between Mr Mitchell and Mr Wood after Mr Mitchell dismissed the board subcommittee paper constituted further interference by Mr Mitchell.

1834 Let me say something about the board subcommittee paper, although I have discussed this previously.

1835 In cross-examination, Dr Collins QC put to Mr Wood sections 2 and 4 of the board subcommittee paper and Mr Wood agreed that section 2 was concerned with management, not the subcommittee. However, ASIC points out that he did not put section 3 of the board subcommittee paper to Mr Wood, a section which stated that the sub-committee would conduct itself as follows:

- all relevant information regarding the next domestic rights deal (including offers and possible meetings with interested parties) will be shared with all members of the Board sub-committee; and
- the Board sub-committee will make all decisions by consensus.

1836 ASIC says that although the board subcommittee paper discussed the process more globally and what steps management would take, it also included section 3, which outlined appropriately, if prescriptively, how the subcommittee should conduct itself. According to ASIC, the board subcommittee paper did outline a process in which the subcommittee could conduct itself, given its purpose was to meet and discuss TA's strategy, which would include the subcommittee needing to be aware of what management was doing in the negotiations.

1837 ASIC says that the board subcommittee paper should have been provided to all members of the subcommittee and its contents considered, given that the board's resolution on 4 March 2013 was that the subcommittee meet and consider TA's strategy in respect of the domestic broadcast rights. I will return to this later.

1838 Further, ASIC says that Mr Mitchell also interfered with Mr Wood's desire and TA's strategy to take over host broadcast. Let me elaborate on this.

1839 On 26 March 2013, Mr Wood and Mr Mitchell met with Mr Worner and Mr McWilliam in Mr Mitchell's office in South Melbourne. On the way out of the meeting, Mr Worner and Mr McWilliam handed over a letter containing a new offer from Seven. The rights fees remained at $24 million per annum and host broadcast was offered for an amount to be agreed. As Mr McWilliam acknowledged under questioning from me, this was not a "great clause … because it only talk[ed] about it being agreed", and it was not agreed at that time.

1840 Mr Wood said at the meeting that TA wanted to take over the host broadcast, but this was rejected by Mr Worner and Mr McWilliam. Further, Mr Wood said that it was also rejected by Mr Mitchell, who told Mr Wood after the meeting: "TA is not going to do the host broadcast. You don't know what you're doing".

1841 Mr Wood said that although he was not sure when Mr Mitchell became supportive, generally speaking, Mr Mitchell did not like TA going after host broadcast because Mr Mitchell wanted Seven to do it. Although Mr Wood agreed that it was possible he got the date wrong about when Mr Mitchell said to him that TA should not be doing host broadcast, ASIC says that it is clear from later TA documents, that Mr Mitchell was never really supportive of TA taking over host broadcast.

1842 In my view, on the evidence, Mr Mitchell was not supportive of TA doing host broadcast.

1843 Further, ASIC also says that Mr Mitchell interfered in respect of management's views about completing the long form agreement. On 20 May 2013 at the board meeting, Mr Mitchell asked whether a long form of the agreement could be concluded within a week. The CFO, Mr Roberts replied that he did not think it was a good idea. Mr Mitchell then said to Mr Roberts "That's how CFOs lose their job". Mr Roberts denied that this was bullying.

1844 ASIC says that there was no imperative for TA to conclude the long form agreement expeditiously and good reason for it to take time over it. The ENP still had 4½ months to run. ASIC says that it is therefore reasonable to infer that, in pressuring TA management to conclude

a long form agreement expeditiously, Mr Mitchell was motivated by Seven's concerns about delay and the potential impact of the cricket rights negotiations. I would say now that ASIC's contention was a stretch.

1845 I have dealt with some of the key themes. Now let me turn to the pleaded case.

The alleged contraventions

1846 First, ASIC alleges that on 25 November 2012, Mr Mitchell told Mr Wood that in his opinion the first IMG offer "fail[ed] to impress", and that he thereby contravened section 180(1) because "a reasonable person occupying the office of director of TA with the same responsibilities as Mitchell in TA's circumstances would not have dismissed the first IMG offer out of hand but given it serious consideration instead". ASIC also says that Mr Mitchell contravened s 182(1), because he used his position as a director of TA "improperly, as it was not in TA's interests to reject out of hand credible bids for the domestic broadcast rights and… to gain an advantage for Seven by sidelining competing bids from its rivals".

1847 Now Mr Mitchell's email to Mr Wood on 25 November 2012 read as follows:

> Thanks for the note on IMG!
>
> It is their usual tactic!
>
> Fails to impress, but we will talk tomorrow!
>
> I have yet to read it again, but I have to say that they seem to be well informed!

1848 But this email does not demonstrate that Mr Mitchell rejected the first IMG offer out of hand or failed to give it serious consideration. Rather, Mr Mitchell indicated to Mr Wood that he had given the matter only preliminary consideration and wanted to discuss it with Mr Wood the following day. Further, Mr Wood said that Mr Mitchell never told him *not* to table the first IMG offer at a board meeting.

1849 At most, the email shows Mr Mitchell expressing to Mr Wood his opinion that the first IMG offer had failed to impress him.

1850 Further, the evidence does not support a conclusion that a reasonable director in Mr Mitchell's position would not have held this view. Indeed, the evidence showed that Mr Wood and other members of the TA board shared Mr Mitchell's view.

1851 As I have already explained, the first IMG offer was not an offer that TA could or would accept. The offer had an expiry date of 31 December 2012 that could not be accepted by TA because

of TA's ENP obligations to Seven. It was also not an acceptable deal for TA. It linked international rights to domestic rights, which was inconsistent with TA's host broadcast strategy. The domestic rights fee offered by IMG was subject to conditions. Further, it did not provide for host broadcasting. The evidence establishes that Mr Wood never entertained recommending to the TA board that the domestic broadcast rights be sold to IMG. The principal purpose of obtaining the first IMG offer was to use it as leverage in negotiations with Seven. And the fact is that it was used for that purpose.

1852 The first IMG offer was discussed at the TA board meeting on 3 December 2012. Mr Wood told the board that IMG had made an offer for the domestic and international broadcast rights. He gave a broad outline of the figures put forward by IMG. Mr Wood said that the IMG offer had conditions. Mr Wood explained that the IMG offer linked domestic and international rights, which he said was not helpful. Mr Mitchell said that IMG was an agent working on a commission model. He said it was undesirable to have domestic rights mediated through an agency rather than directly. Mr Mitchell also said the IMG offer was too conditional. By the end of the meeting, it was clear from the discussion that the TA board had a negative view about IMG as a counterparty to a domestic rights agreement.

1853 Mr Tanner thought IMG "were doing a job that we should be doing within Tennis Australia". Under questioning by Mr Young QC, he gave the following evidence:

> Yes. There was always an issue about a confidentiality of the minutes because they had been circulated to member associations; do you understand that?---Correct.
>
> So on occasions figures that were regarded as confidential were not included in the minutes?---Correct. We were concerned that it would raise the expectations within the MAs.
>
> Yes. So that's another reason why the IMG figure may not have been recorded in this set of minutes; correct?---That's certainly possible, yes.
>
> When IMG was discussed at the board meeting, did you say anything as to your view of an offer from IMG as an agent?---Not really. No, not really. I hadn't – I didn't really have a view on it because of the exclusive negotiating period that was coming up.
>
> Yes?---I had a private view but I didn't – I didn't express the view at the board.
>
> And what was your own private view?---My private was that they were doing a job that we should be doing within Tennis Australia, that interceding, putting an agent between ourselves and the networks was not necessarily helpful to the relationships that we needed to build.

1854 Further, Mr Freeman was not comfortable in dealing with an intermediary. He gave the following evidence under questioning by Mr Young QC:

> Yes. All right. Thank you. Now, Mr Wood described also the main features of an IMG offer that had been received, did he not?---My recollection is that he spoke about IMG principally that it was a commission-based arrangement. I don't recall any numbers being put on the table.
>
> Well, you don't dispute that they may have been; you simply don't recall?---I just don't recall.
>
> Thank you. Did Mr Wood describe the offer as a conditional one in that it was conditional on IMGs international rights being extended on the same terms as currently applied?---I do recall a conversation about the international rights being attached to the agreement.
>
> Yes. Now, yesterday at transcript 872, you referred to strong views being expressed about the inappropriateness of IMG as a counterparty for TA. Do you recall that yesterday?---I do.
>
> Can you recall which directors expressed those strong views?---Look, I think Mr Mitchell would have – spoke about that matter. Principally, I think – as I said previously, I think the real issue for us was we weren't dealing with a direct broadcaster intermediary, a commission-based intermediary and I think – I don't know whether Mr Mitchell made those comments but certainly I was aware that they were – I think they were based in New York. And I was never comfortable in dealing with an intermediary when we could deal with a broadcaster who, as I said before, would champion tennis.

1855 So, the evidence does not support ASIC's contention that the first IMG offer was a credible bid for TA's domestic broadcast rights. Further, it was spurious for ASIC to assert that Mr Mitchell acted improperly in respect of the first IMG offer for the purpose of benefiting Seven by sidelining competing bids from its rivals.

