Federal Court of Australia

Seven Network v Cricket Australia (No 2) [2021] FCA 1032

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| File number: | VID 764 of 2020 |
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| Judgment of: | **ANASTASSIOU J** |
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| Date of judgment: | 27 August 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** whether non-party is entitled to inspect documents pursuant to r 2.32 of the *Federal Court Rules 2011* (Cth) – whether granting access to restricted documents would do irreparable harm to a party’s commercial interests – request for access granted, subject to making of confidentiality order pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth)  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), ss 37AE, 37AF, 37AG*Federal Court Rules 2011* (Cth), r 2.32 |
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| Cases cited: | *Appleroth v Ferrari Australasia Pty Limited* [2020] FCA 756*Australian Securities and Investments Commission v Cassimatis (No 4)* [2015] FCA 465*Australian Broadcasting Commission v Parish* [1980] FCA 33, 29 ALR 228*Baptist Union v Roberts* [2015] FCA 1068; 241 FCR 135*Central Equity Ltd v Chua* [1999] FCA 1067*Churche v Australian Prudential Regulation Authority (No 3)* [2006] FCA 1168*Isaac v Dargan Financial Pty Ltd* [2018] NSWCA 163; 98 NSWLR 343*Mobil Oil Australia Ltd & McDonalds Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34*Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193; 257 FCR 62*Strategic Management Australia AFL Pty Ltd v Precision Sports and Entertainment Group Pty Ltd* [2015] VSC 717 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 40 |
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| Date of last submissions: | 23 March 2021  |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Prospective Applicant: | Mr D. Thomas SC with Mr H. Atkin |
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| Solicitor for the Prospective Applicant: | Atanaskovic Hartnell |
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| Counsel for the Prospective Respondent: | Mr J. Gleeson with Mr A. Dinelli |
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| Solicitor for the Prospective Respondent: | K&L Gates |

ORDERS

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|  | VID 764 of 2020 |
|   |
| BETWEEN: | SEVEN NETWORK (OPERATIONS) LIMITED (ACN 65 052 845 262)Prospective Applicant |
| AND: | CRICKET AUSTRALIA (ACN 53 006 089 130)Prospective Respondent |

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| order made by: | ANASTASSIOU J |
| DATE OF ORDER: | 27 AUGUST 2021 |

THE COURT ORDERS THAT:

