Telstra Corporation Ltd v ACCC [2008]

Thomas Jones and Piccolo Willoughby provide a case note on a recent decision of the Federal Court.

Telstra Corporation Ltd v ACCC [2008] FCA 1758 involved a successful challenge to an arbitral determination made by the Australian Competition and Consumer Commission (**ACCC**) under Part XIC of the *Trade Practices Act 1974* (Cth) (**TPA**).[1] The telecommunications access regime in Part XIC was introduced by the Federal Government in 1997.[2] However, despite substantial regulatory activity in the intervening years, there are still relatively few judicial authorities on its operation.

The Federal Court's decision in this case provides guidance on the meaning and application of key provisions in Part XIC and sets an important benchmark for the quality of ACCC decision-making. It also demonstrates a need for caution by the ACCC in entering into technical regulation of the telecommunications industry.

Access dispute

The access dispute to which the determination related was notified by Optus. It concerned a telecommunications service called the Unconditioned Local Loop Service (**ULLS**), which has been declared since 1999.[3] The ULLS involves Telstra supplying an access seeker with the exclusive use of a pair of metallic wires that run from a local telephone exchange to an end-user's premises.

The dispute concerned the ordering and provisioning of the ULLS where the end-user's premises are located in an apartment block or other 'multi-dwelling unit' (**MDU**) which has its own main distribution frame (**MDF**) on site.

The Federal Court's decision in this case provides guidance on the meaning and application of key provisions in Part XIC

Ordering and provisioning of ULLS is normally carried out in accordance with an industry code called ACIF C569:2005, *Unconditioned Local Loop Service - Ordering, Provisioning and Customer Transfer* (the **ACIF Code**).[4] The ACIF Code was developed by the Australian Communications Industry Forum, which now forms part of the Communications Alliance.

However, the provisioning of ULLS to an MDU involves an added complication not specifically dealt with in the ACIF Code. In order to provide a continuous metallic path between the end-user's premises and the access seeker's equipment in the exchange, jumper wires need to be connected on the MDF at the MDU.

Under the ACIF Code, when a new occupant of premises wishes to be supplied with voice/data services by a provider other than Telstra, the ordering and provisioning process that must be used is called the 'Vacant ULLS' process. The order does not specify a particular pair of wires, but requires Telstra to search for a suitable pair.

In its dispute notification, Optus complained that the need to use the Vacant ULLS process gave Telstra a competitive advantage in relation to MDUs because a new occupant supplied with services by Telstra could often be connected in as little as 1-2 days, whereas a new occupant who chose a different service provider, such as Optus, may have to wait longer. In addition, the Vacant ULLS process required technicians to visit the MDU to connect jumper wires in the on-site MDF whereas, if Telstra was the end-user's chosen service provider there was often no need for such a visit.[5]

Optus wanted the ACCC to remove Telstra's "advantage" and provide Optus with an ordering and provisioning process that was "equivalent" to the process that Telstra used to connect the end-user if it was the service provider.[6] Optus suggested this might involve using the presence of a Soft Dial Tone to indicate the availability of a continuous metallic path.[7]

After conducting site visits to MDUs, the ACCC issued a draft final determination and invited the parties to make submissions on it. The draft sought to incorporate the use of Soft Dial Tone into a new process for ordering and provisioning the ULLS to MDUs that was partly based on an existing process in the ACIF Code called "Transfer ULLS".[8]

In responding to the ACCC's draft, Telstra emphasised that the presence or absence of a Soft Dial Tone on a line plays no role in ordering and provisioning the ULLS under the ACIF Code. Optus essentially supported the draft determination.

Both parties also made submissions on the costs of implementing the proposed new process. Telstra contended it would need to make substantial changes to its IT systems at a cost of approximately $1.7 million. Optus estimated its own implementation costs at $360,000.[9]

Final determination

The ACCC made its final determination on 30 November 2007, requiring Telstra to implement the new process within 180 days, unless the parties agreed otherwise.[10]

The operative clause in the final determination was clause 10, which included the following key paragraphs:[11]

10. Except where the parties otherwise agree, the supply by Telstra to Optus in respect of the ULLS in MDUs serviced by a MDF in the building is to be as follows:

(a) Where there is an existing Communications Wire between the Telstra exchange and the end-user customer's premises which has a soft dial tone and Optus submits a ULLS Request to Telstra that provides the Service Number (which includes the full national number) and address associated with the Communications Wire, Telstra must treat the request as if it was a ULLS Transfer Request following the ULLS Transfer process specified in the ACIF C569:2005 Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code.*

....

