

AMBUSH MARKETING AND THE AUSTRALIAN OLYMPIC COMMITTEE

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I INTRODUCTION

There is no doubt that sponsorship forms an important source of revenue for professional sport, including the formerly amateur Olympic Games. While a suitable sponsorship agreement provides benefits to both the sport and the sponsor, a potential problem is ambush marketing by rival companies trying to diminish those benefits. This paper focuses on the specific situation of ambush marketing in the context of the Olympic Games. It examines the relevant legislation, the *Olympic Games Insignia Act 1987* (Cth), (the ‘OIP Act’), and a recent case, *Australian Olympic Committee v Telstra Corporation Limited*,¹ which involved the application of that legislation to a situation that arose during the 2016 Rio Olympic Games. First, it will provide a brief overview of sponsorship and marketing.

II SPONSORSHIP AND MARKETING

Most of today’s team sports developed in the mid-nineteenth century with the rules of Association Football, for instance, being written in 1864 and of the Rugby Football Union in 1872. When sports began to draw reasonable crowds, clubs soon realised that if the grounds were enclosed, they could charge people to attend matches and thus make money from the game. For decades, however, gate receipts were the only real form of revenue for clubs. This changed in the 1950s when television began to telecast sport as, not only did this provide another revenue stream in the form of broadcasting rights, the television exposure also meant companies became interested in being involved in sport as a part of their marketing strategy. Thus, sponsorship began to be another major revenue source for clubs. Today, another increasing source of revenue is merchandising, involving the selling of replica jerseys, club shirts, scarves, caps and other items. Not only does this provide further revenue for the clubs; it also provides extra exposure for sponsors.

Sponsorship has continued to expand and most professional leagues now have sponsorship deals, such as that between the Australian Football League (AFL) and Toyota. Sponsorship also includes the naming rights to sporting events, such as Hyundai at the Australian Open tennis, and for the trophy that is presented for winning a particular competition, such as the Commonwealth Bank Series for international one day cricket matches in Australia. Sponsors’ names can also be given to sporting venues, such as Sydney’s Olympic Stadium which is named ANZ Stadium. In Melbourne, meanwhile, one of the main grounds is presently known as Etihad Stadium, though it will soon be renamed Marvel Stadium due to a change in sponsorship.

The essential requirement for all sports marketing is to ensure the viewing public identifies the official sponsor’s products and brand name with a particular sport, club or event. What can be considered the ultimate aim is for the sport and the sponsor to become synonymous with each other, usually best achieved by a long term sponsorship. For instance, the Australian rugby union team is presently referred to as the Qantas

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¹ [2017] FCAFC 165

Wallabies on match day tickets and programmes,² which is obviously part of the Qantas strategy to have its name immediately associated with Australian rugby.

If the parties are happy with the relationship a club sponsorship may last for decades, as has happened in the AFL with Ford at Geelong, and QBE Insurance with the Sydney Swans. Both sponsorships have now been in existence for over thirty years. There are obvious benefits for both parties when this happens as the club is provided with an assured revenue stream, while the sponsor begins to become closely associated with the club. After supporting the Sydney Swans through some ordinary on-field performance during the early 1990s, QBE Insurance, for instance, was rewarded by the national exposure the team enjoyed in winning the 2005 and 2012 Premierships. The author would also note that this exposure for both Ford and QBE will, to some extent, continue after the sponsorship agreement comes to an end. The reasons for this are that their names will continue to be seen on merchandise worn by supporters for years after the end of the sponsorship. In addition, the fact that teams have won multiple premierships over the period of the sponsorship means that photographs of those premierships teams, with sponsors' names on their jerseys, will still be seen for decades to come.

However, one of the problems that can arise with sports sponsorship is ambush marketing. It involves the unauthorised association by a business with a particular sporting event, or competition, by rivals of an official sponsor of that event.³ Two of the best known examples of ambush marketing have involved the Olympic Games. The first involved shoe company, Nike, which, during the 1984 Los Angeles Olympic Games, booked every available billboard around the venues with its saturation advertising being highly successful in having the general public believe it was the official shoe sponsor, not Converse.⁴

Qantas adopted similar tactics for the 2000 Sydney Olympic Games, again using a massive advertising campaign around the time of the Games, to counteract their main rival, Ansett, being the airline sponsor of the Games. Like Nike, sixteen years earlier, Qantas was successful in having the majority of Australians believe it was the official Olympic airline, not Ansett. The consequences of this tactic can be seen by the fact Ansett went into liquidation the year after the Olympics, eventually going out of business.