1. Pursuant to s 37AF of the *Federal Court of Australia Act**1976* (Cth),until further order of the Court, the following documents be redacted or marked as confidential (as the case may be) and not be capable of inspection pursuant to r 2.32 of the *Federal Court Rules 2011* (Cth) by a person who is not a party to the proceeding:
	1. in the affidavit of Lewis Martin affirmed on 30 November 2020 (the **First Martin Affidavit**):
		1. sub-paragraphs (a) and (b) of paragraph 10 [CB 84]; and
		2. that sub-paragraph of paragraph 65, beginning "I am therefore … " and ending “the prior year’s cricket Season” [CB 104];
	2. in Annexure LM-1 to the First Martin Affidavit:
		1. pages 1 to 178 [CB 108-275];
		2. pages 229 to 231 [CB 336-338];
		3. on pages 234 to 235 [CB 341-342], the paragraphs under the heading "Additional impacts of the Force Majeure Events";
		4. on pages 243 to 244 [CB 350-351], paragraph 19 including its subparagraphs;
		5. page 250 [CB 357];
		6. page 251 to 255 [CB 358-362];
		7. page 284 [CB 391];
		8. on page 285 [CB 392], the paragraph numbered 5;
		9. on page 289 [CB 396], paragraphs 11(A) and 11(B);
		10. on pages 289 to 290 [CB 396-397], the paragraph numbered 12;
		11. on page 292 [CB 399], the paragraph numbered 5;
		12. on pages 295 to 296 [CB 402-403], the paragraph numbered 9;
		13. on pages 303 and 305 [CB 410 and 412], the monetary amount following the passage "2. CA has allocated a budget of over … ";
	3. in the affidavit of Stephanie Helen Beltrame Sturrock affirmed on 16 February 2021 (the **First Beltrame Affidavit**):
		1. on page 8 [CB 628], the paragraphs 20 and 21;
		2. on page 8 [CB 628], the paragraph numbered 22;
		3. on pages 11 to 12 [CB 631-632], the paragraph numbered 35;
		4. in paragraph 56, the comments on page 18 [CB 638] attributed to Mr Warburton;
		5. the Confidential Schedule [CB 646-647];
	4. in Annexure SBS-1 to the First Beltrame Affidavit:
		1. pages 072 to 075 [CB 720-723];
		2. on page 107 [CB 755], the paragraphs under the heading "Relevant contractual obligations";
		3. on pages 113 to 114 [CB 761-762], the paragraphs under the heading "Relevant contractual obligations";
		4. on page 125 [CB 773], the paragraph beginning with "To that end …";
		5. on page 127 [CB 775], the paragraph beginning with "To that end …";
		6. on page 129 [CB 777], the sentence beginning with "To that end …";
		7. pages 136 to 139 [CB 784-787];
		8. on page 145 [CB 793], the paragraph beginning "As you know …";
		9. on pages 147 to 148 [CB 795-796], the paragraph beginning "change the proposed quarantine … ";
		10. on page 148 [CB 796], the paragraph beginning "The reasons why …";
		11. page 150 [CB 798];
		12. on pages 151 to 153 [CB 799-801], the paragraphs under the heading "Damages/Rights Fee reduction pursuant to clauses 6.3(b)(ii) and 6.3(d)(ii)";
		13. pages 155 to 157 [CB 803-805];
		14. pages 158 to 159 [CB 806-807];
		15. pages 162 to 163 [CB 810-811];
		16. on pages 164 to 165 [CB 812-813], the paragraphs under the heading "23 September Notice";
		17. page 167 [CB 815];
		18. page 174 [CB 822];
		19. on pages 194 to 195 [CB 842-843], the paragraph numbered 1.2 including its subparagraphs;
		20. on pages 201 to 202 [CB 849-850], the paragraph numbered 6;
		21. on pages 203 to 204 [CB 851-852], the paragraph numbered 9;
		22. on page 206 [CB 854], that sub-paragraph of the paragraph numbered 16(B) beginning “each of those” and ending with “in issuing them”;
		23. pages 215 to 216 [CB 863-864];
		24. on page 218 [CB 866], the first paragraph;
		25. on pages 220 to 221 [CB 868-869], the paragraphs under the heading "Determining breach before the end of the 2020/2021 season";
	5. in the affidavit of Christien William Corns sworn 15 December 2020 (including the Confidential Schedule filed on 15 December 2020) (the **First Corns Affidavit**):
		1. on pages 021 to 022 [CB 596-597], the paragraph numbered 1.2 including its subparagraphs;
		2. on pages 029 to 030 [CB 604-605], the paragraph numbered 6;
		3. on pages 031 to 032 [CB 606-607], the paragraph numbered 9;
		4. on page 034 [CB 609], the paragraph beginning that sub-paragraph of the paragraph numbered 16(B) beginning “each of those” and ending with “in issuing them”;
		5. the Confidential Schedule [CB 619-620];
	6. in the affidavit of Stephanie Helen Beltrame Sturrock affirmed on 12 March 2021 (the **Second Beltrame Affidavit**), the Confidential Schedule;
	7. Annexure SBS-2 to the Second Beltrame Affidavit; and
	8. in the Court Book, the materials referred to in paragraphs 1(a) to 1(g) above as they appear in the Court Book.