1856 ASIC's allegation must be rejected.

1857 Second, ASIC alleges that on 1 December 2012 Mr Mitchell instructed Mr Wood that he should abandon his request to Seven for a provision that any renewed agreement would not be binding until a long form agreement was signed, and that he thereby contravened s 180(1). ASIC further alleges that by the same conduct, Mr Mitchell contravened s 182(1), because he used his position as a director of TA "improperly, as it was appropriate for Wood as CEO of TA to make that request of Seven … and … to gain an advantage for Seven by seeking to conclude a binding agreement with it as soon as possible, and before its rivals could make competing bids for the domestic broadcast rights".

1858 Now the apparent basis for ASIC's allegation was an email exchange between Mr Mitchell and Mr Wood on 1 December 2012.

1859 Mr Wood first sent an email to Mr Mitchell:

> To progress the Seven deal during Monday's board meeting I think we should insert

in their existing letter a long form clause similar to the one drafted below.

> The parties agree that while this letter sets out their in principle agreement and is intended to form the basis for the grant of Transmission Rights to Seven for the period from its execution to 30 June 2019 (for the Australian Events) and 31 December 2019 (for the Davis Cup Events), it is expressly intended to be non-binding and will have no legal effect even once signed by both parties. TA and Seven agree to enter into good faith negotiations immediately after execution of this letter to agree on a long-form agreement, incorporating the above provisions as well as a regime to be agreed regarding various secondary issues required to "future proof" our arrangement (for example multi-channelling, back-to-back arrangements to TA's new agreement with MOPT regarding access to the broadcast compound, the ratings bonus clause, news access rights, promotion of live-odds and relating betting issues, use of player imagery, sponsor protection, highlight rights and other changes required by TA assuming control of all or part of the host broadcast) with a view to executing that long-form agreement by March 31 2013. The grant of rights contemplated in this letter will only become effective if and once that long-form agreement is agreed and signed.

1860 Mr Mitchell replied as follows:

> Steve
>
> This was the section that Bruce rejected, saying
> That it allows the contract to be null and void
> On a range of matters that have not been
> Established!
> Basically it is a lawyers way of saying "I
> don't trust you"
> Bad sign!
> Won't fly with them… Or me!!!

1861 But it is important to say something about the context in which this email exchange occurred, some of which I have touched upon in other parts of my reasons.

1862 On 1 November 2012, Mr Wood and Mr Mitchell had met with Mr McWilliam and Mr Martin of Seven. Mr Wood's state of mind at this time was that TA was moving towards seeking to finalise a deal with Seven in long form by 21 December 2012. His intention was to put an offer capable of acceptance to the TA board at the board meeting on 3 December 2012. He was happy to do an early deal with Seven before the ENP in April 2013 if "we got the deal we wanted".

1863 At the 1 November 2012 meeting, there was discussion about Mr Wood's preference for a long form agreement. Seven's position was that it was prepared to sign an extension letter, but it had to be a binding one, and whilst Seven was prepared to make best endeavours to negotiate a long form agreement, it was not prepared to have the "whole thing fall over if we didn't ever get to the long form". It was agreed at the meeting that each party would use its best endeavours to agree a long form contract by 21 December 2012.

1864 Following the meeting, Mr McWilliam sent an email to Mr Wood and Mr Mitchell. The email referred to the discussion at the meeting on 1 November 2012 and attached Seven's November offer. The final paragraph of the offer relevantly read as follows, consistent with the discussions which had occurred on 1 November 2012:

> Each of the parties shall also use their respective best commercial endeavours to agree and execute a long form agreement by December 21, 2012 (provided that if not so agreed and executed the parties must continue to use their best endeavours to agree and execute the same as soon as practicable thereafter.

1865 On 7 November 2012, Mr Wood sent an email to Mr McWilliam in response. The email referred to Seven's November offer and attached TA's response in the form of a mark-up of that offer. The response provided for an increase in the rights fees payable by Seven by adding $750,000 in each year, with a corresponding reduction in the rating bonus payable by TA from $1 million (as proposed by Seven) to $250,000. The marked-up letter also contained a comment that "We do not propose to discuss the Rights Fees in detail at this stage as it would be a distraction from the work of agreeing the important reforms proposed below…" Mr Wood's negotiating strategy was to see what he could bed down in terms of other issues before talking about the dollar amounts of the rights fees.

1866 The TA response of 7 November 2012 inserted a long form agreement clause which in effect provided for any agreement based on the letter to be non-binding.

1867 Mr Wood's email generated a reply from Mr McWilliam on the same day which was also copied to Mr Mitchell. Mr McWilliam complained that Mr Wood's response had been sent in bad faith. Mr McWilliam said in respect of the long form clause added in the TA response: "To say that something that a sign on payment is made on is non-binding is amateur hour and it has never been our deal". He went on:

> We need to sign what we agreed, which is reflected in what we sent to you. We had the draft in front of us, and we went through the 5 or so points which we embodied.
>
> This needs to be fixed.

1868 Now in his email of 1 December 2012, Mr Mitchell correctly noted that the long-form/non-binding agreement clause proposed by Mr Wood was "the section that Bruce rejected, saying that it allows the contract to be null and void on a range of matters that have not been established!".

1869 Mr Mitchell went on to say that Mr Wood's proposed long form/non-binding agreement clause "Won't fly with them… or me!!!". The first part of this statement ("Won't fly with them")

again accurately described the position of Seven, as articulated to TA at and following the meeting on 1 November 2012. The latter part of the statement ("…or me") was to the effect that Mr Mitchell did not support the inclusion of the proposed long form/non-binding agreement clause in the Seven letter. That view had been expressed by Mr Mitchell at the meeting on 1 November 2012 and was known to Mr McWilliam.

1870 I am not satisfied that Mr Mitchell did not act as a reasonable director in his position would have in the circumstances in terms of his dealings with Mr Wood. TA and Seven had been negotiating in good faith towards a mutually beneficial deal for some months. Seven had rejected the proposed long-form/non-binding agreement clause, and the parties had discussed on 1 November 2012 seeking to finalise a long form agreement by 21 December 2012. Mr Wood had incurred Mr McWilliam's anger upon sending the marked-up letter of offer on 7 November 2012, having regard to that discussion. It was understandable that Mr Mitchell would step in to keep the negotiations moving along. But as I have said, he went further than he should have in forwarding TA internal emails with Mr Wood to Mr McWilliam.

1871 Further, Mr Mitchell's email of 7 November 2012 did not amount to a "direction" by Mr Mitchell to Mr Wood not to seek a long-form/non-binding agreement clause. Further, even if Mr Mitchell had the authority to direct Mr Wood, Mr Wood did not perceive Mr Mitchell's email as constituting a direction. Upon receiving Mr Mitchell's email, Mr Wood responded with a watered-down clause, asking Mr Mitchell, "By removing the secondary range of matters will this clause work?" Mr Wood had no recollection of Mr Mitchell responding to that email.

1872 In my view ASIC's case is not made out. But as I have said, Mr Mitchell did step over the line in forwarding TA internal emails to Mr McWilliam.

1873 Third, ASIC alleges that in late 2012 Mr Mitchell told Mr Wood that TA would not follow the process recommended in the Ayles paper but would instead award the domestic broadcast rights to Seven, and that he thereby contravened s 180(1). ASIC further alleges that Mr Mitchell contravened s 182(1), because he used his position as a director of TA "improperly, as he sought to restrict TA's consideration of the broadcast rights and … to gain an advantage for Seven by seeking to ensure the broadcast rights were awarded to it".

1874 The basis for ASIC's contentions is a conversation between Mr Mitchell and Mr Wood at Mr Mitchell's residence. Mr Wood gave the following evidence:

In late December 2012, I visited Mitchell in his home in Spring Street, Melbourne. I

told Mitchell what Ayles had written in the Ayles Paper, in particular the process that Ayles had proposed. I also told Mitchell that we needed to get more information on the broadcast rights to the board in order to educate the other TA board members. Mitchell said to me words to the following effect:

> You're not going to do that.
>
> You're going to do it this way with Seven.
>
> This will cost you your job. When will you learn to be a good CEO?
>
> Let me handle that.

1875 Mr Wood's oral evidence about this conversation was as follows in cross-examination by Dr Collins QC:

> And then in paragraph 144 of your affidavit, you say in late December 2012 you visited Mr Mitchell in his home and you told him what Mr Ayles had written in the Ayles paper. Do you see that?---Yes.
>
> Is the version of the Ayles paper that you spoke to Mr Mitchell about the version with your amendments in it?---I didn't have the paper with me. We just talked in general terms about it.
>
> I see. So you went to see Mr Mitchell in his home. Was the purpose of the meeting to talk about the Ayles paper or something else?---I think it was to talk about the Ayles paper and catch up on the, you know, the broadcast rights negotiation, given that we had been told to go off and work on the deal.
>
> And insofar as you were talking about the Ayles paper to Mr Mitchell, do we take it that you were talking to him about the Ayles paper as you had amended it in the version that you had sent to Mr Healy, Mr Perrins and Mr Ayles as referred to in paragraphs 142 and 143 of your affidavit?---I think just in general terms. You know, it's a combination of both of those papers.
>
> Did you tell Mr Mitchell the recommendation, as you had formulated it in the document in tab 243?---Can I just look at that?
>
> Yes, of course. Take your time but I will just draw your attention to the bottom of page 3946, the final paragraph, and then page 3695 under the heading Recommendation. Just read that to yourself and let me know when you've read it?---Yes.
>
> So did you tell Mr Mitchell that the recommendation was that Tennis Australia reject the current offers on the basis that neither of them meets TA's business objectives?---Yes, I believe so.
>
> Did you tell Mr Mitchell that the recommendation was to commence exclusive negotiations with Seven from 1 April 2013 as was contractually required?---Yes.
>
> And did you tell Mr Mitchell that during that period, Tennis Australia would conduct a process with Seven that was similar to the process conducted recently by the other major Australian sporting codes including the AFL, NRL and Cricket Australia?---Yes.
>
> And did you tell Mr Mitchell that that process would likely include going to the market and relevant providers, on a platform by platform basis?---Yes.

