HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No S79/2003

BAYSIDE CITY COUNCIL & ORS — APPELLANTS

AND

TELSTRA CORPORATION LIMITED & ORS — RESPONDENTS

Matter No S80/2003

MORELAND CITY COUNCIL — APPELLANT

AND

OPTUS VISION PTY LIMITED & ORS — RESPONDENTS

Matter No S83/2003

WARRINGAH COUNCIL & ORS — APPELLANTS

AND

OPTUS VISION PTY LIMITED & ORS — RESPONDENTS

Matter No S84/2003

HURSTVILLE CITY COUNCIL & ORS — APPELLANTS

AND

TELSTRA CORPORATION LIMITED & ORS — RESPONDENTS

Bayside City Council v Telstra Corporation Limited
[2004] HCA 19
28 April 2004
S79/2003, S80/2003, S83/2003 and S84/2003

ORDER

In each matter:

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

Matter No S79/2003

N J Young QC with M N Connock for the appellants (instructed by Maddocks)

P J Hanks QC with J M Jagot for the first and second respondents (instructed by Mallesons Stephen Jaques)

F M Douglas QC with G R Kennett and K M Connor for the third to thirteenth respondents (instructed by Deacons)

Matter No S80/2003

N J Young QC with M N Connock for the appellants (instructed by Maddocks)

D F Jackson QC with N Perram for the first and second respondents (instructed by Gilbert & Tobin)

F M Douglas QC with G R Kennett and K M Connor for the third to fifth respondents (instructed by Deacons)

Matter No S83/2003

F M Douglas QC with G R Kennett and K M Connor for the appellants (instructed by Deacons)

D F Jackson QC with N Perram for the first and second respondents (instructed by Gilbert & Tobin)

N J Young QC with M N Connock for the third respondent (instructed by Maddocks)

Matter No S84/2003

F M Douglas QC with G R Kennett and K M Connor for the appellants (instructed by Deacons)

P J Hanks QC with J M Jagot for the first and second respondents (instructed by Mallesons Stephen Jaques)

N J Young QC with M N Connock for the third to sixth respondents (instructed by Maddocks)

Interveners

H C Burmester QC with M A Perry intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland, with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed Crown Law (Queensland))

R J Meadows QC, Solicitor-General for the State of Western Australia, with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor (Western Australia))

P M Tate SC, Solicitor-General for the State of Victoria, with K L Emerton intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Bayside City Council v Telstra Corporation Limited

Local government – Council – Rates and charges – Respondent corporations were carriers licensed under the *Telecommunications Act* 1997 (Cth) – Respondent carriers installed underground and aerial coaxial cabling in local government areas under the responsibility of the various local authorities – Local authorities in New South Wales resolved to make charges pursuant to *Local Government Act* 1993 (NSW), s 611 in respect of respondents' underground and aerial cabling – Local authorities in Victoria declared and levied rates on land occupied by respondents' cables pursuant to *Local Government Act* 1989 (Vic), Pt 8 – Statutory provisions provided exemptions from relevant charges or rates in respect of other owners or occupiers of public land – Whether State laws imposing such rates and charges discriminated against respondent carriers within meaning of *Telecommunications Act* 1997 (Cth), Sched 3, cl 44, and were therefore invalid under the Constitution, s 109.

Constitutional Law (Cth) – Powers of the Parliament – Whether provision conferring upon respondent carriers an immunity from discriminatory burdens imposed upon them in their capacity as carriers by State or Territory laws is a law with respect to postal, telegraphic, telephonic and other like services – Constitution, s 51(v) – Inconsistency between Commonwealth and State laws – Constitution, s 109 – Whether immunity conferred by a federal law, having regard to its substance and operation, in a significant manner curtailed or interfered with the capacity of States to function as governments.

Constitution, ss 51(v), 109.
Telecommunications Act 1997 (Cth), Sched 3, cl 44.
Local Government Act 1993 (NSW), s 611.
Local Government Act 1989 (Vic), Pt 8.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. These appeals are brought by a number of New South Wales and Victorian local authorities against a decision of the Full Court of the Federal Court of Australia[1] which declared invalid certain legislation of those States to the extent to which the legislation authorised local authorities to impose charges in respect of the possession, occupation and enjoyment of telecommunications cables on, under, or over a public place, or to levy rates in respect of land or space occupied by such cables.

2 The respondent corporations, referred to in the Federal Court collectively as the Telstra parties and the Optus parties, or simply Telstra and Optus, are carriers under the *Telecommunications Act* 1997 (Cth) ("the Telco Act"). (Some of the local authorities that were parties to the original proceedings have also been joined as respondents.) Telstra and Optus each commenced separate proceedings in the Federal Court challenging, on a number of grounds, the lawfulness of charges and rates imposed or levied in respect of telecommunications cables by local authorities including the present appellants. All grounds of challenge failed at first instance before Wilcox J[2]. Most are not in issue in this Court. The Full Court (Sundberg and Finkelstein JJ) reversed the decision of Wilcox J, upholding an argument of Telstra and Optus that the State legislation under which the rates and charges were levied and imposed was, to the extent to which such legislation authorised the rates and charges, inconsistent with a provision of the Telco Act, and invalid pursuant to s 109 of the Constitution[3]. The outcome of these appeals turns upon that argument.

The broadband cable networks

3 In his reasons, Wilcox J said that part of the background to this litigation involved "community concern at the extent of the broadband cabling that was aerially erected in many parts of Australia during the mid-1990s"[4], and the response of local government authorities. In about 1995, Telstra and Optus

---

1 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

2 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.

3 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198. The third judge of the Full Court became unable to continue as a member of the Court and later resigned.

4 (2000) 105 FCR 322 at 329 [2].

commenced installing and laying broadband cable networks in the Sydney and Melbourne metropolitan areas. A broadband cable network uses a wider frequency band than is necessary to transfer speech telephonically. It comprises links between exchanges, between exchanges and a customer's tap-off point, and between a customer's tap-off point and equipment at a customer's premises. It permits a flow of information for a number of purposes, including internet services and cable television.

4 The principal functions of the Telstra broadband network are to provide pay television, high-speed internet access, and telephony services[5]. By a chain of legislative title identified in *Telstra Corporation Ltd v Worthing*[6], Telstra is the successor to the Australian Telecommunications Commission which was continued as a body corporate under the name "Telecom"; this body ("Telecom") had a monopoly as a telephone carrier. Telecom's telephony system originally used extensive aerial cabling, but later this was progressively placed underground[7]. Telstra's cable network was designed to make use of existing infrastructure, including underground ducts and existing electricity poles. The coaxial cable component of the network is reticulated either underground or aerially. In the case of aerial reticulation, existing poles are used. In the case of underground reticulation, existing underground pipes and ducts/conduits are used. In metropolitan Sydney and Melbourne, approximately one quarter of Telstra's coaxial cables are reticulated aerially, and approximately three quarters are reticulated underground. Aerial cables are secured to poles, which typically also carry electricity conductors and cables. Underground cables may be reticulated along with other services such as water, gas, electricity and sewerage[8].

5 The Optus network comprises mainly aerial coaxial cables. Between April/May 1995 and March 1997, Optus laid cables and installed other structures on, under and over land of the appellants. As at 1 July 1997, the Optus network provided a local telephone service, some pay television, and high-speed data products. During the year ended 30 June 1998, Optus used its network to provide pay television to residential subscribers in each appellant's area.

---

5 (2000) 105 FCR 322 at 335 [22].

6 (1999) 197 CLR 61 at 71 [9].

7 (2000) 105 FCR 322 at 337 [31].

8 (2000) 105 FCR 322 at 335 [18]-[20].

6 The Full Court pointed out that, since Federation, telecommunications services have been provided either by the government (the Postmaster-General), or a statutory corporation (such as Telecom), or by a public company (such as Optus), including a company in which the Commonwealth holds a majority of shares (Telstra)[9]. It has always been necessary for the Parliament to confer powers to install and operate facilities. The present federal regulatory regime confers such powers, but extends beyond that. It is convenient to turn to the principal features of that regime.

The federal legislation

7 In the exercise of its powers, including the power, conferred by s 51(v) of the Constitution, to make laws with respect to postal, telegraphic, telephonic, and other like services, the Parliament, in the Telco Act, provided a regulatory framework which was intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community (s 3). "Carriage service" is defined to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy (s 7). Part 2 of the Telco Act deals with network units, which include links of the kind owned by Telstra and Optus. An owner of network units wishing to supply a carriage service to the public must hold a carrier licence (s 42). Such a licence entitles the carrier to use a network unit to supply carriage services to the public. It is subject to specified conditions, including compliance with the Telco Act, and with other conditions declared by the Minister (s 63).

8 As s 3 of the Telco Act states, the regulatory framework is contained, not only in the Telco Act, but also in Pts XIB and XIC of the *Trade Practices Act* 1974 (Cth), which are to be read together with the Telco Act. Part XIB sets up what is described in s 151AA (the simplified outline) as a special regime for regulating anti-competitive conduct in the telecommunications industry. A carrier or carriage service provider must not engage in anti-competitive conduct. That "competition rule" is subject to the supervisory power of the Australian Competition and Consumer Commission ("the Commission"), which may make orders exempting specified conduct from the scope of the definition of anti-competitive conduct, direct carriers and carriage service providers to file tariff

---

9 (2002) 118 FCR 198 at 208 [21].

information, make record-keeping rules for carriers and carriage service providers, and direct carriers and carriage service providers to make certain reports available for inspection. The object of Pt XIC is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services (s 152AB). As explained in the simplified outline (s 152AA), the Part sets out a "telecommunications access regime". The Commission may declare carriage services and related services to be declared services. Providers of declared services are required to comply with standard access obligations, which facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services. Provision is made for the terms and conditions of such access, and for dispute resolution by the Commission where necessary.

9 The simplified outline of the Telco Act (s 5) refers to the obligations of carriage service providers and content service providers to comply with service provider rules. The Australian Communications Authority monitors, and reports to the Minister on the performance of, service providers. The legislation provides both for voluntary industry codes, and for mandatory industry standards. There is established what is called a universal service regime with the object of ensuring that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to standard telephone services, payphones and prescribed carriage services. Provision is made for regulating call charges and various aspects of the services provided pursuant to the legislation, and for standard agreements for the supply of carriage services.

10 The predecessor of the Telco Act was the *Telecommunications Act* 1991 (Cth). That Act made provision for the licensing of carriers, and their obligations, rights and immunities. Section 116 of the 1991 Act provided for regulations exempting activities from State and Territory laws. The regulations specified activities including the construction, maintenance and repair of facilities, being part of a carrier's telecommunications network. A carrier was permitted to engage in an exempt activity despite a law of a State or Territory about the powers and functions of a local government body or the use of land. The cables the subject of the rates and charges challenged in this litigation were installed during the period of operation of the 1991 Act, and pursuant to authorities and exemptions conferred by or under that Act[10].

---

10 (2000) 105 FCR 322 at 352 [92].

11 Provisions dealing with the application of State laws to the conduct of service providers carrying on activities authorised by the Commonwealth pursuant to s 51(v) are familiar. In *R v Brislan; Ex parte Williams*[11], Latham CJ said:

> "It is a question of policy whether there should be any and what legislation upon such subjects as communication services. A telephone service may be provided by a private person or by an ordinary public company, or by a public company or other corporation operating under a franchise or other special power, or by a Government department. The necessity for acquiring rights to erect poles and to place conduits in public highways has in practice made it necessary for the Legislature to confer special powers upon a company or specially created body or upon a Government department ... It appears to me to be impossible to attach any definite meaning to sec 51(v) short of that which gives full and complete power to Parliament to provide or to abstain from providing the services mentioned, to provide them upon such conditions of licences and payment as it thinks proper, or to permit other people to provide them, subject or not subject to conditions, or to prohibit the provision of such facilities altogether."

12 To return to the Telco Act, Pt 24, headed "Carriers' powers and immunities" consists of a single, proleptic, provision:

> "484. Schedule 3 has effect."

Schedule 3 occupies 57 pages of the current print of the Telco Act. The simplified outline of the general provisions contains the following summary of the Part. A carrier may enter on land and install and maintain a facility on the land. "Installation" is defined to include activities ancillary or incidental to installation (Sched 3 cl 2), and would embrace occupation of land by facilities. The power of installation is limited to certain kinds of facility, and its exercise requires a permit. The circumstances in which permits will be issued are defined. A carrier exercising these powers must comply with certain conditions. One condition is that a carrier must take all reasonable steps to ensure that it causes as little detriment and inconvenience as is practicable. Only a carrier may install (Sched 3 cl 6) or enter land to maintain (Sched 3 cl 7) a facility. Division 7 of Pt 1 of the Schedule is headed "Exemptions from State and Territory laws". It provides (cl 36) that activities of carriers are not generally exempt from State and

---

11 (1935) 54 CLR 262 at 276-277.