Despite the consequences for a company like Ansett, it should be noted that ambush marketing is not illegal, even if the tactics used can be considered underhanded. However, one solution to the potential problems of ambush marketing is to enact relevant legislation, and such provisions are now found in the OIP Act.

III THE AUSTRALIAN OLYMPIC COMMITTEE AND AMBUSH MARKETING

A *The Legislation*

The objective of the OIP Act is indicated by its long title: an Act made for the Olympic insignia, for the regulation of the commercial use of certain Olympic expressions and for related purposes.' Section 1A then sets out what is described as a 'simplified outline'. It states that Chapter 2 protects the Olympic insignia by 'making the AOC

² See for example 'Qantas Wallabies v Ireland', Souvenir Programme, 23 June 2018, Bauer Media Group.

³ David Thorpe, Antonio Buti, Chris Davies, Paul Johnson, *Sports Law*, (3rd ed, 2017), 682.

⁴ *Ibid*, 683.

owner of the copyright in the olympic symbol' and also 'the owner of certain olympic designs.' Chapter 3 meanwhile 'prohibits the commercial use of certain olympic expressions unless the user holds a licence granted by the AOC.'

It was noted in *Australian Olympic Committee v Telstra Corporation*⁵ that Chapter 3 was 'introduced into the OIP Act in October 2001 by the *Olympic Insignia Protection Amendment Act 2001 (Cth)*.'⁶ Section 6 sets out the chapter's objective, namely 'to protect and to further the position of Australia as a participant in, and a supporter of, the world Olympic movement.' It was also noted that the Explanatory Memorandum to the Amendment Bill stated that 'this will be achieved by giving the AOC a more certain environment in which to generate greater levels of sponsorship revenue from the private sector to fund its Olympic programs through the licensing of the Olympic expressions.'⁷

While the OIP Act itself does not expressly refer to ambush marketing, it was also noted in *Australian Olympic Committee v Telstra Corporation* that it is referred to in the Regulation Impact Statement for the amending Act:⁸

The proposed protection will increase the AOC's ability to maximise its fundraising by extending the scope of its exclusive licensing rights and assisting in the prevention of ambush marketing. Ambush marketing is the unauthorised association of businesses with the marketing of high-profile events without paying for the marketing rights. Because it is targeted at preventing ambush marketing the proposed protection will add value to the AOC's licensing rights.

Section 36(1) of the OIP Act states that a person other than the AOC 'must not use a protected olympic expression for commercial purposes', with ss (2) making an exception for those who are licensed to use such expressions. Section s 30(2) meanwhile states that the use is for commercial purposes if 'the application is for advertising or promotional purposes' and 'the application, to a reasonable person, would suggest that the first person is or was a sponsor of, or is, or was the provider of sponsorship-like support.' The list of those for whom the support is intended includes the AOC and the Summer Olympic Games, which was relevant in *Australian Olympic Committee v Telstra Corporation Limited*.

B Australia Olympic Committee v Telstra Corporation

1. Background Facts

The rights to the Australian television coverage of the 2016 Rio Olympic Games were held by the Seven Network which, in turn, had an agreement with Telstra in relation to its broadcast.⁹ In the month preceding the Olympic Games, Telstra commenced an extensive marketing campaign which was designed to promote the 'availability of live events which were going to be provided by Seven.' The campaign included advertisements about how to use mobile phones and tablets to access the Games and promoted a Telstra website that could also be accessed. The AOC, however, claimed this 'campaign amounted to ambush marketing and therefore was in breach of s 36 of

⁵ [2017] FCAFC 165.

⁶ *Ibid*, [81]

⁷ *Ibid*, [83].

⁸ *Ibid*, [84].

⁹ *Ibid*, [13].

the Act.¹⁰ It was also claimed that it amounted to misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth) ('ACL').

2. The Federal Court Decision

The original trial judge, Justice Wigney, noted that there had been three versions of Telstra's advertisements about being able to watch the Games on mobile phones.¹¹ It was noted that in the first 20 seconds of the second version, a disclaimer had been included which expressly stated that Telstra was not an official Olympic sponsor,¹² the duration of the disclaimer being extended to 27 seconds in the third version.¹³ There were also three versions of Telstra's advertisement relating to a particular Samsung mobile phone¹⁴ and, while this did not refer to the Olympic Games, it did use Peter Allen's song '*I Go to Rio*' as its theme song.¹⁵ However, it was only in the first seven seconds of the second version that a disclaimer was included regarding the fact that Telstra was not an official sponsor¹⁶ (that being extended to eleven seconds in the third version).¹⁷

