IT'S HOW WE CONNECT

11 April 2019

Rental Arrangements for Communication Towers on Crown Land
Independent pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop

Haymarket NSW 1240

Dear Sir / Madam,

IPART Review of rental arrangements for communications Towers on Crown Land 2019 – Submission in response to Issues Paper

Telstra refers to the Issues paper released on February 2019 in regard to the above review.

Please find attached Telstra's submission in response to IPART's Issues Paper.

Should you have further enquires please contact Mike Packett.

Yours faithfully,

Mike Packett
National Transactions Manager
Global Business Services
Telstra Corporation Limited

1 Introduction and summary

This submission is made by Telstra Corporation Ltd (**Telstra**) in response to the "*Issues Paper – Review of rental arrangements for communications towers on Crown land*" issued by the Independent Pricing and Regulatory Tribunal (**IPART**) dated February 2019 (**Issues Paper**).

Telstra appreciates the opportunity to participate in IPART's review of rental arrangements for communications towers on Crown land as initiated by the Terms of Reference issued by Premier Gladys Berejiklian MP dated 6 November 2018 (**Terms of Reference**).

Telstra's submission can be summarised as follows:

(a) IPART's proposed approach to estimate "efficient rents" is not clearly explained in the Issues Paper. It is not clear what IPART intends by the term "efficient rents". Telstra is concerned that "efficient rents" may be an indirect attempt to tax carrier profits.

(b) This is IPART's third review of rents for tower sites on Crown land – with final reports in each review issued in 2006 and 2013. Telstra considers the implementation of rents recommended by IPART in the previous reviews to be discriminatory and in breach of the *Telecommunications Act 1997* (Cth) (**Telco Act**) sch 3 cl 44. The Terms of Reference and the Issues Paper suggest that the current review may also result in a recommendation for similar (but higher) discriminatory rents. However, Telstra remains optimistic that IPART will pay specific regard to the Telco Act in this review as the Terms of Reference direct it to. This is a significant matter.

(c) IPART's recommendations – both past and anticipated – may involve a suspension of the general principles for determining rents for Crown leases that are already set out in the *Crown Land Management Act 2016* (NSW) (**CLMA**) s 6.5(2). An IPART recommendation, as implemented by the NSW Government, may also involve a suspension of the right for a carrier to object to the rent as is usually available to a lessee following a rental redetermination. In Queensland, legislation providing for rents of Crown leases used for telecommunications purposes, were found ineffective because the legislation provided a different methodology for determination than that adopted for standard commercial and government users.

(d) Telstra welcomes consultation with IPART during the current review. Telstra is open to considering approaches to rental determination for tower sites which may differ from the general approach outlined in the CLMA to the extent that it results in rents that are no greater than those carriers would otherwise be required to pay on the application of well understood and non-discriminatory valuation methods.

2 Discrimination under the Telco Act

Telstra and carriers are afforded certain protections by the Telco Act sch 3 cl 44. This provision renders invalid State laws (and exercises of power pursuant to State laws) to the extent they discriminate against carriers or between carriers. Telstra appreciates that the Terms of Reference recognise this protection and that IPART has indicated, in its Issues Paper, that it will have regard to it.

However, Telstra anticipates that IPART is likely to recommend a rental regime for telecommunications sites similar to the recommendations in the 2006 Report and the 2013 Report (but with increased rents). Telstra's view is that the rents recommended by IPART in the 2006 and 2013 Reports are discriminatory and prohibited by the Telco Act to the extent adopted by land agencies. The past regimes recommended by IPART, involving a rental schedule with a handful of categories does not reflect private market rents paid by Telstra and, in most cases, likely leads Telstra (and other carriers) to overpay in rent for Crown land. Such rents also do not take into account the difficulties associated with private market rents in that Telstra (and other carriers) are anxious lessees.

An assessment of whether there has been effective discrimination against carriers commences with identifying a proper comparator to carriers. Telstra submits that where IPART recommends a methodology for rent setting which is materially at odds with the standard methodology adopted (for what Telstra understands is the bulk of Crown leases in NSW), there is necessarily an obvious methodological discrimination. Different methodologies for rent determination were adopted in Queensland and found by the Courts to be discriminatory.[1] The removal of the right to appeal valuations in Queensland (apparently a feature of the approach suggested by IPART in the Issues Paper) was also found to be discriminatory.

While only recommendations, IPART's recommendations have legislative effect pursuant to CLMA s 6.5(4).[2] If IPART makes recommendations inconsistent with the general principles for rent determination in CLMA s 6.5(1), (2) then a land agency can determine or redetermine rent in a manner which departs from the standard principles for rent determination. It also appears that rights to object to rental redeterminations are not available to a lessee where the rent redetermination is based on a recommendation issued by IPART.[3]

In other words, IPART recommendations (if valid) can be used as a means to avoid the "market rent" principles otherwise required by the CLMA in determining rents for Crown leases. Telstra is aware of only one other category of user where an IPART recommendation has been used as a basis to bypass the standard approach to Crown lease rent setting. This supports the proposition that to employ such a recommendation which is directed at a class of site users (of which carriers are a prominent member) in order to facilitate a departure from normal rent setting principles is necessarily discriminatory.

Relying on Telco Act sch 3 cl 44, Telstra has successfully prosecuted actions for discrimination in relation to overcharging for access to State land – in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 and in *Telstra Corporation Ltd v State of Queensland* [2016] FCA 1213. The key findings in those cases that should be considered by IPART include:

- Carriers are required to access many parcels of land in a wide range of areas for the installation of infrastructure essential to the network. There is a risk that land owners, private or government, will unreasonably resist the installation. There is also a risk that State and Territory governments will take advantage of the particular needs of carriers for

[1] *Telstra Corporation Ltd v State of Queensland* [2016] FCA 1213.

[2] Or the predecessor provision of the *Crown Lands Act 1989* (NSW).

[3] CLMA s 6.8(1)(c).

the use of government-owned land. To this end, Telco Act sch 3 cl 44 can be seen as a mechanism to promote and protect accessible and affordable carriage services. Telco Act sch 3 cl 44 does not allow any exception to the prohibition against the law of the State discriminating against carriers.[4]

- A private land owner is free to discriminate against carriers. However, the State is limited by the effect of Telco Act sch 3 cl 44. "Price-gouging" by State and Territory governments is one type of conduct that Telco Act sch 3 cl 44 is designed to prevent.[5]

- The existence of high rents in the private market (relative to the standard way for determining rents for Crown leases) is not a permissible defence to the discriminatory treatment of carriers by a State.[6]

- Where a State imposes a fee on a carrier not imposed on other bodies which make a similar use of public places, such as electricity, gas or water utilities, it is discriminatory against the carrier because it accords to it less favourable treatment than to the other occupiers of public space.[7]

Telstra further submits that the discriminatory nature of the task currently being undertaken by IPART is inherent in the Terms of Reference. The Terms of Reference oblige IPART to undertake "a review of the rental arrangements for communications towers on Crown Lands". This direction is, presumably, intended to require IPART to review rental arrangements for Crown Lands on which communications towers are (or may be) situated. It is not clear whether it is intended to extend to land which, by reference to some unstated criteria:

- may have such communications towers erected on them at some point in the future; or
- may be suitable for that purpose whether or not so used.

If the direction means "a review of rental arrangements entered into with those who will use the land for the erection and/or operation of communications towers", then land which merely has potential for such use is not included within the direction and it is not to be understood as extending to Crown Land which is being used, or may in the future come to be used, for the designated purpose. No criteria are stated which would permit IPART (or any government agency later required or entitled to adopt IPART's recommendation) to identify land in the latter category.

In its Issues Paper, IPART (possibly recognising certain of the difficulties noted above) has in a number of places recast the direction as follows: "….[to review] the rental arrangements for communications towers sites located on Crown Land". Thus it adopts the concept of "communications towers sites". At section 2.1, it defines that concept as including a site (whether private land or public land) on which certain infrastructure is located. No exhaustive definition is attempted. However, the review is confined to sites managed by the identified land agencies.

In section 2.3 of the Issues Paper, IPART identifies categories of organisation currently engaging in the uses referred to in section 2.1. Thus, the Terms of Reference and the Issues Paper, while framing the review in somewhat different ways (an inconsistency which is itself problematic), indicate that the review is to be conducted on the basis that certain sites are to be characterized not by their inherent qualities having regard to a range of potential uses to which

[4] *Telstra v Queensland* at [140]-[142].

[5] *Telstra v Queensland* at [146]-[148].

[6] *Telstra v Queensland* at [146]-[148].

[7] *Bayside* at [63] relying on the decision below in *Telstra Corporations Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

the sites may be put (or even some hypothetical “highest and best use”) or by reference to demand for such sites by a range of current or potential users (lessees), but by reference to one specific category of actual or potential use and user. The only extent to which any regard is to be had to the inherent qualities of the land is its relative suitability for use as a site for a communications tower: eg. see section 4.1.

Moreover, the process proposed for determining an “efficient rent” is, according to the Issues Paper, to be undertaken by reference to the most that such a category of user would be prepared to pay for such a site and not the most that some alternative user and demand side competitor (who is engaging in or wishes to engaging in some other proposed use) would be prepared to pay. There is no attempt to justify the assumption that the only use for such sites is the erection and operation of communications towers. Neither is there support for the unstated but necessary assumption that any demand for a site will be confined to those who wish to operate erect and/or operate a communications tower nor that there will always be competition between such users.

To proceed in this way is necessarily discriminatory of those who in fact use (or propose to use) relevant sites for the erection and/or operation of communications towers and to carriers as key members of that class of user.

IPART should recommend (and by any terms of reference be directed to recommend) rents only to the extent they are consistent with Commonwealth law. While only recommendations, IPART’s recommendations have legislative effect pursuant to CLMA s 6.5(4). IPART can give independent advice to the NSW Government that a rental schedule – of the kind previously recommended – is discriminatory and recommend an alternative approach (or approaches).

3 Response to questions in Issues Paper

Question 1 – Do you agree with our proposed approach for this review? Are there any alternative approaches that would better meet the terms of reference, or any other issues we should consider?

Telstra does not agree with the approach proposed for undertaking the review.

Telstra refers to its remarks above as to the discriminatory nature of the present review and any recommendation which may result from it. It makes the following additional observations.

The stated approach is to estimate "efficient rents" for communication tower sites on Crown land with different characteristics. The Terms of Reference do not direct IPART to estimate "efficient rents". Rather, IPART has been asked "to advise on a fee schedule that reflects fair, market-based commercial returns". The choice by IPART to estimate "efficient rents" appears to be a departure from the literal terms for the Terms of Reference and also from the principles for rent determination set out in CLMA s 6.5. "Market-based commercial returns" and "efficient rents" may differ.

The Terms of Reference do not mention "efficient rents". The concept of "efficient rents" in the Issues Paper, is also likely to be at odds with the legally accepted methodology for valuing land (both for freehold and rental purposes) as espoused in *Spencer v Commonwealth of Australia* (1907) 5 CLR 418. It is unclear why IPART seeks to estimate "efficient rents" when such a concept does not appear to arise from valuation practice, the CLMA, the *Forestry Act 2012* (NSW) (**FA**), or the *National Parks and Wildlife Act 1974* (NSW) (**NPWA**).

For example, the CLMA s 6.5 sets out the general principles for determining the rent for Crown land managed under that Act (and appears consistent with the Terms of Reference). The central principle for rent setting in the CLMA is in s 6.1(2)(a): "rent is to be the market rent for the land under the holding having regard to any restrictions, conditions or terms to which it is subject". The phrase "market rent" is understood to import the test from *Spencer v Commonwealth*.[8] In interpreting the Terms of Reference, presumably, the reference to "fair, market-commercial returns" is intended to be a reference to the existing principles for rent determination as they apply in NSW.

More broadly, Telstra is concerned that the proposed approach of seeking to estimate "efficient rents" in the matter set out in the Issues Paper may lead to indirect taxation by the State of telecommunications carriers (of equipment owned by carriers or of carrier owned spectrum) rather than lead to "market rents" reflective of valuation principles. For the reasons already stated, "efficient rents" may lead to price discrimination and breach the Telco Act.

As to other issues to consider and alternative approaches, Telstra suggests that IPART review a range of models for rental assessments. Telstra has a preference for a "rate of return" methodology (e.g. 6% multiplied by the unimproved value) where unimproved land value as assessed by the Valuer-General underpins the rental with "rate of return" applied as the formulation of the rent. This is a broadly accepted approach to valuation rentals and is discussed further in this submission.[9]

[8] *The Trust Company Limited v Minister Administering the Crown Lands Act 1989* [2012] NSWLEC 73 at [25].

[9] For example, a rate of return methodology has been recommended by IPART for waterfront tenancies.

Question 2 – Do you agree with our proposed definition of efficient rents for communication tower sites on Crown land as the range bounded by a user's willingness to pay and the opportunity cost to the land agency?

Telstra does not agree with the proposed definition of "efficient rents".

As a threshold issues, IPART has not clearly defined what it means by "efficient rents" because it both refers to "the point where both the buyer and the seller are better off than if they didn't make the transaction" and to rents bounded by a particular category of users' willingness to pay and the lessor's opportunity cost. One meaning is a single point and the other a range. It would assist if IPART clearly defined what it intends "efficient rents" to mean by reference to a standard definition from an authoritative source.

As to IPART's comments that the upper bound of "efficient rents" is a particular category of users' willingness to pay, Telstra again notes that this is likely to be directly at odds with the test in *Spencer v Commonwealth*, which excludes anxious purchasers. As to IPART's comments on opportunity cost, the opportunity cost reflects a site's next best use. In most cases, Crown land is rural unimproved bushland and its next best use would achieve nominal rents relative to the rents IPART has previously recommended for telecommunications sites. In the current review, Telstra asks that IPART compare the freehold value of Crown land to the rents it recommends to mitigate against IPART recommending rents that exceed the land's freehold value.