Territory laws, but cl 37 goes on to provide that activities authorised by Div 2, 3 or 4 may be carried on despite certain laws of a State or Territory, including environmental, heritage, and other specified kinds of law[12]. Clauses 38 and 39 are as follows:

> "38. It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.
>
> 39. This Division does not affect the liability of a carrier to taxation under a law of a State or Territory."

13 In Div 8 of Pt 1 of the Schedule there appears cl 44, which is central to the present appeals. It is in the following terms:

> "44. (1) The following provisions have effect:
>
> (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
>
> (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

---

12 Clause 42 provides for the recovery of compensation by persons suffering financial loss or damage because of anything done by a carrier under Div 2, 3 or 4 in relation to any property owned by such persons or in which they have an interest. There is no question in these appeals respecting the operation of cl 42.

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

(2) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an ***eligible user***.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*."

The State legislation

14 The *Local Government Act* 1993 (NSW) contained[13] the following provision:

"611. (1) A council may make an annual charge on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place.

(2) The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.

(3) The annual charge is to be based on the nature and extent of the benefit enjoyed by the person concerned.

(4) If a person is aggrieved by the amount of the annual charge, the person may appeal to the Land and Environment Court and that Court may determine the amount.

(5) A person dissatisfied with the decision of the Court as being erroneous in law may appeal to the Supreme Court in the manner provided for appeals from the Land and Environment Court.

---

13 There were inconsequential amendments in 1998 and 2000.

(6) This section does not apply to:

(a) the Crown, or

(b) the Sydney Water Corporation Limited, the Hunter Water Corporation Limited or a water supply authority, or

(c) Rail Access Corporation, or

(d) the owner or operator of a light rail system (within the meaning of the *Transport Administration Act 1988*), but only if the matter relates to the development or operation of that system and is not excluded by the regulations from the exemption conferred by this paragraph."

15 The exemptions contained in s 611(6) are not exhaustive. Other legislation exempts other utilities from the charges authorised by s 611. In particular, s 50 of the *Electricity Supply Act* 1995 (NSW) exempts electricity network operators and s 40 of the *Pipelines Act* 1967 (NSW) exempts licensed operators of a pipeline. On the other hand, at the relevant times, gas suppliers were not exempt.

16 The *Local Government Act* 1989 (Vic), in Pt 8, provides that, subject to certain exceptions, all land is rateable. The exceptions include land that is owned by the Crown and used exclusively for public or municipal services (which, as the Full Court said, includes water distribution to households and other premises and road structures such as signs, lights and signals)[14]. Section 46(1A) of the *Electricity Industry Act* 1993 (Vic) provides:

> "Despite anything to the contrary in the *Local Government Act* 1989, land is not occupied land for the purposes of that Act merely because any pole, wire or cable of a distribution company, transmission company or generation company is on, under or over that land."

17 Section 52(2) of the *Gas Industry Act* 1994 (Vic) provides a similar exemption for retail gas suppliers.

---

14 (2002) 118 FCR 198 at 206 [15].

18 The Local Government Act empowers a council to declare rates on rateable land. The owner, or if the owner cannot be found, the occupier, is liable to pay the rates.

The resolutions of the local authorities

19 The New South Wales local authorities involved in these appeals resolved to make charges, pursuant to s 611 of the New South Wales Local Government Act, for the years ending 30 June 1998 and 30 June 1999. The charges were imposed in respect of "cabling" or "cables". Wilcox J summarised the effect of the resolutions[15]: "Sometimes the resolution was limited to cabling over (or under) 'Council property'; which includes public streets and reserves. Sometimes the charge applied to both overhead and underground cabling; sometimes only the former. Sometimes the charge was higher for overhead cabling than for underground cabling; for example, several councils charged $1000 per km for overhead cabling and $500 per km for underground cabling."

20 For the years ending 30 June 1998 and 30 June 1999, the Victorian local authorities involved in these appeals, pursuant to the Victorian Local Government Act, declared and levied rates on the land occupied by Telstra and Optus cables.

21 Reference has been made earlier to statutory exemptions from charges and rates. No charges under s 611 were made by the New South Wales local authorities in relation to structures for the transmission of electricity, or the conveyance of water; rail structures; traffic lights, signs, and signal boxes, bridges and tunnels (road structures); post boxes; and elevated public walkways, bus shelters, signs, awnings and flags, real estate advertising, other advertising signs, or waste and recycling receptacles, on public places within their respective areas. On the other hand, each local authority imposed charges under s 611 with respect to gas pipelines. As to the rates levied by the Victorian local authorities, other occupiers of the same land who were not liable to rates included occupiers for purposes of electricity distribution or transmission, or generation companies in respect of their poles, wires or cables, retail gas suppliers in respect of their pipes for conveyance of gas for sale by retail, water distribution entities in respect of pipes and valves for the distribution of water, and public transport and road traffic authorities in respect of signs, wires, signals, cabinets and other structures.

---

15 (2000) 105 FCR 322 at 338 [32].

22 Telstra and Optus contend that what is involved is discrimination against carriers within the meaning of cl 44 of the Telco Act.

Clause 44

23 The appellants contest the constitutional validity of cl 44. In order to resolve that issue, it is necessary first to consider the scope of the provision in order to determine its operation and effect, for the purpose of relating that to a subject matter in respect of which the Parliament has legislative power[16].

24 There is a question as to the extent of the application of cl 44, and, in particular, cl 44(1)(a). That question is to be resolved primarily by reference to the legislative context in which the clause appears. The general context is that of a Federal regulatory framework for the telecommunications industry, including the supply of carriage services. The more specific context, contained in Pt 24 of the Telco Act, concerns what the heading to the Part refers to as the powers and immunities conferred upon carriers. In that respect, Div 7 of Pt 1 of Sched 3 deals with the extent to which activities of carriers are exempt from State and Territory laws of general application. The terms of cll 36, 37, 38 and 39 are set out above. Subject to certain exceptions, Divs 2, 3 and 4 of Pt 1 of Sched 3 do not authorise an activity if it is inconsistent with State law. Clause 37 is one exception, and cl 44 is another. Clause 39 deals with general State taxes. Clause 44 addresses a more particular issue. In accordance with settled principles of construction, when a law of a State or Territory is of a kind dealt with in the particular provision, then cl 44 prevails over the general provision. "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative …"[17]. Clause 44 deals with the effect of special kinds of State or Territory laws, that is to say, discriminatory laws. It will be necessary later to address the question whether the New South Wales and Victorian laws presently in question are discriminatory within the meaning of cl 44(1)(a). For the present, it is sufficient to note that, if a State or Territory law is discriminatory in one of the ways referred to in cl 44, and that discrimination involves adverse treatment that

---

16 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

17 *Pretty v Solly* (1859) 26 Beav 606 at 610 per Romilly MR [53 ER 1032 at 1034].

is differential by reference to an appropriate standard of comparison, it will attract the operation of that provision. Sub-cl (1) of cl 44 deals with discrimination, either against a particular carrier, or against a particular class of carriers, or against carriers generally. Sub-cl (2) deals with discrimination either against a particular eligible user of carriage services, or against a particular class of eligible users, or against eligible users generally. To the extent covered by sub-cl (2), cl 44 goes beyond the topic of powers and immunities of carriers, but that does not alter materially the context as described in the heading to Pt 24. A particular eligible user of carriage services might have a number of other capacities as well. Plainly, it is discrimination against such a person or corporation in the capacity of a user of carriage services, as distinct from discrimination in some other capacity, that attracts the potential operation of cl 44. Similarly, having regard both to the general and to the more specific context of the legislation, the kind of discrimination against carriers that attracts the potential operation of cl 44 is discrimination against them in their capacity as carriers. Clause 44 is concerned with State or Territory laws which impose discriminatory burdens upon carriers in carrying on activities as carriers authorised by the Telco Act.

25 Telstra and Optus are public companies although, in the case of Telstra, at the relevant times a majority of the shares was held by the Commonwealth. In that respect, the case is different from *Australian Coastal Shipping Commission v O'Reilly*[18]. It will be necessary to return to what was said there about s 109 of the Constitution[19]. What is of immediate relevance, however, is that, in *O'Reilly*, the test applied in determining the validity of the law of the Commonwealth conferring a general exemption from State taxes upon the Commission established in exercise of the trade and commerce power was the relevance of that law to, or its connection with, the head of power exercised in establishing the Commission[20].

26 The power conferred by s 51(v) of the Constitution, to make laws with respect to postal, telegraphic, telephonic and other like services, includes a power to make laws with respect to telecommunications services. So far as presently relevant, it extends to making laws regulating the terms and conditions upon

---

18 (1962) 107 CLR 46.

19 (1962) 107 CLR 46 at 56-57 per Dixon CJ.

20 (1962) 107 CLR 46 at 55-56 per Dixon CJ.

which such services may be provided, the licensing of carriers, their conduct as licensees, and the conferring upon them of powers and immunities in connection with the activities undertaken by them pursuant to the chosen regulatory framework. The federal object of promoting the development of the telecommunications industry, and ensuring that telecommunications services would be provided to meet the needs of the Australian community, falls within a head of the legislative power of the Parliament of the Commonwealth. Conferring upon carriers an immunity from discriminatory burdens imposed upon them by State or Territory laws in their capacity as carriers has a direct and substantial connection with the power.

27 It is not to the point to say that cl 44 is also a law with respect to discrimination. A law may bear more than one character, but that does not make it possible to ignore the character (if there be one) of constitutional relevance. The law protecting trading corporations from boycotts, held to be valid in *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[21], was a law with respect to boycotts, as well as a law with respect to trading corporations. As Stephen J pointed out in that case[22], and after contrasting the situation in Canada, the pattern of distribution of legislative power in Australia is not based on a concept of mutual exclusiveness, and it is inappropriate to seek one sole or dominant character in every law. A law may possess a number of characters. He said[23]:

> "Once it is recognized that a law may possess several distinct characters, it follows that the fact that only some elements in the description of a law fall within one or more of the grants of power in s 51 or elsewhere in the Constitution will be in no way fatal to its validity. So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid. If a law enacted by the federal legislature can be fairly described both as a law with respect to a grant of power to it and as a law with respect to a matter or matters left

---

21 (1982) 150 CLR 169.

22 (1982) 150 CLR 169 at 191.

23 (1982) 150 CLR 169 at 192.

> to the States, that will suffice to support its validity as a law of the Commonwealth."

28 The general principles which are to be applied to determine whether a law is "with respect to" a head of legislative power are well settled and have been considered on many occasions, including recently[24]. One principle that commands universal concurrence is that stated by Mason and Deane JJ in *Re F; Ex parte F*[25]:

> "In a case where a law fairly answers the description of being a law with respect to two subject-matters, one of which is and the other of which is not a subject-matter appearing in s 51, it will be valid notwithstanding that there is no independent connexion between the two subject-matters."

Melbourne Corporation doctrine

29 It was argued for the appellants that cl 44 is an attempt to dictate the content of State law and offends the principle enunciated in *Melbourne Corporation v The Commonwealth*[26]. A similar submission troubled Wilcox J, who considered that cl 44 "has a propensity to disturb the federal/State balance by influencing the manner in which a State legislates in respect of a subject within its own legislative domain."[27] Whatever the balance struck by the Constitution, it must give effect to ss 51(v) and 109. Clause 44 is no less a law with respect to services of the kind described in s 51(v) by reason of the fact that the immunity it confers, or attempts to confer, covers only discriminatory State laws.

30 A law conferring upon carriers an immunity from all State taxes and charges would be a law with respect to telecommunications services; and so is a law conferring an immunity from some State taxes and charges. It does not make a difference that the chosen discrimen requires not only examination of the content of the State law but also comparison with the operation of other State

---

24 *Leask v The Commonwealth* (1996) 187 CLR 579; *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

25 (1986) 161 CLR 376 at 388.

26 (1947) 74 CLR 31.

27 (2000) 105 FCR 322 at 372 [187].

laws. The clause does not affect the capacity of the States to function as governments. Their legislative capacity remains unimpaired, except to the extent to which otherwise s 109 provides. That is a matter to be considered below. There is, in cl 44, no more an attempt to dictate the content of State revenue laws than there was, in *Botany Municipal Council v Federal Airports Corporation*[28], an attempt to dictate the content of State environmental laws.

31 The *Melbourne Corporation* doctrine presents an inquiry whether the federal law in question, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments[29]. In *Re Lee; Ex parte Harper*[30], in a passage later approved by six Justices in the *Native Title Act Case*[31], Mason, Brennan and Deane JJ emphasised that, although the purpose of the doctrine[32]:

> "is to impose some limit on the exercise of Commonwealth power in the interest of preserving the existence of the States as constituent elements in the federation, the implied limitations must be read subject to the express provisions of the Constitution. Where a head of Commonwealth power, on its true construction, authorizes legislation the effect of which is to interfere with the exercise by the States of their powers to regulate a particular subject-matter, there can be no room for the application of the implied limitations."

