HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

TELSTRA CORPORATION LIMITED PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Telstra Corporation Limited v The Commonwealth [2008] HCA 7
6 March 2008
S42/2007

ORDER

1. *The questions reserved in the case stated dated 11 July 2007 be answered as follows:*

Question One

In their application to the ULLS, are any of:

(i) section 152AL(3) of the TPA*;*
(ii) section 152AR of the TPA*; or*
(iii) any other provision(s) in Part XIC of the TPA*,*

beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?

Answer

(i) and (ii) No.
(iii) It is not appropriate to answer this question.

Question Two

If the answer to any part of Question One is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

Answer

This question does not arise.

Question Three

In their application to the LSS, are any of:

(i) section 152AL(3) of the TPA*;*
(ii) section 152AR of the TPA*; or*
(iii) any other provision(s) in Part XIC of the TPA*,*

beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?

Answer

(i) and (ii) No.
(iii) It is not appropriate to answer this question.

Question Four

If the answer to any part of Question Three is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

Answer

This question does not arise.

2. The plaintiff pay the costs of the case stated.

Representation

A C Archibald QC with N Perram SC and J K Kirk for the plaintiff (instructed by Mallesons Stephen Jaques)

D M J Bennett QC, Solicitor-General of the Commonwealth with C J Horan for the first defendant (instructed by Australian Government Solicitor)

N J Young QC with M H O'Bryan for the second defendant (instructed by Australian Government Solicitor)

N J O'Bryan SC with M J Hoyne for the third, fifth, seventh, eighth, eleventh, twelfth and thirteenth defendants (instructed by Herbert Geer & Rundle)

S J Gageler SC with S J Free for the fourth and sixth defendants (instructed by Clayton Utz Lawyers)

M Sloss SC with D B Clough and K L Walker for the ninth and tenth defendants (instructed by Nicholls Legal)

CATCHWORDS

Telstra Corporation Limited v The Commonwealth

Constitutional law (Cth) – Limitations on legislative powers – Acquisition of property on just terms – Declaration by the Australian Competition and Consumer Commission ("the Commission") that certain telecommunications services were "declared services" for the purposes of the *Trade Practices Act* 1974 (Cth) ("the Act") – The plaintiff owned the infrastructure needed to provide the declared services – Requirement in s 152AR of the Act that other service providers be given access to the plaintiff's infrastructure for the purpose of providing the declared services in direct competition with the plaintiff – Further requirement in s 152AY of the Act that access to infrastructure be given on terms and conditions agreed between the plaintiff and the access seeker or, in the absence of such agreement, pursuant to one of two alternative methods that relied upon the approval or determination of the Commission (with the Australian Competition Tribunal exercising review powers) – Whether the Commission's declaration and the subsequent obligation on the plaintiff to make its infrastructure available to its competitors effected an acquisition of property other than on just terms.

Communications law – Telecommunications services – Infrastructure to provide declared services – Requirement that other service providers be given access to plaintiff's infrastructure for the purpose of providing declared services in direct competition with the plaintiff – Whether obligation to provide access effected an acquisition of property other than on just terms.

Constitution, s 51(xxxi).
Trade Practices Act 1974 (Cth), Pt XIC.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. Since the 1880s Australia has had a public switched telephone network ("PSTN"). The PSTN is a large and complex piece of infrastructure widely dispersed throughout Australia. The telephone which is connected in most residential and business premises in Australia is the immediate manifestation of that infrastructure. This proceeding, however, focuses upon the twisted pairs of copper or aluminium based wire which run from an end-user's premises to a local exchange and are known as "local loops". There are about 10.1 million local loops in operation. The plaintiff, Telstra Corporation Limited ("Telstra"), is a publicly listed corporation. It installs, owns and maintains those local loops. Telstra owns about 5,120 local exchanges.

The litigation

2 In this litigation, Telstra asserts that, contrary to s 51(xxxi) of the Constitution, the telecommunications access regime provided for by Pt XIC of the *Trade Practices Act* 1974 (Cth) effects an acquisition of Telstra's property in some of its local loops, other than on just terms.

3 Telstra commenced proceedings in this Court by application for an order to show cause directed to the Commonwealth, the Australian Competition and Consumer Commission ("the ACCC") and 11 other telecommunications service providers. Telstra sought prohibition in several forms and declarations. Telstra subsequently filed a statement of claim setting out its claims in more detail and the parties agreed on facts to be stated, and questions reserved for consideration of a Full Court, pursuant to s 18 of the *Judiciary Act* 1903 (Cth). It is the questions reserved by that Stated Case that now fall for consideration.