IPART appears to be adopting some concept of market efficiency rather than land valuation or recognised method of rent determination. For example, at part 4.1 of the Issues Paper, IPART indicates that it is pursuing the principle that "rents should reflect a fair sharing of the economic surplus between land management agencies and users". It also indicates that "land management agencies should receive a share of … [the] economic value that primary users derive from using the site". Telstra disagrees with the fundamental essence of this approach. It is not an approach undertaken by private land holders and may reflect the special market power possessed by the State. It also appears to be an approach which will result in a tax on the profits of telecommunications lessees rather than result in a schedule of rents that reflect land values. It involves a range of unwarranted assumptions to which reference has been made above in connection with the issue of discrimination.

IPART's reference to Ricardian rent is to a resource rent concept (not a land rent concept) and to a kind of supernormal profit.[10] In Telstra's experience negotiating private rents for telecommunications sites, profits are not a factor and neither are maintenance nor infrastructure costs. The determinative factor is (as standard valuation methods reflect) the nature and level of demand for the site having regard to the characteristics of the land and the range of uses to which it might be put by actual or prospective tenants or licensees.

Further, Telstra is not aware of another category of Crown land user subject to profit based land rent by the State. Telstra suggests that IPART should only recommend a means of Crown rent setting that is consistent with existing methodologies for determining land rent.

IPART has referred to wind turbines. However, apart from the particular considerations which are associated with Telco Act sch 3 cl 44, this may neither be an appropriate comparison nor a comparison which should be made in isolation. If IPART is to undertake a review of rents for wind turbines, Telstra suggests that IPART undertake a review of all utilities which rent land in NSW including the various legislative arrangements that affect those rents (such as the advantages they receive due to State or part State ownership). If utilities do not rent Crown land, but obtain easements, that too may be an important factor for IPART to take into account

[10] https://en.wikipedia.org/wiki/Abnormal_profit. Telstra notes that the article referred to in the Issues Paper at footnote 18 in support of Ricardian rents also discusses such rents in terms of monopoly pricing and price discrimination at 3.2.1.

for analysis including comparable land use and the price the State charges other utilities for that tenure. Telstra has statutory rights under conveyancing legislation to obtain easements for installation. The State has, however, refused to grant Telstra easement tenure when Telstra sought to convert its existing leases (and licences) into statutory easements. IPART may wish to consider undertaking – and setting out in its draft report – a comparative review of the rent paid by all lessees (or users) of Crown land, the categories or industries into which they fall, the benefit to the public for the supply of relevant services, and the methodology for pricing tenure (rental or otherwise) in those categories.

Finally, Telstra is concerned that IPART may be seeking to determine an "efficient rent" pursuant to a market theory which may or may not be accurate.[11] Telstra's difficulty with commenting on IPART's proposed "efficient rent" might be alleviated if IPART provides a clear and comprehensive statement of the theories or methodologies which it anticipates it may employ in formulating any recommendation.

Question 3 – What information should we consider to estimate users' willingness to pay (for example market-based commercial rents paid to private land owners)?

Telstra submits that IPART should not be seeking to determine users'[12] willingness to pay as this is contrary to *Spencer v Commonwealth* and is not an accepted factor in valuing land.

The prices for private leases which Telstra pays today are likely to still be reflective of the rapid development of mobile telephone networks following telecommunications deregulation in Australia in the early 1990s. Carriers were, at the time, anxious to create mobile telecommunications networks quickly and were forced to pay prices in excess of the true value of the land being leased. Hundreds of sites needed to be obtained within a few years. This can reflect in the different prices Telstra can pay for radio tower sites versus sites which are dedicated to Cellular Mobile Telephone Services (**CMTS**) equipment. Legacy sites dedicated to the fixed line network often have lower rents than sites dedicated to the mobile network. This difference reflects carrier anxiety (which fluctuates) rather than characteristics of the land, the technology being deployed, or current demand by potential users of relevant sites.

If, contrary to the above, IPART does proceed to consider users' willingness to pay, Telstra asks that IPART consider each of the following matters:

- Telstra is subject to a Universal Service Obligation (**USO**).[13] The USO requires that Telstra provides all Australians – wherever they are in Australia – with a fixed line service. Radio towers are a key part of the fixed line network as running cables throughout all of Australia is not feasible. Telstra must lease land (for which there may be no other demand) to meet the USO and fulfil a statutory obligation despite it being unprofitable.

- Telstra (and other relevant users) lease sites from NSW which are, for the most part, unimproved. Telstra and other users must invest in the infrastructure on a site in order to make it useful as a telecommunications site. Many of Telstra's leases from NSW have been held for long periods of time. Telstra's (and, presumably, others') willingness to pay for a site in excess of the market rent is affected by the need to make that significant investment. This means Telstra's (and other's) willingness to pay is affected by an anxiety related to lost investment costs.

[11] JD Heydon & BG Donald, Thomson Reuters, Trade Practices Law: Competition and Consumer Law (online) [30.30].

[12] Let alone one specified class of actual or potential user.

[13] *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

- Co-location involves sharing infrastructure with competitors. It is a mandatory requirement pursuant to *Facilities Access Code* (Cth). The fees of co-location paid to a carrier should not be looked at in isolation, as it does not account for the capital costs and the maintenance a carrier may lose because it must permit co-location. IPART should also consider the objects of co-location and the benefits which arise to the people of NSW in reducing the proliferation of telecommunications sites. There is an inconsistency between a Commonwealth requirement to co-locate and a rent imposed by a State that, in effect, penalises compliance with the Commonwealth requirement.

- Rental costs cannot be amortised but infrastructure costs can be amortised. If IPART is seeking to value the characteristics of land which reduce a carrier's infrastructure cost, such costs should be amortised over the life of a lease. Such benefits to carriers are likely to be significantly less than the annual rents IPART recommends. However, as the private market does not take infrastructure costs into account to any significant degree, Telstra submits that IPART should recommend that NSW take a similar approach.

Question 4 – Do market-based rents typically cover all services related to access, use and operation of the land or are there any additional fees charged to users (such as fees for maintenance of access roads)?

Telstra confirms that its private leases for telecommunications purposes typically cover all services and rarely include additional fees. There are examples, however, where Telstra does pay to maintain access routes or contribute to their maintenance.

Question 5 – What characteristics of a communication tower site are users more willing to pay for? Are these different for users that provide services in different markets?

Telstra does not generally consider paying more or less for a site due to its characteristics. A large amount of land is capable of being used for telecommunications purposes (not only sites currently used for telecommunications).[14] While network requirements mean that certain infrastructure may be required in certain locations, there can be flexibility in the exact location. Further, when Telstra negotiates with private land holders, there is not usually a discussion about Telstra's infrastructure costs and its impact on the possible rent. In Telstra's experience, it is only State governments which seek to discuss site and technological characteristics.

Question 6 - How should we estimate the land agency's opportunity cost? Does this vary for sites in different locations?

In Telstra's submission, there is little to no "opportunity cost" likely to be suffered by land agencies. Generally, the parcels of land in question have very limited commercial value (or are available for practical use) because few other viable commercial opportunities exist in relation to the sites. It is often a carrier's installation of equipment that lends value to these sites. Installation allows other users to occupy the land (or adjacent land) under separate and direct agreements with land agencies. Carriers rarely block the continuing development of the sites even after the installation of telecommunication equipment. Carriers are generally willing to work with developers, allowing sites to accommodate multiple uses.

[14] This again throws into issue whether the concept of "communications tower site" is meaningful in the present context and whether to approach rent setting by reference to that concept is inherently discriminatory.

Further, any other viable commercial developments in the area will generally require the provision of a communication service. Carriers provide this essential service, thereby facilitating opportunities for further development of the area.

A suggested method which Telstra has sought to pursue with land agencies, is to value the land having regard to any diminishment in the value of the land resulting from the grant of an easement. Telstra understands that this may be a diminishment of the freehold value and so is likely to be less than IPART's recommended rents. Telstra is open to exploring easement tenure with land agencies as an alternative to leases. This may reflect similar arrangements between NSW and other utilities (both public and private). Telstra does note, however, that this does not relate to national parks.

Question 7 – What do you consider to be a 'fair' sharing of any differences between a user's willingness to pay and the opportunity cost of a site?

Telstra submits that fairness is not a factor used to value land. Fairness is only relevant to the extent that IPART recommends a means of determining rents for telecommunications purposes using a methodology that departs from the usual methodology for determining rents. Fairness in this context would mean that whichever methodology (or schedule of rents) IPART recommends should not result in users of telecommunications sites suffering a detriment relative to others who rent Crown land.

Question 8 – Does the current market evidence support the continuing of the existing schedule of rental fees by location? Would there be benefits to increasing or decreasing the number of location categories?

Telstra only has access to its own data and not data for the entire market. The market data used in the 2006 and 2013 IPART Reports was also either limited in scope or redacted. Telstra did apply to obtain a copy of the redacted market data but it was not provided due to confidentiality concerns. Telstra asks, that in undertaking the current review, IPART specifically prepare the market data it obtains in a form that can be published – in an open and transparent way – while also protecting the confidentiality of the providers of that data.

Telstra does not support the existing categories which are too limited. The Valuer-General already values all Crown land in NSW pursuant to the *Valuation of Land Act 1916* (NSW) ss 14A, 14B. In preparing these valuations, the Valuer-General likely divides the State into sub-groups. There may be hundreds of these sub-groups. Telstra suggests that these sub-groups may be repurposed by IPART. Nearly all land leased to Telstra by NSW is unimproved and so these existing sub-groups are already likely to reflect shared land characteristics.

Telstra also submits that the unimproved land value as assessed by the Valuer-General should be, broadly, an important factor in IPART's review. For example, in Queensland, rent for most Crown leases is determined by taking the unimproved value and multiplying it by a percentage factor (i.e. 6%). As the unimproved value for Crown land is already undertaken, IPART could consider recommending a multiplier that reflects commercial returns for unimproved land.

Question 9 – Are the current location categories reflective of recent data on population density?

The categories should reflect standard land valuation principles. Such principles do not typically take into account population density as having a direct influence on land values.

Question 10 – What is the appropriate rent discount for co-users?

Telstra suggests that it may be appropriate for NSW to approach co-users as it does sublessees of Crown land. Telstra has limited information on how NSW approaches sublessees and requests that IPART address this in its draft report so that it can make further submission.

Otherwise, Telstra does not support any additional fee for co-users and so no discount would be necessary. Co-users typically place antennae on towers installed by the primary user (which is, more often than not, Telstra). The value to the co-user is in the infrastructure investment of the primary user. The unimproved land is of no, or limited, value to a co-user.

The value is in the tower and in a co-user avoiding the expense of building its own tower. A co-user will often obtain an adjacent lease for an equipment shed. This means that a co-user often pays NSW twice – once for the adjacent site and once for the placement of an antennae. Carriers co-locate because it is mandatory. Further, under CLMA s 6.5(2)(b), improvements on Crown land made by the holder of a lease are to be disregarded.

Co-location fees rarely arise, if at all, as a component of private market rents.

Question 11 – Should infrastructure providers receive a discount relative to primary users?

Infrastructure providers should not receive a discount relative to a primary user. This creates price discrimination between carriers and non-carriers. Such a discount targets characteristics of the lessee rather than of the land being leased. The usual value for land is its highest and best use – this should be the same regardless of the lessee. Both primary users and infrastructure providers are corporations which engage in telecommunications.

Question 12 – Does the current rebate system adequately address the benefits that community groups and government authorities provide to the public?

Telstra is concerned with the view that government authorities (some of them utilities) may be in a different category to Telstra (or carriers). Carriers provide a public utility. Telecommunications is a Commonwealth power under the Australian Constitution and Telstra was, historically, a Commonwealth entity. While it is now a publically-listed corporation, it still delivers a public service. Recommendations by IPART should take into account the benefits of telecommunications to Australians and Australia's Constitutional arrangements and history.

One of the main objects of the Telco Act is to promote "the availability of accessible and affordable carriage services that enhance the welfare of Australians". Any interpretation of Telco Act sch 3 cl 44 must take this object into account. To the extent that IPART may recommend price discrimination against carriers, this is likely to be prohibited by the Telco Act.

Question 13 – Should the current rent arrangements based on site-by-site negotiation for high-value sites be continued?

There should be a single consistent methodology for determining rents for Crown land.

Question 14 – Would a valuation formula based on observable site characteristics be a viable alternative to setting rents for high-value sites? If so, what characteristics would need to be included in the formula to determine the rent?

Again, there should be a single consistent methodology for determining rents for Crown land.

Question 15 – Do you agree with our proposed approach for assessing the impact of our recommendations on users?

It is not clear what approach IPART has suggested to assess the impact of recommendations on users. However, Telstra submits that, as part of its review, IPART should consider the following which do not appear to be mentioned in the Issues Paper:

- Does a carrier (such as Telstra) pay more or less to obtain a Crown lease than other public utilities such as water, sewage, power, and gas (and whether private or public)?

- Does a carrier (such as Telstra) pay more or less to obtain a Crown lease than a typical lessee of a Crown lease?

The above impacts are likely to be relevant generally but also to any assessment of whether or not IPART is recommending rents which are impermissible due to the effect of the Telco Act.

Question 16 – Is the current approach of adjusting rents annually by the CPI appropriate?

Subject to Telstra's other comments in this submission about an appropriate rental methodology, CPI increases may be appropriate if they are a typical feature of Crown leases. However, Telstra is not certain how regularly this occurs. CPI increases with periodic adjustments do feature in private telecommunications leases.

Question 17 – Should the fee schedule continue to be independently reviewed every five years?

Telstra submits that IPART could consider recommending a methodology that does not require reviews every five years by IPART. For example, the proposed rate of return methodology.

4 Further comments

Telstra makes the following further comments:

- **The impacts of IPART's recommendations are not limited to the land agencies**
  IPART's recommendations will have impacts beyond the land agencies. They are likely to have an effect on private market negotiations, on negotiations with local governments, and on negotiations with other government agencies (including outside NSW). If IPART recommends pricing which is discriminatory or otherwise inappropriate in the manner outlined in this submission, this may have wide reaching consequences. Telstra is also aware that land agencies (and others like local councils) use IPART recommended rents as a minimum despite IPART's rents, for the most part, being already in excess of private market rents.