32 The States are left by the relevant federal law in cl 44 free to exercise their legislative powers to impose liability to taxation, as cl 39 envisages. All that is forbidden by cl 44 is the imposition of a State law which discriminates against a carrier or person or corporation in the nominated categories. The enactment by federal law of this prohibition is within the ambit of the legislative powers of the Parliament. The prohibition is designed to ensure the effectiveness of the law

---

28 (1992) 175 CLR 453.

29 *Austin v The Commonwealth* (2003) 77 ALJR 491 at 501 [27], 527 [168], 547 [275]; 195 ALR 321 at 333, 370, 397.

30 (1986) 160 CLR 430.

31 *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 477.

32 (1986) 160 CLR 430 at 453.

with respect to carriers and others which is enacted under those powers and attracts the operation of s 109 of the Constitution.

33 Thus, there remains applicable the primary proposition stated by Dixon J in *Melbourne Corporation*[33]:

> "The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the *Engineers' Case*[34] stripped of embellishment and reduced to the form of a legal proposition."

Constitution, s 109

34 Telstra and Optus contend that, if and to the extent to which the provisions of the Local Government Acts of New South Wales and Victoria, pursuant to which the charges and rates in question were imposed or levied, fall within the description of laws which discriminate, or would have the effect (whether direct or indirect) of discriminating, against carriers generally, then they are inconsistent with the Telco Act and invalid.

35 In *The Commonwealth v State of Queensland*[35], this Court held that a provision in the *Commonwealth Inscribed Stock Act* 1911 (Cth) that "interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State" unless a certain condition was satisfied was a law supported by the power in s 51(iv) of the Constitution to make laws with respect to "[b]orrowing money on the public credit of the Commonwealth", and declared that Queensland legislation which made interest derived from Commonwealth stock or Treasury bonds liable to State income tax was to that extent invalid. That decision was referred to by Dixon CJ, in *Australian Coastal Shipping Commission v O'Reilly*[36], as the first in a line of cases in which "[t]he argument that under a legislative power of the Commonwealth the operation of

---

33 (1947) 74 CLR 31 at 78.

34 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

35 (1920) 29 CLR 1.

36 (1962) 107 CLR 46 at 56.

State laws cannot be directly and expressly excluded has been used without effect". The appellant in *O'Reilly* was established as a body corporate by the *Australian Coastal Shipping Commission Act* 1956 (Cth) which also provided that the Commission was not subject to taxation under State laws to which the Commonwealth itself was not subject. The Commonwealth law was held to be a law relevant to, and falling within, the power conferred by ss 51(i) and 98 of the Constitution. It prevailed over a law of the State of Victoria requiring payment of stamp duty on receipts given by the Commission in the course of its trading activities. Similarly, in *Botany Municipal Council v Federal Airports Corporation*[37] a Federal regulation which authorised licensed contractors to carry out works at the Sydney Airport in spite of a law of the State of New South Wales relating to environmental assessment was held to be effective to exclude the operation of State environmental legislation. In a joint judgment of all members of the Court it was said[38]:

> "There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law."

36 The argument for the appellants invoked the idea, expressed by Evatt J in *West v Commissioner of Taxation (NSW)*[39], that attempts by the Parliament of the Commonwealth to manufacture inconsistency between its own legislation and that of the States could result in a law of the Commonwealth which is itself *ultra vires*. A description of inconsistency as "manufactured" may beg the question. In *Wenn v Attorney-General (Vict)*[40], Dixon J said:

> "There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise

---

37 (1992) 175 CLR 453.

38 (1992) 175 CLR 453 at 465.

39 (1937) 56 CLR 657 at 707.

40 (1948) 77 CLR 84 at 120.

> would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. But within such limits an enactment does not seem to me to be open to the objection that it is not legislation with respect to the Federal subject matter but with respect to the exercise of State legislative powers or that it trenches upon State functions. Beyond those limits no doubt there lies a debatable area where Federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament."

37 It is inconsistency between a valid law of the Commonwealth and a law of a State that is involved, and, to be valid, the federal law must be a law with respect to a subject of federal legislative power. This case does not enter upon what Dixon J in *Wenn*[41] described as "a debatable area" in the law of the Constitution and so does not require consideration of the existence of such an area. The concern indicated by Dixon J appears to arise where a law on its face made in exercise of a head of concurrent legislative power in s 51 of the Constitution is "aimed at" preventing the exercise of State legislative power and accordingly is not "a law of the Commonwealth" for the purposes of s 109 of the Constitution and cannot prevail over legislation of a State passed in exercise of its concurrent power.

38 It appeared to Wilcox J that, in the application of s 109, there is a material difference between a Federal law which provides, for example, that a carrier shall not be liable to any State tax, and a law which provides that a carrier shall not be liable to any discriminatory State tax[42]. If the difference is thought to be that a law of the second kind is a law with respect to discrimination and not a law within s 51(v), then the answer to that is given above. Beyond that, the difference is elusive. If protecting carriers against the imposition of burdens, such as taxation, by State law has a sufficient connection with the power confined by s 51(v), then it is difficult to understand why protecting carriers against discriminatory burdens does not have the same connection with the power. Nor does such a limited protection become a bare attempt to exclude State power upon a subject as to which the Parliament has not chosen to legislate exhaustively.

---

41 (1948) 77 CLR 84 at 120.

42 (2000) 105 FCR 322 at 370-374 [179]-[198].

39 In cl 39, the Parliament declared an intention not to protect carriers from State taxes of general application, but the scheme of powers and immunities created by Sched 3, which was to govern the operations of the carriers, was to include (by virtue of cl 44) a protection from discriminatory State taxes and charges. The reasons of policy underlying the distinction are a matter for the legislature, although the responses of local authorities to what Wilcox J described as community concern at the cabling may indicate some of the policy considerations at work. The legislative history shows that an attempt to impose discriminatory taxes or charges, perhaps in order to discourage cabling, or at least overhead cabling, or perhaps simply to raise revenue, was foreseen. As a matter of power, the narrower immunity is as easily sustained as a wider immunity. The enactment of a valid Federal law pursuant to the power engages s 109.

Discrimination

40 Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison[43], and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.

41 In the present case, the basis for the claim of discrimination is in a comparison between, on the one hand, the charges and rates imposed and levied in respect of the Telstra and Optus cables, and, on the other hand, the treatment of facilities, which are installed or operated above, on or under public land, by utilities or other users of such space and are said to be comparable. The exemptions from charges and rates generally applicable to those facilities (except gas pipelines in New South Wales) are referred to above. As Gibbs J pointed out in *Victoria v The Commonwealth (The Payroll Tax Case)*[44], it is in the nature of taxing statutes that not all taxpayers are treated with absolute equality, and the fact that some taxpayers enjoy exemptions that are not available to others does

---

43 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 506 per Brennan J.

44 (1971) 122 CLR 353 at 425-426.

not necessarily involve discrimination. It may involve nothing more than differentiation based upon criteria within its constitutional power which it is well open to the legislature to regard as appropriate. In the present case, however, Telstra and Optus point to a general pattern of State legislative treatment of facilities to which their cables have been made an exception.

42 Clause 44 does not, in terms, identify the kind of comparison that is appropriate for the purpose of considering whether a State law discriminates against carriers generally. (The comparison involved in deciding whether a State law discriminates against a particular carrier, or a particular class of carriers, is more straightforward.) There is extrinsic material capable of assisting in the ascertainment of the meaning of cl 44[45]. The Explanatory Memorandum said:

> "The clause is intended to deal with laws which have an indirect effect of discriminating against carriers or users of carrier services, not just a law which, for example, on its face treats a person differently to someone else. The indirect discrimination which this clause is intended to prevent includes the following examples:
>
> - laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax);
>
> ..."

43 In relation to aerial cabling, which appears to be what primarily attracted the attention of the local authorities, the facilities installed by electricity authorities constitute an obvious basis of comparison. The fact that they are singled out in the Explanatory Memorandum confirms that the kind of discrimination with which cl 44 is concerned, in its reference to discrimination against carriers generally, is the subjection of carriers, in that capacity, to a burden of a kind to which others in a similar situation are generally not subject, and that a similar situation includes the use of public space for the installation and maintenance of facilities such as cables, pipes, ducts and conduits. In relation to underground facilities, the position is somewhat more complex, but gas pipelines in New South Wales are, apart from the facilities in question in this case, the exception to a general pattern of exemption.

---

45 *Acts Interpretation Act* 1901 (Cth), s 15AB.

44 It is not necessary to resolve the question, raised by a submission of Telstra and Optus, whether it would be sufficient to constitute discrimination that there was even one substantial utility that received the benefit of exemptions denied to Telstra and Optus. Here there is a clear general pattern of exemptions, and it is sufficient to say that the existence of one other significant exception to that pattern (gas pipelines in New South Wales) does not negate discrimination. In addition, in the case of aerial cabling, there is an obvious basis of comparison, namely electricity facilities, which enjoy an exemption.

45 The appellants point out that the exemptions are granted directly by State laws, whereas the charges and rates are imposed or levied by local authorities acting pursuant to State laws. They also point out that the differential treatment to which the telecommunications cables are subject is a consequence of the combined operation of the exemptions and the impositions or levies. Why, it is asked, does cl 44 prevail over the laws that authorise the charges and rates, rather than the laws that grant the exemptions? The charges and rates take legal effect by virtue of the State laws pursuant to which the resolutions of the local authorities were passed. Clause 44 refers to laws that discriminate, or have the effect of discriminating against carriers. Those are the laws that are of no effect. The laws that confer favourable treatment upon others are not declared by cl 44 to be ineffective. Their existence may give to the laws pursuant to which the charges and rates in issue are imposed or levied the character of being discriminatory, but they do not themselves discriminate, or have the effect of discriminating, against carriers under the Telco Act.

46 It would be inconsistent with the scheme of the Telco Act, and the context of cl 44, to assert that, in its reference to discrimination, the Telco Act contemplated as a legitimate and appropriate basis of differential imposition of burdens the circumstance that carriers were authorised by a law of the Commonwealth, whereas other utilities or bodies owning or operating comparable facilities were authorised by State laws[46]. Nor is it possible to account for, or justify, the difference on the basis of a distinction between public ownership and private enterprise.

---

46 cf *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ; *Austin v Commonwealth* (2003) 77 ALJR 491 at 517 [118]; 195 ALR 321 at 356 per Gaudron, Gummow and Hayne JJ.

47 The Full Court was right to hold that Telstra and Optus have made out a case of discrimination within cl 44.

Conclusion

48 The appeals should be dismissed with costs.

49 The result is that the following declaration made in each set of proceedings below by the Full Federal Court stands:

> "3. The Court declares that each of
>
> (a) section 611 of the *Local Government Act* 1993 (NSW), to the extent that it authorises the first to eleventh respondents to make, levy and recover from the appellants charges in respect of the possession, occupation and enjoyment of telecommunications cables erected or placed on, under or over a public place; and
>
> (b) Part 8 of the *Local Government Act* 1989 (Vic), to the extent that it authorises the twelfth to fifteenth respondents to declare and recover from the appellants rates and charges on land occupied by telecommunications cables;
>
> discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within clause 44(1) of Schedule 3 to the *Telecommunications Act* 1997 (Cth), and is to that extent inconsistent with clause 44(1) and invalid pursuant to section 109 of the Constitution."

50 McHUGH J. These cases involve appeals against declarations made by the Full Court of the Federal Court of Australia[47] concerning the validity of certain sections of the *Local Government Act* 1993 (NSW) and the *Local Government Act* 1989 (Vic). The Full Court declared that, to the extent that the sections empower local government councils to impose rates or charges on certain cables owned by telecommunications carriers, they discriminate against the carriers and are invalid under s 109 of the Constitution. The questions in the appeals are whether cl 44(1) of Sched 3 to the *Telecommunications Act* 1997 (Cth) is valid and, if so, whether the clause operates to invalidate Victorian and New South Wales provisions that impose charges or rates on licensed telecommunications carriers.

51 In my opinion, cl 44(1) is valid and operates to invalidate the Victorian and New South Wales provisions that impose discriminatory charges or rates on telecommunication carriers licensed under the *Telecommunications Act*.

Statement of the case

52 The Telstra companies – Telstra Corporation Ltd and Telstra Multimedia Pty Ltd ("Telstra") – and the Optus companies – Optus Vision Pty Ltd and Optus Networks Pty Ltd ("Optus") – commenced proceedings in the Federal Court against a number of Victorian and New South Wales local government councils. All four companies are "carriers" under the *Telecommunications Act*[48]. In the proceedings, Telstra and Optus sought declarations that Pt 8 of the *Local Government Act* 1989 (Vic) and s 611 of the *Local Government Act* 1993 (NSW) did not authorise the imposition of rates or charges on cables owned by the companies.