1876 But it follows from this evidence that in the conversation relied upon by ASIC as founding its allegation, Mr Wood had on one view apparently recommended that TA go to market and conduct a process similar to that recently conducted by the AFL, NRL and Cricket Australia whilst the ENP with Seven was on foot. But as Mr Wood correctly accepted at trial, TA could not have gone to the market in this way. Doing so would have breached TA's ENP obligations to Seven. Mr Wood accepted that following his recommended process would have been a serious matter for a CEO to have done. He gave evidence under questioning from Dr Collins QC:

> I just want you to have a look, please, at page 3965, do you have that, in tab 243?---Sorry, what tab?
>
> Tab 243?---Yes.
>
> Page 3965. You see in the second paragraph you say:
>
> *The recommendation is that Tennis Australia rejects the current offers.*
>
> Do you see that?---Yes.
>
> Continuing:
>
> *And commences exclusive negotiations with Seven from 1 April 2013.*
>
> You see that?---Yes.
>
> Then you've said:
>
> *During this period TA would conduct a process with Seven that's similar to the process conducted recently by the other major Australian sporting codes.*
>
> Do you see that?---Yes.
>
> And then you've said:
>
> *This process would likely include going to market.*
>
> Do you see that?---Yes.
>
> And you accept, don't you, that Tennis Australia could not go to market in a process while the exclusive negotiating period was on foot?---Yes.
>
> And that if Tennis Australia had done so, it would have breached, in a very serious way, the exclusive negotiating period provisions?---Yes.
>
> And that would have been a very grave matter for a CEO to have done?---Yes.
>
> Potentially a sackable offence, you agree?---Probably.

1877 In my view, ASIC has not established that a reasonable director in Mr Mitchell's position would not have told Mr Wood not to follow the process recommended in the Ayles paper in the version *verbally* communicated to Mr Mitchell; I have discussed this recommendation question elsewhere in the case against Mr Healy. To the contrary, it was prudent of Mr Mitchell to

convey to Mr Wood that TA should not go to market during the ENP and to counsel him that TA must honour the ENP with Seven in accordance with TA's obligations. As Mr Wood accepted, proceeding as he had recommended in his conversation with Mr Mitchell would likely have been a sackable offence for a CEO.

1878 Further, the evidence does not support ASIC's contention that Mr Mitchell told Mr Wood that he was to award the domestic broadcast rights to Seven. Neither Mr Wood nor Mr Mitchell had any power to do so. Only the TA board had the power to award the domestic broadcast rights. Understood in context, the effect of what Mr Mitchell said in relation to Seven was no more than that TA needed to honour the ENP with Seven.

1879 I would reject ASIC's case on this aspect.

1880 Fourth, ASIC alleges that on 8 March 2013 Mr Mitchell instructed Mr Wood not to provide the board subcommittee paper to the other members of the subcommittee and not to send out any documents that Mr Mitchell had not approved, and that he thereby contravened section 180(1). ASIC further alleges that Mr Mitchell contravened section 182(1), because he used his position as a director of TA "improperly, as he concealed relevant information from the members of the sub-committee of great financial significance for TA … and … to gain an advantage for Seven by depriving the sub-committee of relevant information needed to assess Seven's offers".

1881 Now ASIC's case is based on an email exchange between Mr Mitchell and Mr Wood on 8 March 2013.

1882 On 8 March 2013, Mr Wood sent an email to Mr Mitchell attaching a "draft plan of how the Board sub committee could conduct the process of selection of our broadcast partner". The draft plan had been prepared by Mr Ayles, at Mr Wood's request. Mr Wood asked Mr Mitchell to "let me know your thoughts on this plan and I will then distribute this paper to sub committee members".

1883 But as I have indicated, the board subcommittee paper was not an appropriate plan for the subcommittee formed by resolution of the TA board at the 4 March 2013 board meeting. It misconceived the role of the subcommittee, which was to provide advice and recommendations as required to the board. Indeed, Mr Wood also misconceived the role of the board subcommittee in his email to Mr Mitchell of 8 March 2013. Mr Wood accepted in cross-

examination that contrary to what he had written in his email, TA's management and not the subcommittee was conducting the process of selecting TA's broadcast partner.

1884 Mr Mitchell responded to Mr Wood's email on 8 March 2013, stating:

> Steve, I've quick look at this 7 pages of the paper. I'm not happy.
>
> As Chairman of any subcommittee, any framework documentation that we might commence would only be in a manner that I suggest.
>
> I therefore have put your paper on hold until we can speak. I'm not sure where this paper came from, but as I said its very important that subcommittee of the board, yourself of course, and the board controls the matter.

1885 In view of the obvious deficiencies in the board subcommittee paper, it cannot be concluded that a reasonable director in Mr Mitchell's position, including as chairman of the subcommittee, would not have responded in this way.

1886 Further, Mr Freeman's evidence did not support ASIC's thesis that the paper was of great financial significance for TA that was vital to the working of the subcommittee. Mr Freeman said that if he were the chair of the subcommittee, he too would have questioned the paper. Mr Healy also thought the subcommittee paper was flawed. He said he would have expected the paper to set out what the objectives of the subcommittee were, how the objectives were going to be carried out, what criteria competing offers would be measured against, and how the subcommittee would report to the board. It did none of those things.

1887 Further, Mr Mitchell's email did not amount to the imposition of a relevant restriction on Mr Wood. Mr Mitchell merely said that he had "put your paper on hold until we can speak". And Mr Wood did not recall speaking to Mr Mitchell about the board subcommittee paper after receiving the email.

1888 Further, ASIC's contention that Mr Mitchell, by sending the email to Mr Wood on 8 March 2013, acted improperly to conceal relevant information from the members of the sub-committee "of great financial significance for TA" and to gain an advantage for Seven by depriving the subcommittee of relevant information needed to assess Seven's offers, is unsustainable.

1889 ASIC's case is not made out.

1890 Fifth, ASIC alleges that in March 2013 Mr Mitchell told Mr Wood to "get on and do the deal with Seven" and that Mr Wood should "keep off the grass", and that he thereby contravened s 180(1). ASIC further alleges that Mr Mitchell contravened s 182(1), because he used his

position as a director of TA "improperly, as he sought to restrict TA's consideration of the domestic broadcast rights… and … to gain an advantage for Seven by seeking to ensure the domestic broadcast rights were awarded to it".

1891 Again, the basis for ASIC's allegations is another conversation between Mr Mitchell and Mr Wood. Mr Wood gave written evidence that shortly after receiving Mr Mitchell's email of 8 March 2013 referred to above he had a telephone conversation with Mr Mitchell during which Mr Mitchell is said to have uttered words to the following effect:

> You should get on and do the deal with Seven.
>
> I have never heard of Gemba.
>
> The reports from Gemba were a waste of time.
>
> Ayles should be fired after commissioning Gemba.
>
> The long-standing arrangement in place for media rights in Australia that has existed for many years is that Nine has the cricket, Seven has the tennis and football and Ten gets the dregs.
>
> TA should not seek to disturb this long-standing arrangement.
>
> You should keep off the grass.

1892 But Mr Wood's evidence relevantly was, as I have set out earlier in answer to Dr Collins QC:

> All right. So you have no recollection of any discussion with Mr Mitchell about this subcommittee draft plan at all, is that the position?---No. We had a discussion later on and he was pretty firm to remind me that the way the landscape works in the broadcast world and talked about who gets what rights from each of the broadcasters, and that I should learn that and that that whole scenario was called "keep off the grass".
>
> What you understood him to mean by that was you had an exclusive negotiating period with Channel 7 which needed to be complied with?---Yes.
>
> And that there could be no discussion about – or no contemplation of going with any other counter party until that exclusive negotiating period had been allowed to run its course?---But I already knew that.
>
> Yes. That's what he was reminding you of as you understood it; correct?---No – yes, but he's also reminding me that – do the deal with Seven.
>
> He was reminding you that you, in the exclusive negotiating period, should seek to negotiate a satisfactory deal with Seven; correct?---Yes.

1893 So, Mr Wood explained that by telling him to "keep off the grass" in the above context, he understood Mr Mitchell to be reminding him that TA had an ENP with Seven, there could be no contemplation about going to another counterparty until the ENP had been allowed to run its course, and that TA should seek to negotiate a satisfactory deal with Seven in the ENP.

1894 Mr Mitchell did not give any instruction to Mr Wood to dismiss possibilities other than granting the rights to Seven. Rather, as Mr Wood understood it, Mr Mitchell was focusing Mr Wood's attention on the fact that TA had an ENP with Seven that had yet to commence and was encouraging him to endeavour to reach agreement with Seven during the ENP on a deal that was satisfactory to TA.

1895 Further, the context of Mr Mitchell's statements is not unimportant.

1896 TA owed ENP obligations to Seven that had to be honoured. Until the ENP had elapsed, TA could not consider disturbing the long-standing arrangement by which Seven had the tennis and football, Nine had the cricket and Network Ten had what counsel indelicately described as the dregs. If Mr Wood had stepped onto the "grass" and sought to interfere with those arrangements during the ENP, he would have breached TA's ENP obligations and committed a potentially sackable offence.