(d) For the purposes of the ULLS Transfer Request and in accordance with the definition of Losing Access Seeker stated in the ACIF C569:2005 Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code, where Telstra has been supplying the service immediately prior to the transfer, Telstra is to be considered the Losing Access Seeker.*

(e) Where there is no Communications Wire between the Telstra exchange and the end-user customer's premises (i.e., there is <u>no</u> soft dial tone) and Optus submits a Vacant ULLS Request, Telstra must follow the Vacant ULLS process specified in the ACIF C569:2005 Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer *industry code. ...*

A critical feature of clause 10 was that it required Telstra to follow the Transfer ULLS process in circumstances where the ACIF Code would normally require Telstra to follow the Vacant ULLS process.

The Transfer ULLS process is designed to be used in relation to a specific metallic pair, where the end user is 'churning' from one service provider to another.[12]

As to the parties' costs of implementing clause 10, the final determination was silent. However, the ACCC's supporting reasons summarised the parties' submissions and expressed the ACCC's views on each of the mandatory relevant considerations in s 152CR(1) of the TPA. On "the direct costs of providing access to the declared service" (s 152CR(1)(d)), the ACCC said:

> *130. The Commission acknowledges that Telstra incurs costs in supplying the ULLS. However, it is the Commission's view that the costs in implementing the final determination will be minimised as the determination requires Telstra to utilise existing provisioning processes for ULLS Transfer Requests pursuant to the ACIF Code and that any benefit to end-users will outweigh the costs of any necessary changes to Telstra's current systems.*
>
> *131. On this point the Commission notes that the regulatory regime permits Telstra to recover the efficient costs of supplying and charging for the ULLS. …"*

Optus complained that the need to use the Vacant ULLS process gave Telstra a competitive advantage

Application for judicial review

Telstra applied for judicial review of the final determination in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[13] The grounds of review were that the ACCC had:

- failed to comply with s 152CR(1)(d) of the TPA, because it failed to take into account Telstra's direct costs of implementing the ordering and provisioning process imposed by clause 10 (**Direct Costs Ground**);
- failed to comply with s 152AQB(9) of the TPA, because it failed to take into account its own model terms and conditions relating to the ULLS (**Model Terms Ground**);
- failed to take into account the ACIF Code, which was a mandatory relevant consideration by implication from the subject matter, scope and purpose of Part XIC (**ACIF Code Ground**);
- failed to properly exercise the power in s 152CP, because the final determination was uncertain in its operation (the **Uncertainty Ground**);
- exercised the power in s 152CP so unreasonably that no reasonable person in the position of the ACCC could have so exercised it (**Unreasonableness Ground**); and
- acted beyond power, in that paragraph (e) of clause 10 of the determination dealt with a matter that did not relate to access by Optus to the ULLS, because it was expressed to apply where there is no existing metallic pair (**No Communications Wire Ground**).

Expert evidence

Both Telstra and Optus presented expert evidence on the operation of the ACIF Code and the final determination. While this evidence had not been before the ACCC, Rares J held that some of it was admissible to prove the meaning of technical terms.[14] His Honour treated the evidence on the operation of the determination itself as being in the nature of submissions.[15]

Judgment

Rares J delivered judgment on 24 November 2008, deciding the case in Telstra's favour on all grounds.

His Honour:

- declared the final determination invalid;
- quashed the determination;
- remitted the access dispute to the ACCC for redetermination according to law; and
- ordered Optus to pay Telstra's costs.