53 Two of the proceedings – S79/2003 and S80/2003 – arose from activities in Victoria and concern Pt 8 of the Victorian *Local Government Act*. The other two proceedings – S83/2003 and S84/2003 – arose from activities in New South Wales and relate to s 611 of the New South Wales *Local Government Act*. The Telstra companies are the respondents in matters S79 and S84. The Optus companies are the respondents in matters S80 and S83.

---

47 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

48 Under the Act, the holder of a carrier licence is known as a carrier. A carrier is an owner of a "network unit" – essentially, any communication line or designated radiocommunications facility in Australia – which may be used to supply "carriage services", namely, "a service for carrying communications by means of guided and/or unguided electromagnetic energy": ss 7, 26-29, 42. Carriers are one of the primary suppliers of telecommunications services in Australia.

54 In the proceedings, Telstra and Optus claimed that the rates and charges were invalid for a number of reasons. The reasons included:

- the rates and charges were excises and, under the Constitution, only the Commonwealth could impose an excise; and
- the rates and charges discriminated against Optus and Telstra contrary to cl 44 of Sched 3 to the *Telecommunications Act* and were invalid by operation of s 109 of the Constitution.

55 Wilcox J, who tried the actions, dismissed the claims[49]. His Honour held that, although rates imposed under Pt 8 of the Victorian Act were taxes, they were not taxes on goods and therefore not excises[50]. His Honour held that the charges imposed by s 611 of the New South Wales Act were not taxes and accordingly not excises[51]. Paragraphs (b) and (c) of cl 44(1) of Sched 3 to the *Telecommunications Act* were devoid of legal effect because they purported directly to invalidate State law or actions under State law. Accordingly, they were beyond the constitutional power of the federal Parliament[52]. Further, cl 44(1)(a) of Sched 3 was not a law upon which s 109 of the Constitution was capable of operating[53].

56 An appeal by Telstra and Optus to the Full Court of the Federal Court succeeded. The Full Court (Sundberg and Finkelstein JJ[54]) held that:

- cl 44 of Sched 3 to the *Telecommunications Act* was a valid exercise of the power conferred on the Commonwealth Parliament by s 51(v) of the Constitution[55];

---

49 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.

50 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 350-351.

51 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 350-351.

52 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 369.

53 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 374.

54 After the hearing of the appeal, Katz J became unable to continue as a member of the Full Court. The parties consented to the appeal being completed by the Full Court constituted by Sundberg and Finkelstein JJ.

55 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 213.

- Pt 8 of the Victorian Act and s 611 of the New South Wales Act discriminated against Optus and Telstra[56]; and

- to the extent that those provisions authorised councils to impose rates or charges on telecommunications carriers licensed under the *Telecommunications Act*, they were invalid under s 109 of the Constitution[57].

The material facts and circumstances

New South Wales

57 The appellants in the New South Wales matters are bodies corporate under the New South Wales *Local Government Act*. They are Hurstville City Council, Kogarah Municipal Council, Leichhardt Municipal Council, Parramatta City Council, Penrith City Council, Randwick City Council, Hornsby Shire Council, Drummoyne Council, Burwood Council, Concord Council and Strathfield Municipal Council. Section 611(1) of the New South Wales *Local Government Act* confers power on a council to make an annual charge on a "person ... in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place." However, the New South Wales Act exempts a number of bodies from the operation of the power, either under s 611(6) of the Act or pursuant to other New South Wales laws. Those protected under s 611(6) of the *Local Government Act* include the Sydney Water Corporation, the Hunter Water Corporation, any water supply authority, the New South Wales Rail Access Corporation (now the Rail Infrastructure Corporation) and, in some circumstances, the owner or operator of a light rail system. Section 611(6)(a) provides that the section does not apply to the Crown. This immunity protects, relevantly, the Roads and Traffic Authority of NSW[58]. Those protected under other Acts include electricity network operators pursuant to s 50 of the *Electricity Supply Act* 1995 (NSW) and a person constructing or operating a pipeline authorised by a licence under s 40(1) of the *Pipelines Act* 1967 (NSW).

58 Telstra and Optus have installed underground coaxial cable and aerial coaxial cable in local government areas under the responsibility of each of the appellant councils. Acting under s 611 of the *Local Government Act*, each of the New South Wales appellants has imposed annual charges, at a rate per kilometre,

---

56 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215-217.

57 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 218.

58 This is the combined effect of s 611(6)(a) of the *Local Government Act* and s 46(2)(b) of the *Transport Administration Act* 1988 (NSW).

in respect of these cables. Each appellant has also imposed charges under s 611 in respect of Australian Gas Light Company (AGL) pipelines. No charges under s 611 were made in relation to a range of other structures in public places – for instance, electricity wires, rail structures, traffic lights, post boxes, bus shelters and advertising signs.

Victoria

59 Each appellant in the Victorian matters is a body corporate established under the Victorian *Local Government Act*. The appellants are Bayside City Council, Moreland City Council, Frankston City Council and Yarra City Council. Part 8 of the Victorian *Local Government Act* empowers local government councils in Victoria to levy rates and charges on rateable land. Section 154(1) declares that, except as provided in s 154, all land is rateable. Sections 154 and 155 empower the Victorian councils to declare rates and charges on all land, except land exempted by s 154(2). The categories of land listed in s 154(2) include land that is the property of the Crown and land that is used exclusively for public or municipal services. Other uses of land are exempted from rates and charges by other legislation. At the relevant time, electricity companies were exempt[59], as were retail gas suppliers[60]. Section 156 of the Victorian Act imposes primary liability for rates on the owner of the land.

60 Telstra and Optus have each installed underground coaxial cable and aerial coaxial cable in local government areas under the responsibility of each of the appellant councils. Each of the appellants declared and levied rates on Telstra and Optus in respect of the land occupied by the cables. The rates were calculated by reference to one of the three systems of valuation permitted by s 157(1) of the Victorian Act: the site value, net annual value or capital improved value system.

---

59 *Electricity Industry Act* 1993 (Vic), s 46(1A). This Act was replaced by the *Electricity Industry Act* 2000 (Vic), which commenced on 1 January 2001. Section 94(4) of that Act exempts only electricity generation companies and associated entities from liability to pay rates in respect of land used for generation functions. (Such companies may elect to pay amounts agreed or determined under s 94(5).)

60 *Gas Industry Act* 1994 (Vic), s 52(2). This Act was replaced by the *Gas Industry Act* 2001 (Vic), which commenced on 1 September 2001. Section 145 of that Act is in the same terms as s 52(2) of the 1994 Act.

Commonwealth

61 Clause 44 of Sched 3 to the *Telecommunications Act* is directed at State and Territory laws that discriminate against carriers. Clause 44(1) provides:

> "The following provisions have effect:
>
> (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
>
> (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
>
> (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally."

The issues

62 In this Court, the following issues fall for determination:

(1) Within the meaning of cl 44(1) of Sched 3 to the *Telecommunications Act*, does Pt 8 of the Victorian *Local Government Act* and/or does s 611 of the New South Wales *Local Government Act* discriminate, or have the effect of discriminating against, carriers?

(2) Is cl 44(1) a valid exercise of the power conferred on the Commonwealth Parliament by s 51(v) of the Constitution?

(3) Is cl 44(1) invalid because it intrudes into State power and infringes the implied limitations on federal legislative power inherent in the Constitution by virtue of the federal structure?

(4) Does cl 44(1) validly engage s 109 of the Constitution, or is it a law which merely seeks to deny effect to a State law?

Do the State laws discriminate against carriers?

63 On their face, the Victorian and New South Wales laws operate generally. If those laws do not discriminate, or do not have the direct or indirect effect of discriminating, against Telstra and Optus, then cl 44(1) has no application to the New South Wales or Victorian laws. On that hypothesis, the constitutional issues do not arise.

64 However, the Full Court concluded that, because many bodies which would otherwise be required to pay the council rates or charges were exempt from the State laws, those laws had the "direct or indirect effect of discriminating" against carriers[61]. The Full Court concluded that the word "discrimination" in cl 44(1) should be given its ordinary meaning: "differential treatment ... the failure to treat all persons equally where there is no reasonable distinction to justify different treatment."[62] The Full Court addressed the question whether the State laws discriminated, in this sense, against the carriers. The Court said[63]:

> "In our view there is discrimination when a tax is imposed on a carrier in respect of certain of its activities, for example, on the occupation of a public place by underground or aboveground cables through which communications are sent, but is not imposed on other bodies which make a similar use of public places, such as electricity, gas or water utilities which lay pipes or cables over or under public places to transmit their 'goods'. It is discrimination against the carrier because it accords to it less favourable treatment than to the other occupiers of public space."

65 The appellants contended that a law of general application does not discriminate merely because it exempts a "small group of identified entities" from its operation. I cannot accept this argument. The reference in cl 44(1) to direct and indirect effect focuses on the actual effect of the State law. That the New South Wales and Victorian provisions are of general application is of no relevance if every entity that could conceivably be charged for their use of public land – other than carriers – is exempted from the operation of the provisions. To describe the exempted entities as a small group is to ignore that they are the *only* entities other than carriers on which charges could be imposed under the Victorian and New South Wales provisions. Later in this judgment, I consider

---

61 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 213, 215.

62 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

63 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

the significance to this issue of the liability of retail gas suppliers to pay charges in New South Wales.

66 The appellants submitted that, while the State laws differentiate between the exempted entities and other persons – including carriers – they do not "discriminate against" carriers in the relevant sense. The appellants contended that different treatment of two entities or classes will only be discrimination where the different treatment is based on some impermissible ground or, in the case of indirect discrimination, where apparently equal treatment has a differential impact according to a criterion which is impermissible. They relied on statements by Gaudron J in *Street v Queensland Bar Association*[64] and by Gaudron J and myself in *Castlemaine Tooheys Ltd v South Australia*[65] to support this proposition.

67 However, the distinction between the "constitutional" meaning of discrimination – the sense in which the concept is used in s 117 and in ss 51(iii) and 99 of the Constitution – and the "ordinary" meaning of the term is of little importance in the context of this case. The Full Court held, correctly in my opinion, that the State legislation discriminated against Telstra and Optus even if the apparently narrower scope of the constitutional meaning of that word were applied[66].

Reasonable distinction?

68 The Full Court accepted that different treatment amounts to discrimination only if there is no reasonable distinction to justify different treatment[67]. The appellants submitted that the key difference between Telstra and Optus on the one hand and the exempted bodies on the other is that the latter occupy land under statutory authorities granted by the States, while the appellants occupy land under authority granted by the Commonwealth. A State, they submitted, is entitled to prevent councils, which are the custodians of its land, from charging rates to the State's agents.

69 However, the question whether a reasonable distinction exists must be examined in light of the law prohibiting discrimination, not the potentially discriminatory law. As Gaudron J and I said in *Castlemaine Tooheys Ltd v South*

---

64 (1989) 168 CLR 461 at 569-574.

65 (1990) 169 CLR 436 at 478.

66 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

67 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

Australia[68], a law "is discriminatory if it operates by reference to a distinction which some *overriding law* decrees to be irrelevant". It is of no present relevance whether or not, in exercising their powers under the applicable *Local Government Act*, councils are acting reasonably in perceiving a difference between State agencies and bodies authorised to carry out functions under federal law, such as Optus and Telstra. The question is whether the *Telecommunications Act* permits Optus and Telstra to be treated differently from State agencies in respect of rates and charges.

70 It is true, as Wilcox J noted[69], that cl 44(1) of Sched 3 to the *Telecommunications Act* provides no criteria by which a court may determine what differences are legitimate and what are illegitimate. His Honour observed that in this respect it differs from other federal statutes which prohibit discrimination and which provide such criteria, for example, the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the *Disability Discrimination Act* 1992 (Cth)[70].

71 For the purposes of this case, it is unnecessary to determine whether cl 44(1) prohibits *all* differential treatment of carriers. It is sufficient to say that the wide and unconditional language of cl 44(1) suggests that the Commonwealth Parliament intended to protect carriers from special burdens without regard to any policy objective of a State or Territory law which imposed that burden. If the Parliament had intended to allow such policy objectives to be relevant, it would have framed cl 44(1) so as to prohibit only *unreasonable* discrimination.

72 If the term "discriminate" in cl 44 is ambiguous, the proposition that the Parliament intended to allow State legislatures to treat carriers differently where this serves a policy objective of the State receives no support from either the Explanatory Memorandum or the Second Reading Speech to the Telecommunications Bill 1996 (Cth). The Explanatory Memorandum states[71]:

> "The indirect discrimination which this clause is intended to prevent includes the following examples. ... Laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers

---

68 (1990) 169 CLR 436 at 478 (emphasis added).

69 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 363.

70 See, for instance, s 30 of the *Sex Discrimination Act*, which permits discrimination in employment on the ground of sex if it is a "genuine occupational qualification" to be a member of the other sex.

