name; rather, they hold a licence to use it. auDA's Transfers (Change of Registrant) Policy (2004-03) allows a registrant to transfer their domain name licence to another eligible party in specified circumstances where there are legitimate commercial or legal reasons, such as where the registrant sells their business operations or assets to the other party, or in settlement of a dispute.

The Panel reported no clear consensus of public opinion on the "resale" of (or, in legal terms, the transfer of) .au domain names. Arguments in favour of relaxing the transfer policy included that a secondary market would facilitate the reuse of domain names and that there is no policy reason to stop someone who is willing to pay a secondary market price for a domain name from paying it. Arguments identified against the resale included fears that a secondary market in domain names may artificially increase demand and lead to increased prices, and that allowing people to register domain names for the purpose of selling them would effectively legitimise cyber squatting.

Members of the Panel agreed that:

- regardless of why a domain name licence is transferred, the new registrant must satisfy applicable eligibility criteria as if they were registering the domain name for the first time; and
- the transfer process should be changed to reduce the administrative burden and costs on registrars and registrants.

There was agreement among Panel members for relaxing the transfers policy however no agreement was reached on the way in which the new transfers policy should be implemented. Accordingly, the Panel simply recommended that the policy be relaxed to allow a registrant to transfer their domain name to another eligible party for any reason. The rationale cited in the Report for this recommendation is to give people access to domain names that would not otherwise be available and to allow transfer of domain names to those who have best use for them. The Panel also recommended that auDA conduct a two year review of the new transfers policy.

auDA is currently working on implementing the Panel's recommendations in 2008. Until then, all current auDA policies continue to apply. The relaxation of the current domain name transfer policy is one of the most significant changes recommended by the Panel. It will be interesting to see how this change works in practice and whether concerns expressed about relaxing the policy will be realised.

The Acquisition of Next Generation Broadband on 'Just Terms': A recent High Court Challenge

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Introduction

In November 2007 Telstra, Australia's largest telecommunications company, mounted a constitutional challenge in the High Court claiming that it has not been properly compensated for being forced, under trade practices legislation, to give internet competitors access to its national broadband network.

The judgment, to be handed down in 2008, will be a landmark decision in a number of respects. It will be the first time the High Court will consider how Part XIC of the *Trade Practices Act* 1974 (Cth) ('*TPA*') accommodates the rapidly evolving technology of next generation broadband. It will also be an opportunity for the Court to once again explore the limits of s 51(xxxi) of the Australian Constitution: the power of the Commonwealth to 'make laws with respect to the acquisition of property on just terms from any State or person...'. This note briefly examines the High Court hearing in the context of recent Part XIC regulatory developments.

The Nature of the High Court Challenge

In *Telstra Corporation Limited v Commonwealth of Australia & Ors*[1] Telstra argues that under the provisions of Part XIC of the *TPA* it is being forced to allow its competitors to access its copper network infrastructure at a price that is significantly undervalued. Telstra claims that this is comparable to having its property, the copper infrastructure, compulsorily acquired without 'just' compensation. Section 51 (xxxi) of the Australian Constitution provides:

> 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:...

> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;...

Telstra seeks a High Court ruling stating that the powers in the *TPA* which give the Australian Competition and Consumer Commission (ACCC) power to set prices in the telecommunications industry, breaches section 51(xxxi) of the Constitution. Under a series of ACCC decisions, Telstra has been compelled to give its rivals access to its broadband infrastructure for prices as low as $2.50 a month. The specific technology in question that allows access to the network is the Unconditional Local Loop ('ULL') and the Line-Sharing Service ('LSS'). The ULL allows the access seeker to cut a wire attached to Telstra's exchange and reattach it to its own equipment. The LSS provides the access seeker with actual broadband internet. Under the current infrastructure arrangement, only part of a copper wire is fed into a competitor's (usually an access seeker) equipment.

In terms of specific provisions, as Telstra is required to supply ULL and LSS to any person or entity under the *TPA*, the Court is being asked to consider whether section 152AL, section 152AR or any other provision(s) in Part XIC of the *TPA*, are beyond the legislative power of the Commonwealth by reason of s 51(xxxi) of the Constitution. If successful, Telstra will ask the High Court to review whether price rulings of the ACCC were on 'just terms', with the intention of being awarded compensation for years of underpayments for network access.