- **Social benefits**
  The social benefits of telecommunications should be taken into account by IPART. The issue might perhaps fall within the concepts of "fairness" as referred to in the Issues Paper (although Telstra suggests that IPART should focus on standard valuation principles rather than fairness). Telecommunications are used by most Australians and improve their lives. It is an object of the Telco Act, which is behind Telco Act sch 3 cl 44, to promote "the availability of accessible and affordable carriage services that enhance the welfare of Australians". Discriminatory or inappropriately determined pricing may interfere with this object. Many community groups and social services use telecommunications services.

- **Indirectly taxing carriers**
  Telstra is concerned that IPART's proposed approach to undertaking the review – as evident from the Issues Paper – will result in indirect taxation of telecommunications carriers by the land agencies under the guise of land rent. The targeting of equipment used by carriers, which comments in the Issues Paper suggest will be a focus for IPART, is specifically identified as a matter for which the Telco Act sch 3 cl 44 was introduced.[15] Further, Telstra is concerned that to the extent IPART is seeking to reflect carrier profits in rents for Crown lands, it is seeking to tax profits obtained by carriers from the use of telecommunications spectrum and the exercise of a carrier licence (for which carriers pay fees to the Australian Government). IPART needs to consider the Constitutional limitations to which the land agencies may be subject in respect of taxing property provided by and rights conferred by the Australian Government. Also, while Telstra remains uncertain as to the meaning and content of IPART's "efficient rent" concept, IPART needs to consider the efficiency of double-taxation which may be associated with any recommendation it makes as to Crown rents.

[15] *Bayside City Council & Ors v Telstra Corporation Ltd & Ors* (2004) 216 CLR 595 at [42].

5 Annexures

[HIGH COURT OF AUSTRALIA.]

SPENCER . . . . . APPELLANT
PLAINTIFF,

AND

THE COMMONWEALTH OF AUSTRALIA RESPONDENT.
DEFENDANT,

ON APPEAL FROM A JUDGE EXERCISING THE ORIGINAL JURISDICTION OF THE HIGH COURT.

H. C. OF A. 1906.

PERTH, *Nov.* 13, 14, 15, 16, 22.

Higgins J.

1907.

PERTH, *Oct.* 23, 24, 25, 29.

Griffith C.J., Barton and Isaacs JJ.

Resumption of land—Valuation—Weight of evidence—Procedure—Pleading—Plea of Payment into Court—Admission of value pro tanto—Costs—Property for Public Purposes Acquisition Act 1901, (*No.* 13 *of* 1901), *secs.* 14, 15, 16, 17—*Rules of High Court, Order XVII., r.* 3; *Order XVIII., r.* 5.

Where, in an action for compensation under the *Property for Public Purposes Acquisition Act* 1901, issue has been joined upon a plea of payment into Court without denial of liability, the only issue is whether the amount paid in is sufficient, and the plaintiff is entitled to that sum in any event.

In assessing the value of land resumed under the Act, the basis of valuation should be the price that a willing purchaser would at the date in question have had to pay to a vendor not unwilling, but not anxious, to sell.

APPEAL from the judgment of *Higgins* J. exercising the original jurisdiction of the High Court.

The Commonwealth in 1905 resumed the plaintiff's land by proclamation under the *Property for Public Purposes Acquisition Act* 1901, secs. 6, 7, for the purpose of erecting a fort for the defence of Fremantle harbour, and offered £2,641 in compensation, with a formal notice of valuation under the Act. The plaintiff brought an action in the High Court under sec. 15 of the Act claiming £10,000 as compensation. The Common-

wealth paid into Court without denial of liability £3,000 with interest, and issue was joined whether that sum was enough to satisfy the plaintiff's claim. At the trial the only contest was as to the true value of the land, and it was not suggested by the plaintiff that he was entitled to receive at the least the amount paid into Court. Counsel for the plaintiff admitted that the Court had power to order the payment out of Court to the defendant of any excess over the amount which might be awarded.

The action was heard before *Higgins* J.

Pilkington K.C. and *Stawell*, for the plaintiff.

Keenan A.G., and *Northmore*, for the defendant.

Nov. 22, 1906.

HIGGINS J. read the following judgment. This is a claim for £10,000 compensation for land taken by the Commonwealth for defence purposes on the 22nd July 1905, under the *Property for Public Purposes Acquisition Act* 1901. The land is situated at North Fremantle, about 10 miles from Perth, and contains 6 acres 1 rood and 2 perches. There are no improvements, except a picket fence on the boundary, and a rude building to which no one attaches any money value. The plaintiff is entitled to receive an amount equivalent to the value of the premises as on 1st January 1905. The land consists of sand-hummocks overlooking the Indian Ocean. It has no grass; and it is useless in its present condition for any purpose of production. The owner is entitled to the benefit of any value attributable to the view and to the breezes of the ocean; and he is entitled also to any value which has been added to the site by the growth of population, by the erection of buildings in the neighbourhood, and by the enterprise of the Government and of the municipality. Roads have been made around the land; there are railway lines and conveniences within a short distance; and the harbour has been made and deepened, and wharves constructed. Under sec. 19 of the Act it is my duty not to have regard to any alteration in value "arising from the proposal to carry out the public purpose for which the land is taken;" but I agree with Mr. *Pilkington* that I should take into account all the prospects and potenti-

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alities of the land as on 1st January 1905, including the fact that, by reason of the position of the land, the Defence Department might possibly become a competitor for it, and thus increase its value in competition (*Browne and Allan on Compensation*, 2nd ed., p. 718; *Ripley* v. *Great Northern Railway Co.* (1); *In re Gough and Aspatria, Silloth and District Joint Water Board* (2)).

Now, I have heard the evidence and the arguments; and, with the assistance of counsel for the plaintiff and for the defendant, I have inspected the land. As a result, I entertain a very strong view that the claim for compensation is most excessive. Even the valuations made by the defendant's valuers are liberal. The truth is that, in such cases as this generally, no land agent or valuer has any tangible interest in straining the value unduly downwards, whereas most have a tangible interest in the opposite direction. I do not at all imply, however, that the gentlemen who have given evidence have not given their opinion honestly, on *data* which they frankly state. Yet in this case I am face to face with valuations varying so widely as £8,400 and £2,066. The plaintiff's witnesses assume that the Clifton Street frontage is required for factory or storage purposes, and that the Railway Commissioner will be able and willing to run a siding across Clifton Street into the buildings. As one of the witnesses said to me, his valuation of this frontage—£5,296 or £8 per foot—is the price which a manufacturer would give if *he needed this part of the land*; and another admitted that there is no advantage in having the railway so near unless one can get the private siding. While desiring to give ample weight to the possibilities of this land, I refuse to treat these contingencies as if they were certainties. I believe the evidence of the defendant's witnesses that there is not, and was not on 1st January 1905, any demand for land for factory or storage purposes, and that, if such a demand should arise, there is other land available. I accept the evidence also of those who state that the land is not suitable for villa residences, but only for workingmen's dwellings. I do not think anything is to be gained by an exhaustive statement of the evidence submitted, or of the relative qualifications of the experts. Some of the transactions deposed to with regard to lands in the

(1) L.R. 10 Ch., 435.

(2) (1903) 1 K.B., 574.

vicinity I cannot regard as being of much use in enabling me to ascertain the fair value of this land. Indeed, there are so many factors which may operate as an inducement to any particular dealing in land, that it is unsafe for the Court, which cannot have full knowledge of all the circumstances, to rest its decision on any one transaction. Some of the land in John Street opposite this land was sold with difficulty at various times, chiefly from 1896 to 1902, when land values were higher than on 1st January 1905, at prices averaging about £45 per lot, and on terms, without interest. Some of the lots have not yet been sold, and are for sale at the best terms obtainable. Each lot has 33 feet frontage with a right of way at the rear. This would mean about £1 6s. 8d. per foot frontage. These frontages are admitted by the plaintiff's witnesses to be of the same value as the plaintiff's land facing John Street, except that the plaintiff's frontages would have greater depth; and yet the plaintiff's witnesses claim £3 per foot for the plaintiff's frontages to John Street. There are other standards of comparison of more or less weight. In 1904 the half interest of the late Mr. George Leake in similar land, of nearly the same area (over 6 acres), but not quite so near the wharves, was sold to the owner of the other half interest for £937 10s. This would mean about £1,875 for over six acres, even if we assume that the owner of the other half interest would not be willing to give more than an ordinary purchaser. Moreover, in December 1901, before the great fall in values in Fremantle, the Shell Oil Company bought three sections (about 5 acres) at the rate of £480 per acre, and these sections Mr. Learmonth regards as being very much more valuable than the plaintiff's land. Personally I should have felt much doubt, if I were to rely on my own judgment, as to the possibility of getting even the prices which the defendant's witnesses mention. But I have to remember that the land available for sites in and around Perth and Fremantle is all, or nearly all, of a sandy character, and I am not justified in refusing to give credence to expert witnesses who say that they could find purchasers as stated. If it is not invidious to make a selection among competent and honourable witnesses, I should prefer to rely on the opinion of Mr. Learmonth, and he is the witness who fixes the value at the lowest—£2,066 or £330 per acre.

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There is no claim made by the plaintiff for damage under secs. 13, 14, 19 in addition to the value of the land taken. But the plaintiff's counsel urge that it is incumbent on the Court to allow 10 per cent. more than the true value in consideration of the land being compulsorily taken; and I have been referred to certain Victorian cases: *Leslie* v. *Board of Land and Works* (1); and *In re Wildman*; *Ex parte Lilydale and Warburton Railway Construction Trust* (2) in support of this contention. I am unable to see how a consideration of this kind enters into the question of value, at all events, in the case of land held merely as a speculation, land which the owner does not want for its own sake, land as to which he is not an additional competitor; and it is only on the question of value, not of damage, that the point is pressed. Besides, even if it is a grievance to suffer compulsion, it must be remembered that the owner is saved the expense of surveying and levelling, and preparing the land for sale, of advertising, of agent's commission, &c. I do not quite appreciate some of the expressions used by the learned Judges in the cases cited. But, without taking it upon me either to condemn or to endorse these expressions, it is enough for me to say that there is phraseology used in the Victorian Acts referred to in *Leslie's Case* (1) which are not found in the Federal Act, and that the Federal Act seems to be sufficiently clear and definite as to my present duty. Having regard to all the potentialities of the site, and to all the other circumstances, I think that I am giving to the plaintiff all that he can justly claim if I determine the amount of compensation at £2,250. This amount is less than that offered to him—£2,640 19s. 10d. on 18th December, 1905; and it is still less than the amount paid into Court (including interest) £3,086 1s. 2d. I determine the amount of compensation at £2,250 and direct judgment to be entered accordingly. I order that the money in Court be paid out to the defendant after the payment to the plaintiff of the £2,250 with interest thereon as prescribed by sec. 20. No costs. I have had great doubt whether I should not make the plaintiff pay all the costs; but, inasmuch as the plaintiff was probably misled by the amount of possible purchase

(1) 2 V.L.R. (L.), 21. (2) 27 V.L.R., 43; 22 A.L.T., 199.

money, £6,400, which appeared provisionally in the papers presented to Parliament by the Federal Treasurer, I think it a fair thing, on the whole, to let each party abide his own costs. Liberty to apply.

This order, in so far as it involves the repayment to the defendant of the difference between the amount awarded and the amount paid into Court, seems to be justified on the authority of *Gray* v. *Bartholomew* (1), and Mr. *Pilkington*, on behalf of the plaintiff, has intimated that he does not dispute my power to order the repayment.

Oct. 23, 1907.

The plaintiff moved the High Court for a new trial on the ground that the finding as to value was against evidence and the weight of evidence.

Pilkington K.C. and *Stawell*, for the appellant. Upon the evidence that was given the value assessed was too small. *Higgins* J. considered all the witnesses fair and honest and equally credible; yet out of the ten expert witnesses, five on each side, who testified as to the value, he chose the evidence of the lowest valuator on the Commonwealth side, contrary to the opinion of nine others equally competent and credible. Also the Public Works Department of Western Australia had made an independent valuation, which the Commonwealth used in its Estimates in 1904, assessing this land at £6,400.

It is admitted that, by sec. 16, the Judge is not to be bound in any way by the amount of the valuation notified to the claimant, which was £2,641; and, by sec. 19, the land cannot gain any value arising from the proposal to carry out the public purposes for which the land was taken. But the Act does not refer in any way to payment of money into Court, which was an admission of liability to the extent of the money paid in: *Hennell* v. *Davies* (2); *Berdan* v. *Greenwood* (3); *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (4); *Langridge* v. *Campbell* (5); *Dumbleton* v. *Williams, Torrey & Field Ltd.* (6); *Hobson* v.

(1) (1895) 1 Q.B., 209.
(2) (1893) 1 Q.B., 367.
(3) 3 Ex. D., 251.
(4) (1895) 1 Q.B., 211*n*.
(5) 2 Ex. D., 281.
(6) 76 L.T., 81.

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Stoneham (1); *Chitty's Archbold*, 12th ed., p. 1366; *Elliott* v. *Callow* (2). The plaintiff is not to blame for not taking that money out of Court, because, under Order XVIII., r. 5, it must be taken in satisfaction of the whole claim. If there was jurisdiction to award plaintiff a less amount than was paid into Court, the balance could be paid out to defendant: *Gray* v. *Bartholomew* (3); but there was not such jurisdiction.

The assessment of the value was arrived at on a false basis. It was treated as though at the time of the resumption the land must necessarily be realized as if at a forced sale, and in the shape of a subdivision into small workingmen's allotments. The weight of the evidence was that the most advantageous sale would be as a factory site; the Judge was not entitled to follow his own opinion: *London General Omnibus Co.* v. *Lavell* (4). The awarded value being against the evidence, it is open to the Court to fix the value. The proper basis for a valuation is, what would a willing purchaser be reasonably expected to have to pay to an owner willing, but not anxious, to sell; the plaintiff is not bound to produce immediately a willing purchaser; he is entitled to wait a reasonable time for a purchaser for that purpose for which the land can reasonably be expected to have most value: *In re Ossalinsky (Countess) and Mayor &c. of Manchester* (5); *In re Gough and Aspatria, Silloth and District Water Board* (6); *Leslie* v. *Board of Land and Works* (7); *In re Wildman*; *Ex parte Lilydale and Warburton Railway Construction Trust* (8); *Russell* v. *Minister of Lands* (9); *Housing of Working Classes Act* 1890 (Eng.), (53 & 54 Vict. c. 70), sec. 21.