4 The questions reserved direct particular attention to two provisions of Pt XIC of the *Trade Practices Act*: ss 152AL(3) and 152AR. The questions reserved ask (in effect) whether s 152AL(3) or s 152AR, or any other provisions in Pt XIC of the *Trade Practices Act*, in their application to two forms of use of local loops, are beyond the legislative competence of the Parliament by reason of s 51(xxxi) of the Constitution. These reasons will demonstrate that the impugned provisions are not beyond power for the reason asserted.

Two forms of use of local loops

5 The telephone service could once be used only for transmitting sounds. Now, the PSTN and the local loops as part of that network can be used to carry

not only telephone communications but also data communications including internet access services.

6 The local loops in issue in this matter are local loops that are used in two different ways. First, there are "unconditioned local loops" by means of which a supplier of telecommunications services provides services to the end-user to whose premises the loop is connected. The loops are "unconditioned" in that the electrical characteristics of the loops are not changed by equipment located along the loop. Services using local loops in this way are referred to as "ULLS" ("unconditioned local loop services"). Secondly, there are local loops used for a high frequency unconditioned local loop line sharing service by which one supplier uses the low frequency or "voiceband" part of the frequency spectrum for a voiceband PSTN service to the end-user's premises, but another supplier uses the high frequency ("non-voiceband") part of the spectrum for high bandwidth carriage services to those premises. Services using local loops in this way are referred to as "LSS" ("line sharing services").

7 Both forms of use of local loops require physical connection of the local loop to other equipment of the relevant supplier of telecommunications services. If the local loops are used by a supplier other than Telstra, they are connected to that supplier's equipment. That connection is made in Telstra's local exchange and differs according to which form of use of the local loop is to be made. Telstra emphasised the physical disconnection of the local loop from Telstra's equipment, and its physical connection to the equipment of its competitor. Telstra pointed to these facts as showing that its property had been acquired and that Telstra was deprived of the use of its property for as long as the local loop remained connected to its competitor's equipment.

8 Before dealing with the legislative provisions and administrative acts that Telstra alleges give rise to acquisitions, it is important to describe some of the steps which preceded the enactment of the telecommunications access regime that is now provided for by Pt XIC of the *Trade Practices Act* (the part of that Act in which the impugned provisions, ss 152AL(3) and 152AR, appear). In particular, it is necessary to describe how the competitive provision of telecommunications services by Telstra in competition with other corporations has come about. These steps are necessary because they reveal that although it is right to say that Telstra bought and paid for the PSTN, and thus owns it, it has never had rights in respect of the assets of the PSTN of the nature or amplitude which its arguments assumed.

Some matters of history

9 Before Federation, the telephone services that then existed in Australia were provided by the colonial governments. Section 69 of the Constitution provided for the transfer to the Commonwealth of the posts, telegraphs and telephone departments of the public service in each State and one of the heads of legislative power of the Parliament enumerated in s 51(v) is power to make laws with respect to "postal, telegraphic, telephonic, and other like services". From Federation until June 1976, the Commonwealth owned Australia's PSTN, and the Commonwealth operated that network through the Postmaster-General's Department.

10 The *Post and Telegraph Act* 1901 (Cth) ("the 1901 Act") specified[1] a number of colonial statutes which ceased to apply to the postal and telegraphic services of the Commonwealth. Among them was *The Post and Telegraph Act* 1893 (WA), s 65 of which conferred an "exclusive privilege" upon the Postmaster-General of that colony. This provision was adapted as s 80 of the 1901 Act which included in the subject-matter of the exclusive privilege of the Commonwealth Postmaster-General the erection and maintenance of telegraph lines and the transmission of telegraphic and telephonic communications.

11 The issues in this litigation arise against a legislative background of relaxation of the public monopoly position for which s 69 of the Constitution and the 1901 Act provided.

12 The 1901 Act was repealed in July 1975 by the *Postal and Telecommunications Commissions (Transitional Provisions) Act* 1975 (Cth) ("the Transitional Provisions Act")[2]. Pursuant to s 29 of the Transitional Provisions Act, the relevant Minister of State, the Postmaster-General, transferred the assets constituting the PSTN, owned by the Commonwealth and "held or used in connection with, or arising from, the undertakings of the Postmaster-General's Department", to the body then called the Australian Telecommunications Commission. The Australian Telecommunications Commission was established by s 4 of the *Telecommunications Act* 1975 (Cth)

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1 Section 2, Sched 1.

2 Section 4, Sched 1.

("the 1975 Telecommunications Act"). It was established[3] as a body corporate but it was subject to ministerial direction[4].

13 Section 94 of the 1975 Telecommunications Act, in broad terms, provided that persons other than the Australian Telecommunications Commission were not to construct, maintain or operate telecommunications installations. Section 71 obliged the Commission to pay to the Commonwealth "at such times, and by such instalments, as the Treasurer from time to time determines" the difference between the amount determined by the Treasurer that "should, in his opinion, be taken to be the value of the rights, property and assets vested in the Commission" by s 29 of the Transitional Provisions Act and the amount determined in the same manner as the sum of the amounts of liabilities assumed by the Commission. The total value of assets was determined by aggregating budget appropriations for telecommunications since 1901. The resulting debt was about $4 billion.