The Intended Operation of Section 152AL and Section 152AR

As a primary issue for the High Court is the intersection of s 51(xxxi) of the Constitution and Part XIC of the *TPA*, it is worth briefly considering the operation of several key provisions of the legislation.[2] Part XIC of the *TPA* does not confer a general right to access telecommunications services. The right of access is limited to those services which have been declared to be an eligible service by the ACCC.[3]

The *Explanatory Memorandum to the Trade Practices Amendment (Telecommunications) Bill* provides that it is the intention of Parliament that the ACCC will have a high level of flexibility in describing a service for the purpose of determining whether to make a declaration of an eligible service. Under section 152AL, an 'eligible service' is one that is either:

(a) a listed carriage service; or

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

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).[4] 'Listed carriage services' are defined in the *Telecommunications Act* 1997 (Cth) to be services for the carriage of telecommunications between geographic points using electromagnetic energy.[5]

A declared access provider must, if requested by a service provider, supply a declared service to the service provider in order to enable the service provider to provide carriage services and/or content services.[6] The access provider is further required to take all reasonable steps to ensure that the technical and operational quality of the declared service supplied to the service provider is equivalent to that which the access provider provides to it.[7]

The access provider is also required to 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 services of an operational quality and timing that is equivalent to that which the access provider provides to itself.[8]

However, the access provider's obligations are subject to certain important limitations. The access provider is *not* obliged to provide access where to do so would:

(a) prevent a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the request was made;

(b) prevent the access provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the access provider's reasonably anticipated requirements, measured at the time when the request was made; or

(c) prevent a person from obtaining, by the exercise of a pre-request right, a sufficient level of access to the declared service to be able to meet the person's actual requirements.[9]

In addition to the limitations of s 152AR, the ACCC can grant class,[10] or individual,[11] exemptions where it is satisfied that this will promote the long-term interests of end-users.[12] However, apart from limitations and exceptions, access providers must comply with access obligations on terms and conditions agreed to upon commercial agreement with seekers, or detailed in an access undertaking,[13] or as determined by the ACCC by way of arbitration.[14] If the Federal Court is satisfied that a provider has contravened any of the access provider obligations, the court can compel that provider to comply with the obligations and/or can award damages for any loss suffered by an access seeker.[15]

It is also important to note that under Part XIC if a service has been declared but the seeker and provider are still unable to agree about the terms and conditions of the provider's obligations, or about any other aspect of access that has been declared, either party has the right to inform the ACCC that a dispute has arisen.[16] The ACCC is then required to arbitrate on any dispute, and importantly, give reason for its decision.[17]

If an access provider owns or controls a facility or is a nominated carrier in relation to a facility, the access

provider is additionally obliged to permit interconnection to those facilities for the purpose of enabling the service provider to be supplied with the declared service in order that the service provider can provide carriage services and/or content services.[18]

The access provider is required to take all reasonable steps to ensure that the technical and operational quality and timing of the interconnection is equivalent to that which the access provider enjoys.[19] Again, the access provider is required to take all reasonable steps to ensure that the service provider receives fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to the standard which the access provider enjoys.[20]

The Full Court Hearing

On the first day of the hearing Counsel for Telstra, Alan Archibald QC, argued that the requirement to provide access to the ULL and LSS, which allows competitors to install equipment in Telstra exchanges to supply their own broadband internet services, was an acquisition of property. Under current arrangements, Telstra claims that instead of providing a service as it is required to do, it is actually compelled to give access to its broadband infrastructure for a ' tenancy of indefinite duration',[21] which has the effect of a compulsory acquisition of property. The unique and specific requirements of ULL and LSS - that require wires to be connected from Telstra's copper network to the competitor's equipment - constituted a compulsory acquisition, therefore, affording Telstra a guarantee of 'just terms' under s 51(xxxi) of the Constitution.

In regard to how the technology 'switches' in the critical 'last mile' of the network, Mr Archibald stated in the hearing that:

> *...there is physical disconnection. The loop ceases to be an operative part of the Telstra network and becomes a connected operative part of the access seeker's network.*[22]

An interesting exchange with Justice Kirby ensued:

> ***KIRBY J:*** *Of the nature of telecommunications all of this must be instantaneous, so how is there physical disconnection? I mean, the copper wires remain in situ; there is no mechanical shifting of gear so that it makes a new connection.*
>
> ***MR ARCHIBALD:*** *Almost all of the last mile remains intact but a particular step is taken at a particular piece of equipment within the local exchange. That is what the diagram shows ...*
>
> ***KIRBY J:*** *I cannot wait to see it.*
>
> ***MR ARCHIBALD:*** *The only point I wanted to make before going to it is, having made the connection, the point about disconnection from one and connection to another is that in fundamental contrast to all the other services, what then happens is that the access seeker carries the service over the local loop.*[23]