Direct Costs Ground

On the Direct Costs Ground, Rares J accepted Telstra's submission that s 152CR(1)(d) required the ACCC to take into account the direct costs of providing access to the ULLS, along with the other mandatory considerations listed in s 152CR(1), "as a fundamental element in making its decision". He said at [110]:

> *I am of opinion that the sense in which the High Court used the expression "fundamental weight" in this context is to require the decision-maker to treat the* consideration *of the factors, as opposed to the factors themselves, as a central element in the deliberative process:* Meneling Station *158 CLR at 338 per Mason J.*

He also held that s 152CR(1)(d) required the ACCC "to have regard to the actual direct costs which Telstra would incur in providing the access [to the ULLS] to Optus as required by the final determination."[16] It was "beside the point" that Telstra may be able to recover such costs through charges for the ULLS, because "[t]he incurring of a cost is different from its possible recovery."[17]

His Honour found that the references in the ACCC's supporting reasons to the parties' estimates of their implementation costs were not sufficient to comply with s 152CR(1)(d).[18] Sub-section 152CP(5) required the ACCC to give reasons for making the final determination, and s 25D of the *Acts Interpretation Act 1901* (Cth) provided that the obligation to give reasons "extended to setting out … [the ACCC's] findings on material questions of fact including references to the evidence or other material on which those findings were based."[19]

Rares J decided the case in Telstra's favour on all grounds

He concluded:

> *A mere recitation of submissions to it and then the expression of an unreasoned conclusion, could not suffice to comply with the Commission's obligation, within the meaning of s 152CR(1)(d), to have regard to Telstra's direct costs of providing access and its claim that they would be about $1.7 million.*[20]

Model Terms Ground

The Model Terms Ground related to the ACCC's obligations under s 152AQB(2) of the TPA "to make a written determination setting out model terms and conditions relating to access to each core service". The ULLS is one of four core services for the purpose of the section. Sub-section 152AQB(9) requires the ACCC to have regard to such a determination if it is required to arbitrate an access dispute in relation to the core service concerned.

In making its final determination, the ACCC purported to have regard to the *Final Determination - Model Non-price Terms and Conditions*, which it had made in October 2003 (**2003 Model Terms**).[21] However, Telstra argued that the ACCC had fundamentally misunderstood the 2003 Model Terms, by failing to appreciate that they incorporated relevant provisions of the ACIF Code. Rares J agreed with Telstra that the 2003 Model Terms did incorporate relevant provisions of the ACIF Code, and concluded that the ACCC had not complied with s 152AQB(9).[22]

Somewhat controversially (as it turned out), he also held that s 152AQB(2) required the ACCC to make a determination of model

terms and conditions that was comprehensive in its scope, and set out "all material" or "all appropriate" terms and conditions for each core service.[23] This was the subject of appeals by the ACCC and Optus, which were recently decided. A full bench of the Federal Court (*Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68) held that, on its true construction, s 152AQB(2) required the ACCC only to determine "some" model terms and conditions for each core service. The "scope and content" of the model terms and conditions was otherwise a matter for the ACCC's discretion.[24] While this did not substantially alter the effect of the decision below, the Court varied the orders made by Rares J to ensure that, on remitter, the ACCC would not adopt an interpretation of s 152AQB(2) which the Court regarded as erroneous.[25]

the decision makes it clear that the ACCC must have regard (in the sense of giving them fundamental weight in the decision-making process) to the access provider's costs of implementing any system or process changes that a proposed determination would require

ACIF Code Ground

Rares J also found that the ACCC had misunderstood the ACIF Code itself. However, on one view of his Honour's reasons for judgment, this finding simply confirmed the ACCC's failure to have regard to the 2003 Model Terms, as required by s 152AQB(9), rather than giving rise to a separate error of law.