1897 Further, the evidence was that other directors of TA shared Mr Mitchell's view that TA should try to reach agreement on a satisfactory deal with Seven prior to the conclusion of the ENP, as did Mr Wood himself. Indeed, Mr Wood did not agree with the view expressed by Mr Guinness in his letter of 31 October 2012 that there were compelling reasons for TA to issue a competitive tender process for the domestic broadcast rights. He thought it would be in TA's best interests if a good deal could be struck with Seven before the end of the ENP, and that there were serious risks of allowing the ENP to expire and then testing the market in an open tender process. Mr Tanner and Mr Freeman gave evidence to similar effect.

1898 In light of that evidence, it cannot be concluded that a reasonable director in Mr Mitchell's position would not have made the statements alleged to Mr Wood in March 2013. I reject ASIC's case on this aspect.

1899 Sixth, let me turn to another matter concerning Mr Healy's direction and Mr Mitchell's subsequent conduct.

1900 As I have already said, in late December 2012, Mr Wood raised with Mr Healy concerns that Mr Mitchell was interfering in the conduct of the negotiations, and that Mr Wood thought he could get more money for the broadcast rights. Mr Wood's evidence in cross-examination was that the single purpose of his phone call to Mr Healy in late December 2012 was to raise the concern about Mr Mitchell. Mr Healy responded with words to the effect that "Well, if that's your view, I will have a discussion with Harold and tell him to back off. I will back you".

1901 As I have already set out in my reasons, Mr Healy subsequently spoke to Mr Mitchell by telephone and said that he wanted Mr Wood to be driving negotiations, and that Mr Mitchell should only provide input if requested by management. Mr Healy said that otherwise, Mr Mitchell should provide his input through the board. After some discussion, Mr Healy said he was requiring Mr Mitchell to cease his involvement unless asked specifically by management to become involved. Mr Mitchell said that he would do as Mr Healy asked. Mr Healy described the conversation as a robust discussion in which he ultimately gave Mr Mitchell a direction to cease his involvement in the negotiations, which Mr Mitchell accepted.

1902 Now in Mr Wood's evidence about his conversation he had with Mr Healy, he had a slightly different recollection, but for the moment those differences are not material. Mr Wood said that he raised concerns with Mr Mitchell's involvement in the negotiations with Seven, which he described as Mr Mitchell "hijacking the negotiations". Mr Healy responded with words to the effect of "leave it to me. I'll fly down and see Harold and tell him how the process will operate in the future". Mr Healy denied saying that the word "hijacking" was used and that he said to Mr Wood that he would fly down to speak to Mr Mitchell. I am inclined to accept Mr Wood's version concerning the "hijacking" reference. This was the only complaint that Mr Wood made to Mr Healy about Mr Mitchell's involvement in the negotiations.

1903 Mr Wood subsequently received an indirect report from Mr Freeman that Mr Healy had spoken to Mr Mitchell regarding governance. Mr Wood accepted that after his discussion with Mr Healy in December 2012 right through until the agreement with Seven was concluded on 29 May 2013, as far as he was aware Mr Mitchell did not interfere in Mr Wood's conduct of the negotiations with Seven.

1904 Now at the heel of the hunt, Mr Pearce SC in cross-examination of Mr Healy asked a series of questions that were directed to an evolution of ASIC's case theory. Mr Healy was asked whether if Mr Mitchell had had contact with Mr McWilliam in the period after late December 2012, Mr Healy would have considered that to be a breach of a direction that he had given Mr Mitchell on that date. ASIC sought to establish that Mr Mitchell had interfered in negotiations between TA and Seven, despite having been told by Mr Healy that he was not to do so. But there are difficulties for ASIC on this aspect.

1905 First, ASIC did not plead any contraventions to the effect that Mr Mitchell had breached his directors' duties by disobeying a direction by Mr Healy.

1906 Second, Mr Wood gave evidence that after Mr Healy had spoken to Mr Mitchell, Mr Mitchell ceased to interfere in the negotiations so far as he was concerned. Mr Healy said that Mr Wood made no further complaints to him about Mr Mitchell's conduct.

1907 Third, the fact that there may have been conversations between Mr Mitchell and Mr McWilliam in which the domestic broadcast rights were discussed in the period after 18 December 2012 does not establish that there was material interference by Mr Mitchell in the negotiations. The relevant and meaningful negotiations, which resulted in Seven's final offer, occurred during an intensive period between 7 and 16 May 2013. Mr Mitchell played no relevant role during that period.

1908 In summary, I would not find a relevant contravention by Mr Mitchell on this aspect of the matter.

(c) ASIC's breach case – Mr Mitchell withheld information from the board

1909 Let me begin by summarising ASIC's case on this aspect.

1910 ASIC says that Mr Mitchell withheld relevant information from the TA board being the Gemba summary, the first IMG offer, the level of interest of Network Ten in the rights, the Ayles paper and the board subcommittee paper.

1911 First, ASIC says that Mr Mitchell had each item of information.

1912 Mr Wood provided a hard copy of the Gemba summary to Mr Mitchell. Further, Mr Mitchell made subsequent disparaging remarks about Gemba, which ASIC says shows that he knew about the Gemba valuation. Further, Mr Wood gave Mr Mitchell a copy of the first IMG offer on 23 November 2012. Moreover, Mr Mitchell then later referred to the first IMG offer in an email on 25 November 2012. Further, Mr Mitchell was aware of the level of Network Ten's interest in the domestic broadcast rights. In around May 2012, Mr Wood spoke with Mr Mitchell and said to him that Network Ten was indicating it might be willing to pay $40 or $50 million per annum for the domestic broadcast rights. Mr McWilliam also said that Network Ten's "speaking $40 million" had been reported to him by one of Mr Mitchell, Mr Martin or Mr Gyngell, though he could not remember. ASIC says that given the strong inference that Mr Mitchell told Mr McWilliam about Network Ten's interest, I should draw the inference that Mr Mitchell therefore knew about Network Ten's interest in paying $40 million for the rights. Further, although Mr Mitchell did not physically receive a copy of the Ayles paper, Mr Wood

reported the recommendations and process proposed in the Ayles paper to Mr Mitchell. Further, Mr Mitchell was sent a copy of the board subcommittee paper by Mr Wood.

1913 Second, ASIC says that Mr Mitchell withheld this information from the board.

1914 ASIC says that Mr Mitchell never provided a copy of the Gemba summary to the board at any TA board meeting in 2012 or 2013 or discussed it in detail at any board meeting. And it says that there is also no evidence that Mr Mitchell ever discussed the Gemba summary with any other TA board members in 2012 or 2013.

1915 ASIC says that the Gemba summary contained other information that was relevant to the decision that the board had to make, yet Mr Mitchell never provided a copy of the Gemba summary to the board, or disclosed to the board the details of the Gemba summary.

1916 Further, ASIC says that at the 3 December 2012 board meeting, Mr Wood raised the first IMG offer, said that it was for hundreds of millions of dollars over several years, but had conditions. Mr Mitchell interjected to dismiss IMG and said that Seven's November offer was reasonable. Mr Mitchell also said that he and Mr Wood would "wrap this up and come back to [the] Board". There is no evidence that Mr Mitchell discussed the details of the first IMG offer with the TA board on 3 December 2012. ASIC says that even though the first IMG offer was not capable of being accepted, it was nevertheless relevant for the board to know the details of the offer as it showed the value of the domestic broadcast rights, and that there was scope for competitive tension in the market in respect of the domestic broadcast rights.

1917 Further, ASIC says that at the 3 December 2012 board meeting, Mr Wood mentioned to the board that Nine and Network Ten had expressed an interest in the rights, but no details were provided to the board. But it says that there is no evidence that Mr Mitchell mentioned to the TA board that Network Ten had expressed an interest of $40 to $50 million in the domestic broadcast rights, even though according to ASIC he was aware of the figure. ASIC says that the figure of $40 to $50 million was important for Mr Mitchell to discuss with the board, because it showed the value of the rights as well as the strong potential for competitive tension in the market.

1918 Further, ASIC says that at the 4 March 2013 board meeting, Mr Mitchell did not mention the details of either IMG offer or the level of interest of Network Ten in the domestic broadcast rights.

1919 Further, ASIC says that at the 20 May 2013 board meeting, Mr Mitchell said that Nine was committed to the cricket and Mr Mitchell also said Network Ten was not in a sound financial position and so should not be considered. Mr Mitchell also said that he did not understand why TA would want to do the host broadcast.

1920 Further, ASIC says that Mr Mitchell told the board at the 20 May 2013 board meeting that the board subcommittee, which had never met, recommended that the board accept the offer.

1921 In this respect, ASIC says that Mr Freeman accepted that he later voted to substitute a reference to Mr Mitchell for the reference to the subcommittee in the minutes of that recommendation, but he did not actually recall to whom the recommendation had been attributed. Mr Tanner's recollection was that it was the subcommittee's recommendation that the offer be accepted. Dr Young recalled that "[Mr Mitchell] was speaking on behalf of the subcommittee and his recommendation was that the Board accept that offer". Mr Davies could not recall any discussion about the subcommittee at the 20 May 2013 meeting. Mr Davies recalled that no-one mentioned at the 20 May 2013 meeting that the subcommittee recommended the offer be accepted, but he remembered that Mr Mitchell recommended the offer be accepted.