Telstra argued that it is burdened with significant obligations to maintain the networks that their rivals use and the ACCC has arbitrarily set prices in the past that have ignored Telstra's costs.[24] Counsel for Telstra have stressed that what they simply seek is a 'fair commercial return' for its property. The intention of the telco giant is not to prevent competitors getting access to its infrastructure. The appellants claim that it loses the most valuable feature of property - the ability to exclude others from using it.[25]

In response, counsel for the Commonwealth, Solicitor General David Bennet QC, argued that '[t]his is not a borderline case'.[26] The Commonwealth submitted that the ULL and LSS broadband infrastructure can be more accurately characterised as an 'overall system' which is not exclusively controlled. What Telstra is providing is a service over the copper infrastructure. When Telstra has no use for the system, and other stakeholders do, they have no property acquisition rights to the system.[27]

The Commonwealth submitted that the real concern for Telstra is not that an alternate access seeker 'gets to send impulses down the loop and that he does not' but that the customer is free to select another internet access provider. In this circumstance, there is simply nothing on the system for Telstra to provide. Alternatively, the competitor access provider does have for the system and can use it. The customer's choice is what essentially 'deprives' Telstra's use of the system and this is 'in no way' an acquisition of property.[28]

Neil Young QC, Counsel for the second defendant the ACCC, argued that the methods the ACCC used to determine the access price was appropriate and fair:

> *The Commission may have regard to other matters but it must act in accordance with the objects of Part XIC, and they are the same objects that set in place the telecommunications regime that gives Telstra its effected right in the first place. The ACCC does not have a discretion at large.*[29]

'Fairness', as far as ACCC are concerned, was whatever Parliament decides. This involves a process of hearing submissions, providing drafts of determinations to the parties and, most importantly, arriving at an agreed settlement. Parliament 'has a measure of latitude' in determining the requirements of just terms implementation.

Stephen Gallagher QC, counsel for Optus, argued that Telstra had chosen to hold a licence under the conditions of the telecommunications regime and therefore had obligations to make its copper network available to its competitors:

> *If Telstra or Optus or XYZed or any other owner of a network unit wants to use that network unit to provide telecommunication services to the public, then it needs a licence and a standard condition of every carrier licence is that the*

> *licence carrier comply with the standard access obligations that are imposed by section 152AR in the event of a declaration being made under section 152AL. It really comes down to this. You do not have to play in the telecommunications sandpit. If you want to play in the telecommunications sandpit, then you play by the rules*[30]*... the rules are the rules and the rules include a rule that in some cases at some times you are going to have to share your bucket.* [31]

Melanie Sloss SC , for the defendants NEC and Macquarie Telecom, argued that an over-arching aim of the regulatory framework was to provide long-term industry competition. Telstra's competitors were already paying a fair price to gain access to the network because that price was formulated by the independent ACCC. Ms Sloss SC said any higher payment or compensation would put smaller carriers, such as her clients, at a significant disadvantage and would distort the mechanisms of the market:

> *It is incongruous to have compensation on a just terms basis if just terms is other than the compensation that the legitimate business interests of Telstra received under the regulatory regime under Part XIC. For those reasons we say that you do not need to have a just terms mechanism because anything over and above what is provided under Part XIC would be antithetical to that competitive market and it would not enable competition to be sustained in the long term.* [32]

Questions from the Bench suggest that Telstra has a number of challenges in establishing its case against the thirteen defendants. Both Gleeson CJ and Kirby J questioned whether Telstra's former status as a 'Government owned' body had access implications. Public policy and competition issues were constantly referred to over the two days of the High Court hearings. Justice Kirby said the network had been 'built up with the blood and sweat of the people of Australia over a century',[33] and any access obligation that ensued from holding the license was 'the downside of getting a very great resource.' [34] The Chief Justice said that it was 'inherently likely' that the appellant had to accept competition as a consequence of privatisation.

In a similar vein, Hayne J comments in an exchange with Mr Archibald QC on the proposition of whether the 'property' was compulsorily or voluntarily acquired.