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

REASONS FOR JUDGMENT

ANASTASSIOU J:

# Introduction

1. These reasons are to be read alongside the background matters set out in *Seven Network v Cricket Australia* [2021] FCA 1031 at [1]-[35] (the **Preliminary Discovery Reasons**). For convenience, I adopt the abbreviations and definitions in the Preliminary Discovery Reasons in these reasons.
2. By a request dated 16 March 2021, a journalist from The Australian newspaper requested access to various restricted documents on the Court file in this proceeding (the **Request**). The Request is a ‘non-party search request’ made pursuant to r 2.32(4) of *Federal Court* ***Rules*** *2011* (Cth) to “assist in the fair and accurate reporting of matters of journalistic interest”.
3. It is likely that other persons, including other media organisations, will be interested in like materials. I invited the parties to make submissions in relation to the Request, given that the requested documents contain commercially sensitive information.
4. Briefly stated, Seven’s position is that any interested non-party should be granted leave to inspect the restricted documents, except any documents covered by a suppression order, in accordance with the overarching public interest in open justice.
5. Conversely, Cricket Australia opposes leave being granted to inspect the restricted documents in the Request unless appropriate redactions are made to suppress:
6. the terms of the MRA between Seven and Cricket Australia;
7. the Expert Determination conducted pursuant to the MRA;
8. draft schedules prepared by Cricket Australia for the conduct of the 2020-21 cricket season; and
9. other commercially sensitive information, disclosure of which may prejudice Cricket Australia in future dealings.
10. For the reasons that follow, I shall grant leave pursuant to r 2.32(4) of the Rules for non-parties to inspect the relevant documents, subject to certain documents being redacted or marked confidential, as the case may be. Those redactions and confidentiality orders are substantially, but not entirely, in the form proposed by Cricket Australia and subject to one matter of principle, namely, that the orders shall be made pursuant to s 37AF of the *Federal Court of Australia* ***Act*** *1976* (Cth) for the reasons I explain below.

# Background

1. Mr David Ross of The Australian newspaper seeks leave to inspect the following restricted documents (as defined in the Preliminary Discovery Reasons):
2. the First Martin Affidavit;
3. the Second Martin Affidavit;
4. the First Corns Affidavit, including the Confidential Schedule;
5. the First Beltrame Affidavit;
6. the Second Beltrame Affidavit;
7. Seven’s Outline of Submissions dated 26 February 2021;
8. Cricket Australia’s Outline of Submissions dated 5 March 2021;
9. Cricket Australia’s Submissions on Confidentiality dated 5 March 2021;
10. Seven’s Reply Outline of Submissions dated 10 March 2021;
11. Seven’s Submissions on Confidentiality dated 11 March 2021;
12. the Court Book filed on 15 March 2021;
13. a list of authorities filed on 15 March 2021; and
14. a joint bundle of authorities filed on 15 March 2021.
15. Rule 2.32 of the Rulesprovides:

(1) A party may inspect any document in the proceeding except:

(a) a document for which a claim of privilege has been made:

(i) but not decided by the Court; or

(ii) that the Court has decided is privileged; or

(b) a document that the Court has ordered be confidential.

(2) A person who is not a party may inspect the following documents in a proceeding in the proper Registry:

(a) an originating application or cross‑claim;

(b) a notice of address for service;

(c) a pleading or particulars of a pleading or similar document;

(d) a statement of agreed facts or an agreed statement of facts;

(e) an interlocutory application;

(f) a judgment or an order of the Court;

(g) a notice of appeal or cross‑appeal;

(h) a notice of discontinuance;

(i) a notice of change of lawyer;

(j) a notice of ceasing to act;

(k) in a proceeding to which Division 34.7 applies:

(i) an affidavit accompanying an application, or an amended application, under section 61 of the Native Title Act 1993; or

(ii) an extract from the Register of Native Title Claims received by the Court from the Native Title Registrar;

(l) reasons for judgment;

(m) a transcript of a hearing heard in open Court.

…

(3) However, a person who is not a party is not entitled to inspect a document that the Court has ordered:

(a) be confidential; or

(b) is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member.

Note: For the prohibition of publication of evidence or of the name of a party or witness, see sections 37AF and 37AI of the Act.