1922 ASIC says that given that the draft minutes had noted that it was the subcommittee's recommendation that the offer be accepted, and with two directors even under challenge recalling that Mr Mitchell said that the subcommittee recommended the offer, an inference should be drawn that Mr Mitchell did in fact say that the subcommittee recommended the offer. It says that this inference is strengthened by Mr Wood's evidence that "Harold was the committee … committee of one". But this submission was selective. In context the passage of cross-examination by Mr Young QC reads:

> Do you recall whether Mr Mitchell said the committee's recommendation or his recommendation?---I don't recall that, but Harold was the committee.
>
> Yes. All right?---Committee of one.

1923 Further, ASIC says that there was no mention by Mr Mitchell of any of IMG's offers at the 20 May 2013 board meeting. At this meeting, Mr Mitchell did not refer to the level of interest of Network Ten or details of the first IMG offer, the Gemba summary, the proposed process in the Ayles paper or the board subcommittee paper.

1924 Third and generally, ASIC says that it is significant that Mr Mitchell withheld information from the board. Mr Mitchell had influence over the board in respect of media rights issue. And whilst the ultimate decision was for the board as a whole, ASIC says that Mr Mitchell's

influence cannot be discounted and that directors relied on him in respect of the domestic broadcast rights.

1925 Generally, ASIC says that given Mr Mitchell's influence on the board, his actions in co-operating with Seven, interfering with management and withholding information from the board were significant.

Analysis

1926 Let me go through each of the alleged contraventions.

1927 First, ASIC alleges that at the 3 December 2012 board meeting, Mr Mitchell said that the first IMG offer had a number of shortcomings and should not be considered, that he did not inform the board about the details of the first IMG offer, and that he thereby contravened section 180(1). ASIC further alleges that Mr Mitchell contravened s 182(1), because he used his position "improperly, as he concealed relevant information from the board on a subject of great financial significance for TA and … to gain an advantage for Seven by seeking to downplay interest from a rival bidder for the domestic broadcast rights".

1928 I would reject ASIC's case.

1929 Mr Wood disclosed details of the first IMG offer at the 3 December 2012 board meeting. At the meeting he told the board that IMG had made an offer for the domestic and international broadcast rights, he gave a broad outline of the figures that were being put forward by IMG, he said that the IMG offer had conditions, he explained that the IMG offer linked domestic and international rights and he said that having that linkage was not helpful.

1930 In response to Mr Wood's report to the board, Mr Mitchell said that IMG was an agent working on a commission model, it was undesirable to have domestic rights being approached through an agency rather than directly, IMG did not add value to TA's business, and the IMG offer was too conditional.

1931 Other directors agreed with Mr Mitchell at the meeting. They said words to the effect that it would be preferable for TA to have a direct relationship with its broadcast partner, rather than have the rights sold through an agent like IMG.

1932 Further, the signed minutes of the board meeting record that Mr Mitchell "advised that, in his view, the IMG offer contained a number of shortcomings and should not be considered".

1933 Further, the views expressed by Mr Mitchell at the meeting about the IMG offer were to the effect that IMG was not a desirable counterparty for TA in respect of the licensing of the domestic broadcast rights and that IMG the offer was too conditional to warrant serious consideration. Those views were shared by Mr Wood and other members of the board.

1934 Further, as Mr Wood explained, the IMG offer was not an acceptable deal for TA because it would have required TA to extend its international rights deal with IMG, which was inconsistent with TA's host broadcast strategy, and the fee of $30 million offered by IMG for the domestic rights was subject to other conditions. Mr Wood never seriously entertained recommending to the TA board that the domestic broadcast rights be sold to IMG. The purpose of TA management in procuring the first IMG offer was not to put it to the board for serious consideration, but rather to use it as leverage in negotiations with Seven. Further, Mr Wood's evidence was that Mr Mitchell never told him not to table the first IMG offer at the meeting.

1935 Further, Mr Tanner's view was that IMG "were doing a job that we should be doing within Tennis Australia". And Mr Freeman was "never comfortable in dealing with an intermediary [IMG] when we could deal with a broadcaster who… would champion tennis". According to Mr Freeman, by the end of the 3 December 2012 board meeting, it was clear from the discussion that the TA board had a negative view about IMG as a counterparty to a domestic rights agreement.

1936 ASIC's assertion that a reasonable director in Mr Mitchell's position would not have told the board that the first IMG offer should not be considered and would have disclosed its details to the board is spurious.

1937 Further, the allegation that Mr Mitchell improperly concealed relevant information from the board in respect of the first IMG offer for the purpose of advantaging Seven by downplaying interest from a rival bidder is also hopeless.

1938 Second, ASIC alleges that at the 3 December 2012 board meeting, Mr Mitchell said that he and Mr Wood would continue to work on an agreement with Seven and that "Steve and I will wrap this up and come back to the Board", and that he thereby contravened s 180(1). ASIC further alleges that, by the same conduct, Mr Mitchell contravened s 182(1), because he used his position "improperly, as he sought to prevent the board from considering a broadcast rights agreement with any person other than Seven and … to gain an advantage for Seven by seeking to ensure that TA granted it a further five years of domestic broadcast rights".

1939 But ASIC's contentions are not borne out by the evidence.

1940 Mr Wood opened the discussion about the domestic rights by telling the board that a deal with Seven was close. Mr Wood said that his view was that TA should go early with its natural partner. He said that Seven had offered a 5 year deal on terms and conditions that were the same as the previous agreement. He told the board the approximate annual figure that was being offered by Seven. He told the board that Seven's offer was a 280% increase in the rights fees over the last 10 years. Mr Wood said that he was "happy about the uplift". He said that it produced an 18% increase in rights fees.

1941 Mr Healy said to the board that an 18% increase in rights seemed small relative to the reported increases enjoyed by other major sports in their new broadcasting deals.

1942 Mr Mitchell said that other sports had received an uplift of up to three times. Mr Mitchell reported that TA had received a significant uplift in domestic rights in the previous renewal. Mr Mitchell said that he considered the current Seven offer to be reasonable in the current economic environment. Then, after referring to IMG, Mr Mitchell said that both he and the CEO would continue to work on the domestic rights agreement and come back to the board at a later date.

1943 Mr Freeman said in respect of the 3 December board meeting:

> I think Mr Mitchell mentioned that [the Seven offer] seemed a reasonable proposition but to the extent that they would wish to continue on and pursue negotiations for a higher amount.

1944 Further, any agreement with Seven or any other counterparty needed board approval and Mr Mitchell had no authority in that regard. Mr Mitchell did not at that time move a resolution to the effect that Seven's November offer should be accepted. Understood in context, Mr Mitchell's words that he and the CEO would continue to work on the domestic rights agreement and come back to the board at a later date were not a statement to the effect that TA should only consider making an agreement with Seven.

1945 Third, ASIC alleges that at the 3 December 2012 board meeting, Mr Mitchell did not inform the board that Mr Warburton and Mr Marquard had informed Mr Wood and Mr Ayles that Network Ten was very interested in acquiring the domestic broadcast rights for tennis, might pay more than $40 million per annum for those rights and was willing to pay significantly more than what Seven was offering, and that he thereby contravened s 180(1). ASIC further alleges that Mr Mitchell contravened s 182(1) because he used his position "improperly, as he

concealed relevant information from the board on a subject of great financial significance for TA and … to gain an advantage for Seven by seeking to sideline a rival bidder for the domestic broadcast rights".

1946 But the board was told about interest from Network Ten at the 3 December 2012 board meeting. Mr Wood said that Nine and Network Ten had expressed interest in the domestic broadcast rights. There was discussion to the effect that the directors would expect them to be interested. It was obvious to the board that Network Ten would be interested in the rights.

1947 Further, other directors confirmed that they were aware of the interest from Network Ten. Mr Tanner was told in late 2012 that Nine and Network Ten had expressed some interest in the domestic broadcast rights. Mr Fitzgerald understood that Network Ten had expressed interest in the rights as it was discussed in board meetings.

1948 Further, Mr Mitchell had only secondhand information about any communications between Network Ten and TA management. He had been told by Mr Wood in or about May 2012 – approximately six months before the 3 December 2012 board meeting – only that "Ayles had had discussions with Network Ten in respect of the Domestic Broadcast Rights and that Network Ten was indicating that they might be willing to pay $40 or $50 million per annum".

1949 Further, to the extent that any figures had been mentioned at all by Network Ten, the evidence on this point was contradictory.

1950 Further, as Mr Wood and Mr Ayles explained it, any numbers mentioned to them by Network Ten were equivocal. Mr Marquard also gave evidence that any mention of figures by Network Ten was heavily qualified and equivocal.

1951 Mr Ayles gave evidence that he knew there was a risk that Network Ten was simply posturing. He was more focused on the competitive tension that interest from Network Ten would generate. Mr Wood stated that he "listened to what [Mr McLennan] had to say. Was very respectful and that was pretty much it". It is clear that TA management placed little reliance on any figures mentioned by Network Ten.

1952 Further, Mr Wood knew much more about the discussions with Network Ten than Mr Mitchell. He chose not to refer to any numbers from Network Ten in his report to the TA board on 3 December 2012.

1953 Further, it was for Mr Wood, as CEO, to form a judgment about what to tell the TA board about the level of interest from Network Ten as at 3 December 2012. He told the TA board about Network Ten's interest. The level of disclosure to the board was reasonable in the circumstances, particularly given that TA had to honour its ENP commitment to Seven before it could seriously entertain negotiating with any rival bidder.