Indeed, during the hearing the Bench questioned whether Telstra's copper wire could be regarded as property. For example, Gummow J said the value of the wire could be understood from how it is used in a broader context.

Justice Crennan alluded to some of the responsibilities that Telstra may have in fostering an environment of competition in the context of ULL and LSS:

> *[S]o far as the development of competition is concerned, it has commonly been said, has it not, in relation to electricity and gas, as well as this sort of industry, that the first way of developing greater competition is to have retail competition, and the next step is to have network access. For example, that is a debate that has been had in the electricity industry.*[35]

The Significance of the Decision

The decision of the High Court will be the first opportunity for Australia's final appellate court to examine critical aspects of the operation of next generation broadband. Telstra argues for a fair commercial return for a substantial investment. Mr Archibald QC contends, '[w]e got it and paid for it and we have spent a fortune building it up ever since.'[36] The defendants argue that if the High Court endorses Telstra's constitutional challenge to access pricing set by the ACCC, this would be a regressive step for broadband development in Australia.

The current High Court proceedings must also be understood in the context of the new generation broadband industry that desires greater regulatory certainty. For some time industry stakeholders have expressed a need for regulatory certainty in the telecommunications access regime.[37] In 2006, a 'Group of Nine' businesses released a series of reports under the name 'G9.'[38] Many of the members of the G9 are defendants in the current High Court challenge.

The G9 group argue that for certainty to be achieved there needs to be a fair regulatory framework in place, predictability in the way in which regulation is applied and confidence in the market that the outcomes of regulatory decision-making will be consistent with what investors perceive as being commercially fair and reasonable.[39] In this context, predictability requires appropriate consideration for the commercial risk being borne by investors, the synchronization of regulatory principles with commercial reality and consistency in decision-making.[40] Further concern has been expressed over the way that telecommunications services are declared,[41] and how disputes are resolved.[42]

Moreover, as Part XIC determination and resolution provisions are premised on a 'negotiate/arbitrate' model, preference is given to negotiation and voluntary undertakings, and *ex ante* regulatory intervention is used only as a last resort. This form of dispute resolution is not conducive to creating certainty and predictability in the market, as key business decisions are contingent on the uncertainties of often protracted negotiation and arbitration processes.

It has also been suggested that there is a perception that current regulation in relation to access pricing is overly complex and ambiguous.[43] There have been calls for a regulatory pricing regime that reflects commercially acceptable and fair returns in light of the significant risks that investors undertake when investing in broadband technology.

In such an environment of regulatory uncertainty, the issue of 'access' has become the key battleground for major business stakeholders to articulate their commercial interests and stake their claims in a next generation broadband world. In 2006, the G9

released its proposed Fibre to Node ('FTTN') network proposal in direct competition to Telstra's next generation broadband network plans.[44] The plan proposes to create an industry-owned, special purpose company, 'SpeedReach', to make key decisions about the network. In addition, G9 proposes to secure more extensive capital investment in the FTTN network, an access pricing model to set prices for use of the network and a managed process for transition from unbundled local loop to FTTN. The group suggests this model would include wider network coverage than under Telstra and regulatory certainty to let the FTTN investment go ahead. The consortium has expressed concerns at the proposal to grant Telstra generous regulatory concessions in exchange for building a FTTN network. The consortium emphasises the need to either maintain the status quo of competition in terms of the current ULLS, *or* pursue a new model which allows a FTTN network to proceed while sustaining competition and fair access conditions.

The G9 consortium submitted a request to the ACCC to amend the ULLS service description 'in order to clarify that access to the ULLS is available at all potential points of interconnection on the communications wire comprising the ULLS and to ensure that the declaration has continuing application in the event of a network modernization and FTTN deployment.' [45] In May 2007 the ACCC announced that a public inquiry would be held to determine whether it should vary its service declaration for the ULLS.[46]

This development highlights the need for the regulatory body to take the initiative and address the impact of technological innovation in the industry on the operation of access regulation. It is unsatisfactory for regulatory change to be driven by industry submission as the resulting amendments tend to be piecemeal rather than measured and comprehensive. It is therefore necessary for law and policy makers to conduct a comprehensive review of the efficacy of Part XIC and consider whether the limitations of the present sector-specific regime can be resolved through a greater reliance on the generic provisions of Part III of the *TPA*.[47]

Part XIC represents a sector specific set of regulations where the thresholds for intervention by the ACCC are purposely set lower than those in the generic access regime in Part III. Part XIC was introduced in 1997 at a time when the industry was being deregulated. The provisions were intended to aid in the transition to a fully competitive market.

