Turning to the Past to Clarify the Future: Access to the Next Generation of Broadband and the High Court

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Introduction

In this companion piece to the 2007 hearing note *The Acquisition of Next Generation Broadband on 'Just Terms': A recent High Court Challenge*, the authors review the decision of *Telstra Corporation Limited v Commonwealth* [2008] HCA 7.

The High Court unanimously held that the telecommunications access regime set out in Part XIC of the *Trade Practice Act 1974* (Cth) ("*TPA*") did not amount to an acquisition of property otherwise than on just terms contrary to s 51(xxxi) of the Commonwealth Constitution. The seven-member bench delivered joint reasons for so holding.

Background

Telstra Corporation Ltd ("Telstra") commenced proceedings in the original jurisdiction of the High Court. Those proceedings named as defendants the Commonwealth, the Australian Competition and Consumer Commission ("ACCC") and 11 telecommunications service providers.[1] The questions reserved by the Stated Case asked whether s 152AL(3), s 152AR or other provisions within Pt XIC of the TPA were beyond the legislative competence of the Commonwealth because those provisions had the effect of permitting other telecommunications service providers access to certain of Telstra's infrastructure at prices determined by the ACCC, which Telstra asserted amounted to an acquisition of property otherwise than on just terms.

Telstra owned pairs of copper or aluminium wires running between local exchanges and end users, called "local loops". Those loops allowed line sharing by providers of voice services (which used a low-frequency spectrum) and other services (which used a high-frequency for high bandwidth services). When local loops were used by a telecommunications service provider other than Telstra the loops were physically disconnected from Telstra's network and re-connected to equipment of the other supplier.

Telstra challenged the provisions within Part XIC by which the ACCC set prices for compulsory third party access to its loops. Telstra argued that because the prices were set by the ACCC access to the loops was on terms which were different to the terms which would be negotiated at arms' length by which property was acquired on other than just terms. Telstra also argued that s 152EB, which required the Commonwealth to pay to Telstra compensation if any determination by the ACCC resulted in an acquisition of property without sufficient compensation, did not save the impugned provisions.

Judgment

In joint reasons the High Court held that sections 152AL(3) and 152AR of the *TPA* were valid. The Court held that access to Telstra's local loops by competitors did not effect an acquisition of Telstra's property in the those loops.[2]

Statutory History

The issues arose against a legislative background of relaxation of the public monopoly originally provided for under the *Commonwealth Post and Telegraph Act* 1901 (Cth).

The Commonwealth had owned and operated the PSTN from Federation to June 1976.[3] Ownership had been transferred to the Australian Telecommunications Commission,[4] still under ministerial direction,[5] preserved in 1989 as a body corporate under the name of the Australian Telecommunications Corporation.[6] In 1992 the assets of the PSTN were vested in Telstra. [7] Telstra (or its predecessors) had bought and paid for the Public Switched Telephone Network ("PSTN") and therefore owned it.[8]

Telstra operated as a carrier under the *Telecommunications Act* 1991 (Cth). Other carriers had the right

to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra; Telstra had like rights with respect to other carriers. Telstra's ownership of the assets of the PSTN vested in it in 1992 and was subject to the statutory rights of access by other carriers.[9] Telstra was owned by the Commonwealth until 1997 and that ownership was reduced by three offerings of shares to the public (in 1997, 1999 and 2006).[10] Telstra's assets remained subject to the access regime of Part XIC. [11]

The Impugned Provisions and Just Terms

The Court emphasised the need to understand the impugned provisions in the context of the broader objectives of Part XIC:[12]

> 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.[13]

Telstra submitted that the physical disconnection of the local loops from its equipment and reconnection of those loops to competitor's equipment involved an acquisition of property.[14] The contrary argument was that the physical act of disconnection and reconnection did not lead to an acquisition of property, which could occur only where a competitor took possession of the loops. [15] It was pointed out that Telstra repaired and maintained the loops, which Telstra could not have done had the loops been in the possession of Telstra's competitors.

The Court considered that Telstra's statutory rights were inherently susceptible to change and that there was no compulsory acquisition; therefore, there was no deprivation of the reality of proprietorship of the local loops.[16]

Part XIC was to be viewed in context. Telstra's history and the regulation of telephone and telecommunications services in Australia more generally was relevant.[17]

Rights to use Telstra's assets were governed by a statutory access regime:

> 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 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"[18] and sought to achieve this goal by "giving each carrier the right ... to obtain access to services supplied by the other carriers"[19]. 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. [20]

The Court regarded Telstra's argument as "a synthetic argument, and ... unreal" (using a description of Dixon J in *British Medical Association v Commonwealth* (1949) 79 CLR 201 at 270).[21] That criticism flowed from what the Court considered to have been an erroneous although unstated premise by Telstra that it had larger and more ample rights than was the case.[22] The Court pointed out that Telstra's bundle of rights had for some time been subject to the rights of its competitors to require access to and use of Telstra's assets. The Court concluded that the engagement of s 152AL(3) and s 152AR did not effect an acquisition of property which, if done on other than unjust terms, would attract the operation of s 51(xxxi).

