

**TELSTRA CORPORATION LIMITED v COMMONWEALTH OF AUSTRALIA  
& ORS (S42/2007)**

Date of stated case: 11 July 2007

Both the Plaintiff ("Telstra") and the Fourth Defendant ("Optus") are holders of a carrier licence under the *Telecommunications Act 1997* (Cth) ("Telco Act"). They are also carriers, service providers and carriage service providers within the meaning of that Act. On 22 November 1991, each of the Australian Telecommunications Corporation and Optus (then named "AUSSAT Pty Ltd") was granted a general telecommunications licence under Part 5 of the *Telecommunications Act 1991* (Cth) ("1991 Act"). Both licences came into force on 26 November 1991. Also on 25 November 1991, Telstra (then known as the "Australian and Overseas Telecommunications Corporation Limited") was granted a general telecommunications licence under Part 5 of the 1991 Act. That licence came into force on 1 February 1992.

On 22 November 1991, pursuant to section 64 of the 1991 Act, the Minister for Transport and Communications made the following declarations specifying conditions to which all general telecommunications licences were subject:

- a) *Telecommunications (General Telecommunications Licences) Declaration No.1 of 1991; and*
- b) *Telecommunications (General Telecommunications Licences) Declaration No.2 of 1991.*

From 1 July 1997, pursuant to section 49 of the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (Cth), the Telco Act has had effect in relation to Telstra and Optus as if the Australian Communications Authority (now the Australian Communications and Media Authority) had granted each a carrier licence under that Act at the beginning of 1 July 1997. Telstra's carrier licence under the Telco Act is and has been subject to licence conditions specified in declarations made by the Minister under section 63 of the Telco Act, including the *Carrier Licence Conditions (Telstra Corporation Limited) Declaration 1997* (as amended from time to time).

Each of the Third Defendant ("Primus"), the Fifth Defendant ("Chime"), the Sixth Defendant ("XYZed"), the Seventh Defendant ("Powertel"), the Eleventh Defendant ("Amcom"), the Twelfth Defendant ("Adam") and the Thirteenth Defendant ("Agile") is:

- a) the holder of a carrier licence under the Telco Act, granted to it on or after 1 July 1997; and
- b) a carrier, a service provider and a carriage service provider within the meaning of the Telco Act.

Each of the Eighth Defendant ("Request"), the Ninth Defendant ("NEC") and the Tenth Defendant ("Macquarie") is a service provider and a carriage service provider within the meaning of the Telco Act. The Second Defendant

("the Commission") is the body established by section 6A of the *Trade Practices Act 1974* (Cth) ("TPA").

As part of the T3 Telstra share float in 2006, the relevant disclosure documents identified various regulatory risks associated with Telstra's business concerning what is known as the Unconditional Local Loop Service ("ULLS") and the Line Sharing Service ("LSS"). Those risks were said to arise because of the possibility that the Commission might exercise its powers under Part XIC of the TPA with the effect of reducing the price which Telstra was able to charge for those services.

On 11 July 2007 Justice Gummow stated a case in the following terms:

- 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 on section 51(xxxi) of the Constitution?

- 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?

- 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?

- 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?