(4) A person may apply to the Court for leave to inspect a document that the person is not otherwise entitled to inspect.

…

1. Rule 2.32(3) prevents a person who is not a party from inspecting a document if the Court has ordered the document be “confidential” or “is forbidden from, or restricted from publication to, the person or a class of persons of which the person is a member”; that is, where the document is subject to a suppression or non-publication order: ***Porter*** *v Australian Broadcasting Corporation* [2021] FCA 863 at [91] (Jagot J). A suppression or non-publication order is an order made pursuant to Division 2 of Part VAA of the Act.
2. Relevantly within Part VAA, s 37AE of the Act provides:

In deciding whether to make a suppression order or non‑publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

1. By s 37AF of the Act, the Court may make a suppression or non-publication order in respect of “information that relates to a proceeding before the Court”, including “information lodged with or filed in the Court”: s 37AF(1)(b)(iv).
2. A suppression or non-publication order under s 37AF of the Act can only be made on the basis of one of the grounds in s 37AG(1). Those grounds include that the “order is necessary to prevent prejudice to the proper administration of justice”: s 37AG(1)(a).
3. One of the ways in which the administration of justice may be prejudiced is if people cannot come to the Court with confidence that commercially sensitive information (that might either be valuable to that party or to a third party) won’t be disclosed: see, eg, *Porter* at [84].
4. Cricket Australia does not expressly seek an order pursuant to s 37AF of the Act. However, it does so impliedly by submitting that the requested documents, or parts of such documents, be redacted or marked as confidential and not be capable of inspection by any person who is not a party to the proceeding.

# Seven’s position in relation to the Request

1. Seven submitted that the non-party should be granted access to inspect the specified documents sought. In particular, Seven submitted that the affidavits and exhibits have already been adduced in evidence and are therefore to be regarded as having been read aloud in open court: *Australian Securities and Investments Commission v Cassimatis (No 4)* [2015] FCA 465 at [9]-[10] (Edelman J). Seven further submitted that once adduced in this way, the documents have entered the public domain: *Isaac v Dargan Financial Pty Ltd* [2018] NSWCA 163; 98 NSWLR 343 at [174] (Gleeson JA, Bathurst CJ and Beazley P agreeing).
2. Seven also submitted that there is a strong presumption in favour of allowing inspection of anything adduced into evidence and inspection should only be refused in exceptional circumstances: *Baptist Union v Roberts* [2015] FCA 1068; 241 FCR 135 at [33]-[36] (Rangiah J). Accordingly, Seven submitted that the specified documents ought to be made available to non-parties unless the Court prohibits their disclosure or otherwise makes suppression and non-publication orders in respect of the documents under s 37AF of the Act.
3. In this respect, Seven’s position was that if Cricket Australia wanted to prevent public access to documents referred to in open court, it ought to have sought suppression or non-publication orders under Part VAA of the Act. Seven submitted that Cricket Australia has not made such an application, nor has it put before the Court any evidence which might justify the making of such an order in relation to the specified documents.

# Cricket Australia’s position in relation to the Request

1. Cricket Australia conceded that under the *General Practice Note on Access to Documents and Transcripts*, access to a restricted document is generally to be granted where the document (or the relevant parts of the document) has been admitted into evidence or read out in open court.
2. Notwithstanding the above, Cricket Australia rightly identified that the Court has a discretion under r 2.32 of the Rules to determine what access there should be to documents filed with the Registry: see, eg, *Central Equity Ltd v Chua* [1999] FCA 1067 at [20] (Weinberg J) in relation to the old rule; cited in *Appleroth v Ferrari Australasia Pty Limited* [2020] FCA 756 at [9] (Snaden J) in relation to the current rule. Accordingly, Cricket Australia submitted that there may be a proper reason that pursuant to r 2.32(3), or otherwise, the Court would make an order that specified documents, or parts thereof, remain confidential. As I have said above, the source of the power to make any of the restricted documents confidential is s 37AF of the Act, and I shall treat the application made by Cricket Australia as one made pursuant to that section.
3. Cricket Australia contended that the relevant reason for the Court to restrict access to the specified documents is the potential for full publication to lead to irreparable harm to Cricket Australia’s business interests by disclosing commercially sensitive information, causing Cricket Australia to suffer financial loss and/or a commercial disadvantage in future commercial dealings and negotiations.
4. Cricket Australia’s objections to the Request were both general and specific.