1954 ASIC's contention that Mr Mitchell contravened his directors' duties by not telling the board of this limited information at the 3 December 2012 board meeting is again tenuous to say the least.

1955 Fourth, ASIC alleges that at the 4 March 2013 board meeting, Mr Mitchell did not inform the board that Network Ten was "very serious" about acquiring the domestic broadcast rights and might pay in excess of $40 million per annum for those rights, and that he thereby contravened section 180(1). ASIC further alleges that Mr Mitchell contravened section 182(1), because he used his position "improperly, as he concealed relevant information from the board on a subject of great financial significance for TA and … to gain an advantage for Seven by seeking to downplay interest from rival bidders for the domestic broadcast rights".

1956 But Mr Mitchell had acquired no further information about the level of interest of Network Ten between the time of the 3 December 2012 and the 4 March 2013 board meetings.

1957 Further, the evidence established that Network Ten was discussed again at the 4 March 2013 meeting.

1958 Mr Tanner's evidence was that he asked why TA was not putting the domestic broadcast rights out to tender in order to get a better idea of the value of the rights. Mr Mitchell responded to the effect that Network Ten was not strong enough financially and that Nine had spent its money on the NRL.

1959 Mr Healy said that Mr Wood told the board that Nine and Network Ten had both expressed interest in the rights. In response, Mr Healy said words to the effect, "I was approached by an executive from Ten. He told me that Ten was interested in the rights." Mr Healy said he did not recall any of the directors saying anything in response.

1960 Following Mr Wood's mention of Network Ten, Mr Healy's recollection was that Mr Mitchell said words to the effect, "Channel Ten is in an unstable financial state. It would be a risk to go with Channel Ten given their financial position". ASIC's case is not made out.

1961 Fifth, ASIC alleges that Mr Mitchell never convened a meeting of the subcommittee that was formed by resolution of the board at the 4 March 2013 meeting, and that he took no step to ensure that it conducted any business or fulfilled its function, and that he thereby contravened s 180(1). ASIC further alleges that Mr Mitchell contravened s 182(1), because he used his position "improperly, as the failure of the sub-committee to fulfil its functions meant that it could not give the TA board the advice it needed to assess Seven's offers and … to gain an advantage for Seven by depriving the TA board of the advice and information it needed properly to assess Seven's offers".

1962 In response to a request for further and better particulars of these allegations, ASIC said that:

> The advice that the TA board needed from the board sub-committee was:
>
> (i) advice about market conditions for sports broadcasting rights in Australia at that time;
>
> (ii) advice whether there were other realistic bidders for the broadcast rights apart from Seven;
>
> (iii) analysis of the Seven offer, its true value to TA and whether it could be bettered by a competitive bidding process.
>
> The advice and information which the TA board needed to properly assess Seven's offer was:
>
> (i) advice about market conditions for sports broadcasting rights in Australia at that time;
>
> (ii) advice about whether there were other realistic bidders for the broadcast rights apart from Seven;
>
> (iii) analysis of the Seven offer, its true value to TA and whether it could be bettered by a competitive bidding process.

1963 Now as I have set out much earlier, the board resolution on 4 March 2013 establishing the subcommittee was:

> Mr Mitchell (Chairman), Mr Freeman, the President and the Chief Executive Officer would form a Sub-Committee to consider the domestic television rights renewal and report back to the Board with recommendations as required.

1964 Prior to the resolution being passed, Mr Wood had provided an update to the TA board on domestic television rights. He reported that the "official" ENP with Seven would commence on 1 April 2013. The board was aware from the 3 December 2012 board meeting that discussions with Seven were underway to attempt to reach a deal before the ENP. Mr Wood had told the board he thought a deal with Seven was close and that TA should go early with its natural partner.

1965 In his update to the board on 4 March 2013, Mr Wood said that Seven's November offer, which had been discussed at the 3 December 2012 board meeting, essentially remained unchanged. He told the board that Seven had not improved its offer from what was previously discussed. He said that TA had obtained a valuation from Gemba, valuing the rights at around $40 million. This figure was discussed at length as a "benchmark". Mr Wood referred to the second IMG offer. Mr Mitchell said that IMG was not as financially viable as a network. Mr Wood made a statement to the effect that he believed Seven would "come to the party" with a higher offer during the ENP. Some discussion followed about how much Mr Wood would be able to get up Seven's November offer.

1966 Mr Tanner asked why TA was not putting the rights out to tender in order to get a better idea of the value of the rights. Mr Mitchell responded that Network Ten was not strong enough financially and Nine had spent its money on the NRL. Both propositions were unexceptional and well known to the other directors of the board. In any event, the rights could not go out to tender until after the expiration of the ENP. The purpose of the ENP was to seek to negotiate a satisfactory deal with Seven.

1967 After this debate, the directors arrived at a position where they wanted to trigger the ENP to get the process underway so Seven would put an improved offer to TA. The board, in effect, wanted to move ahead into the ENP in the expectation of getting a better offer from Seven. The board's decision to proceed with negotiations with Seven in the ENP, to see if a further offer with an increase in rights fees which was satisfactory to TA could be obtained from Seven, was confirmed at the 15 April 2013 board meeting.

1968 There is no evidence to support the proposition that the function of the subcommittee established by the TA board was to conduct analysis of the kind alleged by ASIC. The terms of the board's resolution were clear. The intended function of the subcommittee was to consider the domestic television rights renewal and report back to the board with recommendations as required. The board had not prescribed any particular functions for the subcommittee beyond the making of recommendations to the board at the appropriate time.

1969 Nor does the evidence support the proposition that Mr Mitchell breached his directors' duties by failing to ensure that the subcommittee conducted any business or carried out its function.

1970 Mr Wood provided Mr Mitchell with the board subcommittee plan on 8 March 2013 of which Mr Mitchell was justifiably critical, telling Mr Wood he would "put your paper on hold until we can speak".

1971 In accordance with the desire of the board expressed at the 4 March 2013 meeting, TA proceeded into the ENP in April 2013 in the expectation of getting a better offer from Seven.

1972 There was a TA board meeting of 15 April 2013, at which Mr Mitchell was not present. Mr Wood gave evidence that he could not recall the discussion at that board meeting, but his written report in the board pack ahead of the meeting was to the effect that TA intended to lock in a long form deal with Seven at an offsite meeting in early May.

1973 The intended role of the subcommittee was then overtaken by events. Negotiations during the ENP did not commence in substance until an off-site meeting between representatives of TA and Seven on 9 May 2013. They resulted in an impasse. The next step was Mr Wood's meeting with Mr Worner in the latter's office in Sydney on 16 May 2013.

1974 Mr Wood reached an in-principle agreement with Seven on the terms of a renewal of the domestic broadcast rights on 16 May 2013, and Seven submitted a written revised offer in accordance with that in-principle agreement on Friday, 17 May 2013. Mr Wood took Seven's final offer to the board for approval the next business day, Monday 20 May 2013.

1975 As Mr Healy explained in his written evidence:

> I responded [to Mr Wood] with words to the effect that "given the timing and the terms of the offer, you should put the offer straight to the Board as the whole of the broadcast rights sub-committee is on the Board". By this, I meant that it was not practical to hold a meeting of the sub-committee before the board meeting. 17 May 2013 was a Friday, and the Board meeting was scheduled for the following Monday 20 May 2013. I was due to fly to Melbourne for that meeting on Sunday 19 May 2013. This meant that there was not enough time to have a meeting of the sub-committee. Further, as the sub-committee was tasked to make a recommendation to the Board, and as all members of the sub-committee were on the Board, it seemed to me to be sensible to allow Wood to present Seven's offer directly to the entire Board, and the views of the members of the sub-committee could be ascertained in the course of ascertaining the views of all the members of the Board.

1976 At the 20 May 2013 board meeting, Mr Wood tabled Seven's final offer. Dr Young asked whether the subcommittee had a chance to discuss the offer.

1977 The signed minutes of the board meeting of 20 May 2013 correctly record the ensuing discussion:

> In response to a query from Dr Young as to whether the committee designated to make recommendations to the Board in relation to the domestic broadcast rights deal had a chance to discuss the offer, the President advised that the offer had only been received the previous Friday. Mr Mitchell advised that his recommendation was to accept the offer.

1978 ASIC's contention that Mr Mitchell did not convene any business of the subcommittee to gain an advantage for Seven by depriving the TA board of the advice and information it needed to properly assess Seven's offers is untenable.

1979 Seven's final offer was provided during the ENP. The TA board had been told about the Gemba valuation, the IMG offers and the potential interest of Nine and Network Ten. Each member of the subcommittee was present at the 20 May 2013 meeting. Seven's final offer was the subject of an enthusiastic and unreserved recommendation by Mr Wood who told the board that Mr Worner had opened Seven's books to him and he had satisfied himself that the domestic rights fee of $195.1 million was about as much as Seven could afford to pay.

1980 No director sought to defer consideration of the offer to enable the subcommittee to make a recommendation. That was because the board was satisfied that it had all the information it needed to make an informed decision.

1981 Sixth, ASIC alleges that, at the 20 May 2013 board meeting, Mr Mitchell said that he recommended that Seven's final offer be accepted, and that he thereby contravened section 180(1). ASIC further alleges that Mr Mitchell contravened section 182(1), because he used his position "improperly, as he made a recommendation which if accepted, would not be in TA's best interest and … to gain an advantage for Seven by seeking to ensure that it was awarded the domestic broadcast rights for a further five years".