However, since the provisions were introduced in 1997, considerable progress in competition across a range of sectors in the telecommunications market has been made, including in the critical broadband internet market. Despite the increase in competition, regulation, if anything, has increased since 1997. In such circumstances it is submitted that it is now appropriate to conduct an assessment of whether competition in the industry has reached a level where it would be appropriate for the industry to be governed by the generic provisions of the *TPA*. If the review concludes that competition has indeed reached an adequate level it would be appropriate to remove the role of sector specific regulation in the telecommunications sector.[48] The current challenge before the High Court will have significant ramifications for any future review.

Conclusion

The High Court challenge not only presents an opportunity to expand the already comprehensive jurisprudence on section 51(xxxi) of the Australian Constitution, but also presents an opportunity to add another chapter in the evolving canon of cases on the proper operation of Part XIC of the *TPA*. At the heart of this case is the question of how the law accommodates new and evolving technology. Kirby J opined during the hearing:

> *I wish I understood all this. I mean, I really do not understand the technology. I will read about it, try to understand it, but I suspect that we lawyers are using phrases and expressions that engineers would laugh at. I do not know, but I just do not understand it, and the cold diagram in the stated case does not help to elucidate it for me.*[49]

In this case, the Court has to consider the fluid and complex technology underlying the deployment of next generation broadband. Indeed the case offers a complex combination of legal, technical and economic issues that need to be carefully entangled and addressed by the High Court. The challenge for the Court is to discern the proper application of Part XIC of the *TPA* so as to balance the rights of the powerful incumbent Telstra with the access rights of its competitors.

A critical objective of Part XIC is to promote the long-term interests of end-users.[50] The necessary corollary to this is to ensure that the provision is not manipulated by parties to create artificial and costly delays that thwart development and competition in the telecommunications industry.

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[1] The matter has been brought in the original jurisdiction of the High Court. Telstra is opposed by 13 Commonwealth defendants, the ACCC and 11 of Telstra's competitors. The Full Court hearing transcripts: *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 (13 November 2007) and *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 (14 November 2007). The history of the proceedings before the Full Court hearing, are as follows: *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 48 (8 February 2007); *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 118 (20 March 2007); *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 118 (22 June 2007); *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 118 (4 July 2007) (S42/2007) (Application for an order to show cause) (Case stated). All available at austlii: <www.austlii.edu.au >.

[2] A detailed examination of the provision is beyond the scope of this paper. Please refer to forthcoming *TPA* access and broadband article written by Selvadurai, Salter and Gillies for a more comprehensive analysis of provisions of Pt XIC (currently on file with authors). There are also other provisions that the Court consider in the hearing that are not examined here including ss 152AY and 152EB.

3 Examples of services the ACCC has declared under s 152 include: Domestic GSM

Originating Access (29/05/1998); Domestic PSTN Originating Access (29/05/1998) ; Domestic PSTN Terminating Access (29/05/1998); AMPS to GSM Diversion Service (29/05/1998); Conditioned Local Loop Service (29/05/1998); Digital Data Access Service (29/05/1998); Transmission (29/05/1998); Domestic AMPS Originating Access (01/06/1998); Domestic AMPS Terminating Access (29/05/1998); Domestic GSM Terminating Access (29/05/1998); ISDN Originating and Terminating Access (07/01/1999); Domestic Transmission Capacity Service – Variation to Service Declaration (01/05/2001); GSM Declarations Made Technology-Neutral – Variation to Service Declaration (02/03/2002).

[4] *Trade Practices Act* 1974 (Cth) s 152AL. Decisions that have referred to this provision include : *Foxtel Management Pty Ltd v Australian Competition Consumer Commission* [2000] FCA 589; *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1160; *Seven Network Limited (No 4)* [2004] A Comp T 11; *Telstra Corporation Limited* [2006] A Comp T 4; *Vodafone Australia Limited v Australian Competition Consumer Commission* [2005] FCA 1294.

[5] *Trade Practices Act* 1974 (Cth), s 16.

[6] *Trade Practices Act* 1974 (Cth), s 152AR(3)(a). Decisions that discuss responsibilities of access providers include: *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 350; *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1159; *Foxtel Management Pty Ltd v Australian Competition Consumer Commission* [2000] FCA 589; *Seven Network Limited (No 4)* [2004] A Comp T 11; *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1399; *Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1161; *Telstra Corporation Limited* [2006] ACompT 4; *Seven Cable Television Pty Ltd v Telstra Corp Ltd* [2000] FCA 21; *Telstra Corporation Ltd* [2001] A Comp T 1.