## Cricket Australia’s general objections

1. Cricket Australia submitted that the following general matters support the proposed redaction of the specified documents.
2. First, Cricket Australia submitted that much of the material has not been revealed to anyone other than to Seven and the Court.
3. Cricket Australia submitted that if the information contained in the requested documents were disclosed, it is likely to prejudice Cricket Australia’s ability to negotiate future media rights agreements with broadcast partners, as potential counterparties would become aware of the terms that Cricket Australia had agreed with Seven. Cricket Australia submitted that disclosure of this information would also lead to counterparties having a potential and/or perceived advantage over Cricket Australia in future media rights negotiations.
4. Second, the essence of Seven’s contention is that it may have a right to obtain relief as a result of Cricket Australia’s putative breach of cl 6.9(b) of the MRA. Accordingly, Cricket Australia submitted that disclosure of the affidavits and exhibits specified in the Request would not assist the public in a full and frank understanding of such a case. This position was analogous to the conclusion reached in *Strategic Management Australia AFL Pty Ltd v Precision Sports and Entertainment Group Pty Ltd* [2015] VSC 717 at [31], where Sifris J explained:

Finally, and in summary, restricting the disclosure of the Private Information does not impinge on the jurisprudential basis which underpins the principle of open justice. As stated, the ability to comprehend the case and evaluate the court’s decision and conduct is not compromised. Full scrutiny to detect any abuse of power, arbitrariness, or idiosyncratic behaviour, is not affected. Accordingly, preserving the confidentiality of the Private Information is, in my opinion, in the public interest for the reasons given.

1. Third, Cricket Australia submitted that much of the material before the Court has not yet been tested, or completely tested, given the nature of the preliminary discovery application and the importance of that application not being conducted as a “mini-trial”: see, eg, *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193; 257 FCR 62, Allsop CJ (at [2]) and Perram J (at [119], [126]).
2. Fourth, Cricket Australia submitted that it is otherwise not in the interests of justice for specific confidential and sensitive information to be disclosed in circumstances where Cricket Australia relied on much of that material in opposition to an application in respect of a proceeding which may never be commenced. Cricket Australia submitted that to find otherwise might not only signal that the Court was not paying proper regard to confidentiality but also “might open the way to abuse”: *Australian Broadcasting Commission v Parish* [1980] FCA 33, 29 ALR 228 at 235 (Bowen CJ).

## Cricket Australia’s specific objections

1. Cricket Australia also identified four specific matters in relation to which it said redactions and/or confidentiality orders were necessary. I paraphrase those four bases below.
2. First, Cricket Australia submitted that the MRA and its contents are confidential and many aspects of the document are commercially sensitive. Public disclosure of those terms is capable of prejudicing Cricket Australia’s ability to negotiate media rights agreements in the future.
3. Second, Cricket Australia submitted that the Expert Determination process undertaken by the parties is subject to the MRA’s confidentiality clause. The appointed expert is also subject to a confidentiality obligation. Cricket Australia submitted that confidentiality is proper and necessary, as the Expert Determination process involves a detailed assessment of the value of rights granted by Cricket Australia to Seven under the MRA. As above, disclosure of such commercially sensitive information would undermine Cricket Australia’s ability to negotiate future media rights agreements.
4. Third, Cricket Australia submitted that public disclosure of draft schedules proposed by Cricket Australia would prejudice Cricket Australia’s ability to negotiate with stadium management and other relevant stakeholders. Cricket Australia submitted that these are, in effect, commercial working papers, which are exploratory in nature and not Board-endorsed positions and it would therefore be improper that they be made public.
5. Fourth, Cricket Australia submitted that there are other materials containing commercially sensitive information. Amongst other things, that includes information about financial support provided to BBL teams and information regarding the performance of the BBL, in relation to which it is prudent to say less rather than more. I have also considered these specific objections to the disclosure of the restricted documents.