14 From 1 January 1989, the Australian Telecommunications Commission was preserved and continued in existence as a body corporate under the name of the Australian Telecommunications Corporation[5]. The Corporation remained subject to ministerial direction.

15 In November 1991, Telstra was incorporated under the Corporations Law of the Australian Capital Territory as a company limited by shares. Telstra was then called Australian and Overseas Telecommunications Corporation Limited and became the successor of the Australian Telecommunications Corporation. Section 11 of the *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth) ("the AOTC Act")[6] operated with effect from 1 February 1992, and vested all the property and rights of the Australian Telecommunications Corporation (as well as the property and rights of another entity – OTC Limited) and certain liabilities in Telstra. Thus, from 1 February 1992, the assets of the

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3 *Telecommunications Act* 1975 (Cth) ("the 1975 Telecommunications Act"), ss 4, 21.

4 The 1975 Telecommunications Act, s 7.

5 *Telecommunications Amendment Act* 1988 (Cth), s 6.

6 Subsequently renamed the *Telstra Corporation Act* 1991 (Cth).

PSTN were vested in Telstra, and Telstra became responsible for the balance of the debt that had been fixed under the 1975 Telecommunications Act.

16 When Telstra was incorporated, and at the time the assets of the PSTN were vested in Telstra, the Commonwealth was Telstra's sole shareholder. Section 8 of the AOTC Act provided that the Commonwealth "must not transfer any of its shares" in Telstra and that neither the Commonwealth nor Telstra was to do anything to cause or contribute to the Commonwealth no longer holding and controlling the exercise of voting rights attaching to the voting shares in Telstra. Telstra was subject to ministerial direction[7], but s 26 of the AOTC Act provided that Telstra was taken not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth, was taken not to be a public authority or an instrumentality or agency of the Crown and was taken not to be entitled to any immunity or privilege of the Commonwealth "except so far as express provision is made by this Act or any other law of the Commonwealth, or by a law of a State or of a Territory, as the case may be".

17 The PSTN was vested in Telstra, with effect from 1 February 1992, against a legislative background of which the most prominent feature was the *Telecommunications Act* 1991 (Cth) ("the 1991 Telecommunications Act"). Subject to some exceptions that are not now important, the 1991 Telecommunications Act commenced on 1 July 1991[8] and all of its provisions had commenced before the PSTN was vested in Telstra.

18 One of the stated objects of the 1991 Telecommunications Act was "creating a regulatory environment for the supply of telecommunications services which promotes competition and fair and efficient market conduct"[9]. Part 8 of the 1991 Telecommunications Act (ss 136-172) was directed to that end. It provided for access by "carriers" (holders of either a general telecommunications licence in force under Pt 5 of that Act or a public mobile licence in force under

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7 *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth), s 9.

8 s 2(1).

9 *Telecommunications Act* 1991 (Cth) ("the 1991 Telecommunications Act"), s 3(i).

that Part)[10] to networks and services of other carriers. Telstra was one such carrier[11]. The object of Pt 8 of the Act was described[12] as being:

> "to promote the long-term interests of consumers of telecommunications services by:
>
> (a) promoting and protecting competition in the telecommunications industry generally and among carriers; and
>
> (b) enabling the carriers to compete with each other on an equal basis in providing telecommunications networks and supplying telecommunications services."

Section 136(2) provided that this object would be achieved by:

> "(a) protecting each carrier from the misuse of market power by other carriers in relation to access to essential facilities or access to consumers; and
>
> (b) giving each carrier the right:
>
> (i) to interconnect its facilities to networks of the other carriers; and
>
> (ii) to obtain access to services supplied by the other carriers;
>
> and to do so on terms and conditions that:
>
> (iii) are fair to the first-mentioned carrier and to the other carriers concerned; and

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10 Definitions of "carrier", "general carrier" and "mobile carrier" in s 5.

11 Telstra was granted a general telecommunications licence under Pt 5 of the Act with effect from 1 February 1992.

12 s 136(1).

(iv) promote the long-term interests of consumers of telecommunications services; and

(c) removing obstacles to consumers having equal access to the telecommunications services supplied by the various carriers; and

(d) encouraging the efficient use of, and investment in, telecommunications infrastructure."

Detailed provision was made by ss 137-172 of the 1991 Telecommunications Act for implementing the access rights of carriers to the "facilities that [another] carrier operates or uses, or intends to operate or use, as part of, in, or in connection with, a network of the carrier"[13].

19 Thus the PSTN was vested in Telstra, and Telstra operated as a "carrier" under the 1991 Telecommunications Act, under a regulatory regime by which other carriers had the right to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra, and Telstra had like rights with respect to other carriers. Telstra's ownership of the assets of the PSTN vested in it in 1992 was subject to the statutory rights of access to the use of those assets by other carriers.

