

WARU and the ARU - Friends or foes?

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After twelve seasons in the Super Rugby Competition, the Western Force rugby union team (**Force**) was recently pulled from the 18-team competition by the Australian Rugby Union (**ARU**) after years of persistent financial hardship and poor on-field performances. The culling was immediately challenged by the Western Australia Rugby Union (**WARU**) by way of arbitration with a subsequent appeal to the New South Wales Supreme Court. The nature of this case provides a reminder of when a Court will consider the context in which a contract is agreed upon between parties, in this case between the WARU and ARU, and where that context is not otherwise recorded in that contract.

Background

During 2015, the ARU entered into an agreement with the WARU, by which the ARU would purchase the Force franchise from the WARU, and then subsequently enter an Alliance Agreement (**Agreement**), which would see the ARU operate and fund the Force. This background, along with the existence of the South African, New Zealand and Australian Rugby (**SANZAR**) broadcast deals (discussed below) were set out in the Agreement to provide context.

The term of the Agreement was dependent, in part, upon the broadcasting deals made by the governing body of the Super Rugby Competition, SANZAR. The composition of the Super Rugby Competition had recently been altered due to the renegotiation of those broadcast deals by SANZAR, with negotiations being finalised on 20 July 2017. As a result, the competition was to be reduced from 18 to 15 teams, requiring the removal of one Australian team.

In deciding to cull the Force, the ARU relied upon provisions within the Agreement that stated “*the Alliance Agreement would come to an end on the last day of the SANZAR Broadcast Agreements (being 31 December 2020) or if the... SANZAR Broadcast Agreement is terminated or renegotiated earlier as a result of the renegotiation of the commercial terms of a broadcast agreement, such earlier date.*”

At the termination of the Agreement, the ARU would own the Force unconditionally and, as His Honour Justice Hammerschlag stated, they “could do with it what it likes, even destroy it”.

Arbitration and Supreme Court Appeal

The WARU referred the matter to arbitration, with the case put forward by the WARU alleging that the provisions of the Agreement were ambiguous. The WARU also sought to imply further words, and subsequently an alternate meaning into the Agreement with the effect that the renegotiation of SANZAR broadcast deals had to result in those deals ending earlier than 31 December 2020 for the Agreement to be at an end.

The arbitrator disagreed with the WARU, asserting that the Agreement was not ambiguous and took the approach of applying the terms of the Agreement, as written. The WARU proceeded to challenge the decision and took the matter to the Supreme Court of New South Wales, which upheld the decision of the arbitrator.

The decisions of the arbitrator and the Supreme Court are a reminder that a Court will take external

material into account where the terms of an agreement are ambiguous. If the Court is of the view that there is no ambiguity in the contractual terms, then it will not be appropriate to reference external material, for the purposes of giving meaning to what are unambiguous terms. This was particularly so with respect to the Alliance Agreement, which set out the background against, and the context in which, that agreement was made.

Where to next for the Western Force?

Following their culling, various campaigns and ideas have come to light to keep the Force alive. This includes an 'IPL' style rugby competition across the Indo-Pacific region to be established by Andrew Forrest. Whilst the logistics of such a competition are still to be determined, many rugby enthusiasts are intrigued by the possibilities it could have for the future of Australian rugby.

Meanwhile, former ARU boss Bill Pulver has faced a Senate inquiry into 'the Future of Australian Rugby' in which Senator Reynolds told the inquiry that the Western Force had received the least amount of funding from the ARU of all Australian rugby clubs. The results of that inquiry are set to be realised on 13 November 2017.

At the end of the day, it appears His Honour was quite correct when saying, of the ARU and WARU, *'they were supposed to be allies, but they were not friends'*.

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