1982 In response to a request for further and better particulars of this allegation, ASIC said:

> The acceptance of Seven's final offer was not in the best interests of TA as it denied TA the opportunity to secure a broadcast rights deal for a higher price than what Seven offered.

1983 But Mr Wood, the former directors of TA called by ASIC, and Mr Healy all gave evidence that the Seven deal was in the best interests of TA for a range of reasons that I have already discussed.

1984 Mr Wood was ASIC's main witness in the proceeding and he was clear that Seven's final offer was a great result for TA. He unreservedly recommended Seven's final offer to the TA board on 20 May 2013.

1985 As I have indicated, three main issues evolved in the course of the negotiations. TA wanted to take over the role of host broadcaster. Ultimately it achieved this. Further, TA wanted to enter into a long form agreement with Seven. It also achieved this. Further, TA was looking for a significant uplift in rights fees. It also achieved this. Further, TA had a number of subsidiary and related objectives in the negotiations, including increased control over archive footage, much more extensive exploitation of digital and streaming media, and steady growth in the number of courts and matches covered. It also achieved them.

1986 The negotiations with Seven culminated in a series of meetings and conversations in May 2013, during the ENP, between TA and Seven management.

1987 As I have previously set out, the first relevant meeting was between Mr Wood and Mr Martin at a restaurant in Toorak on 7 May 2013. The meeting was held in advance of a scheduled "off-site" meeting between the wider management teams at the Olsen Hotel in South Yarra on 9 May 2013.

1988 Mr Wood told Mr Martin that the domestic broadcast rights had been valued at $40 million per annum and said something like that "$40 million is the take-off table number; otherwise no deal-it will go to market". Mr Martin indicated that Seven might be willing to agree to TA becoming the host broadcaster, but he said "we can't do" $40 million. In response, Mr Wood said:

> [Y]ou need to make a better offer. Don't get into this meeting, the 9th and not be ready for, you know, a serious discussion about the rights fee, host production and some of the other issues such as archive and so on that were items of concern.

1989 The second relevant meeting occurred at the Olsen Hotel in South Yarra on 9 May 2013. Mr Wood, Mr Ayles, Mr Browne, Mr Roberts, Mr George and Mr Perrins attended for TA. Mr Worner, Mr McWilliam, Mr Martin and Mr Shtein attended for Seven. The meeting lasted the whole day.

1990 From Mr Wood's perspective, everyone knew that TA was looking for a rights fee around the $40 million per year mark and for TA to take over the host broadcast role. By the end of the day, the parties were close to a deal. Seven was sitting at $190.5 million in rights fees over 5 years, while TA was sitting at around $200 million.

1991 On 15 May 2013, Mr Wood had a telephone conversation with Mr Martin. He said to Mr Martin words to the effect that he needed Seven to pay $200 million over five years. He said that the TA board was expecting a rights fee of $200 million.

1992 The following day, 16 May 2013, Mr Worner and Mr Wood met at Seven's offices in Sydney. At the start of the meeting, Mr Wood told Mr Worner that Seven's position was unacceptable to TA and that he should open his advertising books. Mr Worner showed Mr Wood Seven's advertising figures on a spreadsheet. The figures showed that the amount of advertising revenue that Seven was predicting from future Australian Opens was about equal to the amount of rights fees Seven was offering. Mr Wood talked Mr Worner up to a figure of $195.1 million over five years. Based on the figures he had seen on the spreadsheet, Mr Wood was satisfied that this was the maximum amount that Seven could be expected to pay.

1993 The following day, Friday 17 May 2013, Seven sent its final offer to TA, providing relevantly for rights fees of $195.1 million over five years.

1994 At the board meeting on the next business day, Monday 20 May 2013, Mr Wood gave a report to the board about the negotiations. Let me summarise again what I have already set out in more detail elsewhere. He tabled Seven's final offer and told the board that the fee he had negotiated of $195 million over five years was a "great result". He said that he was satisfied that this figure was about the maximum amount that TA could get out of Seven for the broadcast rights. He said that Mr Worner has opened Seven's books to him to demonstrate the direct advertising revenue which Seven generated from the AO broadcast and that it was the maximum Seven could pay for the rights. He said that TA should be able to take over the host broadcast function. He said that this was one of the issues that had to be nailed down in a long form agreement. Mr Wood recommended that the TA board accept Seven's final offer. Mr Mitchell told the board that he believed that Seven was the natural partner of tennis. He congratulated Mr Wood on securing the offer. He said that Mr Wood had his complete support and recommended the board approve the offer.

1995 Further, Mr Wood agreed that the board had not delegated to any one director the authority to bind TA to a rights deal and that this was always a matter the board had to approve. He gave the following evidence under cross-examination by Dr Collins QC:

> See, Mr Wood, as at 20 May 2013, you had extracted an offer from Channel 7 that you wholeheartedly recommended to the board; correct?---Yes.
>
> You did that, having satisfied yourself that it was the best offer you could get from Channel 7?---Yes.
>
> You did so knowing that if you allowed the external – the ENP to expire and went to market, there were substantial risks to Tennis Australia?---Yes.
>
> Having obtained an offer from Channel 7 for $195 million on 20 May, you had

> resolved that Tennis Australia ought to accept that offer and not take the risk of going to competitive tender; correct?---Yes.
>
> Thank you. And you sent your email to the board on 13 June in which you set out why you considered the deal to be a very good deal?---Yes, a script.
>
> You remain of the view today that it was a very good deal?---Yes, it was a good deal.
>
> Now, just a couple of final questions, Mr Wood then I will be able to stop. Can I put this to you: that at no time prior to the board meeting on 20 May 2013 had the board of Tennis Australia made a decision about whether it would go with Channel 7 as opposed to any other party?---They had made a decision, no.
>
> No one ever suggested to you – I withdraw that. The board never said to you we are going to end up doing a deal with Channel 7, just do your best?---The board?
>
> Yes?---No. The board didn't say that. When you say the board, you've got all these different board members, the instructions and the authorisation came from the president and the media expert, which was Harold.
>
> The ultimate decision came from the board as a whole, didn't it?---Yes, true.
>
> The authority to enter into a deal resided with the board and nobody else?---Yes.
>
> And the board didn't tell you at any time prior to 20 May 2013 that you had better do a deal with Seven?---No.
>
> Thank you. And the board didn't have any plan that it conveyed to you that although you should do your best in your negotiations, ultimately the board would award the rights to Channel 7 no matter what?---They didn't say that, no.
>
> As you understood the board had no such plan; correct?---They weren't – that wasn't contemplated, no.

1996 The TA board unanimously approved Seven's final offer. No member of the board spoke against doing so. No member of the board suggested that, or even queried whether, Seven's final offer should be rejected, the ENP allowed to expire, and the rights be put to a competitive tender on the open market.

1997 Mr Tanner supported the resolution approving Seven's final offer. He was in favour for the following reasons. He had satisfied himself that TA had obtained appropriate advice as to the valuation of the rights in the form of the Gemba report at up to $40 million. Further, Mr Wood had advised that he had seen Seven's internal figures and was satisfied that the offer was the maximum he thought he could get out of Seven. Further, the amount of Seven's final offer was $195 million over 5 years, or $39 million per annum, which was well within the range of the Gemba valuation. Further, Mr Tanner thought that the alternative of taking the rights to tender was not likely to result in a better outcome for TA. Further, Mr Tanner was concerned about a risk of another network overpaying for the rights which could result in a negative outcome for TA, for example, by the network cutting back in various ways.

1998 Mr Fitzgerald's primary consideration with respect to the domestic rights was to safeguard the image of tennis. The quality of the broadcast and how the game was projected to the Australian public was the most important thing for him. The amount of the rights fees was not the primary issue. He wanted a broadcaster to promote the sport. He thought Seven was a polished broadcaster.

1999 Mr Freeman supported the resolution. His view was that it was commercially an "outstanding outcome" and an "exceptional result" for TA. Mr Freeman gave the following evidence under cross-examination by Dr Collins QC:

> You said in answer to a question from our learned [friend], Mr Pearce, that you regarded the outcome that was reached on 20 May 2013 as a win-win outcome. Could I just get you to explain what you meant by that?---Firstly, this is probably the third time I've made this point. Commercially, I think it was an exceptional result, that is, financially it was 195.1 million. That did include a – in these types of transactions, a relatively small amount of contra and we were able to recover and fully control the host broadcasting rights. And I think we thought – and there was a strategy around why that was important but I don't know whether we knew fully what the revenues might be in relation to that. But there was a strong direction led by management and then endorsed by the board to take control of the media content, control our customers, control our relationship, have 22 courts that could beam something anywhere in the world. So – and in that sense, it was a very – embodied in the 195 million were other matters like global rights to digital content; all those things added to a very good outcome. I personally had a strong sense of comfort with the Channel 7 outcome, given that we had commercially succeeded in what seemed to me extraordinary going from 18 per cent increase to an 86 per cent increase. But I had a very strong level of operational comfort in dealing with Seven who we had so much experience with as a counterparty, and transitioning through them into the host broadcasting. That is, if we got into difficulty, I felt that there would be some support around that. So - - -
>
> Can I just ask you – sorry, I didn't mean to cut you off?---So you asked me the question why was it a win-win. I would assume Channel 7 would not have provided the renewal on those terms unless they were comfortable, and I thought that we were very comfortable as Tennis Australia.
>
> Can I ask you a counterpoint to that question which is an option as at 20 May 2013 would have been to reject the Channel 7 offer, allow the exclusive negotiating period to expire and take the rights to a competitive tender; what did you see as being the risks of that approach?---I think that would have been a most – extremely risky decision by the board to do that, having – it would have been, from what I saw about the media there seemed to be leakage everywhere around the place and I'm reasonably confident in assuming that that might have leaked into the media. It would have eroded our relationship with Channel 7 bearing in mind that we had a contractual agreement with Seven that went through to September, six months – it was a six months due diligence agreed – exclusivity, sorry, not digital, exclusivity, so it would have eroded that relationship, and I don't think we could have dealt with anyone in that period anyway. Contractually, I would have thought Seven would have had a view on that. And then when we – in September, October we had come back to the market and if IMG or who we have expressed views on as to why we didn't think they were a suitable counterparty commission-based agent; they charge up to 20 per cent commission. I can't remember what the deal was on that, I didn't read it yesterday. We expressed our

> concern about the viability of Channel 10. We talked about – or we may not here, but Channel 9 having both tennis and cricket, that doesn't work in my – I think we needed a champion broadcaster that focuses and devotes their attention on tennis. So we would have been in a position then of having undermined our relationship with Seven, how would we deal with the market generally? I don't know. It would have been a very high risk and, in my mind, it would have been totally unacceptable as a director.