Keenan A.G. and *Northmore*, for the respondent. There was power to award less than the amount paid in. This being a resumption case, there could not be any denial of liability in the plea, unless the Commonwealth had desired to deny the plaintiff's title to the land. The money paid in was therefore not an admission of liability to that extent, but a deposit of so much to

(1) 13 V.L.R., 738.
(2) 2 Salk., 597.
(3) (1895) 1 Q.B., 209.
(4) (1901) 1 Ch., 135.
(5) Browne and Allan on Compensation, 2nd ed., App. p. 659, at p. 622.
(6) (1903) 1 K.B., 574.
(7) 2 V.L.R. (L.), 21.
(8) 27 V.L.R., 43; 22 A.L.T., 199.
(9) 17 N.Z.L.R., 241, 780.

be available against whatever the Court might award; the balance to be refunded, on the authority of *Gray* v. *Bartholomew* (1). The High Court Rule, Order XVIII., r. 1, materially differs from English Rule, Order XXII., r. 1, in containing the additional words "unless otherwise stated." The question for the Judge was not the bare issue whether the money paid into Court was enough; sec. 16 of the Act requires him to find what damage the plaintiff has suffered. Once the plaintiff has declined to take out the money paid into Court, but on the contrary has pleaded an issue which goes to trial, he has no indefeasible title to the money. Payment into Court is only in continuation of the notification of valuation to the plaintiff: secs. 13, 15; and under sec. 17 the Judge is empowered to award less than that amount. The pleadings cannot affect the procedure prescribed by the Act, which affords the sole remedy between the parties; and sec. 16 binds the Judge to ignore any admissions as to value made in the pleadings and to assess the true value.

With regard to finding the value of the land, the Court is bound to consider only reasonably immediate probabilities and potentialities, legitimate expectations, not barely possible contingencies. There was no evidence that there was any reasonable prospect of the land being required for factory and storage sites; the only positive evidence given was the other way, that the land was saleable only as workingmen's lots; a buyer would considerably abate his offer if buying to realize on less proximate probabilities of demand for other special purposes. Defendant's witnesses valued the land properly, at the price that ordinary prudent buyers would give, not on the basis of a forced sale, but in an open bargain with a prudent seller. The fact that the land was specially adapted for a fort might introduce the Commonwealth Government as an additional competitor, but not at fancy prices. The discretion of the Judge in these resumption cases, as in the analogous awards in salvage cases, should not be disturbed: *The "Alice"* (2). The pleadings did not raise the issue whether the money paid in was enough to satisfy the plaintiff's claim, but really whether it was not more than enough, *i.e.*, whether

(1) (1895) 1 Q.B., 209.

(2) 5 Moo. P.C.C. N.S., 300, at p. 303.

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plaintiff's claim was excessive: *Hennell* v. *Davies* (1); *Dumbleton* v. *Williams, Torrey & Field Ltd.* (2). In *Gray* v. *Bartholomew* (3) the order was made in that way because, under Order XXII., r. 5, the plaintiff was entitled to the whole money paid in, "unless the Court otherwise orders," which words are not in the High Court Rules; that judgment did not decide the effect of a plea of payment in on the rights of a plaintiff.

[ISAACS J.—*Langridge* v. *Campbell* (4) is very plain that payment in irrevocably admits that so much is due, and leaves only one issue to decide, whether a greater, not a less, amount is owing.]

The whole case was conducted upon a different understanding, and defendant should therefore have leave to amend in order to raise the true issue requisite under the Act.

[GRIFFITH C.J.—Apparently no direct rule for payment out was put in the High Court Rules because of the old rule at law that money once paid in was thenceforward the plaintiff's property. It would prejudice the plaintiff, after conducting his case on that basis, to allow such an amendment.]

If the plaintiff is declared entitled to the amount paid in, and no more, the defendant is entitled to costs since the date of payment in.

Pilkington in reply. There is no doubt that plaintiff's land was "fit" for industrial purposes; the only element of futurity in its value was the finding of an actual purchaser; and plaintiff was not bound to produce him. The special "adaptability" spoken of in *In re Ossalinsky (Countess) and Mayor of Manchester* (5), referred to peculiar purposes such as quarry and reservoir sites, not to ordinary purposes such as industrial sites. The plaintiff is entitled to have the Judge's misdirection of himself corrected, so that the land may be valued at its present value having regard to the reasonable probabilities of sale at the most advantageous price: *Montgomerie* v *Wallace-James* (6).

The plaintiff should get all the costs if he gets the full amount

(1) (1893) 1 Q.B., 267.
(2) 76 L.T., 81.
(3) (1895) 1 Q.B., 209.
(4) 2 Ex. D., 281.
(5) Browne and Allan on Compensation, 2nd ed., App., p. 659.
(6) (1904) A.C., 73.

paid into Court: sec. 17 of the Act; or, at any rate, should not have to pay costs.

Cur. adv. vult.

Oct. 29, 1907.

The following judgments were read:—

GRIFFITH C.J. This is an action brought under the provisions of the *Property for Public Purposes Acquisition Act* 1901 (No. 13 of 1901) to recover compensation for land taken by the defendant for public purposes. The land was in fact taken as a site for a fort. By sec. 6 of that Act land might be acquired by the publication of a notice in the *Gazette*. Persons claiming compensation in respect of any land so acquired were within a prescribed time to serve a notice on the Minister of the Department concerned and the Attorney-General (sec. 13). If a *primâ facie* case for compensation was disclosed, the Minister was required to cause a valuation to be made of the land, and to inform the claimant of the amount of the valuation (sec. 14 (2)). If the claimant and the Minister did not agree as to the amount, the claimant might institute proceedings in the High Court in the form of an action for compensation against the Commonwealth (sec. 15), which was to be tried by a single Justice without a jury (sec. 16). In determining the amount of compensation the Justice was not to be bound by the amount of the valuation notified to the claimant (*Ib.*). If judgment were given for a sum equal to or less than the amount of the valuation notified to the claimant, he was to pay the costs of the action unless the Justice otherwise ordered, but, if the judgment were for a sum one third less than that amount, the claimant was to pay the costs in any event (sec. 17). Either party might move for a new trial or to set aside the finding in accordance with the practice of the High Court (*Ib.*). The Act did not contain any other special provisions as to procedure. In my opinion the direction that the proceedings were to be by action incorporated the general practice of the Court relating to actions, so far as no other practice is substituted.

The plaintiff by his statement of claim, after setting out the necessary facts showing his title to sue, claimed £10,000. The defendants' defence was in the following words:—"The defend-

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ants bring into Court the sum of £3,086 1s. 2d. and say that it is enough to satisfy the plaintiff's claim." Accompanying particulars showed that that sum was made up of £3,000 for the value of the land and £86 1s. 2d. for interest at 3% from the date of acquisition to the date of payment, which was the rate prescribed by sec. 20 of the Act. The plaintiff simply joined issue.

Upon these pleadings the action was set down for trial before *Higgins* J., who, after hearing much conflicting evidence, found that the value of the land at the relevant date (1st January 1905) was £2,250 only. He thereupon ordered that that sum with interest at the rate prescribed by the Statute should be paid out to the plaintiff, and that the residue should be paid to the defendant, and directed that judgment should be entered without costs. From this judgment the plaintiff appeals.

Two distinct questions are raised upon the appeal: (1) whether the plaintiff is entitled in any event to the whole of the money paid into Court, and (2) whether the learned Judge was wrong in assessing the value of the land at a sum not exceeding £3,000. The first question depends upon the effect of the Rules of Court; the second depends partly upon the principles to be applied in estimating the value of the land, and partly upon the evidence in the case.

I have already pointed out that the ordinary practice of the Court is applicable to the action. By Order XVIII., Rule 1, a defendant in an action to recover a debt or damages may before or at the time of delivering his defence (or later by leave of the Court or a Justice) pay into Court a sum of money by way of satisfaction, "which shall, unless otherwise stated, be taken to admit the cause of action in respect of which the payment is made." Or he may pay money into Court with respect to any cause of action with a defence denying liability, in which case the money is subject to the specific provisions contained in Rule 6, one of which is that, if the plaintiff does not accept it in satisfaction, it remains in Court until the determination of the action, and is subject to the orders of the Court. If the defendant succeeds in the action the whole amount is to be repaid to him, and if the plaintiff recovers less than the amount paid in the balance is to be repaid to the defendant.

Rule 5 provides that when money is paid into Court the plaintiff may before joining issue accept it in satisfaction, in which case he may tax his costs up to that date, and if they are not paid within four days may sign judgment for them. The Rules do not contain any express direction as to the payment out to the plaintiff of money paid into Court either with or without denial of liability, but under Order XVII., Rule 3, which provides that when admissions of fact are made on the pleadings any party may at any stage of the cause apply to the Court or a Justice for such judgment or order as upon the admissions he is entitled to, it is clear that the plaintiff is entitled to ask for payment out to him at any time. If a formal order is necessary it is little more than formal, although, no doubt, the Court or a Justice might allow a defendant in a proper case to amend his defence or withdraw his notice of payment, but in the absence of such amendment I think that the plaintiff's right to the money paid into Court without denial of the cause of action is absolute, whatever may be the result of the action. This is in accordance with the view that was always accepted as to the effect of payment into Court before the statutory provisions of the Common Law Procedure Acts (see *Archbold's Practice*, ed. 1866, vol. 2, p. 1366).

In the present case the defence contained nothing to limit the effect of the payment into Court. It follows that the plaintiff's cause of action in respect of which the payment was made was admitted. No case was cited to us in which it has been expressly decided that the admission involved in a plea of payment into Court is an admission of liability to the full amount paid in, but in all the cases cited this seems to have been taken for granted. In any view the plaintiff became entitled to receive the money as soon as it was paid in, and nothing has since occurred to disentitle him to it, unless the finding of the learned Judge has that effect. The only issue for trial raised by the joinder of issue was whether the sum paid into Court was or was not enough to satisfy the plaintiff's claim. It was, therefore, not material to consider whether it was more than enough. If it was not enough, the plaintiff would be entitled to damages *ultra*, if it was, he was entitled to no more than he already had. It was suggested that the direction that the Justice should not be bound by the

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valuation notified to the claimant implies that he should not be bound by an admission on the record, but I am unable to accept this suggestion. I am, therefore, of opinion that the plaintiff is entitled to recover at least the amount paid into Court. In an ordinary case, if a plaintiff does not recover more than the sum paid into Court, judgment is given for the defendant, but the Statute appears to contemplate that there must be a formal judgment for the plaintiff in every case. I think, therefore, that the plaintiff is entitled to judgment for the sum paid into Court in any event.

I proceed to consider whether he is entitled to anything more. The evidence, as I have said, was conflicting, but the divergence was not so much with regard to facts as with regard to the point of view from which the question of value was regarded.

The land is situated at North Fremantle, within 100 yards of the ocean, and at a very short distance from the harbour. The area is more than six acres, and there is a railway line separated from it only by a road. Fremantle is the principal port of the State of Western Australia, and some persons naturally entertain a high opinion of its future prospects. The plaintiff's witnesses thought that the land in question, by reason of its situation, its height, and its exceptionally large area amongst a number of small subdivisions, had a prospective value as a site for a factory or some other enterprise requiring a considerable space. It was also one of a very small number of suitable sites for a fort. The defendants' witnesses on the other hand thought that the land was not fit for anything except subdivision into small allotments for workmen's dwellings, of which there were several in the immediate neighbourhood, and they estimated the value on the basis of the sum which they thought could have been realized for it in January 1905, if so subdivided. The learned Justice, in effect, accepted the view of the defendants' witnesses, or rather of those of them who put the lowest valuation on the land, and, if I rightly understand his judgment, applied his mind to the question of what the plaintiff could have realized by a sale of the land in January 1905, if he had then sold it.

It has often been pointed out that, when a cause has been heard by a Judge on oral evidence, a Court of Appeal is very

reluctant to differ from him on a question of fact, especially when there is a conflict of evidence. And the same considerations apply whether the conflict is as to the actual facts, or as to a matter of opinion as to which it is material to weigh the relative values of the opinions of different witnesses. So far, therefore, as *Higgins* J. founded his judgment on the weight to be given to the opinion of the different witnesses as to relevant facts, I am not prepared to differ from him. I therefore accept the conclusion (though I doubt whether I should have arrived at it myself) that, if the land had been cut up and sold in small allotments in January 1905, it would not have realized more than £2,250. I will assume also that he thought that at that date it would have realized more if sold in that mode than in any other. But I do not think that these facts conclude the question of value, although they are very relevant to the question.

In the case of chattels it is often, though not always, easy to ascertain the value. In order that any article may have an exchange value, there must be presupposed a person willing to give the article in exchange for money and another willing to give money in exchange for the article. When there is a large or considerable number of articles of the same kind which are the subject of daily or frequent sale and purchase, the value of the articles is taken to be their current price. Thus, in the *Sale of Goods Act*, the measure of damages for wrongful refusal to deliver goods is to be ascertained with reference to "the market or current price of the goods." The foundation of this doctrine is that a man desiring to sell such articles can readily find a purchaser at a price which is fairly certain, and conversely that a man desiring to buy can find a seller at about the same price. But these considerations are not necessarily equally applicable to land. There is, no doubt, much land in many places the value of which per acre is as definitely fixed as the price of wheat or sugar. But in the case of a new port, in a new State, where the area of land is limited, and each piece differs in many of its characteristics from the rest, it is impossible to apply any such rule. Bearing in mind that value implies the existence of a willing buyer as well as of a willing seller, some modification of the rule must be made in order to make it applicable to the case

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of a piece of land which has any unique value. It may be that the land is fit for many purposes, and will in all probability be soon required for some of them, but there may be no one actually willing at the moment to buy it at any price. Still it does not follow that the land has no value. In my judgment the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, *i.e.*, whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?" It is, no doubt, very difficult to answer such a question, and any answer must be to some extent conjectural. The necessary mental process is to put yourself as far as possible in the position of persons conversant with the subject at the relevant time, and from that point of view to ascertain what, according to the then current opinion of land values, a purchaser would have had to offer for the land to induce such a willing vendor to sell it, or, in other words, to inquire at what point a desirous purchaser and a not unwilling vendor would come together. This is not, as I understand the evidence and the decision of the learned Justice, the test which was applied by him or by the witnesses upon whose testimony he relied. On this ground I think that his assessment of the value is open to be reviewed.