[7] *Trade Practices Act* 1974 (Cth), s 152AR (3)(b).

[8] *Trade Practices Act* 1974 (Cth), s 152AR(3)(c). Reasonableness is a key criteria that is applied across al of Part XIC (see s152AH and the recent decision *Telstra Corporation Ltd (No 3)* [2007] A Comp T3.)

[9] See *Trade Practices Act* 1974 (Cth), s 152AR(4).

[10] *Trade Practices Act* 1974 (Cth), s 152AS.

[11] *Trade Practices Act* 1974 (Cth), s 152AT.

[12] *See Re Seven Network Ltd* [2004] A Comp T 10.

[13] *Trade Practices Act* 1974 (Cth), s152BS (for ordinary undertaking) or ss 152BX, CBA (for special access undertakings)

[14] *Trade Practices Act* 1974 (Cth), s 152AY.

[15] *Trade Practices Act* 1974 (Cth), s 152BB(3).

[16] *Trade Practices Act* 1974 (Cth), ss 152CM(1)(2).

[17] *Trade Practices Act* 1974 (Cth), s 152CP.

[18] *Trade Practices Act* 1974 (Cth), s 152AR (5)(a)-(c).

[19] *Trade Practices Act* 1974 (Cth), s 152AR (5)(d).

[20] *Trade Practices Act* 1974 (Cth), s 152AR (5)(e).

[21] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [1613].

[22] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [928] - [930].

[23] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [932] – [948].

[24] See *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [1381] – [1386].

[25] See *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [1141] - [1143].

[26] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [3918].

[27] See *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [2753] – [2755].

28 Telstra Corporation Limited v Commonwealth of Australia & Ors [2007] HCA Trans 661 [2765] – [2771]

[29] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [4756] – [4759].

[30] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [4949] – [4956].

[31] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [4964] – [4966].

[32] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [6178] – [6185]. Mr Archibald responded by arguing that the concept of industry competition reflected the view of the ACCC, not Macquarie or NEC, and market distortions did not reflect the facts of this case.

[33] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [2270] – [2271].

[34] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [2286] – [2287].

[35] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [6435] - [6440].

[36] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 661 [2277] – [2278].

[37] KPMG & ALCATEL, *Fostering Investment in Broadband Infrastructure – The Need for Regulatory Certainty*, 2006 (the "KPMG &ALCATEL Report") at p 9.

[38] Allens Consulting Group, *A Competitive Model for National Broadband Upgrade*, 10 July 2006 ("G9 Report"). The G9 comprises of a coalition of companies: AAPT, Internode, iiNet, Macquarie Telecom, Optus, Powertel, Primus, Soul and TransACT.

[39] Ibid.

[40] Ibid at p 13.

[41] Ibid at p 31; *See also* Productivity Commission, *Telecommunications Competition Regulation Inquiry Report*, September 2001, at p XXI; and KPMG & ALCATEL, above n 44 at p 27; *See further* Australian Competition and Consumer Commission, *Declaration of Subscription Television Broadcast Carriage Services*, Final Report, August 1999; Australian Competition and Consumer Commission, *Competition in Data Markets, Final Report*, October 1998.

[42] Note that an Act to amend Pt XIC of the *Trade Practices Act 1974* (Cth), the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005* (Cth) received Royal assent on 23 September 2005. The amendments reflect a desire to deliver more timely access, while affording interested parties adequate procedural parties.

[43] G9 Report, above n 45 at p 27.

[44] Ibid.

[45] G9, 'G9 Request for Amendment to ULLS Service Declaration,' 15 March 2007.

[46] Australian Competition and Consumer Commission, *Possible Variation of the ULLS Service Declaration*, 16 May 2007.

[47] Elizabeth Knight, 'Argument Ignores Net Users,' *Sydney Morning Herald*, 17 May 2007.

[48] Vodafone, *Submissions to Department of Communications, Information Technology and the Arts, 2005*; *See also* Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation Issues Paper*, 2005.

[49] *Telstra Corporation Limited v Commonwealth of Australia & Ors* [2007] HCA Trans 663 [3263] - [3267].

[50] *Trade Practices Act* 1974 (Cth), s 152AB(2).