Uncertainty Ground

On the Uncertainty Ground, Rares J held that:

> *In the way it was expressed, the Commission's final determination did not adapt the provisions of Code 569, because it presupposed the fundamental matter that an ULLS transfer request had to determine, namely, the existence of an ULLS to transfer. This created a fundamental uncertainty both as to how the final determination should be construed and the methodology for Telstra to follow postulated in par 10 [of the determination]. If the presupposition is wrong in respect of a request made by Optus, will Telstra be in breach of the final determination since it can never supply the service over the identified pathway used by the soft dial tone? Alternatively, will Telstra be entitled to reject the request in any event because the omission of essential information in the ULLS transfer request process … (namely the ULLS identifier) entitled it to do so?* [26]

Paragraph (a) of clause 10 proceeded on the assumption that the presence of a Soft Dial Tone would indicate that the line consisted only of a metallic pair of wires that were capable of being used to supply the ULLS. It was uncertain how Telstra was supposed to test that assumption, or what consequences would follow if it proved to be false. More generally, it was uncertain which provisions of the ACIF Code were intended to operate with the final determination.

Unreasonableness Ground

On the Unreasonableness Ground, Rares J referred to "the important distinction" drawn by Dixon CJ, Williams, Webb and Fullagar JJ in *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Limited* (1953) 88 CLR 100 at 120, between:

> *… a mere insufficiency of evidence or other materials to support a conclusion of fact where the function of finding the fact has been committed to a person or body by the Parliament and, on the other hand, the absence of any foundation in fact for the fulfillment of the conditions upon which, in point of law, the existence of the power depends.* [27]

He then concluded that:

> *[I]n reality, the Commission was not satisfied of the requisite matters upon which its power to make the final determination depended, namely, it acted on the misconception that the presence of soft dial tone demonstrated the existence of an unconditioned communications wire or ULLS. This was because of its misunderstanding of the subject matter with which it purported to deal, that I have described. The Commission's determination was therefore unreasonable and an improper exercise of power.* [28]

No Communications Wire Ground

Lastly, on the No Communications Wire Ground, Rares J found:

> *The drafting of par 10 was inapt to specify terms and conditions for ordering and provisioning a communications wire or ULLS in a practical or intelligible fashion. The Commission's power was conferred to enable it to regulate a declared service, such as the ULLS, not to regulate something else. The Commission's powers under Part XIC of the Act to determine access to the declared service, being the ULLS, did not extend to determining matters where no ULLS existed as contemplated by par 10(e). I am of opinion that the Commission exceeded its jurisdiction by including par 10(e) in its final determination.* [29]

While paragraph (e) would have been severable from the remainder of clause 10, such severance "would not make the final determination any more meaningful or give it validity" in view of his Honour's conclusions on the other review grounds.[30]

Implications of the decision

The judgment of Rares J and, in particular, his finding on the Direct Costs Ground have significant implications for the making of future arbitral determinations by the ACCC, under Part XIC and Part IIIA of the TPA.

First, the decision makes it clear that the ACCC must have regard (in the sense of giving them fundamental weight in the decision-making process) to the access provider's costs of implementing any system or process changes that a proposed determination would require.

Second, to comply with s 152CR(1), it will not be enough for the ACCC merely to recite in its supporting reasons the parties' submissions on the mandatory relevant considerations listed in that section. Rather, the ACCC must direct an "active intellectual process" at each consideration.[31] The reasons must state the ACCC's findings on material questions of fact, along with references to the material on which those findings were based.[32]

His Honour's finding that the ACCC had fundamentally misunderstood the ACIF Code, and his conclusions on the Uncertainty Ground and the Unreasonableness Ground, also raise questions about the wisdom of the ACCC involving itself in technical regulation. In circumstances where technical standards have been developed by an industry body such as the Communications Alliance, should the competition regulator refrain from imposing changes to those standards? Or should it engage its own technical experts, as contemplated by s 152DC(1)(e), to advise on such changes? In some cases, it may be preferable to refer technical and operational matters to the industry body for inquiry prior to the ACCC making a decision.[33]

Thomas Jones is a Special Counsel and Piccolo Willoughby is a Solicitor at Mallesons Stephen Jaques. Both were involved in the carriage of this matter for Telstra. However the views expressed here are those of the authors.

(Endnotes)

1 The determination was made on 30 November 2007. Public versions of both the determination and supporting reasons were later published

on the ACCC's website at www.accc.gov.au/content/index.phtml/itemId/793062.