71 Telecommunications Bill 1996 (Cth) Explanatory Memorandum, vol 3 at 27.

because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax) ...".

73 The Second Reading Speech states[72]:

> "The bill continues and reinforces the provisions in the [*Telecommunications Act* 1991 (Cth)] which prevent the law of a State or Territory from operating so as to discriminate against a carrier or a class of carrier. It provides that a State or Territory law has no effect to the extent that it discriminates, or has the effect of discriminating, either directly or indirectly against a carrier or a user or potential user of a carrier's services. An example of one kind of discrimination that this provision deals with are State or Territory laws which give special powers or immunities to public utilities such as electricity suppliers or railways where these are not also given to any carrier in that State or Territory in like circumstances."

74 Neither the Explanatory Memorandum nor the Second Reading Speech refers to any policy objective of a State as a legitimate basis upon which either carriers may be treated differently from other public utilities or the facilities of carriers may be treated differently from similar facilities.

75 Wilcox J said[73] that Telstra and Optus were inviting the Federal Court to use the above example in the Explanatory Memorandum not to determine any ambiguity about the word "discriminate", but to decide how cl 44(1) may be applied in a particular factual situation. However, in so far as an Explanatory Memorandum indicates Parliament's purpose is enacting a term, the Memorandum indicates that the Commonwealth Parliament, in using the term "discriminate", had the purpose of striking down laws similar to those in the present case. Further, it shows that the Parliament intended cl 44 to invalidate a law which treats a State authority or State-owned entity that provides an essential public service more favourably than carriers. For example, assuming that a Victorian instrumentality still owned and operated an electricity transmission and distribution network, cl 44 would operate in respect of a law which treated that entity more favourably than carriers[74].

---

72 Australia, Senate, *Parliamentary Debates* (Hansard), 25 February 1997 at 944 per Ian Campbell.

73 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 363-364.

74 Following the disaggregation of the electricity industries in Victoria and New South Wales, transmission and distribution networks are owned and operated by different entities. Private entities own, operate and maintain electricity distribution assets (poles and wires) in both States. The transmission network in Victoria is owned and operated by a private entity, SPI PowerNet Pty Ltd, while in New South

(Footnote continues on next page)

76 For this reason, it is unnecessary to evaluate the appellants' arguments as to why the States might reasonably have treated Telstra and Optus differently from other public utilities.

With whom is the appropriate comparison?

77 Clause 44(1) prohibits discrimination against a particular carrier, class of carriers or carriers generally. If the discrimination alleged was against a particular carrier, the appropriate comparison would probably be other carriers. Where the discrimination is alleged to be against "carriers generally", however, the issue arises as to the appropriate entity with which "carriers" should be compared. Was the Full Court correct to conclude that the appropriate comparison here was between Optus and Telstra on the one hand and "other bodies which make a similar use of public places"[75] on the other?

78 The appellants were unable to suggest any alternative point of comparison. Instead, they resorted to the suggestion that cl 44(1) is designed to prevent only laws *aimed* at carriers, rather than to ensure that carriers receive equal treatment. Such a narrow interpretation of "discrimination" is incompatible with the breadth of cl 44(1). In particular, the reference to the "direct or indirect" *effect* of a State or Territory law leaves no room for such an argument.

79 In cases like the present, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). The New South Wales and Victorian Acts confer a power to levy charges or rates on the owners or occupiers of public land, that is, land used for a public purpose. This indicates that the Full Court was correct in comparing the position of carriers with that of other owners or occupiers of public land. In turn, this invites a comparison with electricity suppliers, water suppliers, gas suppliers and other pipeline users. These entities

---

Wales a government owned statutory corporation which operates under the *State Owned Corporations Act* 1989 (NSW), TransGrid, owns and operates the transmission network.

In the other States and Territories, private entities own and operate or lease and operate the electricity distribution networks in South Australia and the ACT. Government owned corporations own and operate electricity distribution networks in Queensland, Tasmania, Western Australia and the Northern Territory. In South Australia private entities lease and operate the electricity transmission network. Government owned corporations own and operate electricity transmission networks in Queensland, Tasmania, Western Australia and the Northern Territory.

75 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

resemble Telstra and Optus in their ownership and/or occupation and use of public land, a use which involves putting wires, cables or pipes over or under the land. Other owners or occupiers of public land, whose use of the land is perhaps less directly comparable with that of Telstra and Optus, include rail authorities, road traffic authorities and public transport authorities. Whether the comparison is made with the first group or the second group, the New South Wales and Victorian Acts exempt all – or in the case of New South Wales, almost all – of these entities from the operation of the legislation. This has the effect that the New South Wales and Victorian Acts authorise charges or rates that discriminate against Telstra and Optus.

The significance of the liability of gas suppliers in New South Wales

80 In New South Wales, gas suppliers are the only bodies apart from Telstra and Optus that are subject to the charges. Section 51 of the *Gas Supply Act* 1996 (NSW) provides an exemption for gas network operators from local council charges, although this provision has not yet been proclaimed. The Full Court assumed, correctly in my opinion, that this liability on the part of gas network operators did not mean that the New South Wales councils did not discriminate against Telstra and Optus[76]. A person may be discriminated against even if some other person is treated equally unfavourably.

81 If *many* other persons were also treated unfavourably, a question might arise whether the law discriminated against a particular person. This question does not arise in the present case. The great majority of occupiers of public space in New South Wales are exempt from local government charges. That gas suppliers remain subject to these charges does not alter the fact that carriers are treated less favourably than most comparable entities.

The constitutional issues

82 The central claim of the appellants is that cl 44(1) is a law about the power of State parliaments, rather than about telecommunications. On their analysis, and for essentially this reason, they claimed that cl 44 is unsupported by s 51(v) of the Constitution, breaches an implied limitation of the Constitution and does not engage s 109 of the Constitution so as to render the New South Wales and Victorian laws invalid. The Attorneys-General for Victoria, Western Australia and Queensland intervened to support the appellants' submissions. The Attorney-General for the Commonwealth intervened to support Telstra and Optus.

---

76 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

The scope of cl 44(1)

83 As the Full Federal Court noted, it is necessary to consider the scope of cl 44(1) before considering its constitutional validity. The text of cl 44(1) is set out at [61] above.

84 The Full Court thought that cl 44 had two possible interpretations. One was that it granted carriers exemption from all discriminatory State and Territory laws[77]. The second was that it prevented discrimination against a carrier by laws that affect the provision of telecommunications services[78].

85 Each appellant criticised the Full Court's reasoning and submitted that the Court put forward two different interpretations of cl 44(1). The Full Court, after referring to the content of Divs 2, 3 and 4 of Pt 1 of Sched 3 to the *Telecommunications Act* – which relate respectively to the inspection of land and the installation and maintenance of facilities – said that the "protection must relate to the carrying out of those activities."[79] Second, the Court said that cl 44(1) was designed to prevent State and Territory legislatures from enacting discriminatory legislation "which would burden the activities of a carrier in the course of *providing the telecommunications services* for which the carrier holds a permit."[80]

86 The appellants contended that, on the first construction, cl 44(1) does not operate with respect to the Victorian and New South Wales provisions. In addition, Divs 2, 3 and 4 of Pt 1 of Sched 3 do not relate to occupation and enjoyment of telecommunications facilities. If the scope of cl 44(1) derives from those Divisions, the appellants argued, it does not extend to the kind of activities that Telstra and Optus were carrying out, namely, activities that had nothing to do with such inspection, installation or maintenance.

87 However, I do not think that the Full Court intended to suggest that cl 44(1) was limited to the activities listed in Divs 2, 3 and 4 of Pt 1 of Sched 3. Rather, the Court was suggesting that these Divisions, together with the remainder of the *Telecommunications Act*, indicate that the Act is concerned with the regulation of carriers acting in their capacity as telecommunications carriers.

---

77 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 207.

78 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 207-208.

79 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210.

80 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210 (emphasis added).

Schedule 3 is titled "Carriers' Powers and Immunities" and confers a variety of powers and immunities on carriers. The Schedule should not be read so that the immunities contained in it are limited to the powers contained in it. Such a construction is at odds with the accepted purposive approach to statutory interpretation.

88 The appellants also criticised the second construction of cl 44. They contended that the concept of "telecommunications services" is so vague that it does not identify a particular set of activities which cl 44(1) protects. The Commonwealth Parliament may have intended to protect carriers in the particular activities which their carrier licences, under the *Telecommunications Act*, allow them to undertake – but it may equally have intended to cover a wider or narrower set of activities. This argument is unpersuasive. When cl 44(1) is viewed in the context of the rest of the Act, it is limited to protecting carriers only in relation to the provision of telecommunications services. The Act authorises the provision of those services. It seems natural to regard cl 44(1) as protecting carriers in so far as they carry out those services. It was not necessary for cl 44(1) to refer specifically to the provision of telecommunications services in cl 44 because this was the subject matter of the entire Act. If this meaning was not clear from the nature of the Act, s 15A of the *Acts Interpretation Act* 1901 (Cth) would require the clause to be read down so as to protect carriers only in relation to the provision of telecommunications services[81].

Is cl 44(1) a law with respect to telecommunications?

89 The appellants in each proceeding claimed that, on its proper characterisation, cl 44(1) is not a valid exercise of the power conferred by s 51(v) of the Constitution. Section 51(v) provides that the Commonwealth may make laws for the peace, order and good government of the Commonwealth with respect to "postal, telegraphic, telephonic, and other like services".

90 The *Telecommunications Act* provides for the licensing of an organisation to act as a carrier, and establishes the powers, rights, duties and immunities of a carrier. The Act also regulates the activities the subject of a carrier licence. These provisions are within s 51(v)[82]. Further, that head of power entitles the

---

81 Section 15A provides:

> "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

82 *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 277 per Latham CJ.

Commonwealth to confer protection on carriers when they engage in activities the subject of the carrier licence, including protection against discriminatory State or Territory legislation[83]. Because s 51(v) gives the Commonwealth power to license and regulate telecommunications carriers and to confer powers and immunities on them, the conferring on carriers of an immunity from discriminatory State laws, including taxes, has a clear and direct connection with the head of power[84].

91 A s 51 power extends beyond laws that authorise, regulate or prohibit subjects that fall within or are incidental to that head of power. A s 51 power also authorises a law that expressly limits the operation of a State law in relation to a subject matter authorised, regulated or prohibited under that head of power. This Court has held on many occasions that, where the Commonwealth has power to regulate an area, it has power to protect entities which operate in that area from the effect of State laws. The cases, where the Court has so held, include *Australian Coastal Shipping Commission v O'Reilly*[85], *Botany Municipal Council v Federal Airports Corporation*[86] and *Western Australia v The Commonwealth* (*Native Title Act Case*)[87]. In *O'Reilly*, Dixon CJ said[88]:

> "The argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect in a succession of cases beginning with *The Commonwealth v Queensland*[89]. It may be worth remarking that the interpretation, long since adopted by this Court, of s 109 is hardly consistent in thought with such an argument. The Court has interpreted s 109 as operating to exclude State law not only when there is a more direct collision between federal and State law but also when there is found

---

83 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.

84 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490-491 per Barwick CJ; *Leask v The Commonwealth* (1996) 187 CLR 579 at 591 per Brennan CJ, 605 per Dawson J, 616 per McHugh J, 621-622 per Gummow J.

85 (1962) 107 CLR 46.

86 (1992) 175 CLR 453.

87 (1995) 183 CLR 373.

88 (1962) 107 CLR 46 at 56-57.

89 (1920) 29 CLR 1.

> in federal law the manifestation of an intention on the part of the federal Parliament to 'occupy the field'. ... Surely, consistency with that doctrine demands that a legislative power ... must extend to a direct enactment which expressly excludes the operation of State law provided the enactment is within the subject matter of the federal power. Indeed there can really be no other way of expressing the intention and accomplishing the federal legislative purpose."

92 The appellants and the State Attorneys-General submitted that cl 44(1) is a law about discrimination and the operation of State laws, rather than a law about telecommunications. This argument ignores the principle that a law of the federal Parliament is valid if it is a law with respect to a s 51 head of power even if it may also be characterised as a law with respect to a subject that is outside the grant of federal power[90]. Clause 44(1) is a law which confers rights, powers and immunities on carriers *and* a law which deals with the effect of State and Territory laws on those carriers. Even if cl 44(1) can be characterised as a law with respect to the effect of State and Territory laws, that characterisation does not prevent it from being a law "with respect to" the head of power described in s 51(v). This is because it is a law with respect to telecommunications carriers, a subject that is within the scope of s 51(v).

93 The appellants' submission on this point cannot stand with the decisions of this Court in *O'Reilly*[91], *Botany Municipal Council*[92] and the *Native Title Act Case*[93]. As the Court stated in its unanimous decision in *Botany Municipal Council*[94]:

> "There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorized to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity."