20 This description of some of the legislative and other history that lies behind the present litigation takes matters only as far as 1992. Telstra was then wholly owned by the Commonwealth. That remained the position until, by three separate share offerings in 1997, 1999 and 2006, the Commonwealth sold the majority of its shares to members of the public and then transferred the balance of its shares to the "Future Fund" established under the *Future Fund Act* 2006 (Cth).

21 The legislation that is in issue in this litigation was not enacted until 1997 and it is necessary to identify and describe those provisions in detail.

The impugned provisions – s 152AL(3)

22 Section 152AL provides (so far as now relevant):

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13 s 137, definition of "network facilities".

"*Eligible service*

(1) For the purposes of this section, an ***eligible service*** is:

(a) a listed carriage service (within the meaning of the *Telecommunications Act 1997*); or

(b) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);

where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons).

Declaration made after public inquiry

(3) The Commission may, by written instrument, declare that a specified eligible service is a ***declared service*** if:

(a) the Commission has held a public inquiry under Part 25 of the *Telecommunications Act 1997* about a proposal to make the declaration; and

(b) the Commission has prepared a report about the inquiry under section 505 of the *Telecommunications Act 1997*; and

(c) the report was published during the 180-day period ending when the declaration was made; and

(d) the Commission is satisfied that the making of the declaration will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Note: Eligible services may be specified by name, by inclusion in a specified class or in any other way."

23 Section 152AL permits the ACCC to declare listed carriage services (which include[14] a carriage service between two points in Australia) to be a

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14 *Telecommunications Act* 1997 (Cth) ("the 1997 Telecommunications Act"), s 16.

declared service. A "carriage service" is defined[15] as "a service for carrying communications by means of guided and/or unguided electromagnetic energy". If a service is a declared service, the carrier and the carriage service provider that provide that declared service must meet the "standard access obligations" prescribed by s 152AR. The two forms of local loop described earlier in these reasons (ULLS and LSS) are declared services. Each form of local loop is a service that facilitates the supply of a listed carriage service.

24 Pursuant to s 152AL(3) the ACCC has declared the ULLS[16] to be a "declared service" for the purposes of Pt XIC. One declaration was made on 11 August 1999, varied in May 2000, and expired on 31 July 2006. A further declaration was made with effect from 1 August 2006 to 31 July 2009.

25 Pursuant to the same provision (s 152AL(3)) the ACCC has declared the LSS[17] to be a declared service. That declaration is still in force.

26 Various other services have been declared under s 152AL. It is not necessary to notice the details of the other services that have been thus declared.

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15 The 1997 Telecommunications Act, s 7.

16 Defined in the relevant declaration as "the use of unconditioned communications wire between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at or associated with a customer access module and located on the end-user side of the customer access module".

17 Defined in the relevant declaration as "the use of the non-voiceband frequency spectrum of unconditioned communications wire (over which wire an underlying voiceband PSTN service is operating) between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at, or associated with, a customer access module and located on the end-user side of the customer access module".

The impugned provisions – s 152AR

27 As pointed out earlier, s 152AR prescribes one consequence of a service being a declared service: the provider of the service must comply with the standard access obligations. As the expression "standard access obligations" may suggest, the party that provides the service to which the obligation attaches (here, Telstra) must supply the service, when requested to do so by another service provider, so that the latter can use the service to provide carriage services. Section 152AR prescribes what steps the party providing the service (here, the use of local loops) must take to ensure its utility to the service provider that seeks to use it. Section 152AR provides, so far as now relevant:

> "(1) This section sets out the ***standard access obligations***.
>
> *Access provider and active declared services*
>
> (2) For the purposes of this section, if a carrier or a carriage service provider supplies declared services, whether to itself or to other persons:
>
> (a) the carrier or provider is an ***access provider***; and
>
> (b) the declared services are ***active declared services***.
>
> *Supply of active declared service to service provider*
>
> (3) An access provider must, if requested to do so by a service provider:
>
> (a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and
>
> (b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and
>
> (c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and

> rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.
>
> ...
>
> *Exceptions*
>
> (9) This section does not impose an obligation on an access provider if there are reasonable grounds to believe that:
>
> (a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or
>
> (b) the access seeker would fail, in connection with that obligation, to protect:
>
> (i) the integrity of a telecommunications network; or
>
> (ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility."

28 The implementation of the standard access obligations is spelled out further in s 152AY. That section obliges the person required to comply with any or all of the standard access obligations to do so on such terms and conditions as are agreed with the access seeker (s 152AY(2)(a)) or, failing agreement, according to whichever of two alternative methods of determining those terms and conditions is engaged.