2 See *Trade Practices Amendment (Telecommunications) Act 1997*.

3 The ULLS was most recently declared by the ACCC on 28 July 2006: see *Commonwealth of Australia Gazette*, No GN31, 9 August 2006.

4 Clause 8.9 of the ACIF Code in turn requires transactions associated with the ordering, provisioning and customer transfer of ULLS also to be in accordance with an industry guideline called ACIF G587:2002, *Unconditioned Local Loop Service IT Specification: Transaction Analysis*.

5 See the ACCC's supporting reasons, paras 24-27.

6 See the ACCC's supporting reasons, paras 2-3 and TPA s 152AR(3)(c), (4A).

7 ACCC's supporting reasons, para 32.

8 ACCC's supporting reasons, para 58ff.

9 ACCC's supporting reasons, paras 62, 64.

10 ACCC's final determination, cl 11.

11 Clause 10 is quoted in full in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at para 9.

12 ACIF Code cl 11.1.1(c).

13 The application was filed on 28 December 2007.

14 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [48]ff, following *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 398-399 per Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ; *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at 566 [458] per Weinberg J; *Visa International Service Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 437-439 [659]-[666] per Tamberlin J.

15 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [52].

16 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [120].

17 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117].

18 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [118].

19 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119]. His Honour referred in this context to *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [68] per McHugh, Gummow and Hayne JJ.

20 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [124].

21 ACCC's supporting reasons, para 69ff.

22 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [133]-[138].

23 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [35]-[45].

24 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [49] per the Court (Ryan, Jacobson and Foster JJ).

25 *Australian Competition and Consumer Commission v Telstra Corporation Limited* [2009] FCAFC 68 at [66] per the Court.

26 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [173].

27 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [181]. In the same context, Rares J also referred to *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at 120 per McHugh and Gummow JJ; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 223-224 [39] per Gleeson CJ, Gummow and Heydon JJ; and *Avon Downs Pty Limited v Commissioner of Taxation* (1949) 78 CLR 353 at 360 per Dixon J.

28 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [183].

29 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [189].

30 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [191].

31 Tickner v Chapman (1995) 57 FCR 451 at 462 C-D per Black CJ, quoted by Rares J in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [106].

32 *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [119].

33 In so far as this can be done consistently with confidentiality requirements: see for example TPA s 152CZ.

The Future of the 'Multiple Publication' Rule

Anne Flahvin discusses proposals to introduce a 'single publication rule' for internet publications in the UK and whether Australian defamation law might also move in this direction.

The UK Government is considering abandoning the 'multiple publication' rule in favour of a 'single publication' rule with respect to defamatory internet publications.

Such a reform, which would bring UK law in line with US law, has long been urged by online publishers in Australia and the UK. If adopted in the UK it could be expected to lead for calls for a similar reform to Australian law.

What is the 'multiple publication' rule?

The multiple publication rule stems from the 19th century case of *Duke of Brunswick v Harmer*, in which the Duke of Brunswick sent his servant to purchase a back issue of a newspaper published 17 years earlier, thus triggering an action for defamation by the Duke with respect to material contained in the newspaper. The court held that the delivery of the newspaper to the Duke's agent constituted a separate publication of the newspaper for the purposes of defamation law entitling the Duke to sue. The case remains authority for the proposition that defamatory material is published wherever and whenever it is read, seen or heard.

While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.

One effect of the rule that has caused particular concern to publishers of online archives is its effect on the statute of limitations. Like Australia, the statute of limitations for defamation in the UK is 12 months from the date of publication. When material is available online, the limitation period is effectively open-ended, with a fresh limitation period starting to run each and every time defamatory material is accessed online.[1]

While the rule was relatively uncontroversial in the context of hard copy publications, its application to online publications has attracted much criticism.

Courts in the UK have also held that an online publisher who becomes aware that the truth of an article is disputed, and fails to bring readers' attention to that fact, cannot rely on a defence of qualified privilege if sued for defamation: *Loutchansky v Times Newspapers Ltd.*[2] A qualified privilege that arose in respect of the hardcopy original – based on a duty to publish material in the public interest – was not available with respect to successive online publications. By then there was no public interest to warrant publication.