2000 Mr Freeman's view was that allowing the ENP to end without a deal with Seven and going to market would have been extremely risky for TA.

2001 Mr Wood recommended, and the board of TA approved, the deal with Seven having regard to the risks of not accepting Seven's final offer and going to market at the end of the ENP. Even if there may, speculatively, have been an opportunity to get a higher price for the domestic broadcast rights, there was equally a very real risk that there would be no higher amount on offer or that the only amounts on offer would be lower. I have discussed this earlier.

2002 There were also non-price factors rightly weighing on the minds of Mr Wood and the board at the 20 May 2013 board meeting, including that Seven was the number one rated network, TA had a forty years long relationship with Seven, and Seven's experience would assist TA in making a smooth transition to being the host broadcaster. All of these matters were legitimate for TA to take into account as I have discussed earlier.

2003 In my view there is no substance at all to ASIC's assertion that Mr Mitchell breached his directors' duties by recommending at the 20 May 2013 meeting that the board approve Seven's final offer.

2004 Seventh, ASIC alleges that at the 20 May 2013 board meeting, Mr Mitchell said that the subcommittee's recommendation was to accept Seven's final offer, and that he thereby contravened s 180(1). ASIC further alleges that, by the same conduct, Mr Mitchell contravened s 182(1), because he used his position "improperly, as he misled the TA board about the sub-committee's position and … to gain an advantage for Seven by seeking to ensure that it was awarded the domestic broadcast rights for a further five years".

2005 Now ASIC's case is substantially based on the draft minutes of the 20 May 2013 board meeting, which relevantly read:

> In response to a query from Dr Young as to whether the committee designated to make recommendations to the Board in relation to the domestic broadcast rights deal had a chance to discuss the offer, the President advised that the offer had only been received the previous Friday. Mr Mitchell advised that the committee's recommendation was to accept the offer.

2006 The draft minutes were included in the board pack for the next TA board meeting on 22 July 2013. At the 22 July 2013 board meeting, the board resolved, without dissent, to affirm the draft minutes, subject to replacing the words "the committee's" in the above passage with the word "his". I note that this was prior to any suggestion of any ASIC investigation or any complaint to ASIC by Dr Young.

2007 The signed minutes of the board meeting on 20 May 2013 thus relevantly read:

> In response to a query from Dr Young as to whether the committee designated to make recommendations to the Board in relation to the domestic broadcast rights deal had a chance to discuss the offer, the President advised that the offer had only been received the previous Friday. Mr Mitchell advised that his recommendation was to accept the offer.

2008 In my view the signed minutes more accurately record what was said on 20 May 2013.

2009 Mr Davies recalled Mr Mitchell saying at the meeting that it was his recommendation to accept the offer. He did not recall there being any other discussion about the subcommittee at the meeting. Mr Freeman gave evidence that he agreed with the corrected minutes. When challenged in re-examination by ASIC's senior counsel, Mr Freeman affirmed that although he could not recall the exact words Mr Mitchell used, he did not think that Mr Mitchell would have said that it was the subcommittee's recommendation to accept the offer, because they had not met.

2010 The account of what occurred as set out in the signed minutes is also more probable. Mr Healy had advised the board, in response to Dr Young's question about whether the subcommittee had had a chance to consider the offer, that the offer had only been received on the previous Friday. What Mr Healy said conveyed that the answer to Dr Young's question was "no".

2011 Further, if Mr Mitchell had said what ASIC alleged, one would have expected the other members of the subcommittee, all of whom were present at the 20 May 2013 board meeting, namely Mr Healy, Mr Wood and Mr Freeman, to have corrected Mr Mitchell. There was no evidence of any response from the other members of the subcommittee, or any other member of the board for that matter, to the statement made by Mr Mitchell.

2012 I reject ASIC's allegation of contravention.

2013 Eighth, ASIC alleges that Mr Mitchell did not disclose at the board meeting on 20 May 2013 the level of interest in the domestic broadcast rights of Network Ten or the opinion of Gemba that TA had the opportunity to increase significantly the amount it received for the domestic

broadcast rights, and that he thereby contravened section 180(1). ASIC further alleges that, by the same conduct, Mr Mitchell contravened section 182(1), because he used his position "improperly, as he withheld relevant information from the board of great financial significance for TA and … to gain an advantage for Seven by depriving the board of relevant information needed to assess Seven's offer".

2014 But the board was told about interest from Nine and Network Ten at the 3 December 2012 board meeting. There was discussion to the effect that the directors would expect them to be interested. There was also press coverage at the time disclosing Network Ten's interest in the broadcast rights. A number of the directors confirmed that they were aware of interest from Nine and Network Ten, for example, Mr Tanner and Mr Fitzgerald.

2015 Further, the board was told well prior to 20 May 2013 that Gemba had valued the domestic broadcast rights at around $40 million. This figure was discussed at length as a "benchmark". Other directors gave evidence confirming they were aware of the Gemba valuation at up to $40 million or that management had otherwise obtained a valuation from Gemba, for example, Mr Tanner and Mr Freeman.

2016 I also reject ASIC's case on this aspect.

2017 Ninth, ASIC alleges that at the 20 May 2013 board meeting, Mr Mitchell advised the board that Nine was not interested in bidding for the domestic broadcast rights because it was committed to acquiring the cricket rights and that Network Ten was not in a position and could not afford to pay for the domestic broadcast rights, and that he thereby contravened section 180(1). ASIC further alleges that, by the same conduct, Mr Mitchell contravened section 182(1), because he used his position "improperly, as the board was thereby misled about the true market for the domestic broadcast rights and … to gain an advantage for Seven by leading the TA board to believe that only Seven was interested and able to acquire the domestic broadcast rights".

2018 In response to a request for further and better particulars of this allegation, ASIC said that:

> The "true market for broadcast rights" involved potential competition from IMG, Network Ten and Nine Entertainment.

2019 But the TA board was well aware at all relevant times of the interest of Nine and Network Ten and IMG in the domestic broadcast rights.

2020 But there is a more fundamental difficulty for ASIC. Its case is based on Dr Young's evidence that Mr Mitchell made statements to the effect alleged at the 20 May 2013 board meeting. But Mr Wood could not recall such statements being made at the meeting. And no other witness gave evidence that Nine and Network Ten were discussed at the 20 May 2013 board meeting. Further, there is no reference to any such discussions in the minutes of the meeting.

2021 Now Mr Tanner gave evidence that Nine and Network Ten were discussed at the 4 March 2013 board meeting. Mr Tanner's evidence was that, at that meeting, he asked why TA was not putting the rights out to tender in order to get a better idea of the value of the rights, and Mr Mitchell responded that Network Ten was not strong enough financially and Nine had spent its money on the NRL. He gave evidence that he was independently aware of these matters. It was well known to the other directors of the board that Network Ten was in a precarious financial position and Nine would have had difficulty accommodating the Australian Open in its schedule. I prefer Mr Tanner's evidence. It is more likely that any discussion about Nine and Network Ten occurred at the 4 March 2013 board meeting, in response to the question put by Mr Tanner, than at the 20 May 2013 board meeting, where the focus was Mr Wood's recommendation in respect of Seven's final offer. Moreover, Dr Young's recollection of some of the events was poor, as I have discussed elsewhere.

2022 Accordingly, ASIC's allegation against Mr Mitchell concerning the 20 May 2013 meeting on this aspect fails.

(d) Summary

2023 Notwithstanding the breadth of ASIC's case against Mr Mitchell, I have only sustained a narrow part of its case concerning Mr Mitchell's conduct in the latter part of 2012 which in my view amounted to three contraventions of s 180 (see at [1713] to [1741]).

CONCLUSION

2024 For the foregoing reasons, ASIC's case against Mr Healy will be dismissed with costs.

2025 As for ASIC's case against Mr Mitchell, I have found for ASIC on some parts of its case concerning the conduct of Mr Mitchell in the latter part of 2012 that in my view amounted to contraventions of s 180. But I have rejected the balance of its case. I will hear further from the parties as to the consequential orders and directions that I should make concerning the penalty phase and other matters.

I certify that the preceding two thousand and twenty-five (2025) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach.

Associate: 

Dated: 31 July 2020