29 In determining whether particular terms and conditions are reasonable s 152AH(1) provides that, for the purposes of Pt XIC, regard must be had to six matters:

> "(a) whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;

(b) the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;

(c) the interests of persons who have rights to use the declared service concerned;

(d) the direct costs of providing access to the declared service concerned;

(e) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

(f) the economically efficient operation of a carriage service, a telecommunications network or a facility."

Section 152AH(2) provides that sub-s (1) does not, by implication, limit the matters to which regard may be had.

30 If a person required to comply with standard access obligations and an access seeker do not agree on terms and conditions, the first of the alternative methods of determination that may be engaged hinges about "an access undertaking" which, in effect, is a statement by a carrier or carriage service provider of the terms and conditions on which it will make its services available. Those terms and conditions must be approved by the ACCC or the Australian Competition Tribunal under Div 5 of Pt XIC (ss 152BS-152CGB) before the undertaking is effective.

31 The second method is engaged if either there is no access undertaking or the undertaking does not specify terms and conditions about a particular matter. In either of those events the terms and conditions are to be determined by the ACCC under Div 8 of Pt XIC (ss 152CL-152EB). Division 8 of Pt XIC deals with the arbitration of disputes about access. In finally determining a dispute about access the ACCC must take into account a number of matters specified in s 152CR(1), and the ACCC may take into account any other matters it thinks relevant. The matters which *must* be taken into account are, in substance, the six matters specified in s 152AH(1), together with a seventh consideration: "the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else".

32 The considerations identified in both s 152AH and s 152CR include promoting the long-term interests of end-users as well as "the legitimate business interests" of the carrier or provider. There may be cases, then, in which the application of the statutory considerations would require the ACCC to fix terms and conditions which differ from those that would be fixed in arm's length bargaining by two commercial parties concerned only for their individual legitimate business interests.

33 That this may be the consequence of applying these provisions is reinforced by consideration of the relevant statutory objects. All of the provisions that have been mentioned (ss 152AL(3) and 152AR, the validity of which is challenged, and ss 152AH, 152AY and 152CR) take their place in Pt XIC of the *Trade Practices Act*. Part XIC of the *Trade Practices Act* was inserted in that Act by the *Trade Practices Amendment (Telecommunications) Act* 1997 (Cth) ("the 1997 Trade Practices Act"). The *Telecommunications Act* 1997 (Cth) ("the 1997 Telecommunications Act") was enacted shortly before the 1997 Trade Practices Act. The 1997 Telecommunications Act provided[18] that the main object of that Act, when read together with Pts XIB and XIC of the *Trade Practices Act*, is to provide:

> "a regulatory framework that promotes:
>
> (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
>
> (b) the efficiency and international competitiveness of the Australian telecommunications industry."

The object of Pt XIC of the *Trade Practices Act* is stated in s 152AB(1) as being "to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services". Section 152AB(2) now provides that, for the purposes of Pt XIC, in determining whether a particular thing promotes the long-term interests of end-users, regard must be had to the extent to which the thing is likely to result in the achievement of three objectives stated in s 152AB(2)(c)-(e):

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18 s 3.

"(c) the objective of promoting competition in markets for listed services;

(d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;

(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:

(i) the infrastructure by which listed services are supplied; and

(ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied."[19]

The objects thus identified in the 1997 Telecommunications Act and in Pt XIC of the *Trade Practices Act* are wider than and different from that narrow self-interest which, statute apart, is all that one participant in a market would ordinarily consult when striking a bargain with another participant in that market.

34 If then, as Telstra submitted, terms and conditions may be fixed for its compliance with standard access obligations in respect of local loops used in the two ways described (ULLS and LSS) which are terms that differ from those that would be fixed in arm's length bargaining between it and the access seeker, the provisions that lead to that result provide, so the argument proceeded, for an acquisition of property otherwise than on just terms.

35 Telstra submitted that this conclusion is not denied by the provisions of s 152EB which deal expressly with the subject of just terms. It is convenient to deal with that argument at once.

Section 152EB

36 Section 152EB is the final provision of Div 8 of Pt XIC. It will be recalled that Div 8 regulates the resolution of disputes about access. Section 152EB provides:

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19 Paragraph (e)(ii) was added to s 152AB(2) by item 1 of Sched 9 to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act* 2005 (Cth).

"(1) If:

(a) a determination would result in an acquisition of property; and

(b) the determination would not be valid, apart from this section, because a particular person has not been sufficiently compensated;

the Commonwealth must pay that person:

(c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or

(d) failing agreement – a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) In assessing compensation payable in a proceeding begun under this section, the following must be taken into account if they arise out of the same event or transaction:

(a) any damages or compensation recovered, or other remedy, in a proceeding begun otherwise than under this section;

(b) compensation awarded under a determination.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution."