But, applying what I conceive to be the true test, I am unable to come to the conclusion upon the whole evidence that the plaintiff has satisfied the onus, which is upon him, of showing that such an owner would not in January 1905 have accepted an offer of £3,000 cash, although I am not prepared to say that he would have accepted a smaller sum. In coming to this conclusion I have given much weight to the opinion of the learned Justice, as I understand it, as to the value of the testimony of the respective witnesses so far as regards their accuracy and the soundness of the basis of their opinion. I am, therefore, of opinion that on this ground, as well as on that already dealt with, the plaintiff was entitled to recover £3,000. But the result, so far as regards the issue for trial, is the same, namely, that the sum paid into Court was enough to satisfy the plaintiff's claim.

If the action had been triable, and tried, with a jury, the result would have been that the plaintiff would have had to pay the costs of the issue on which he failed. And I do not see any sufficient reason for departing from this rule in the present case. *Higgins* J., in the exercise of his discretion under sec. 17 of the Act, relieved the plaintiff from payment of costs although he recovered less than the amount of the valuation, and the Court could not review that exercise of discretion if it applied to the case as now determined. But I do not think that he applied his mind at all to the question of costs on the basis that the plaintiff was entitled to the £3,000 paid into Court. We must, therefore, exercise our own discretion, which I think will be best done by following the ordinary rule.

Counsel for the defendant asked for leave to amend the defence by stating that the liability for the full sum paid in was not admitted. Assuming that such an amendment could be made, it would, in the view which I take of the facts, be prejudicial and not beneficial to the defendant, for it would entail payment by it of the costs of the action. But, even if I took a different view of the facts, I do not think that any sufficient ground was shown for allowing so unusual an amendment.

The judgment appealed from should therefore be varied by directing judgment for plaintiff for £3,081 1s. 2d., with costs up to the time of payment into Court. The plaintiff must pay the defendant's costs of action after payment. The respondent should pay the costs of this appeal.

BARTON J. The amount of the valuation being £2,640 19s. 10d., and the defendant having paid £3,000 into Court without any denial of liability, the first question is whether the plaintiff is not entitled to have at least the whole £3,000, and I think he is. Sec. 17 of the *Property for Public Purposes Acquisition Act* 1901 provides that in determining the amount of compensation the Justice who tries the case shall not be bound by the amount of the valuation notified to the claimant. But I do not see how the defendant can have the benefit of that section after paying into Court, irrespectively of the valuation, a sum exceeding it in

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amount and tendering issue on the bare averment that the sum so paid in was enough. The plaintiff was entitled to join issue on the plea as filed, and to prove, if he could, that £3,000 was not enough, and thus the contest invoked by the defendant was solely on the sufficiency of that sum. The plea deliberately abandoned the valuation as the subject of contest, and by offering £3,000 without denying liability, disabled the defendant, in my opinion, from contending that a less sum should be assessed as compensation. Any contention that a less sum was enough became irrelevant to the issue raised by the defendant, by whose own pleading the sole question was, £3,000, or how much more? It is true that the Statute does not expressly authorize the plea of payment into Court, but it does not exclude it even by implication (although in some circumstances it may be rather an imprudent plea to an action under the Statute). The authority given to the claimant by sec. 15 to proceed for compensation refers only to an action, and if an action is brought, it is reasonable to conclude that the practice and procedure in ordinary actions are to be applied as far as may be. Now as to their application. In the first place, keeping in mind that the payment into Court was unaccompanied with any denial of liability, it must be taken to admit the plantiff's cause of action to the extent of £3,000, and the interest, £86 1s. 2d., follows as of course under sec. 20 of the Act: *Hennell* v. *Davies* (1). The Chief Justice has made a close analysis of the Rules under Order XVIII. which are relevant to this case, and I cannot add to that; further, I think it impossible to resist the construction of Order XXVII., Rule 3, which lays it open to a plaintiff to treat such an admission of fact as this plea as the foundation for an application, at any stage of the cause, to the Court or a Justice, for the payment out to him of the amends tendered with the plea. From that construction it follows, not only that the refusal of such an order is scarcely to be thought of, but also that the right to it is not dependent on the result of the action. The comprehensive Rule in question, so construed by its framers, is probably the reason why it has not been thought necessary to provide specially for payment out of Court, as in England is done by Order XXII., r. 5. I am, there-

(1) (1893) 1 Q.B., 367.

fore, of opinion that the plaintiff was and is entitled to the whole of the money paid into Court.

The remaining question is whether the plaintiff has shown a right to compensation exceeding the sum paid in. For it is on him to show it, and he undertook to do so. As in most cases of the kind, the witnesses, called as experts in land values, presented a view for each side difficult to reconcile with that for the other. The differences were upon a matter in which the worth of opinion, and not the degree of truthfulness, was in question. Still, the matter was one of credibility in that sense, and the conflict was strong. In such a case a Judge who sees and hears the witnesses has a distinct advantage over others who are asked to review his decision. Therefore I am very loath to attempt such a process in this case, and can only do so on the ground of necessity. But, after giving my best attention to the judgment of *Higgins* J., I am unable to find that he has applied certain principles which, as it appears to me, should be applied to a question of this kind. I am unable to say that the bare market value of the land for workingmen's residences on a particular day would be a value constituting a real compensation for this taking. The Court must take into consideration all the circumstances, and, to quote the admirable judgment of the Supreme Court of New Zealand in *Russell* v. *The Minister of Lands* (1), must "see what sum of money will place the dispossessed man in a position as nearly similar as possible to that he was in before." His loss is to be tested by the value of the thing to him: *Stebbing* v. *Metropolitan Board of Works* (2), and the loss he has sustained is not necessarily to be gauged by what the land would realize if peremptorily brought into the market on a day named. True, it is "value" which is to be assessed, but the value to the loser of land compulsorily taken is not necessarily the mere saleable value. See *Russell* v. *The Minister of Lands* (No. 2), (3). I make these observations without losing sight of the fact that, in arriving at the market or saleable value of £2,250 for workingmen's cottage sites, which is the only value that I think he found, *Higgins* J. was perfectly entitled to follow, as he did, that one of

(1) 17 N.Z.L.R., 241, at p. 253.
(2) 40 L.J.Q.B., 1, at p. 5, *per Cockburn* C.J.
(3) 17 N.Z.L.R., 780.

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the defendants' witnesses who gave the lowest estimate of market value, and I should not be at all disposed to disturb his conclusion on that element of the case, as an element.

The plaintiff's witnesses attributed considerable value to this land, or a great part of it, as a site for a factory—one of them said a freezing-house. One cannot shut one's eyes to the fact of the importance of Fremantle as a port, or refuse to see that Australian ports generally are growing in trade and consequence. It may be that commerce and manufactures will for years be concentrated on the part of the port south of the river, but probably that will in a reasonable time cease to be the case with this the chief port of this State. A man is perfectly entitled, so long as he escapes government resumptions, to hold his land, in view of such progress as he sees going on, in the hope and belief that it will realize its best return to him before many years as a site for some manufacture or the like. And its value to him in that regard, though often called prospective, may even be a very present one if he exercises due care and does not exhibit too great anxiety to sell. The plaintiff's witnesses have attributed such a value to the land, and though I do not doubt that they have been sanguine as to amounts, I still think that something should have been allowed the plaintiff in this regard, that is, that it was a factor of the value which *Higgins* J. left out of consideration, but which the plaintiff was entitled to have estimated: See *In re Gough and Aspatria, Silloth and District Joint Water Board* (1), and *In re Ossalinsky (Countess) and Mayor &c. of Manchester* (2). All "reasonably fair contingencies," as *Grove* J. put it in that case, are to be considered; and then he uses these words:—"What it would sell to a willing purchaser for in consequence of its having these additional advantages."

Of course, the price for which land would sell to a willing purchaser is there intended by *Grove* J. to be the test, whether there are special advantages or contingencies to be valued or not. And I should say, in view of the many authorities cited and upon the sense of the matter, that a claimant is entitled to have for his land what it is worth to a man of ordinary prudence and fore-

(1) (1903) 1 K.B., 574.
(2) *Browne and Allan on Compensation*, 2nd ed., App. p. 659, at p. 661.

sight, not holding his land for merely speculative purposes, nor, on the other hand, anxious to sell for any compelling or private reason, but willing to sell as a business man would be to another such person, both of them alike uninfluenced by any consideration of sentiment or need.

But while I think with great respect that His Honor did not take into consideration all the factors that he might have done, or apply principles as broad as such a case required, I am still not satisfied that the plaintiff has proved himself entitled to more than the £3,000 paid into Court. As it is now for this Court to name the sum which will really compensate the plaintiff, I am bound to say that, taking all things into consideration, I think the fair value of this land to such a vendor as I have described exceeded on 1st January 1905 (sec. 19), the sum found by the learned Justice, but that it did not exceed the sum of £3,000 paid into Court. Ordinarily that conclusion would mean a verdict for the defendant, but in view of secs. 17 to 20 of the Act I agree with the Chief Justice that the proper form of judgment is for the plaintiff for £3,086 1s. 2d., being the whole amount, including interest, paid into Court.

As this is a finding that the sum paid in was enough, it is a result which on an ordinary trial by jury would involve the payment of the costs by the plaintiff from the time of payment in. Though *Higgins* J. ordered the sum of only £2,250 to be paid out to the plaintiff, he did not order him to pay costs. But, as we have been unable to agree with his judgment, we cannot say how he would have treated the costs after deciding the compensation on the principles now applied, and as we cannot possibly say how he would then have exercised his discretion, we must use our own. For my part I cannot see any reason why, awarding the plaintiff the £3,086 in Court, we should exempt him from the normal consequence of such a result in costs; while the costs up to payment into Court should be paid by the defendant. I think the respondent should pay the costs of the appeal, as the appellant has succeeded in having the amount awarded to him increased by £750.

As to the question of amendment, I do not see how we could

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possibly allow so radical an alteration in these pleadings at such a stage.

ISAACS J. I agree with the order proposed by the learned Chief Justice. The only issue raised by the pleadings was whether the sum of £3,086 1s. 2d. brought into Court without any denial of liability was enough to satisfy the plaintiff's claim. His claim for compensation was solely for the value of the land itself, and did not include any claim for damage otherwise. The particulars of the sum paid into Court showed that the money was in respect of the identical claim made, and consisted of an amount representing the valuation of the land together with interest at 3% from the date of acquisition of the land until the date of payment into Court.

The amount found by the learned primary Justice as the true value of the land was £2,250, and His Honor directed that judgment should be entered for that sum.

The first question is, whether the plaintiff, notwithstanding the finding that £2,250 was the actual value, is entitled to judgment for the amount of £3,086 1s. 2d. paid into Court.

Section 15 of the *Property for Public Purposes Acquisition Act* 1901, which was in force when this action was tried and until July 1st 1907, prescribed that, in the absence of an agreement as to the amount of compensation, proceedings might be instituted in the High Court in the form of an action for compensation. This brings into application the principle enunciated by *James* L.J. in *Dale's Case* (1). "It was strongly urged that this was a new jurisdiction and a new procedure. According to my view of the case, that is not material, because if a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known Court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that Court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

(1) 6 Q.B.D., 376, at p. 450.

Subject, therefore, to any special provision contained in the Act itself, the ordinary rules and practice of the Court apply; and in the absence of any express rules or practice governing the procedure, the Court must *pro hac vice* act on its own views of justice and convenience. There is nothing in the Act which in any degree interferes with the constant rule that the Court tries the issues raised, and does not treat as still in contention any matters admitted between the parties on the pleadings as they stand.

What then is the effect to be attributed to the payment of £3,086 1s. 2d. into Court upon the only item of claim made by the plaintiff? Clearly, that the defendant has expressly admitted the value of the land to be at all events £3,000, and that so much in any event ought to be paid to the plaintiff.

Money paid in on a plea not denying liability, so long as the pleading so stands, is, as it always has been, a formal admission that the sum paid in is due.

In the words of Lord *Denman* C.J. in *Steavenson* v. *Berwick Corporation* (1), the defendants say "We do not choose to dispute so much of the demand." The cases are uniform as to this.

Whether in any particular case such a payment has any further effect may depend on the form of the action and of the payment itself. But money paid in simply and without denial of liability is, in the absence of permitted amendment, the money of the plaintiff if he chooses to take it; but if he determines to proceed for more, then he runs the risk of the money, which is his money, being dealt with by the Court so as to protect the defendant from some possible injustice. Apart from that contingency, the unqualified payment into Court is for him, and leaves the money at his disposal.

There having been no amendment of the pleadings, it was not, in my opinion, competent for the defendant to dispute the right of the plaintiff to a judgment for at least £3,000 with interest.

It appears, however, that this view was, by inadvertence, not placed before *Higgins* J., and that it was admitted before him by plaintiff's counsel that under the authority of *Gray* v. *Bartholomew* (2) there was power to order the repayment to the defendant

(1) 1 Q.B., 154, at 159. (2) (1895) 1 Q.B., 209.

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of the difference between £2,250 and £3,086 1s. 2d. Assuming there was power to limit the amount recoverable by the plaintiff to £2,250, there was also power to order the balance to be refunded; and, in any event, if costs were payable to the defendant, there was equally power to order them to be first paid out of the sum in Court before payment out to the plaintiff.