94 The appellants relied on two points to distinguish the current case from these decisions. First, they suggested that the Commonwealth is entitled to protect its own agent, but not an independent commercial enterprise, such as

---

90 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.

91 (1962) 107 CLR 46.

92 (1992) 175 CLR 453.

93 (1995) 183 CLR 373.

94 (1992) 175 CLR 453 at 465.

Optus and (to a lesser extent) Telstra from the operation of State and/or Territory laws. Second, the appellants contended that the partial nature of the protection conferred on carriers distinguishes this case from the earlier decisions.

Must the entity protected be a statutory authority?

95 The appellants and the State interveners observed that many of the decisions referred to by the Full Court involved the protection of the Commonwealth or a Commonwealth agency from State legislation. For instance, *O'Reilly* concerned the Australian Coastal Shipping Commission, a Commonwealth statutory authority established under the *Australian Coastal Shipping Commission Act* 1956 (Cth). The Attorney-General for Western Australia suggested that *Botany Municipal Council* is also such a case. The persons exempted from the relevant New South Wales legislation, the *Environmental Planning and Assessment Act* 1979 (NSW), were contractors carrying out works for the Federal Airports Corporation, a Commonwealth statutory authority established under the *Federal Airports Corporation Act* 1986 (Cth).

96 Although, historically, the Commonwealth has exempted Commonwealth statutory authorities from State taxes, this fact does not mean that these are the *only* bodies that the Commonwealth can exempt from State taxes or State laws. It is difficult to see why the telecommunications power, which enabled the Commonwealth to create its own telecommunications carrier (Telecom Australia, now trading as "Telstra"[95]) and to protect it from State laws[96], does not extend to protecting a private company operating as a telecommunications carrier from State laws.

---

95 Until 1975, telecommunications services were provided by a government authority, the Department of the Postmaster General. The Australian Telecommunications Commission, trading as Telecom Australia, was established as a statutory corporation in 1975 to provide Australia's domestic telecommunications services. After 1992, the entity which traded as Telecom Australia (including the Australian Telecommunications Corporation and the Australian and Overseas Telecommunications Authority) also provided Australia's international telecommunications services. Telecom Australia changed to the trading name "Telstra Corporation Limited" in April 1993 (trading domestically as "Telstra" since 1995) and, as an Australian public limited liability company, was partially privatised commencing November 1997.

96 See, eg, *Telecommunications Act* 1975 (Cth), s 80, which operated to exempt Telecom Australia from taxation under any law of a State or Territory.

97 The decisions of this Court on which the appellants sought to rely do not support the proposition that the Commonwealth may only exempt itself and its agents from the operation of State taxes or State laws. As *O'Reilly* concerned a Commonwealth statutory authority, the Court expressed its reasoning in terms of such an authority. However, there is nothing in that decision to suggest that the Commonwealth would *only* be entitled to protect a statutory authority from State taxation. In *Botany Municipal Council*, the Court upheld a federal law that exempted licensees of the Federal Airports Corporation from compliance with the *Environmental Planning and Assessment Act* 1979 (NSW). At no point did the Court suggest that this conclusion was based on the fact that the licensees had acquired any kind of governmental authority from the Federal Airports Corporation.

Partial protection of carriers

98 The primary judge, Wilcox J, held that, while s 51(v) would have entitled the Commonwealth Parliament to protect carriers from State laws, it was not open to the Parliament to prohibit only discriminatory State laws[97]. The appellants also relied on this argument – although in a slightly different form – in this Court. The appellants contended that a State law can only be rendered inconsistent with a federal law if the federal law "exclusively and exhaustively" covers the relevant field. Thus, the appellants claimed that in the *Native Title Act Case* the impugned provision was treated as expressing an intention that the Commonwealth law be exclusive and that it was valid only on this basis. It follows, claimed the appellants, that a provision such as cl 44(1) can *only* be valid if it is construed as indicating an intention that the federal law is to have exclusive operation – that it "cover the field" of telecommunications.

99 The appellants contended that the *Telecommunications Act* does not deal with carriers in such a comprehensive way. In particular, the appellants pointed to Div 7 of Pt 1 of Sched 3 to the *Telecommunications Act*, which makes it clear that State laws are generally applicable to carriers. Accordingly, they submitted that cl 44(1) is beyond the legislative power of the Commonwealth Parliament in that it constitutes a "bare attempt to oust State law". If the Commonwealth is entitled to prohibit the States from taxing carriers generally, however, it is equally entitled to provide for a partial prohibition. Such a partial prohibition is connected with the head of power. It does not represent a bare attempt to oust State law. In the *Native Title Act Case*, the Court said in a unanimous judgment[98]:

---

97 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 374.

98 (1995) 183 CLR 373 at 468.

> "Provided it is within the legislative power of the Commonwealth to exclude completely the operation of State law extinguishing native title, it is within Commonwealth power to exclude partially or on terms the operation of a State law which has that effect."

Implied limitation on Commonwealth legislative power

100 I also agree, for the reasons given in the joint judgment, that cl 44 does not offend the principle in *Melbourne Corporation v The Commonwealth*[99], namely, that the Constitution restricts Commonwealth legislative powers so as to prohibit discrimination which involves the placing on the States of special burdens or disabilities, and to prohibit laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments. Accordingly, that clause does not infringe any implied limitation on Commonwealth legislative power resulting from the federal structure of the Constitution.

Conclusion

101 Clause 44(1) is therefore a valid exercise of the Commonwealth's power in relation to telecommunications. Part 8 of the Victorian *Local Government Act* and s 611 of the New South Wales *Local Government Act*, to the extent to which they impose rates and charges on telecommunications facilities have a discriminatory effect in their operation in relation to carriers under the *Telecommunications Act*. They are inconsistent with cl 44(1) and are inoperative under s 109 of the Constitution.

Order

102 The appeals should be dismissed.

---

99 (1947) 74 CLR 31 at 81-83 per Dixon J; see also *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

CALLINAN J.

Facts

103 These appeals were heard together. It is convenient to refer to all of the local authorities as the appellants, although at times in these proceedings their names may have appeared on the other side of the record, and to deal with the appeals together.

104 The respondent corporations ("the respondents") are telecommunications companies. They are commercial corporations in every sense. Pursuant to rights conferred upon the respondents by the *Telecommunications Act* 1997 (Cth) ("the Telco Act"), by, for example Divs 2, 3 and 4 of Sched 3 to the Act, they have entered upon roads and other public spaces owned by the appellants, and have erected under, on, and above the surface of them, cables and other installations for the carriage of communications electronically. Almost invariably the respondents have made use of existing infrastructure such as electric light poles and subterranean pipes and conduits. It is common ground that the respondents have paid or offered no compensation to the appellants in respect of their entry upon, use and occupation of the land, air space, or existing infrastructure on or in which their installations have been erected or inserted.

105 The appellants, some in New South Wales, and others in Victoria have resolved, the former pursuant to s 611 of the *Local Government Act* 1993 (NSW) ("the NLGA"), and the latter, to Pt 8 of the *Local Government Act* 1989 (Vic) ("the VLGA"), to make, levy and recover from the respondents charges ("the cable charges") in respect of the possession, occupation and enjoyment of the telecommunications cables erected or placed on, under or over public spaces. For present purposes it is sufficient to set out sub-ss 611(1), (2), (3) and (4) of the NLGA:

> "**611 Annual charge on rails, pipes etc**
>
> (1) A council may make an annual charge on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place.
>
> (2) The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.
>
> (3) The annual charge is to be based on the nature and extent of the benefit enjoyed by the person concerned.

(4) If a person is aggrieved by the amount of the annual charge, the person may appeal to the Land and Environment Court and that Court may determine the amount."

106 The Court did not have before it any of the relevant resolutions. The description that I have just given of them, although imprecise, is apparently the description that the parties were content to adopt, and was in terms incorporated in the declarations of the Full Court of the Federal Court from which these appeals are brought[100].

107 In 1901 the Commonwealth Government established the Postmaster-General's Department to own and manage all domestic telephone, telegraph and postal services. Subsequently, in 1946, the Commonwealth Government established the Overseas Telecommunications Commission to manage international telecommunications services. These were wholly owned organs of government. In 1975 the Australian Telecommunications Commission was established by s 4 of the *Telecommunications Act* 1975 (Cth). Although it was corporated (by s 21(1)(a)) it was wholly owned by the Commonwealth and directed by Commissioners appointed by the Governor-General (s 22). Section 6 of the *Telecommunications Amendment Act* 1988 (Cth) preserved and continued the Australian Telecommunications Commission as a body corporate under the name Australian Telecommunications Corporation (trading as Telecom).

108 In 1991 however, all of the property, rights and liabilities (actual, contingent and prospective) of Telecom were, by s 11 of the *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth) ("the AOTC Act"), vested in a company incorporated under the Corporations Law of the Australian Capital Territory with the name Australian and Overseas Telecommunications Corporation Limited ("AOTC"). AOTC was registered under the Australian Capital Territory law on 6 November 1991 as an unlisted public company limited by shares. On 13 April 1993, AOTC was renamed Telstra Corporation Limited. The *Transport and Communications Legislation Amendment Act* 1994 (Cth) subsequently amended the title of the AOTC Act to the *Telstra Corporation Act* 1991 (Cth) ("the Telstra Corporation Act"). The Commonwealth is a major shareholder in Telstra Corporation but quite separate from it in all relevant respects.

109 Section 26 of the Telstra Corporation Act provides that, for the purposes of Commonwealth, State and Territory laws, Telstra is *not* to be taken as incorporated for a purpose of the Commonwealth, or as being a public authority, instrumentality or agency of the Crown, or as entitled to any immunity or privilege of the Commonwealth. The second Telstra respondent (Telstra

---

100 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

Multimedia Pty Ltd) and the Optus respondents have no history of government ownership of any kind. These circumstances, it may, at the outset be noted, provide an important point of departure from the facts of *Botany Municipal Council v Federal Airports Corporation* ("*Third Runway Case*")[101]. There the respondent which sought to avoid compliance with State environmental laws was not only a corporation owned by the Commonwealth, but also had acquired under the *Lands Acquisition Act* 1989 (Cth) the fee simple in the land the subject of the proposed works and identified interests in the dredging site adjacent thereto. The work to be undertaken there, although it might be done by private contractors, was work on Commonwealth land on behalf of, and directly for the benefit of a Commonwealth body. The case has nothing of relevance to say about the Commonwealth's right to impose its own basis of charging (or not charging) for the use by its licensees of land and space in which neither it nor they have any proprietary interest.

110 Various utilities operators, owned, or licensed, or regulated by the States, or emanations of them, have erected and inserted their installations (the "utilities installations") for the carriage, for example, of water, gas and electricity, in the same, or similar public spaces to the respondents. So too has Australia Post, but it is entirely a department or creature of the Commonwealth and enjoys immunity from rates and like levies sought to be raised by the States or authorities of them by virtue of s 114 of the Constitution.[102]

111 The States have in some instances legislated to confer exemptions upon some of the owners, occupiers and users of utilities installations.[103] The activities of the respondents are not governed merely by the Telco Act. The *Trade Practices Act* 1974 (Cth) establishes a regime for the promotion and maintenance of competition in the industry in which the respondents are engaged (see Pts XIB and XIC).

---

101 (1992) 175 CLR 453.

102 "**States may not raise forces. Taxation of property of Commonwealth or State**

> **114** A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

103 See *Gas Industry Act* 1994 (Vic), (s 52(2)), *Electricity Industry Act* 1993 (Vic), (s 46(1A)), *Local Government Act* 1989 (Vic), (s 154(2)), *Gas Supply Act* 1996 (NSW), (s 51), *Electricity Supply Act* 1995 (NSW), (s 50), *Local Government Act* 1993 (NSW), (s 611(6)), and *Pipelines Act* 1967 (NSW), (s 40(1)).

112 Division 7 of Sched 3 to the Telco Act (comprising cll 36 to 39) is concerned with exemptions to carriers from some State and Territory laws. Clause 36 provides that, subject to cl 37, Divs 2, 3 and 4 of Sched 3 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory. Clause 37 then sets out specific exemptions from cl 36. It only applies to an activity carried on by a carrier if the activity is authorised by Divs 2, 3 or 4. Clause 37 then provides as follows:

> "**37 Exemption from State or Territory laws**
>
> ...
>
> (2) The carrier may engage in the activity despite a law of a State or Territory about:
>
> (a) the assessment of the environmental effects of engaging in the activity; or
>
> (b) the protection of places or items of significance to Australia's natural or cultural heritage; or
>
> (c) town planning; or
>
> (d) the planning, design, siting, construction, alteration or removal of a structure; or
>
> (e) the powers and functions of a local government body; or
>
> (f) the use of land; or
>
> (g) tenancy; or
>
> (h) the supply of fuel or power, including the supply and distribution of extra-low voltage power systems; or
>
> (i) a matter specified in the regulations."