37 Telstra submitted that s 152EB does not save the impugned provisions (ss 152AL(3) and 152AR) from invalidity. The argument proceeded by the following steps. First, it was said that the relevant acquisitions "occur by the imposition of the [standard access obligations] on carriers [or] providers pursuant to s 152AR". Secondly, those obligations come into operation when a service provider makes the relevant request, and thus the acquisitions effected by the standard access obligations occur as soon as the relevant request is made. (As Telstra rightly pointed out, upon making the request, the access seeker has an

enforceable right[20] to use the relevant loop.) Thirdly, Telstra submitted that s 152EB should be read as engaged only in respect of *determinations* that *effect* an acquisition, and that the only relevant determinations are those identified by s 152CL: determinations made by the ACCC under Div 8. Thus, so the argument concluded, s 152EB did not speak to any acquisition effected by s 152AR because the relevant acquisition is effected by the access seeker's request engaging the standard obligations under s 152AR, not by any determination which the ACCC makes under Div 8.

38 Telstra's submissions about s 152EB should not be accepted. The submissions depend upon reading the expression in s 152EB(1)(a) "a determination would *result in* an acquisition of property" as confined to determinations which *effect* an acquisition. The provision should not be construed so narrowly.

39 Access disputes may relate to the terms and conditions on which a carrier or provider is to comply with standard access obligations (s 152CM(1)) or to "one or more aspects of access" to a declared service in respect of which one or more standard access obligations apply (s 152CM(2)). Defining access disputes in these ways, in which the engagement of standard access obligations is a necessary element, is not consistent with treating acquisitions effected by the standard access obligations as a class distinct from acquisitions effected by a determination. Drawing a distinction of that kind was a critical step in Telstra's argument but both text and context deny its validity.

40 Section 152EB(1)(a) does not refer to acquisitions that are *effected by* a determination. Paragraph (a) of s 152EB(1) invites attention to whether a determination *results in* an acquisition of property and par (b) amplifies the premise upon which the obligation to pay compensation is imposed by reference to the determination being otherwise invalid "because a particular person has not been sufficiently compensated". Given first, that the determinations to which s 152EB is directed are determinations of access disputes and second, that access disputes are defined by reference to compliance with standard access obligations, the distinction upon which Telstra's argument about s 152EB depended should not be drawn.

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20 s 152BB.

41 Telstra's central complaint in this litigation was that compliance with its standard access obligations in respect of either ULLS or LSS would see it deprived of the use of those local loops and that it would not be recompensed for that loss of use at a level that amounts to just terms. The ultimate measure of the compensation Telstra could receive for providing access to the local loops to an access seeker would be compensation fixed in accordance with Div 8 in resolving a dispute about the terms and conditions on which Telstra would comply with its standard access obligations. Considered in the context of the whole of Pt XIC, s 152EB should be read as imposing on the Commonwealth an obligation to pay compensation if the resolution of an access dispute in accordance with Div 8 would result in an acquisition otherwise than on just terms. And that outcome of acquisition otherwise than on just terms is the outcome which Telstra asserts follows from it being required to comply with standard access obligations in respect of the local loops in issue in this case.

42 It follows that if, as Telstra alleges, s 152AL(3) and s 152AR do effect an acquisition of property, just terms for that acquisition are afforded by the operation of s 152EB and Telstra's allegations of invalidity fail. It is nonetheless important to go on to consider whether, apart from s 152EB, there would be an acquisition of property otherwise than on just terms.

Acquisition of property?

43 It is well established that s 51(xxxi) of the Constitution is concerned with matters of substance rather than form and that "acquisition" and "property" are to be construed liberally[21]. Moreover, "acquisition" is to be understood in the "compound conception, namely, 'acquisition-on-just-terms'"[22].

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21 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ, 284-285 per Rich J; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350 per Dixon J; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 370-372 per Dixon CJ; *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 201-202 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 303-304 per Mason CJ, Deane and Gaudron JJ; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 49 [128]-[129] per McHugh J.

22 *Grace Brothers Pty Ltd v The Commonwealth* (1946) 72 CLR 269 at 290 per Dixon J.

44 In the present case it is also useful to recognise the different senses in which the word "property" may be used in legal discourse. Some of those different uses of the word were identified in *Yanner v Eaton*[23]. In many cases, including at least some cases concerning s 51(xxxi)[24], it may be helpful to speak of property as a "bundle of rights". At other times it may be more useful to identify property as "a legally endorsed concentration of power over things and resources"[25]. Seldom will it be useful to use the word "property" as referring only to the subject-matter of that legally endorsed concentration of power.

45 These considerations are important in the present matter because of the differing emphases given by the parties to features of the facts of the present matter. As noted earlier, Telstra emphasised the *physical* disconnection of the local loops from its equipment and the *physical* connection of those loops to a competitor's equipment as indicating that there had been an acquisition of property. These physical acts indicated, so Telstra submitted, that Telstra was deprived of the use of the local loops in question. It submitted that it "owns" the infrastructure but loses "control of and the ability to use the infrastructure in respect of which the right" is granted to the other service provider.