There were no costs so payable; and though the learned Justice was quite justified in asking himself, and indeed bound to ask himself, the true value of the land irrespective of the amount paid in, yet when that was once ascertained to be below the amount paid in, the answer only enabled the Court to determine in favour of the defendant the issue as to sufficiency of the amount paid in. It did not alter the admission of the pleadings up to that amount, or the plaintiff's right to receive the sum paid in. In an ordinary action final judgment would in such a case be given on the issue for the defendant, but here the language of the Act contemplates a judgment for the plaintiff, and in the circumstances the judgment must be for at least the sum paid in.

The plaintiff, however, was not content to accept that sum as sufficient; he denied its sufficiency, and has further contended on the appeal that the learned Justice ought to have given more. Invited to state the minimum amount that would meet the legal requirements of the evidence, learned counsel for the appellant candidly admitted it would be impossible to do so.

It would be profitless to examine the evidence in close detail, but there are some broad considerations to which reference may be directed.

In the first place the ultimate question is, what was the value of the land on 1st January 1905?

All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to

purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property.

In *The Queen* v. *Brown* (1) *Cockburn* C.J. said :—"A jury, whether the dispute be as to the value of land required to be taken by the company, or as to the compensation for damages by severance, in assessing the amount to which the landowner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. That is the mode in which the land would be valued." Having mentally placed itself in the position of the bargaining parties as on the critical date, 1st January 1905, the question for the tribunal is, what is the point at which the parties would meet; what is the sum the one would be willing to give and the other to take? That is practically the same as asking what is the highest sum such a purchaser would give, because we must assume the owner would be willing to take the best he can get. The best he can get in those circumstances is the test of

(1) L.R. 2 Q.B., 630, at p. 631.

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what he loses, and it is his loss which must be replaced. It is not, as it seems to me, proper for this purpose to assume that the owner retains his land unsold indefinitely because such an assumption could only be for the purpose of getting an improved value, arising from more favourable circumstances than those existing in January 1905, which is the very thing forbidden by the Statute. If permissible in his favour, it would also be permissible against him, and it would be palpably unjust to him to diminish the price he could actually have got in January 1905 because some time after he could not have obtained so much. What is to be avoided is the supposition that on the specified date there is to be a forced sale, and that is completely guarded against by the considerations I have enumerated. That being so, how has the plaintiff satisfied the onus he undertook in asserting the insufficiency of the amount paid into Court? The value of the land for workmen's cottages as determined by the learned Justice cannot, on the materials present here, be disturbed on the ordinary principles upon which an appellate tribunal acts. It is urged, however, that His Honor was wrong in not accepting the estimates of the plaintiff's witnesses on the basis of a business site. But apart from balancing their relative competency as compared with the gentlemen called for the defendant, by reason of varying personal professional experience of this particular locality, there is ample material to justify the primary tribunal to disregard this aspect of their testimony without being chargeable with error which the appellate Court would correct. As the Privy Council said in *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1):—"It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little

(1) (1901) A.C., 373, at p. 391.

experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at."

The suitability of the land for a factory site is incontestable. But its inherent suitability, and its money value, for a factory site are two very different matters. No demand for factory sites there existed on 1st January 1905, and therefore no special value could be placed on it for that purpose, unless the hypothetical prudent purchaser would then take into his calculation the future prospects of the land being wanted for such a site. As to this not a single concrete fact leading to such a probability, or likely to influence a would-be purchaser, is adduced. Indeed, one witness for the plaintiff, James Morrison, although his valuation is on the basis of a factory site, says:—"Owing to the neighbourhood, I think of no value except for workmen's cottages."

The evidence for the defendant, equally honest and capable, was precise and clear that the highest price obtainable for the land was for cottage property. There was a general agreement of opinion among the witnesses that for some years past prices of land have come down in the locality and are still on the decline. Reading the judgment as a whole, I understand the learned Justice practically to arrive at a special finding that on 1st January 1905, whatever the property might have fetched as a future factory site, the highest value of the land was for workmen's cottages. This conclusion was founded on conflicting opinions of equally honest competent and confident experts. I entertain no doubt that such a finding cannot be reversed by a Court who do not see the witnesses, and are not in so favourable a position as the learned primary Justice to form what after all is only a judicial opinion of the relative weight to be attached to the opinion of witnesses regarding the estimate they think a hypothetical purchaser would form of the probable use to which the land might in the indefinite future be most beneficially applied. This is altogether too unsubstantial for an appellate Court to act upon in such a case. Unless some error of principle is established, or the evidence on one side so far preponderates over that on the other, by reason of its character, force or quality, as to distinctly outweigh the disadvantages of not seeing and

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hearing the witnesses, it is almost impossible to disturb a finding of the nature now under consideration.

In the result then the special adaptability of the land for factory sites is immaterial, and the general value of the land as workmen's residences prevails, at a sum not exceeding the amount paid into Court.

The question of costs is all that remains. Ordinarily that is also a matter for the discretion of the primary tribunal. But here the plaintiff invokes the general practice of the Court to escape from the specific finding of the learned Justice limiting him to £2,250, and he is entitled to do so; but the same general practice also says that in such a case the ordinary rule is that the plaintiff should get his costs up to payment into Court, and should, if he fail on the issue as to sufficiency, pay them to the other side. That is only the complete statement of the one rule.

As a new feature operating to his advantage has been introduced into the judgment at the instance of the plaintiff to secure a benefit, it is only just to apply it in its entirety unless special circumstances, not appearing here, make it more just to order otherwise. In this sense the order varying the provision of the judgment as to costs is no departure from the well established rule of non-interference with the discretion of the primary Court as to costs. It is not improbable that, if the principle we are acting upon had been urged before *Higgins* J., he would have accompanied its application with the same order as to costs that this Court now makes.

Judgment appealed from varied by directing judgment for plaintiff for £3,082 1*s.* 2*d., being the amount paid into Court. Plaintiff to pay defendant's costs of action after payment in. Respondent to pay costs of appeal, including cost of printing.*

Solicitors, for the appellant, *James & Darbyshire.*
Solicitor, for the respondent, *Barker* (Crown Solicitor).

N. G. P.

BAYSIDE CITY COUNCIL AND OTHERS ..... APPELLANTS;
DEFENDANTS,

AND

TELSTRA CORPORATION LIMITED AND OTHERS ..... RESPONDENTS.
PLAINTIFFS,

MORELAND CITY COUNCIL ..... APPELLANT;
DEFENDANT,

AND

OPTUS VISION PTY LIMITED AND OTHERS RESPONDENTS.
PLAINTIFFS,

WARRINGAH COUNCIL AND OTHERS..... APPELLANTS;
DEFENDANTS,

AND

OPTUS VISION PTY LIMITED AND OTHERS RESPONDENTS.
PLAINTIFFS,

HURSTVILLE CITY COUNCIL AND OTHERS APPELLANTS;
DEFENDANTS,

AND

TELSTRA CORPORATION LIMITED AND OTHERS ..... RESPONDENTS.
PLAINTIFFS,

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ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

HC OF A
2003-2004
Oct 1, 2
2003
April 28
2004
Gleeson CJ,
McHugh,
Gummow,
Kirby,
Hayne,
Callinan and
Heydon JJ

Constitutional Law (Cth) — Inconsistency between Commonwealth and State laws — Telecommunication services — Power of Commonwealth to confer immunity from a law of a State or Territory to extent that it discriminates or has effect of discriminating against carriers — Local government charges and rates — Whether discrimination against carriers — Discrimination — Whether local government rates and charges constitute a law of a State or Territory — Whether interference with capacity of States to function as governments — Commonwealth Constitution, ss 51*(v),* 109 *— Telecommunications Act* 1997 *(Cth), Sch* 3, *cl* 44.

Local Government — Rates and charges — Levying of rates and charges by local governments on carriers in respect of underground and aerial coaxial cabling on, under, or over public places — Whether rates and charges discriminated against carriers — Whether State laws under which rates and charges levied invalid to extent that they discriminate or have effect of discriminating against carriers — Telecommunications Act 1997 *(Cth), Sch* 3, *cl* 44 *— Local Government Act* 1993 *(NSW), s* 611 *— Local Government Act* 1989 *(Vict), Pt* 8.

Clause 44(1)(a) of Sch 3 to the *Telecommunications Act* 1997 (Cth) provided that a law of a State or Territory had no effect to the extent to which the law discriminated, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

Pursuant to powers conferred by s 611 of the *Local Government Act* 1993 (NSW) and Pt 8 of the *Local Government Act* 1989 (Vict), local councils in New South Wales and Victoria levied rates on land occupied by cables installed and maintained by companies which were carriers under the *Telecommunications Act*. Each of those State Acts exempted from the levying of rates and charges by local authorities, the Crown and those entities responsible for, amongst other things, water supply and distribution, electricity and pipeline networks and, in Victoria, retail gas supply. The telecommunications carriers challenged the lawfulness of the rates and charges declared and levied by certain local authorities.

Held, (1) by Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ, Callinan J dissenting, that cl 44(1) of Sch 3 of the *Telecommunications Act* was a law with respect to postal, telegraphic, telephonic and other like services and fell within the power of the Commonwealth Parliament under s 51(v) of the Constitution. To the extent that s 611 of the *Local Government Act* 1993 (NSW) and Pt 8 of the *Local Government Act* 1989 (Vict) authorised local authorities to levy upon carriers under the *Telecommunications Act* rates and charges in respect of land occupied by telecommunication cables in a way which discriminated, or had the effect of discriminating against a carrier or carriers generally, they were inconsistent with cl 44(1) and were invalid pursuant to s 109 of the Constitution.

Bank of New South Wales v The Commonwealth (1948) 76 CLR 1; *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46; *Actors and Announcers Equity Association of Australia v Fontana Films*

Pty Ltd (1982) 150 CLR 169; and *Re F; Ex parte F* (1986) 161 CLR 376, applied.

Per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ. The object of promoting the development of the telecommunications industry, and ensuring that telecommunications services would be provided to meet the needs of the Australian community, falls within a head of legislative power of the Commonwealth. Conferring upon carriers an immunity from discriminatory burdens imposed upon them by State or Territory laws in their capacity as carriers has a direct and substantial connection with the power.

(2) By Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ, Callinan J not deciding, that the general pattern of the State legislative exemptions from rates and charges enjoyed by comparable users of public land had the effect that the laws imposing those rates and charges discriminated against carriers under the *Telecommunications Act*.

Street v Queensland Bar Association (1989) 168 CLR 461, applied.

Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436, considered.

Per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ. The basis for the claim of discrimination is in a comparison between, on the one hand, the rates and charges levied in respect of the telecommunication cables and, on the other, the treatment of facilities, which are installed or operate above, on or under public land by utilities or other users of such space and are said to be comparable.

(3) By Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ, Callinan J not deciding, that cl 44(1) did not affect the capacity of the States to function as governments.

Melbourne Corporation v The Commonwealth (1947) 74 CLR 31, considered.

Per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ, Callinan J *contra*. Whatever the federal-State balance struck by the Constitution, it must give effect to ss 51(v) and 109. Clause 44 is no less a law with respect to services of the kind described in s 51(v) by reason of the fact that the immunity it confers covers only discriminatory State laws. The States are free to exercise their legislative powers to impose taxation subject only to the prohibition contained in cl 44 on an imposition of a State law which discriminates against a carrier or person or corporation in the nominated categories.

Re Lee; Ex parte Harper (1986) 160 CLR 430, and *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453, applied.

Decision of the Federal Court of Australia (Full Court): *sub nom Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198, affirmed.

APPEAL from the Federal Court of Australia.

Telstra Corporation Ltd and Telstra Multimedia Pty Ltd (together, ''Telstra''), and Optus Vision Pty Ltd and Optus Networks Pty Ltd (together, ''Optus''), were ''carriers'' under the *Telecommunications Act* 1997 (Cth). During the mid-1990s they commenced installing broadband cable networks in the Sydney and Melbourne metropolitan areas to provide pay television, high-speed internet access, and telephone services. Certain New South Wales councils resolved to levy charges pursuant to s 611 of the *Local Government Act* 1993 (NSW) for the years ending 30 June 1998 and 30 June 1999 with respect to

''cables'' and ''cabling'' on, over or under ''Council property'', which included public streets and reserves. Certain Victorian councils declared and levied rates on land occupied by Telstra and Optus cables for the years ending 30 June 1998 and 30 June 1999 pursuant to Pt 8 of the *Local Government Act* 1989 (Vict). Telstra and Optus commenced separate proceedings in the Federal Court of Australia against the New South Wales councils for declarations that s 611 of the *Local Government Act* 1993 (NSW) did not authorise the imposition of rates or charges on telecommunication cables installed and maintained by them above, on or under public land. Proceedings were also brought in the Federal Court by each carrier for declarations that Pt 8 of the *Local Government Act* 1989 (Vict) did not authorise the imposition of such rates or charges. Wilcox J, who heard the proceedings together, dismissed the claims (1). Telstra and Optus appealed to the Full Court (by consent, Sundberg and Finkelstein JJ, Katz J being unable to continue) which allowed the appeal (2). The councils were granted special leave to appeal to the High Court from the judgment of the Federal Court by Gleeson CJ and Gummow J.

N J Young QC (with him *M N Connock*), for the appellant Victorian councils. A provision such as cl 44 can only operate as a declaration of intention by the Commonwealth Parliament that a legislative regime it has otherwise validly established is intended to be exhaustive or exclusive, with the consequence that s 109 of the Constitution comes into play (3). If cl 44(1) does not trigger the operation of s 109, there are no other means by which the operation of State laws can be nullified or excluded. A provision of a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object. The Commonwealth has no power to bring s 109 into play by a legislative declaration that a class of State laws is not to operate, divorced from any Commonwealth regulation or control of the relevant subject (4). The Commonwealth cannot declare inconsistency to exist where there is none (5). A provision such as cl 44 is invalid if it is a bare attempt to exclude State concurrent power from a subject that the federal legislature has not effectively or exhaustively dealt with or if it attempts to limit the exercise of State legislative power so that the Commonwealth should not be consequentially affected in the ends it is pursuing (6). [GLEESON CJ. What does ''bare'' mean in this context?] It is the word Dixon J used in *Wenn*. A

(1) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.
(2) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.
(3) *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545 at 562-563.
(4) *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 120.
(5) *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1977) 137 CLR 545 at 552.
(6) *Wenn* (1948) 77 CLR 84 at 120.