Section 152EB made provision for 'top-up'[23] payments by the Commonwealth if (a) the determination resulted in an acquisition of property; and (b) the amount determined by the ACCC to be paid to Telstra was insufficient. Telstra argued that because property was acquired as a result of a request for access and not a determination on price by the ACCC, s 152EB had no application. The Court rejected Telstra's argument that s 152EB did not save s 152AL(3) and s 152AR from invalidity. The Court said that s 152EB should not be read narrowly. Although the Court did not need to determine the point, it stated that had its conclusion been otherwise s 152EB would have saved s 152(AR) and s 152AL(3) from invalidity.

Reflections

The decision will bring obvious relief for telecommunication service providers that rely on the broadband network to provide services to their customers. So far as the role of the ACCC is concerned, its Chairman described the decision as "removing yet another layer of uncertainty created by the Telstra strategy of continual litigation." The Chairman added that the decision "provides welcome encouragement to industry participants using the access regime to continue investments which provide competitive services to end users".[24]

Had Telstra succeeded, the vexing question of the amount of compensation due to Telstra for providing access to the network would have arisen. Whether s 152EB has any work under the present arrangements is an interesting one.

In what might reasonably be seen as a highly litigious environment, the High Court's decision was, as one of the defendants suggested, a 'welcome encouragement to industry participants using the access regime to continue investments which provide competitive services to end users'.[25] It will be interesting to observe how Telstra engages with its competitors and the ACCC in the near future,[26] particularly in relation to the next generation telecommunications network.

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[1] See B Salter and N Selvadurai, 'The Acquisition of Next Generation Broadband Rights on 'Just Terms': A Recent High Court Challenge' (2007) 70 *Computers and the Law* 13. The proceeding was brought in the original jurisdiction of the High Court. The Full Court hearing transcripts: *Telstra Corporation Limited v Commonwealth* [2007] HCA Trans 661 (13 November 2007) and *Telstra Corporation Limited v Commonwealth* [2007] HCA Trans 663 (14 November 2007). The history of the proceedings before the Full Court hearing, are as follows: *Telstra Corporation Limited v Commonwealths* [2007] HCA Trans 48 (8 February 2007); *Telstra Corporation Limited v Commonwealth* [2007] HCA Trans 118 (20 March 2007); *Telstra Corporation Limited v Commonwealth* [2007] HCA Trans 118 (22 June 2007); *Telstra Corporation Limited v Commonwealth* [2007] HCA Transcript 118 (4 July 2007) (S42/2007) (Application for an order to show cause) (Case stated). All available at austlii: <www.austlii.edu.au >.

[2] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [54].

[3] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [12] – [13].

[4] *Telecommunications Act* 1975 (Cth) s 4.

[5] *Telecommunications Act* 1975 (Cth) s 7.

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

[7] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [15].

[8] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [11]. The *Post and Telegraph Act* 1901 (Cth) specified a number of colonial statutes which ceased to apply to the postal and telegraphic services of the Commonwealth including the *The Post and Telegraph Act* 1893 (WA), s 65 of which conferred an "exclusive privilege" upon the Postmaster-General of that colony: see *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [10].

[9] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [20].

[10] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [20] established under the *Future Fund Act* 2006 (Cth).

[11] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [50]-[52].

[12] See Salter and Selvadurai, above n 1; for a more detailed examination of the Part XIC see: Selvadurai, Salter and Gillies, 'Roadblocks on the Information Superhighway – Reconsidering the Telecommunications Access Regime' (2008) 4(1) *Monash Business Review.*

[13] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [33]; See, for example ss 152AB, 152AH, 152AY. For discussion of concepts such as 'long term interests of end users' see Selvaduria, Salter and Gillies above.

[14] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [45].

[15] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [46].

[16] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [48].

[17] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [50].

[18] See *Telecommunications Act 1991* (Cth), s 136(1)(a).

[19] See *Telecommunications Act 1991* (Cth), s 136(2)(b)(ii).

[20] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [51].

[21] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [52].

[22] *Telstra Corporation Limited v Commonwealth* [2008] HCA 7, [52].

[23] Ibid.

[24] See ACCC Media Statement, above n 1.

[25] ACCC Media Statement, 'High Court Unanimously Supports availability of the Telecommunications Access Regime' <www.accc.gov.au>.

[26] See the comments of M O'Sullivan, 'Fears Grow that Telstra will be the sole bidder' *Sydney Morning Herald* (17 April 2008) and David Forman from the Competitive Carriers Coalition in Cath Hart, ' "Own Goal" in Telstra court case', *The Australian* (7 March 2008).