46 By contrast, some of the defendants sought to shift the focus of argument from the physical steps taken of connection and disconnection of elements of an electrical circuit to whether it could be said that a competitor took "possession" of loops made available by Telstra in compliance with its standard access obligations. In this respect the Commonwealth and the ACCC emphasised that it is Telstra that must undertake all physical connections to the local loop and that it is Telstra that installs, repairs and maintains the loop and it follows, so it was submitted, that Telstra retains "possession" of the loop. Other defendants sought to emphasise whether and when Telstra might supply any of the

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23 (1999) 201 CLR 351 at 365-367 [17]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 388-389 [85]-[86] per Gummow J.

24 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285 per Rich J.

25 Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252 at 299 cited in *Yanner v Eaton* (1999) 201 CLR 351 at 366 [18] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

telecommunications services required by the end-user to whose premises the loop in question was connected. And in this last respect, emphasis was placed upon the fact that it is the end-user's choice of carrier which determines whether a particular telecommunications carrier seeks to use a local loop for voiceband or non-voiceband communications. End-users can and do change carriers and so long as the end-user chooses not to deal with Telstra, Telstra has no use for the local loop that is connected to that end-user's premises. These aspects of the matter were emphasised in aid of the proposition that steps taken to comply with Telstra's standard access obligations were too transient to amount to an acquisition of property.

47 All of these attempts at characterising the legal consequences of the engagement of Telstra's standard access obligations may be understood as attempts at comparing the differences between the "legally endorsed concentration of power" over a local loop before and after an access seeker requests the use of that loop. Each form of summary characterisation sought, directly or indirectly, to draw analogies with other, more familiar forms of dealing with property. In particular, Telstra's repeated references to exclusion from *use* of the local loops may be understood as inviting comparison with the use that may be made of land or a movable chattel but it may also be understood as presupposing both desire and the ability to make some alternative use of the item in question.

48 It is not productive to analyse analogies of the kind just identified with a view to identifying the extent to which they are apt. And it is not useful to attempt to resolve the constitutional issues which are presented by applying descriptive expressions of the kinds deployed in argument ("Telstra ... loses control of and the ability to use the infrastructure"). Especially is this so where the defendants submit, as they did, that the rights in issue in this case, rights of use of local loops, were statutory rights inherently susceptible of change, that there was no compulsory acquisition and that there was "no deprivation of the reality of proprietorship" of the local loops.

49 Each of these branches of the defendants' arguments sought to invoke particular elements of the long line of cases in this Court in which s 51(xxxi) has been considered. At times argument proceeded as if discrete exceptions to the application of s 51(xxxi) can be identified as established in those decisions. So to approach the application of s 51(xxxi) may invite error. Rather than begin from some constructed taxonomy of rule and exceptions to a rule, it is necessary to begin by recognising the force of the observation by Brennan CJ, Toohey,

Gaudron, McHugh and Gummow JJ in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[26] that:

> "It is well established that the guarantee effected by s 51(xxxi) of the Constitution extends to protect against the acquisition, other than on just terms, of '*every species of valuable right and interest* including ... choses in action'[27]." (emphasis added)

Further, references to statutory rights as being "inherently susceptible of change" must not be permitted to mask the fact that "[i]t is too broad a proposition ... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of s 51(xxxi)"[28]. Instead, analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue.

50 In the particular circumstances of this case it is of especial importance, in undertaking that task of understanding the operation of the relevant provisions, to recognise that the particular provisions of Pt XIC that are impugned in this litigation must not be divorced from their statutory context, and must not be understood in isolation from the history of the provision and regulation of telephone and telecommunications services in Australia.

51 There are three cardinal features of context and history that bear upon the constitutional issues which are raised. First, the PSTN which Telstra now owns (and of which the local loops form part) was originally a public asset owned and operated as a monopoly since Federation by the Commonwealth. Second, the successive steps of corporatisation and privatisation that have led to Telstra now

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26 (1996) 187 CLR 416 at 559, cited in *Attorney-General (NT) v Chaffey* (2007) 81 ALJR 1388 at 1393 [21]; 237 ALR 373 at 378.

27 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 299, 349; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 509; *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 172, 176, 184, 194, 201, 222.