Commonwealth law is invalid if it is specifically aimed at preventing or controlling State legislative action rather than legislating on a subject within Commonwealth power, or if it is properly characterised as a law that seeks to expand the operation of s 109 (7). Clause 44(1) is not an exercise of power under s 51(v) of the Constitution but an attempt to limit the exercise of State legislative power. It does not deal with the activity of ''postal, telegraphic, telephonic and other like services'' but with the application of State laws to a class of persons defined by the holding of licences to engage in that activity. It purports to impose a criterion for the applicability of State laws to them. Nor is cl 44(1) reasonably capable of being regarded as appropriate and adapted to a purpose lying within the scope of power (8). Nothing in cl 44(1) confines its operation to State laws affecting the provision of telecommunications services by a carrier: it purports to grant a carrier an exemption from compliance with all discriminating State laws on any subject. The Full Court addressed that difficulty by construing cl 44 narrowly. It concluded that the discrimination against which cl 44 gives protection must relate only to the carrying out of the activities referred to in Divs 2, 3 and 4 of Sch 3 of the *Telecommunications Act* 1997 (Cth) (the Telco Act), namely entering on any land and carrying out an inspection for the purpose of determining whether it is suitable for a carrier's purpose (Div 2); installing specified facilities (Div 3); and maintaining its facilities on the land (Div 4). The Court then relaxed that construction in holding that the object of cl 44 is ''to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier in the course of providing the telecommunications services for which the carrier holds a permit''. It was this broader notion of burdening activities, whether or not they fell within Divs 2, 3 and 4 of Sch 3, that the Court employed to underpin its holding that cl 44(1) invalidated Pt 8 of the *Local Government Act* 1989 (Vict). The discriminatory effect identified was that a tax was imposed on carriers who occupy public land where no similar tax was imposed on other bodies that make a similar use of the land. Clause 44(1) was interpreted as requiring carriers to be treated under applicable State laws no less favourably than anyone who makes similar use of public land, regardless of any connection with Divs 2, 3 and 4 activities. The conclusion that the discrimination against which cl 44 gives protection must relate only to the carrying out of those activities cannot be sustained. Clause 44 appears in Div 8 of Sch 3. Unlike Div 7, its operation is not confined to activities described in Div 2, 3 or 4. If Parliament had intended to limit the operation of cl 44 it could have done so expressly. Clause 44(3)-(7) indicate that the intended aim of cl 44(1) was not to protect carriers only where they

(7) *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453.
(8) *Cunliffe v The Commonwealth* (1994) 182 CLR 272.

are carrying out activities authorised by Divs 2, 3 and 4. Parliament thus has no objection to a State tax on those activities. The objection arises under cl 44(1) only if a similar State tax is not imposed on all other persons in a similar position to carriers. The trial judge suggested that cl 44 better fits the description of being ''a law about discrimination, rather than telecommunications''. He correctly stated that cl 44(1) does not necessarily relieve licensed carriers of a tax that the Parliament considered an unreasonable burden on a licensed carrier. It puts States and Territories in the dilemma of forgoing revenue from licensed carriers or changing their own tax policies and amending other State or Territory legislation to provide for the same tax to be imposed on all other users of public land, such as electricity and gas companies. Hence cl 44(1) is accurately described as a law about the exercise of State legislative power.

Parliament may make a law with respect to a subject within the scope of s 51 of the Constitution that is ''exclusive and exhaustive''. If a State law then applies to that subject there is inconsistency and the State law becomes inoperative while both laws remain (9). That is not what occurred with cl 44. Division 7 of Sch 3 of the Telco Act explicitly identifies the extent to which the Commonwealth regime is to be exclusive of State or Territory law. [KIRBY J. Is the relevance of that Division as an indication of the purpose of the federal Parliament for the purposes of s 109 of the Constitution?] Yes. State taxation is not within the exclusive field. Clause 44 was intended to perform the different function of denying operational validity to a State or Territory law that might have a discriminatory effect on carriers or their customers. The juxtaposition of Divs 7 and 8 shows that Div 7 is concerned to define the Commonwealth field. Division 8 is concerned to set up a prohibition against a category of State law. Hence cl 44 does not provide a body of Commonwealth law on which s 109 can operate. *Australian Coastal Shipping Commission v O'Reilly* (10), *Botany Municipal Council v Federal Airports Corporation* (11), *Wenn* (12), and *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (13) do not advance the respondents' case. [MCHUGH J. Doesn't *Australian Coastal Shipping Commission v O'Reilly* (14) destroy your argument?] No. In that case the Commonwealth made positive provision for the operation of the Commission, so that it was appropriate for the Commonwealth to assert that its laws exhaustively and exclusively covered the Commission's position in respect of taxation. While the Full Court

(9) *Western Australia v The Commonwealth* (the *Native Title Act Case*) (1995) 183 CLR 373 at 466.
(10) (1962) 107 CLR 46.
(11) (1992) 175 CLR 453.
(12) (1948) 77 CLR 84.
(13) (1977) 137 CLR 545.
(14) (1962) 107 CLR 46.

correctly concluded that those cases show that the Commonwealth can evince an intention that its laws will make exclusive provisions for the rights and immunities the Parliament has decided that should be enjoyed, thereby bringing s 109 into operation, it was in error in deciding that this is what has occurred in relation to cl 44. Clause 44 is a bare attempt to oust State law. [GUMMOW J. Is that saying that it is unsupported by the Commonwealth's telegraphic power and is invalid?] Yes. Furthermore, it is contrary to the principles of federalism enunciated in *Melbourne Corporation v The Commonwealth* (15). [GUMMOW J. What is State function is eroded by cl 44?] Legislative power.

Assuming that cl 44 is constitutionally valid, there is no relevant inconsistency between Pt 8 of the *Local Government Act* 1989 (Vict) and cl 44 because Pt 8 itself is not discriminatory, and the rates imposed on Telstra and Optus were not discriminatory. Part 8 makes no special provision for carriers and has no differential effect on them. Land occupied by carriers, whether by cables or other installations, is liable to be rated in the same manner as other rateable land. Section 154 of the *Local Government Act* 1989 (Vict) provides (subject to exceptions) that ''all land is rateable''. Liability to pay rates is imposed on the owner or occupier of land under s 156(1), (2) and (3). The ''effect'' of a ''law of a State'' is not to be confused with the effect of individual exercises of power under that law. Clause 44(1)(b) applies only where the law, rather than the mere circumstances of the exercise of a discretion under it, is discriminatory. The effect of Pt 8 is to confer power on a council to declare and collect rates and charges. It does not select any criteria of operation or distinction that result in differentiation between a carrier or carriers and others. Regardless of the terms or effect of the rates in issue, Pt 8 does not have the effect cl 44(1) proscribes. Clause 44(1) does not preclude the operation of Pt 8 and the rates and charges declared thereunder. Hence there is no inconsistency between Pt 8 and cl 44 capable of triggering s 109.

If, however, cl 44(1) invalidates Pt 8 in so far as it authorises the declaration of rates or charges which ''discriminate against'' a carrier, the nature of the proscribed discrimination must be identified. The legal concept of discrimination normally involves an element of inappropriate or unacceptable distinction (16). The essence of discrimination is the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and the unequal outcome is not the product of a distinction is appropriate and adapted to the attainment of a proper objective (17). A prohibition on

(15) (1947) 74 CLR 31.
(16) *Street v Queensland Bar Association* (1989) 168 CLR 461.
(17) *Austin v The Commonwealth* (2003) 215 CLR 185 at 247; *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1 at 31.

''discrimination'' is therefore a prohibition on the differential treatment of relevantly similar persons or things (including activities) on an inappropriate, unacceptable or unjustified basis. [GLEESON CJ. How do you know with whom to compare treatment?] The Telco Act gives little guidance. The Full Court said that the comparators were any others who make a similar use of public space. On the evidence, that included not just other utilities such as electricity and gas franchisees under State legislation but also railway operators, hospitals and users of public space to put up signage. The conception of discrimination recognised in *Street v Queensland Bar Association* (18), *Castlemaine Tooheys Ltd v South Australia* (19) and *Austin v The Commonwealth* (20) is of general application, a point supported by *Cameron v The Queen* (21). The Full Court erred in concluding that although the language in *Street* and *Castlemaine Tooheys* seems to be of general application, it should be confined to its constitutional setting. Further, that conclusion is not supported by *Leeth v The Commonwealth* (22). There was no discrimination against Telstra and Optus. The items, activities or persons said to have received different treatment are not relevantly alike and no distinctions were drawn by the councils in striking the rates on an unacceptable or unjustified basis. The existence of statutory exemptions in relation to electricity, gas and water suppliers confirms that these are basic services, traditionally provided by public utilities, which stand in a different position from cables supplying pay television services. That is recognised by s 154(2) of the *Local Government Act* 1989 (Vict). [KIRBY J. If somebody is looking at a street and in the ground goes one pipe and it is exempt and in the ground goes another pipe and it is taxed, they might conclude that the latter has been discriminated against?] It is not as simple as that. In exercising its rating powers the council is entitled to take account of other factors such as environmental impact and other matters. In any event, no discrimination against carriers inheres in a decision not to impose a rate on a body, person or activity or thing that is, by operation of law, made exempt from such imposts. In not striking comparable rates against electricity and gas companies for their occupancy of public land, the councils were not discriminating but were merely complying with the laws to which they are subject. [He also referred to *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (23) and *Queensland Electricity Commission v The Commonwealth* (24).]

(18) (1989) 168 CLR 461.
(19) (1990) 169 CLR 436.
(20) (2003) 215 CLR 185.
(21) (2002) 209 CLR 339.
(22) (1992) 174 CLR 455.
(23) (1982) 150 CLR 169.
(24) (1985) 159 CLR 192.

F M Douglas QC (with him *K M Connor* and *G R Kennett*), for the appellant New South Wales councils. This litigation ultimately turns on what is meant by ''discrimination'' in cl 44. Section 611 of the *Local Government Act* 1993 (NSW) differentiates between entities such as the Crown, the Sydney Water Corporation Ltd, the Rail Access Corporation (NSW), and electricity ''network operators'' on the one hand, and other persons, including telecommunications carriers, on the other. It does not follow that it ''discriminates against'' carriers in a relevant sense. In legal discourse, ''discrimination'' does not occur whenever two entities or classes are treated differently. It occurs when different treatment is based on a ground which is impermissible, either because legislation says it is impermissible or because it is irrelevant to the object to be obtained, or when apparently equal treatment has a differential impact according to a criterion which is impermissible, giving rise to what is referred to as ''indirect discrimination'' (25). The Full Court erred by treating the analysis in *Street* and other cases as limited to a ''constitutional'' context and by seeking to give ''discriminate'' its ''ordinary English meaning''. First, nothing in the dicta of this Court limits their application to ''constitutional issues''. Secondly, the ''ordinary signification'' apparently applied by the Full Court does not supply any test for when discrimination occurs. Discrimination is said to occur when a tax is imposed on a carrier in respect of its occupation of a public place but is not imposed on ''other bodies which make a similar use of public places''. No criterion of ''similarity'' emerges from the intersection of cl 44 and s 611, except through the analysis suggested by Gaudron J in *Street* (26) and by Gaudron and McHugh JJ in *Castlemaine Tooheys* (27) which identifies three categories of direct discrimination. The first involves a distinction which some overriding law decrees irrelevant. Clause 44 may be seen as an overriding law which proscribes discrimination against an entity on the ground that it is a carrier or a member of a particular class of carriers. Since discrimination involves comparison, the categories of person protected by cl 44(1) suggest that its aim is to proscribe discrimination against carriers because they are carriers. Section 611 does not effect discrimination on that basis. It operates by reference to a distinction between entities which are exempted and other persons, including but not limited to carriers. The second category involves a distinction which is irrelevant to the object to be attained. The purpose of s 611 is to allow councils to charge persons who occupy or enjoy the use of public places what is in effect an occupation rent. The legislative scheme exempts particular bodies from those charges, presumably to

(25) *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478.
(26) (1989) 168 CLR 461 at 570-571.
(27) (1990) 169 CLR 436 at 478.

further other legislative purposes relating to them or the services they provide. The distinctions are clearly not irrelevant to those objectives. [GLEESON CJ. Are those who enjoy exemptions in competition with Telstra or Optus?] There was no evidence that they were. [GLEESON CJ. Could it be that the telecommunication carriers are in competition with the exempted bodies for the use of the space?] There is no suggestion of that in the evidence. The third broad category involves different treatment which operates by reference to a relevant difference but is not appropriate and adapted to that difference. The issues here are whether the distinction operates by reference to some real difference and whether the difference in treatment is reasonably capable of being seen to advance the relevant objective. [HAYNE J. What is the comparator to which cl 44(1)(a) invited attention?] In the case of particular carriers, other carriers. In the case of carriers generally, we have difficulty in finding a comparator and tend to the view that the best way is to read that as discrimination in the sense of laws aimed against, as distinct from seeking equality of treatment. [KIRBY J. If the purpose of the federal legislation is to ensure a level playing field for those who supply public services and require access to public land to do so, what difficulty is there in finding a comparator?] The ''similarity'' between the telecommunication carriers and the exempt bodies begins and ends with the fact that they occupy public land and offer services to the public. On the other hand, several differences may be identified which may be thought to justify different treatment. The fundamental difference is that, while the carriers occupy the land pursuant to rights granted by Commonwealth law, the exempted bodies are the Crown and its statutory agents who occupy the land pursuant to State statutory authority. There is nothing irrelevant or inappropriate in a regime that does not allow the councils, as custodians of the land for the State, to charge the State itself and its agents, while allowing charges to be levied against others. Other differences may also be relevant, including one between essential services such as water, sewerage and electricity on the one hand, and cables providing pay television and internet access on the other; a difference between privately owned commercial entities and publicly owned entities; and one between profit-making activities and those undertaken without charge. It is undesirable for a court to be required to pronounce on the legitimacy of such distinctions. However, none is irrelevant to the object of the statutory regime of which s 611 forms a part, one of those objects being to allow councils to give effect to social policies through decisions about the level and applicability of charges. Nor do they equate with the distinction which cl 44 apparently proscribes. The contention that the carriers are discriminated against by s 611 because it provides exemptions to a small group of identified entities does not coincide with any legal concept of

''discriminate against'' a person or group. [MCHUGH J referred to *The Commonwealth v Cigamatic Pty Ltd (In liq)* (28).]