The advertisement for the website used the same soundtrack and used a written message that Telstra was the 'Official Technology Partner of Seven's Olympic Games Coverage.' Again it was only in the second version that a disclaimer was included. In its monthly retail catalogue for July Telstra included images of swimming events at the Games, but it was only in the August catalogue that a disclaimer was included.¹⁸

His Honour stated that, in relation to the Telstra television advertisements, the critical question was when it was made sufficiently clear that Telstra's arrangement was with Seven, and not with any Olympic body.¹⁹ It was held to be 'somewhat borderline' since there was 'a degree of ambiguity concerning Telstra's connection with the Olympics.'²⁰ His Honour held, however, that the advertisements 'would not suggest to a reasonable person that Telstra was a sponsor of or provided sponsor-like support to, any Olympic body' while the revised version 'more clearly did not contain the suggestion of sponsor-like support.'²¹ In regard to the contents of the website, it was held that while it was again 'borderline... on balance...it did not cross the line to suggest Telstra was an Olympic sponsor.'²² It was also held that the ACL claim had not been made out as the message was of Telstra's association 'with Seven, not with any Olympic body.'²³

¹⁰ *Ibid.*

¹¹ *Australian Olympic Committee v Telstra Corporation Limited* [2016] FCA 857, [28].

¹² *Ibid.*, [33].

¹³ *Ibid.*, [34].

¹⁴ *Ibid.*, [37].

¹⁵ *Ibid.*, [39].

¹⁶ *Ibid.*, [41].

¹⁷ *Ibid.*, [43].

¹⁸ *Ibid.*, [55].

¹⁹ *Ibid.*, [91].

²⁰ *Ibid.*, [94].

²¹ *Ibid.*

²² *Ibid.*, [114].

²³ *Ibid.*, [149].

3. The Full Court of the Federal Court Decision

It was noted by the Full Federal Court that ‘the statutory purpose of the OIP Act was to ensure that the AOC was better equipped to protect its income through licensing than it would be under an application of the more generally-worded protection provisions of the ACL.’²⁴ It was noted, however, that ‘the OIP Act does not use the expression “ambush marketing”... and the scope of the protection to the AOC is to be ascertained from the language of the OIP Act itself.’²⁵ It was also noted that ‘the requirement that the application ‘to a reasonable person’ would suggest that ‘sponsorship or sponsor-like support’ involves an objective test.’²⁶

There were ten grounds on which the AOC contended that the primary judge had fallen into error. The Full Federal Court, however, was all but scathing about the content of the claims, stating that:

[M]any of the grounds are broadly expressed and amount to little more than assertions that the primary judge fell into error by not deciding in accordance with AOC’s case. It has the tendency to leave it to the court to trawl through the oral and written submissions in search for the basis upon which the appellant puts its case.²⁷

The first ground was that the primary judge had erred in not finding that Telstra’s use of protected Olympic expressions in the advertisements involved a breach of s 36 of the OIP Act. The Full Federal Court, however, found no such error, upholding the primary judge’s finding that in its advertising campaign, Telstra had not ‘deliberately set about implying something which it knew it could not lawfully imply.’ It noted, however, that the primary judge had stated that Telstra had pushed ‘the envelope as far it could.’²⁸

The Full Federal Court also dismissed the AOC’s second argument, that the primary judge had failed to give specific weight to his finding that Telstra knew it should not use words like the Olympics, ‘but did so anyway.’²⁹ It also dismissed the third claim that too much weight had been given to the clarification in the last few seconds of the advertisements, stating that ‘the primary judge was conscious that the advertisements must be viewed as a whole, having regard to the likely perception of viewers.’³⁰ Weight was also the basis of the fourth claim, which was that the primary judge had failed to give sufficient weight to the response of a focus group member that the advertisements may have conveyed that Telstra was a sponsor of the Olympic Games.³¹ The Full Federal Court, however, upheld the primary judge’s decision to give this factor little weight because the documents relied upon presented what appeared to be a very small sample of interviewees.³²

Ground seven was that the judge had erroneously proceeded on the basis that, if the association created by the advertisements was between Telstra and Seven, then it did not contravene the OIP Act or the ACL.³³ The Full Federal Court noted that the primary judge had not ruled out the possibility that the advertisements might suggest that Telstra

²⁴ *Australian Olympic Committee v Telstra Corporation Limited* [2017] FCAFC 165, [93].

²⁵ *Ibid.*

²⁶ *Ibid.*, [97].

²⁷ *Ibid.*, [111].

²⁸ *Ibid.*, [120].

²⁹ *Ibid.*

³⁰ *Ibid.*, [127].