28 *Attorney-General (NT) v Chaffey* (2007) 81 ALJR 1388 at 1393-1394 [24]; 237 ALR 373 at 379.

owning the PSTN (and the local loops that are now in issue) were steps which were accompanied by measures which gave competitors of Telstra access to the use of the assets of that network. In particular, as noted earlier in these reasons, the step of vesting assets of the PSTN in Telstra, in 1992, was preceded by the enactment of the 1991 Telecommunications Act. At all times thereafter Telstra has operated as a carrier, first under the 1991 Telecommunications Act, and later under the 1997 Telecommunications Act, within a regulatory regime by which other carriers have the right to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra, and Telstra has like rights with respect to other carriers. Telstra has never owned or operated any of the assets that now comprise the PSTN except under and in accordance with legislative provisions that were directed to "promoting ... competition in the telecommunications industry generally and among carriers"[29] and sought to achieve this goal by "giving each carrier the right ... to obtain access to services supplied by the other carriers"[30]. And the third feature of context and history which is of cardinal importance is that in 1992, when the assets of the PSTN were vested in Telstra, Telstra was wholly owned by the Commonwealth.

52 When proper account is taken of these three considerations, it becomes apparent that Telstra's argument that there is an acquisition of its property otherwise than on just terms is, as Dixon J said in *British Medical Association v The Commonwealth*[31], "a synthetic argument, and ... unreal". The argument is synthetic and unreal because it proceeds from an unstated premise that Telstra has larger and more ample rights in respect of the PSTN than it has. But Telstra's "bundle of rights" in respect of the assets of the PSTN has never been of the nature and amplitude which its present argument assumes. Telstra's bundle of rights in respect of the PSTN has always been subject to the rights of its competitors to require access to and use of the assets. And the engagement of the impugned provisions (ss 152AL(3) and 152AR) does not impair the bundle of

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29 1991 Telecommunications Act, s 136(1)(a).

30 1991 Telecommunications Act, s 136(2)(b)(ii).

31 (1949) 79 CLR 201 at 270.

rights constituting the property in question in a manner sufficient to attract the operation of s 51(xxxi)[32].

53 Telstra succeeded to the ownership of the assets comprising the PSTN under legislative arrangements which may be described (not inaccurately) as requiring Telstra and its predecessors to buy, and pay for, those assets. It was not (and could not be) suggested that vesting those assets (and the associated liability to pay for the assets) in Telstra was other than a transfer of the assets to be held and used in accordance with and subject to the then regulatory regime contained in the 1991 Telecommunications Act. And it was not (and could not be) said that any question of acquisition of property was presented by the legislation which vested the assets in Telstra. Those assets were held by a Commonwealth statutory corporation and had previously been held directly by the Executive Government. The 1991 laws vesting the PSTN and other assets in Telstra, and establishing a regulatory regime providing for access by Telstra's competitors to Telstra's network and services, were not laws with respect to the acquisition of property. In so far as those laws dealt with matters of property, they effected alterations in the property interests of, on the one side, a Commonwealth statutory corporation and, on the other side, a corporation wholly owned by the Commonwealth. It matters not that the latter corporation was taken not to have been incorporated or established for a public purpose or a purpose of the Commonwealth, was taken not to be a public authority or an instrumentality or agency of the Crown and, subject to some exceptions whose content is not now important, was not entitled to any immunity or privilege of the Commonwealth. What is important is that the rights in the assets vested in Telstra were rights to use the assets in connection with the provision of telecommunications services but those rights were always subject to a statutory access regime which permitted other carriers to use the assets in question.

54 The subsequent repeal of the 1991 Telecommunications Act and enactment of the 1997 Telecommunications Act altered the regulatory regime in various ways but in one critical respect the regulatory regime did not change. Under the 1997 Telecommunications Act, as under the earlier legislation, other participants in the telecommunications market have access rights to Telstra's

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32 *Smith v ANL Ltd* (2000) 204 CLR 493 at 505-506 [23] per Gaudron and Gummow JJ.

network. The legislative provisions for exercise of those rights effect no acquisition of Telstra's property in the local loops in issue.

55 The questions reserved should be answered accordingly. No separate argument having been directed to any provision of Pt XIC other than the two impugned provisions, the questions asking about invalidity of other provisions of that Part should not be answered. The questions should therefore be answered:

Question One

In their application to the ULLS, are any of:

(i) section 152AL(3) of the *TPA*;
(ii) section 152AR of the *TPA*; or
(iii) any other provision(s) in Part XIC of the *TPA*,

beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?

Answer

(i) and (ii) No.
(iii) It is not appropriate to answer this question.

Question Two

If the answer to any part of Question One is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

Answer

This question does not arise.

Question Three

In their application to the LSS, are any of:

(i) section 152AL(3) of the *TPA*;
(ii) section 152AR of the *TPA*; or
(iii) any other provision(s) in Part XIC of the *TPA*,

beyond the legislative competence of the Parliament by reason of section 51(xxxi) of the Constitution?

Answer

(i) and (ii) No.
(iii) It is not appropriate to answer this question.

Question Four

If the answer to any part of Question Three is "Yes", can the relevant provision(s) be read down so that it is valid and, if so, how?

Answer

This question does not arise.

56 Telstra should pay the costs of the Stated Case.