113 Clauses 38 and 39 further define these exemptions. Clause 38 provides:

> "**38 Concurrent operation of State and Territory laws**
>
> It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act."

114 Clause 39 states:

"**39 Liability to taxation not affected**

This Division does not affect the liability of a carrier to taxation under a law of a State or Territory."

115 It follows that none of the exemptions granted to a carrier engaging in activities authorized by Divs 2, 3 and 4 of Sched 3 affords immunity from liability to taxation under a law of a State or Territory.

116 The respondents asserted that they were not obliged to pay the cable charges: the purported making of the charges, when carriers of energy and electricity are exempted from them, involved unlawful discrimination against them contrary to cl 44 of Sched 3 to the Telco Act which provides as follows:

"**44 State and Territory laws that discriminate against carriers and users of carriage services**

(1) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

(2) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a

particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an ***eligible user***.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*."

First Instance

117 Whether the respondents' assertion was correct was, together with other issues (the "other issues"), the subject of proceedings commenced by the respondents and tried by Wilcox J in the Federal Court at first instance[104]. His Honour resolved some of those other issues adversely to the respondents, and

---

104 *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.

some he found it unnecessary to decide. For present purposes it is sufficient to say that the assertion of the respondents was held by Wilcox J to be incorrect.

The Full Court of the Federal Court

118 The respondents successfully appealed to the Full Court of the Federal Court[105] which came to be constituted for the purposes of its decision by two judges only, Sundberg and Finkelstein JJ[106], who made declarations as follows:

> "(a) section 611 of the *Local Government Act* 1993 (NSW), to the extent that it authorises the first to eleventh respondents to make, levy and recover from the appellants charges in respect of the possession, occupation and enjoyment of telecommunications cables erected or placed on, under or over a public place; and
>
> (b) Part 8 of the *Local Government Act* 1989 (Vic), to the extent that it authorises the twelfth to fifteenth respondents to declare and recover from the appellants rates and charges on land occupied by telecommunications cables;
>
> discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within clause 44(1) of Schedule 3 to the [Telco Act], and is to that extent inconsistent with clause 44(1) and invalid pursuant to section 109 of the Constitution."

The appeal to this Court

119 The appellants relied upon several arguments in this Court including that the cable charges did not involve discrimination within the meaning of cl 44 of Sched 3 to the Telco Act, and that sub-cl 1 was not a valid exercise of the power conferred upon the Commonwealth by s 51(v) of the Constitution, that is, to make laws with respect to postal, telegraphic, telephonic and other like services. Western Australia, intervening to support the appellants, also submitted that cl 44 was in any event invalid for infringing the restriction on Commonwealth power first explained in *Melbourne Corporation v The Commonwealth*[107]. The two

---

105 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

106 The third judge of the Full Court, Katz J, became unable to continue as a member of the Court.

107 (1947) 74 CLR 31. That the restriction may apply to a law which would otherwise be characterized as being with respect to a subject matter of Commonwealth legislative power is made clear at 50 per Latham CJ, 63-64 per Rich J, 66-67 per Dixon J; see also *Victoria v The Commonwealth* (the "*Payroll Tax Case*") (1971)

(Footnote continues on next page)

matters are by no means unrelated. A large or obvious intrusion upon the capacity of a State to carry out the functions of government of that State may, of itself, provide an indication that the Commonwealth law is not sensibly related, or only tenuously so, to a Commonwealth head of power. For this reason it will be convenient to deal with these arguments together. And because I am satisfied that they are correct it will be unnecessary for me to explore any of the others.

Is cl 44 within Commonwealth power: does the *Melbourne Corporation* doctrine apply?

120 There is no doubt, as s 51(v) of the Constitution provides, that parliament may make laws with respect to the activities in which the respondents engage, relevantly telegraphic, telephonic and like services. It is important to keep in mind however that creation of a conflict by the enactment of a Commonwealth law with a State law cannot of itself provide a basis for the validity of a Commonwealth law. Section 109 of the Constitution[108] is not, and cannot be used, either directly or indirectly as a head of power. And it is to that issue that inquiry must first be directed: is the apparently conflicting Commonwealth law within power?

121 A law enacted by the Commonwealth not sensibly related to, or, to adopt language used by this Court on other occasions, having an "insubstantial, tenuous or distant[109]" relationship only with a head of Commonwealth power, cannot be a valid exercise of that power. It may be accepted that for a law to be a valid exercise of a head of power it is not necessary that every one of its provisions be seen to be exclusively within the power. This is so, not simply because of the presence of the incidental power in s 51(xxxix) of the Constitution[110]. Few if any

---

122 CLR 353 at 387 per Menzies J and in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 250 per Deane J and 260 per Dawson J.

108 "**Inconsistency of laws**

109 When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

109 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 per Dixon J.

110 "**Legislative powers of the Parliament**

51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(Footnote continues on next page)

human or public endeavours can be completely disconnected from others. Take for example the power of the Commonwealth to legislate with respect to weights and measures in s 51(xv) of the Constitution. An Act to require that a particular locally produced commodity may not be sold over the counters of shops in New South Wales unless it be sold in boxes measuring 10 cms by 10 cms by 10 cms exactly, although it may use the language of measures and is in that sense about or related to them, is not truly a law with respect to measures. Its proper characterization would be as a law with respect to either or all of, the particular commodity, retail trade or consumer protection in New South Wales. So too, s 51(xxviii) of the Constitution, "the influx of criminals" would not empower the Commonwealth to make a law prescribing a complete sentencing regime for a State, albeit that the regime might have an effect upon some criminals who might be disposed to try to enter Australia.

122 In *Leask v The Commonwealth*[111] Gummow J, before pointing out that a single law can possess more than one character, adopted a passage from the judgment of McHugh J in *Re Dingjan; Ex parte Wagner*[112]:

> "In determining whether a law is 'with respect to' a head of power in s 51 of the Constitution, two steps must be taken. First, the character of the law must be determined. That is done by reference to the rights, powers, liabilities, duties and privileges which it creates[113]. Secondly, a judgment must be made as to whether the law as so characterised so operates that it can be said to be connected to a head of power conferred by s 51. In determining whether the connection exists, the practical, as well as the legal, operation of the law must be examined[114]. If a connection exists between the law and a s 51 head of power, the law will be 'with respect to' that head of power unless the connection is, in the

---

...

(xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

111 (1996) 187 CLR 579 at 621.

112 (1995) 183 CLR 323 at 368-369.

113 *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 152.

114 *Herald & Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 440; *The Tasmanian Dam Case* (1983) 158 CLR 1 at 152.

words of Dixon J[115], 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' the head of power."

123 In argument the respondents accepted that the paragraph which has just been quoted stated the test to be applied here.

124 What rights, powers, liabilities, duties and privileges does cl 44(1) of Sched 3 to the Telco Act purport to create? In answering the question a practical view should be taken of the effect and impact of the provision.[116] Subject to one qualification, it would be mere semantics to regard the right or privilege which the section seeks to create as other than a right or privilege of enjoying exactly the same immunities and exemptions from charges as all, or some of the other operators of utilities using and occupying *public spaces which the States own or over which they have legislative power*, as the States choose to confer upon them. (The qualification relates to the meaning to be given to "carrier" in the clause, a matter to which I will refer later). Of what character or characters is a law that produces that practical result? It seems to me that a characterization of it as other than a law with respect to the use and occupation of "State" public spaces, or "State activities", or discriminatory charging in respect thereof, is artificial and strained. "State activities" could mean for example, the insistence on payment of registration fees on motor vehicles. Clause 44 would appear to be cast in terms wide enough to preclude a State from exempting a carrier owned and operated or regulated by the State from motor vehicle registration fees unless the respondents' vehicles were similarly exempted. Another equally accurate characterization of cl 44, is as a law with respect to the way in which the States choose to assist, or facilitate, or make less expensive, the delivery of energy and commodities to consumers within the States, by operators of utilities over which the States have control. Such a characterization assumes of course, in the respondents' favour, that a differential approach to charging various utilities operators, including the respondents, is within the concept of "discrimination" as that concept finds expression in cl 44 of Sched 3.

125 A further accurate characterization of the law is as a law with respect to the price of the use and occupation of State controlled land in which the Commonwealth has no proprietary rights, the Commonwealth[117] (or its licensees

---

115 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.

116 cf *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

117 The assumption is probably correct. See *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 401-402 per Latham CJ. See also cl 42 of Sched 3 to the Telco Act which provides a regime for the assessment of compensation.

the respondents, assuming they could) not having chosen to acquire any. The fact that the respondents may have rights of statutory user carries with it no entitlement to dictate or even influence the financial terms of their use.

126 Yet another possible characterization of cl 44 is as a law with respect to State constitutional power, a characterization which brings into play the *Melbourne Corporation* doctrine[118]. Remarks made by Gaudron, Gummow and Hayne JJ in *Austin v The Commonwealth*[119], the most recent application of *Melbourne Corporation*, regarding the limits of federal power in relation to its operation upon the States are of relevance to a question of characterization. It is to "'the substance and actual operation' of the federal law [cl 44]" that regard must be had. The State of Queensland with one exception[120] correctly submits that the practical effect of cl 44 is this:

> "[it] puts the States in a dilemma. Either they forgo revenue from licensed carriers that even in the judgment of the Commonwealth Parliament, would not be an unreasonable burden for licensed carriers to bear or, they change their own policy about a matter totally within State jurisdiction and tax hitherto exempt entities. A State could levy rates and charges against carriers' infrastructure on or over public land only if it also ensured that similar rates and charges were levied against other infrastructure owners whether or not the State wished to expose these owners to the rates and charges."

127 Because of the other reasons which lead me to the conclusion that I reach in this appeal, it is unnecessary for me to consider whether the true and substantial effect of cl 44, if valid, would also be to confer upon the respondents, contrary to cl 39 of Sched 3, an exemption from liability to taxation, if the charges are to be so identified, and the relationship between these two clauses.

128 In a passage in *Murphyores Incorporated Pty Ltd v The Commonwealth*[121] Stephen J (Barwick CJ and Gibbs J agreeing) suggested that the fact that a decision when made would be expressed in terms of a constitutional power of the Commonwealth, was sufficient to enable the decision (and presumably the enactment under which it was made) to be characterized as being under and within the relevant power. This is to prefer form to substance, the latter being that to which courts now look. Accordingly, the fact that different phraseology

---

118 (1947) 74 CLR 31.

119 (2003) 77 ALJR 491 at 518 [124]; 195 ALR 321 at 357.

120 The reference to "tax" is not in my opinion appropriate.

121 (1976) 136 CLR 1 at 12.

might be used, unconvincingly in my view, to give cl 44 a flavour of the exercise of the telecommunications power cannot suffice to give it that real and true character.

129 It is difficult to see how a State law that imposes a charge for use and occupation upon an operator which is not the Commonwealth, but which merely owes its right to carry out its activities to enactments within Commonwealth power can burden the Commonwealth in any way (or for that matter the respondents as its licensees), or give rise to a need for the *protection* of the Commonwealth. Section 26 of the Telstra Corporation Act manifests a clear intention that the Telstra respondents are not to enjoy any advantages which they would have if they were in fact the Commonwealth. This litigation equally manifests a rejection of that intention as does, it must be assumed, cl 44 itself. What is somewhat unusual is that s 26 of the Telstra Corporation Act is not expressed to be subject to the Telco Act and cl 44 is not introduced by a conventional formula such as "Notwithstanding anything herein or elsewhere ...". The task of interpretation and reconciliation is left therefore entirely to the courts.

130 I would say this about the respondents' submissions that the charges are a burden. The word "burden" is a misnomer in these circumstances. The New South Wales legislature was right in enacting in s 611(2) of the NLGA that the charges were not to be regarded as a "rate". As s 611(3) makes clear, they are based upon the nature of the benefit enjoyed. They are charges for value received personally. They are not in any sense a tax or a rate. A significant and valuable benefit not derived by the community generally is enjoyed by the respondents. The language of revenue law is inapt in the circumstances. The charges are not even burdensome in the sense of being arbitrary or excessive, because, so far as New South Wales at least is concerned, s 611(4) of the NLGA provides a mechanism for judicial assessment of quantum.