# Consideration

1. During the course of the preliminary discovery hearing, I observed that the principles applicable to protecting confidential information might be expected to operate more favourably in the context of a preliminary discovery application for a party seeking to suppress commercially sensitive material. There are good reasons for such an approach, including that at this stage, the proceeding is putative only and the prospective respondent is not yet subject to the full coercive powers of the Court in relation to discovery between parties to a proceeding.
2. This observation is consistent with observations by Cowdroy J in *Churche v Australian Prudential Regulation Authority (No 3)* [2006] FCA 1168 at [19], in which his Honour said:

It is important to bear in mind that the application before this Court is an application for preliminary discovery. Further, only an interlocutory hearing has taken place, so the ultimate merits of the applicant’s preliminary discovery claim have not yet been considered and much of the evidence filed in the proceedings has not yet been read in open court.

1. I am satisfied that Cricket Australia has proposed a regime which is proportionate and adapted to the commercial risks upon which its application is founded. As Hayne JA (as he then was) explained in *Mobil Oil Australia Ltd & McDonalds Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 38 (Winneke P and Phillips JA agreeing at 35):

Once the documents are inspected by the principals of the trade rival the information which is revealed is known to the trade rival and cannot he forgotten. Confidentiality is destroyed once and for all (at least so far as the particular trade rival is concerned). To say that the trade rival is bound not to use the documents except for the purposes of the action concerned is, in a case such as this, to impose upon that trade rival an obligation that is impossible of performance by him and impossible of enforcement by the party whose secrets have been revealed. How is the trade rival to forget what internal rate of return the competitor seeks to achieve on a new investment of the kind in question? How is the party whose hurdle rate has been revealed to know whether the rival has used the information in framing a tender? Thus, if the trade rival may inspect the documents concerned, the confidentiality of the information in them is at once destroyed. **Is that necessary for the attainment of justice in the particular case?**

[Emphasis added]

1. In the present case, the orders sought by Cricket Australia are directed to maintaining the confidentiality of only those parts of affidavits and exhibits that contain sensitive commercial information. For the reasons I have given above, I am satisfied that it is in the interests of justice that Cricket Australia’s legitimate commercial interests in protecting sensitive commercial information should be recognised. In particular, Cricket Australia’s bargaining position in future negotiations with other potential counterparties should not be put at risk of prejudice by the disclosure of the documents in unredacted form.
2. Accordingly, I shall make the orders sought by Cricket Australia, save in respect of the redactions it sought in relation to its written submissions. I am not satisfied that the submissions contain information which, if disclosed, would risk causing commercial prejudice to Cricket Australia.
3. Further, as alluded to above, I have made those orders pursuant to s 37AF of the Act, as I accept Seven’s submission that it is proper and necessary to do so. For the avoidance of doubt, I do not, however, accept Seven’s submission that because the documents have been ventilated in open court, it would now undermine the legislative scheme, and the primacy it places on the public interest in open justice in s 37AE, by making those orders.
4. The issue of confidentiality was a live one during the hearing and Cricket Australia foreshadowed that it might seek confidentiality orders if a request for access by a non-party were to be made. Subsequent to the hearing of the substantive application, the Request was made and Cricket Australia made its foreshadowed application. The parties were also given the opportunity to make written submissions concerning this Request.

# Disposition

1. For the above reasons, I shall grant leave pursuant to r 2.32(4) for non-parties to inspect the relevant documents, subject to certain documents being redacted or marked confidential pursuant to s 37AF of the Act, as the case may be.

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| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anastassiou. |

Associate:

Dated: 27 August 2021