³¹ *Ibid.*, [129].

³² *Ibid.*, [130].

³³ *Ibid.*, [140].

supported both Seven's coverage and a relevant Olympic body. However, it then held that the judge had 'considered each option and determined it did not' and that no error was 'reflected in this approach.'³⁴

In grounds eight and nine it was contended that the judge erred in concluding that the disclaimer used in the later advertisements that Telstra was not an official sponsor was capable of reversing, or erasing, any impression that Telstra was an Olympic sponsor.³⁵ The AOC claim was that the disclaimer was qualified and limited because the term 'official' left it open for a viewer to perceive Telstra may have been an 'unofficial sponsor.' The Full Federal Court, however, supported the primary judge in rejecting this argument.³⁶

The Full Federal Court's final comments were in relation to the fact Telstra had been an official sponsor for the 2012 London Olympic Games with the AOC claiming this 'would therefore contribute to giving Telstra an Olympic sponsor "halo effect."' It was held however that the primary judge had taken that into account, noting 'that a hypothetical reasonable person viewing the advertisements would not necessarily know or recollect Telstra's previous sponsorship of the Australian Olympic team.'³⁷

IV DISCUSSION

One of the issues raised by *Australian Olympic Committee v Telstra Corporation* is whether the decision indicates that the OIP is ineffective in protecting the AOC from ambush marketing. It should firstly be noted that Telstra's behaviour did not include the tactics used by Nike and Qantas at previous Olympic Games. While the primary judge acknowledged that Telstra had pushed the envelope and that the case was borderline, the decision indicates that being associated with another aspect of the Olympic coverage does not mean the OIP Act has been breached. It is suggested, however, that the decision indicates that disclaimers must be included at the beginning of any advertising that has some association with the Olympics. Thus, Telstra should have included such a disclaimer in the very first second of the first version of its advertisements and, probably, only just avoided breaching the OIP Act by including them in later versions.

An interesting aspect of the case was that Telstra had been a sponsor of the 2012 London Olympic Games, which may explain why the AOC decided legal action was required to protect its 2016 sponsors. It is suggested, however, that there could have a potential negative aspect to the AOC winning the case in that sponsors may have been put off by the fact that an association with other parties at future Olympic Games may mean they were in breach of the OIP Act, though the proper use of appropriate disclaimers would probably prevent this. The previous official sponsorship also raised what the AOC described as the 'halo effect', namely that people watching recent advertisements would still think that Telstra was an official sponsor. The author, however, agrees with the court's dismissal of this argument. One reason is that the four year gap between Olympic Games means it is unlikely that most people would remember the previous sponsorship, particularly as the name is not on, or even associated with, any long term item, such as merchandise.

³⁴ *Ibid.*, [143].

³⁵ *Ibid.*, [147].

³⁶ *Ibid.*, [153].

³⁷ *Ibid.*, [155].

It is suggested, however, that there is a ‘halo effect’ with the sponsorship of sports that compete on an annual basis, rather than in the four-yearly cycle of the Olympic Games. This is particularly true of long term sponsorships. After Ford and QBE’s multi-decade sponsorships in the AFL, for instance, any new sponsors of Geelong and the Sydney Swans will undoubtedly face the situation of people still identifying the clubs with their previous sponsors. It may well even take years for this impression to be displaced, especially given the amount of club merchandise that has been sold bearing Ford’s and QBE’s names. This can occur even with much shorter sponsorship deals. HSBC, for instance, finished its multi-year sponsorship of Super Rugby side, the NSW Waratahs, a number of years ago, but the author has noticed many supporters are still wearing club merchandise displaying its name rather than the new sponsor, Daikin. Thus, HSBC is still getting good exposure, both at the ground and on television, by means of shots of the crowds, well after its sponsorship deal concluded. This, however, has nothing to do with ambush marketing; it is simply a halo effect that is a benefit of a having had long-term sponsorship deal.

V CONCLUSION

While ambush marketing has been a major problem at previous Olympic Games, the author agrees with the decision in *Australian Olympic Committee v Telstra Corporation* that Telstra’s behaviour in regards to the 2016 Rio Olympic Games did not amount to ambush marketing and, therefore, was not a breach of the OIP Act. It is also unlikely that Telstra obtained any halo effect from people watching the Telstra advertisements and associating it with being an official sponsor due to previous Olympic sponsorship — because of the four year gap between Olympic Games. It is acknowledged that such an effect will exist with long-term sponsorship of sports conducted on an annual basis, but this is simply one of the benefits of such sponsorship, rather than involving ambush marketing.