131 Another unusual feature of the Telco Act is that there is no definition, or indeed even any attempt at internal identification of those carriers with whose activities and charges made upon them, the respondents and like carriers are to be compared for the purposes of cl 44. The explanation may be that originally the relevant purpose was to prohibit discrimination between telecommunications carriers. On their faces, the expressions used in cl 44, "particular carrier", "class of carriers" and "carriers generally" could mean carriers by road, rail or air, and not necessarily by cable, wire or pipeline. It is quite unsatisfactory to have to resort to a Second Reading speech and only the vaguest of indications in the Telco Act to try to ascertain at which kinds of carriers as comparators the Telco Act is aimed. It seems that the legislature may even have had in mind State railways as an appropriate comparator. Relevantly the Second Reading speech was as follows[122]:

---

122 Australia, Senate, *Parliamentary Debates* (Hansard), 25 February 1997 at 944.

"The bill continues and reinforces the provisions in the [AOTC Act] which prevent the law of a State or Territory from operating so as to discriminate against a carrier or a class of carrier. It provides that a State or Territory law has no effect to the extent that it discriminates, or has the effect of discriminating, either directly or indirectly against a carrier or a user or potential user of a carrier's services. An example of one kind of discrimination that this provision deals with are State or Territory laws which give special powers or immunities to public utilities such as electricity suppliers or railways where these are not also given to any carrier in that State or Territory in like circumstances."

132 What had been said earlier in relation to cl 42 which was to become the present cl 44 was similarly unilluminating[123]:

"**Clause 42 State and Territory laws that discriminate against carriers**

This clause provides that a State or Territory law has no effect to the extent to which it discriminates, or has the effect of discriminating, directly or indirectly against a carrier, or a user or potential user of a carrier's services. It is based on s 120 of the [AOTC Act]. The clause is intended to deal with laws which have an indirect effect of discriminating against carriers or users of carrier services, not just a law which, for example, on its face treats a person differently to someone else. The indirect discrimination which this clause is intended to prevent includes the following examples:

- laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax);

- laws which have the effect of giving powers or immunities to a person or body in relation to the installation, maintenance or operation of a facility which do not apply to carriers generally (for example, where a public utility may rely on general land access powers given to that utility under State or Territory law to install telecommunication facilities without obtaining the approvals which would ordinarily be required for that activity under the law of that State or Territory); and

---

123 Explanatory Memorandum to the Telecommunications Bill 1996, vol 3 at 27.

- laws which discriminate against people by reason of their use of the facilities of a carrier."

133 Again the word "burden" is misused. For a person owning or controlling land or space to require user A to pay for its use and occupation and not users B and C is not to impose a burden on user A: it is simply to choose to forgo a right in respect of some but not all users. There is another misstatement. The so-called burden is not upon the facilities. It is a charge for the use and occupation of the space they occupy.

134 Here the Full Court said this[124]:

> "... it can be seen that the object cl 44 is designed to achieve ... is to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier in the course of providing the telecommunications services for which the carrier holds a permit."

135 The passage uses language which departs from the Telco Act and contains a large assumption: that the State exempting enactments were "potentially *unfairly* discriminatory". It is far from obvious that it is unfair to exempt the means of delivery of, for example an essential commodity such as pure water, but not the means of delivery of television programmes transmitted from a studio of a commercial broadcaster, or bounced on to or off a satellite and transmitted by cable for a substantial reward to a commercial broadcaster and the respondent carriers.

136 Nor can a court know whether, and what compromises may have been made between a State and a carrier to enable the latter to provide a service or a commodity to residents of that State. So too, a State may have chosen to exempt one or more carriers from charges, or to differentiate between carriers in order to provide employment or infrastructure in a particular area, or to provide a fundamental service to its taxpayers and residents. Intrusion into these matters represents a grave potential interference with the capacity of the States to carry out their functions of government: government in relation to essential matters of water, energy, the environment, and also therefore, health. By s 154(2)(b) of the VLGA, for example, water distributors in public ownership are exempted from charges. It is no answer to say that these are matters which may be taken into account in deciding, pursuant to cl 44 of Sched 3 to the Telco Act whether discrimination has occurred. I doubt whether any satisfactory equation exists or can be devised of the various benefits and costs of the objects a State may wish to achieve with the charges that it chooses to impose or refrain from imposing.

---

124 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210 [24].

In any event a State should not be obliged, as it would be in proceedings under or relating to cl 44, to justify and quantify the political, demographic, social and economic objectives that it sets out to achieve in the exercise of legitimate State power, particularly in respect to land which neither the Commonwealth nor a non-public licensee of the Commonwealth has sought to acquire, or has acquired. On the construction of cl 44 advanced by the respondents the States' ability to further their policies by, for example, enacting workplace safety laws, and regulating motor vehicle insurance, would all be in jeopardy so far as they related to the respondents. To give cl 44 such an operation would inevitably, to use the language of Gaudron, Gummow and Hayne JJ in *Austin*[125], involve a "'curtailment' of [the] 'capacity' of the States 'to function as governments'."

137 Something needs to be said about the respondents' submission that the charges are taxes. *Luton v Lessels*[126] is the most recent decision of this Court as to the nature of a tax. There Gleeson CJ cited[127] a passage from the judgment of Latham CJ in *Matthews v Chicory Marketing Board (Vict)*[128]:

> "The levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered."

138 Although Gleeson CJ offered a caution against reading the statement of Latham CJ and statements by other judges elsewhere as exhaustive definitions of a "tax", his Honour did not suggest that the distinction made by Latham CJ between an exaction for public purposes, and a payment for services rendered, the latter being of a very similar kind to use and occupation, was not well made. If there were any doubt about this it can be dispelled by reference to the joint judgment of Gaudron and Hayne JJ in *Luton v Lessels* in which their Honours said[129]:

> "...as the Court also pointed out in *Air Caledonie*[130], the reference to 'payments for services rendered', as an antonym for 'tax', is only one example of various special types of exactions of money which are not

---

125 (2003) 77 ALJR 491 at 518 [124]; 195 ALR 321 at 357.

126 (2002) 210 CLR 333.

127 (2002) 210 CLR 333 at 342 [10].

128 (1938) 60 CLR 263 at 276.

129 *Luton v Lessels* (2002) 210 CLR 333 at 352-353 [50].

130 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

> taxes. Charges for the acquisition or *use of property*, *fees for a privilege*, and fines or penalties for criminal conduct are some other examples of what are unlikely to amount to forms of tax." (emphasis added)

139 McHugh J in *Luton v Lessels* also pointed out that the fact that charges collected may go into Consolidated Revenue does not mean that they are on that account alone taxes[131]. The same may equally be said of the depositing of the charges here in the appellants' general or rate accounts, or otherwise as the case may be.

140 Something additional needs to be said about the proposition that the charges are a tax by way of rates or a "rate". The answer to that proposition is a short one. The charges here are made not just in respect of the use and occupation of airspace and land, but for space and land owned or controlled by the appellants. However the charges are to be characterized, a characterization of them as a rate upon land or space is inappropriate.

141 The charges are therefore neither a tax, a rate nor a burden.

142 The Full Court of the Federal Court relied, for the different view that they formed upon three cases. Each of them is distinguishable. *Australian Coastal Shipping Commission v O'Reilly*[132] was concerned, not as here with corporations separate from and mere licensees of the Commonwealth but with a corporate agency of the Commonwealth, as Dixon CJ described it[133], a Commonwealth government body. It is one thing to seek to protect as the legislation did there, a Commonwealth government body, but a quite different thing, to protect a commercial licensee forming no part of the government, a matter to which I will return. Indeed one of the main purposes of the Telco Act and the other related legislation was, as the Second Reading speech further stated, "to promote fair, but vigorous, competition in this industry"[134]; a goal somewhat removed from that ordinarily pursued by a governmental, and therefore usually, a monopolistic or preferred public enterprise. There is another point of distinction. In *Australian Coastal Shipping Commission* the issue was whether the agency should bear the burden of a state tax, stamp duty, an exaction simpliciter, in exchange for which the Commonwealth body obtained no rights, property, privilege or benefits. The issue here is not whether the respondents should bear the burden of a State tax: it is whether they should be entitled to use land and

---

131 (2002) 210 CLR 333 at 361-362 [80]; see also at 383-384 [177] per Callinan J.

132 (1962) 107 CLR 46.

133 (1962) 107 CLR 46 at 55.

134 Australia, Senate, *Parliamentary Debates* (Hansard), 25 February 1997 at 944.

space owned by the State or a State creature upon exactly the same financial terms as undefined and only at best, vaguely contextually and extraneously identified other carriers.

143 The second and third cases relied upon were *Strickland v Rocla Concrete Pipes Ltd*[135] and *Actors and Announcers Equity Association v Fontana Films Pty Ltd*[136]. Both were concerned with the validity of sections of the *Trade Practices Act.* The second held that the proscription of certain monopolies with the object of protecting Australian trade and commerce generally was valid. It has little, in my opinion, of relevance to say about a provision such as cl 44.

144 The third of the cases does not in my opinion throw much light upon the problem here. What the statement of Mason J[137] quoted by the Full Court[138] does emphasize is the need for the drawing of careful distinctions between laws going beyond the power generally, and laws which incidentally only have an operation upon objects outside the power. Here cl 44 strikes directly at, and does not merely incidentally touch or operate upon the use and occupation of State land and infrastructure and the price thereof.

145 Clause 44, in its application to State laws cannot be characterized as a law with respect to telegraphic, telephonic and other like services merely because those State laws may have application to an operator required by the Telco Act to hold a licence to engage in telecommunications services. Neither *R v Brislan; Ex parte Williams*[139] nor *Jones v The Commonwealth [No 2]*[140] which were relied on by the respondents supports a proposition that a law exempting a Commonwealth licensee from State taxes, let alone charges for the use of State land and space, must be characterized as a law with respect to postal, telegraphic, telephonic and other like services.

146 Something more needs to be said about the application of the *Melbourne Corporation* doctrine. In my opinion cl 44 answers the description of a law to

---

135 (1971) 124 CLR 468.

136 (1982) 150 CLR 169.

137 *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 205-206.

138 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 212-213 [30].

139 (1935) 54 CLR 262.

140 (1965) 112 CLR 206.

prevent, control, or seriously curtail State legislative action in a manner that infringes the implied restriction recognized in *Melbourne Corporation*. In terms it is directed to the intended and legitimate effect of State laws and rights arising under State law, rather than the operation and effect of an authority given by the Commonwealth. The Commonwealth Minister's power to exempt specified State laws, and to make the exemption subject to conditions, is another indication that the focus of cl 44 is on State laws, rather than on an exercise of Commonwealth power. The connexion sought to be drawn by the respondents is tenuous: between the State laws imposing charges and that a Commonwealth licensee might have to pay them at a differential rate from others. It is true therefore that it is the operation of the State laws in relation to persons other than carriers, as much as the operation of State laws in relation to "carriers", which cl 44 seeks to control. In the circumstances the use of the word "protect" by the respondents in the sense of shielding or in some way defending the respondents against an assault by way of a charge levied upon them, is as misplaced and inappropriate as the respondents' use of the words "burden" and "tax". To exempt another or others, is not to burden the respondents. Or, to impose the same or a similar charge upon others, is not to burden, or otherwise to make an imposition upon the respondents.

147 It cannot be entirely ignored that the respondents are not government agencies or part of government. Windeyer J in *O'Reilly*[141] was the only Justice who expressed the view that the fact that the Commission there was an agency of the Commonwealth, was not a decisive factor[142]. At other times however emphasis has been placed on that fact. Dixon CJ in *O'Reilly* did so[143]. And in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority*[144], Dawson, Toohey and Gaudron JJ said[145]:

> "[b]y exercising the legislative power granted to it by the Constitution the Commonwealth Parliament can legislate to exclude the operation of a State law with respect to the *Commonwealth executive or its agencies*." (emphasis added)

148 The mere fact that the Commonwealth has the power to regulate an activity that may be engaged in by private and public bodies does not empower

---

141 (1962) 107 CLR 46.

142 (1962) 107 CLR 46 at 69.

143 (1962) 107 CLR 46 at 56.

144 (1997) 190 CLR 410.

145 (1997) 190 CLR 410 at 446.

the Commonwealth to make a law on any subject applying to a regulated person. There is a statement to a similar effect by Rich and Williams JJ in *Bank of NSW v The Commonwealth*[146] ("*Bank Nationalisation Case*"): that a provision immunising the Commonwealth Bank from the operation of State taxation "could only be valid with respect to State law if the Bank is an agent of the Commonwealth"[147]. It is also consistent, as Western Australia submits, with the manner in which decisions such as *O'Reilly*[148] and *The Commonwealth v Queensland*[149] have been subsequently viewed, as depending on a connexion of the subject matter of the law with the Commonwealth itself.

149 It follows, in my opinion, that cl 44 of Sched 3 to the Telco Act is beyond the power of the Commonwealth. It also offends against the doctrine of implied restrictions upon the curtailment by the Commonwealth of the legitimate governmental functions of the States. It is unnecessary for me therefore to consider any of the other arguments in the appeals.

150 I would allow the appeals with costs, make declarations in accordance with the preceding paragraph, and order that the respondent corporations pay the appellants' costs of the appeals to the Full Court of the Federal Court.

---

146 (1948) 76 CLR 1.

147 (1948) 76 CLR 1 at 275.

148 (1962) 107 CLR 46.

149 (1920) 29 CLR 1.