If s 611 of the *Local Government Act* 1993 (NSW) infringes the cl 44 standard, the New South Wales councils contend that, in so far as cl 44 seeks to protect corporations engaged in the business of providing telecommunications services, it goes beyond power under s 51(v) of the Constitution. The Full Court avoided this conclusion by reading cl 44 down to apply only to certain activities. It attempted to deduce the object of cl 44 from its statutory context and then to equate it with ''what the law does in fact''. It concluded that once it is seen that the principal purpose of Sch 3 of the Telco Act is to authorise a carrier to engage in the Divs 2, 3 and 4 activities, it is a short step to conclude that the discrimination against which cl 44 gives protection must relate to the carrying out of those activities. If that is the scope of cl 44, it does not intersect with s 611 because the ''activities'' mentioned in those Divisions all relate to construction, installation and maintenance of telecommunications facilities, not their occupation, use or enjoyment. More generally, the Court's approach never reaches the text of cl 44 or its ''practical application . . . in the circumstances to which it applies'' (29). The Court did not determine how the cl 44 concept of discrimination worked before it determined the validity of the clause. Clause 44 has to be read down to achieve the Full Court constructions since it is not limited to telecommunications services. Such reading down cannot be achieved by the exercise of judicial power. Further, if cl 44 is to achieve its aim it must trigger s 109 of the Constitution. The Commonwealth has no other means to exclude or limit the operation of State laws. It may establish a statutory corporation with functions within a head of Commonwealth power and exempt it from the application of State taxes (30). The reasoning there focuses on the character of the corporation as carrying on functions on behalf of the Crown, so that the exemption reflects the immunity of the Commonwealth from such taxes. But the Commonwealth has no general power to grant exemptions from compliance with State laws. It can exclude the operation of a State law only by enacting a law that is inconsistent with it. Further, because cl 44(1) does not merely declare the regime of the Telco Act to be exclusive, it does not gain validity from the bulk of that regime. Finally, cl 44 is, in effect, an attempt to dictate the contents of State law in areas including, but going beyond, the rights of carriers. Hence it is inconsistent with the preservation of State constitutions and the powers of State Parliaments by ss 106 and 107 of the Constitution. [He also referred to *Essendon Corporation v*

(28) (1962) 108 CLR 372.
(29) *Leask v The Commonwealth* (1996) 187 CLR 579 at 591.
(30) *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.

Criterion Theatres Ltd (31); *Collins v Charles Marshall Pty Ltd* (32); *Victoria v The Commonwealth* (the *Second Uniform Tax Case*) (33); *Commissioner of Main Roads (NSW) v North Shore Gas Co Ltd* (34); *Gazzo v Comptroller of Stamps (Vict)* (35); and *Department of Revenue (Oregon) v ACF Industries Inc* (36).]

P A Keane QC, Solicitor-General for the State of Queensland, (with him *G R Cooper*), for the Attorney-General for that State, intervening. Our submissions concern the validity of cl 44 and assume the resolution of the construction arguments against the councils. Clause 44 is novel in that it declares State laws to have no effect and directs people that they are not to obey them. It is a legislative expedient without precedent or judicial support. The Full Court's reasoning overstates the extent of Commonwealth legislative power. [HAYNE J. The argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect in a line of cases from *The Commonwealth v Queensland* (37). Is your argument different?] There is a difference between a Commonwealth law that says ''This is our creature and it shall enjoy these rights and immunities'', which are the terms of the kind of legislation upheld in the past, and the legislation now before the Court, which says ''This is our creature, we do not choose to clothe it with any right or immunity but we say that a State law that impinges on it in a particular way shall be of no effect.'' Clause 44 does not create any rights and immunities. It has no operation other than by reference to State law in respect of State land. Section 109 contemplates a comparison between two sets of laws which create duties, rights, obligations and immunities and resolves conflict, if it exists, in favour of the Commonwealth. Clause 44 purports to obviate the need for that comparison by striking directly at the State law and without pausing to prescribe a conflicting rule. Dixon CJ said in *Wenn* (38) that this is a difficult area because one confronts questions of characterisation and the implication to be discerned from the presence of s 109 in the Constitution. [He also referred to *Adams v Rau* (39); *Australian Coastal Shipping Commission v O'Reilly* (40); *Hematite Petroleum Pty Ltd v Victoria* (41);

(31) (1947) 74 CLR 227.
(32) (1955) 92 CLR 529.
(33) (1957) 99 CLR 575.
(34) (1967) 120 CLR 118.
(35) (1981) 149 CLR 227.
(36) (1994) 510 US 332.
(37) (1920) 29 CLR 1.
(38) (1948) 77 CLR 84 at 120.
(39) (1931) 46 CLR 572.
(40) (1962) 107 CLR 46.
(41) (1983) 151 CLR 599.

Mutual Pools and Staff Pty Ltd v Commissioner of Taxation (42); and *Ha v New South Wales* (43).]

R M Mitchell (with *R J Meadows* QC, Solicitor-General for the State of Western Australia), for that State and the Attorney-General for that State, intervening. Clause 44 is a law aimed at preventing or controlling State legislative action in a manner that infringes the limitation on Commonwealth legislative power which, if it does not arise from the express provision of s 107 of the Constitution, arises by implication from the structural considerations identified in *Melbourne Corporation v The Commonwealth* (44). Commonwealth laws which are bare attempts to limit or exclude State legislative power; which seek to limit State power rather than lay down a positive rule; or which are aimed at preventing or controlling State legislative action rather than legislating on a subject matter within Commonwealth power, are invalid (45). If the Commonwealth can simply provide that State laws that have some connection with a head of legislative power are of no effect and by that means engage s 109, it will then have practical control over the laws, or a large range of laws, which the State legislatures can effectively enact. A general capacity to do that, particularly in the area of State taxes and charges, could have a dramatic impact on the federal structure established by the Constitution which includes provision for State legislatures which are independent from Commonwealth control. [GUMMOW J referred to *The Commonwealth v Queensland* (46).] [Counsel also referred to the *Second Uniform Tax Case* (47); *Australian Coastal Shipping Commission v O'Reilly* (48); the *Native Title Act Case* (49); and *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (50).]

P M Tate SC, Solicitor-General for the State of Victoria, (with her *K L Emerton*), for that State and the Attorney-General for that State, intervening. Clause 44 should be held invalid because it seeks to use s 109 as a source of legislative power. Clause 44 seeks to manufacture a Commonwealth regime concerning the imposition of municipal rates and the exemptions from them, then render invalid any State law inconsistent with that regime by purporting to cover the legislative field. The sphere of operation of cl 44 cannot be ascertained

(42) (1992) 173 CLR 450.
(43) (1997) 189 CLR 465.
(44) (1947) 74 CLR 31.
(45) *Wenn* (1948) 77 CLR 84; *Lamshed v Lake* (1958) 99 CLR 132; *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453.
(46) (1920) 29 CLR 1.
(47) (1957) 99 CLR 575.
(48) (1962) 107 CLR 46.
(49) (1995) 183 CLR 373.
(50) (1997) 190 CLR 410.

independently of the terms and effect of State laws. [GUMMOW J. What follows from that submission?] It is not that cl 44 should be characterised as a law about State laws and can have no other characterisation but that because it has that feature, connection with the head of legislative power under s 51(v) of the Constitution is colourable. [MCHUGH J referred to *R v Licensing Court of Brisbane; Ex parte Daniell* (51).] It is not that a Commonwealth law can make no reference to a State law but that nothing in cl 44 provides it with content until one looks to the terms and effect of State laws. [MCHUGH J. What about the word ''discriminating''? It is not as if cl 44 said ''no law of a State or Territory shall apply to a carrier''. It says, ''no law which discriminates''. So it is discrimination against which the Commonwealth law seeks to protect.] The Commonwealth has no legislative power in relation to discrimination. One cannot tell whether a State law is discriminatory without examining its terms and effect. That is the first of two features that provide a basis for considering that any connection with s 51(v) is a colourable connection, and it is one noted by the trial judge. The second feature which suggests that there is only a colourable connection is that cl 44 is potentially applicable to any State law. It could cover the whole of State legislative power.

P J Hanks QC (with him *J M Jagot*), for the Telstra respondents. If s 611 of the *Local Government Act* 1993 (NSW) authorised the councils to make a charge on Telstra and other carriers in respect of their occupation and possession of structures laid, erected, suspended, constructed or placed on, under or over a public place, in circumstances where they were not authorised to make a similar charge on other entities in respect of their occupation and possession of such structures, it would have the effect of discriminating against Telstra as a carrier by exposing it to the exercise of an authority that could not be exercised in relation to other entities making a similar use of public places. The councils contend that the concept of ''discrimination'' in cl 44(1) of the Telco Act involves something more than differential treatment and that it requires different treatment being accorded to persons or things by reference to considerations which are irrelevant to the object to be attained (52) or different treatment not appropriate and adapted to the difference which supports the distinction (53). The contexts in which those formulations were developed are important. *Street* involved the application of s 117 of the Constitution, while *Castlemaine Tooheys* involved the freedom guaranteed by s 92. In each case, the Constitution supplied the key to an ''object to be obtained'' that could justify differential treatment. In

(51) (1920) 28 CLR 23.
(52) *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571.
(53) *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478.

contrast, the discrimination to which cl 44(1) refers is to be identified by reference to the terms and the context of that provision. The critical question is what degree of protection did the Parliament intend to extend to carriers when it proscribed State and Territory laws which ''discriminated against'', or had ''the effect ... of discriminating against'' them? The language of cl 44(1) indicates that it intended to protect carriers generally from State and Territory laws which imposed special burdens on carriers or isolated them from the general law applicable to others; and to protect a particular carrier from State and Territory laws which imposed a special burden on that carrier or isolated it from the general law applicable to others or to carriers generally without regard to the policy objective of the particular State or Territory law. The questions whether any distinction drawn by the State or Territory law is ''valid'', seeks to further ''other legislative purposes'', or is based on a ''real difference'' that advances a ''relevant object'' are irrelevant to cl 44(1) protection.

The Explanatory Memorandum to the Bill for the Telco Act resolves the ambiguities raised by the councils and Wilcox J who noted that cl 44(1) did not express criteria of what differences between affected persons were discriminatory. The Memorandum identifies one class of difference between affected persons which will be discriminatory: having or not having the status of a carrier where two entities have ''similar facilities''. It is also said that cl 44(1) does not identify the relevant comparator for the purposes of that clause, that is the other entities standing in a similar situation to carriers. The Memorandum identifies the relevant comparator: other entities, such as electricity authorities, owning ''street furniture'' where a tax is imposed on a carrier but not on the other entities. [MCHUGH J. Why are you discriminated against in that sense?] The effect of s 611, if valid, is to impose on or to expose Telstra to a burden or a liability to which other users of cables and pipelines installed on public land are not exposed. [GUMMOW J. Is it enough to say ''some other users''?] Yes. The absence of discrimination against Telstra compared to a gas supplier does not deny that there is discrimination against Telstra compared to other users — water, electricity, commercial pipelines holding licences under the *Pipelines Act* 1967 (NSW) (54). The Explanatory Memorandum does not suggest that any differential burdening of carriers' facilities might be justified because of ''protection of the local environment'' or other considerations such as the differences between ''essential'' and other services. It is beside the point that s 611 does not select any criteria of operation or distinction that differentiate between carriers and others or that the power to impose rates and charges is indifferent to whether the land is occupied or used by a carrier. To the extent that s 611 authorises the imposition of charges

(54) *ACF Industries Inc v Department of Revenue (Oregon)* (1992) 961 F 2d 813 (9th Cir).

on Telstra in respect of its possession, occupation or enjoyment of cables under and over public places, it has the effect of exposing Telstra to less favourable treatment than the treatment accorded to other entities which make the same use of that land. As the Full Court observed, the parity of treatment approach accords with the meaning which an ordinary lay person would accept as correct. The councils' complaint that the Full Court failed to consider the differences that might justify different treatment is beside the point because the identity or objects of different users of public places is not a criterion which cl 44 makes relevant.

The appellants contend that cl 44(1) is beyond power because it purports to exempt a carrier from all discriminatory State law on any subject matter and is not a law with respect to the subject matter of s 51(v) of the Constitution. On the contrary, it operates to prevent State law from adding to the burdens of a carrier in its activities as a carrier regulated by, and subject to, the Telco Act. There is no inconsistency between the Full Court's reading of cl 44(1) as conferring a protection on carriers relating to the carrying out of the activities mentioned in Divs 2, 3 and 4, and its conclusion that cl 44 protects carriers against discriminatory legislation which would burden the activities of a carrier in the course of providing telecommunication services for which it holds a permit.

If the character of cl 44(1) is found by reference to the rights, duties, powers and privileges it changes, regulates or abolishes, it is a law with respect to the subject matter of s 51(v) of the Constitution (55). Clause 44 operates directly on activities that involve or are related to the provision of telecommunication services (56). It does not matter that cl 44 immunity is conferred on an entity which is not a Commonwealth agency (57). The connection with the relevant head of Commonwealth power is substantial and not tenuous or distant (58). The concern that cl 44(1) is an attempt to dictate the content of State law and interfere directly in the exercise of State legislative powers is misconceived. An otherwise valid Commonwealth law cannot be limited by a concern that it may intrude on the legislative area of the States because there is no exclusive area of State legislative power (59). Finally, Commonwealth legislative power extends to a law which expressly excludes the operation of State laws provided the enactment is within a subject matter of federal power. It is of no consequence that cl 44(1) directly operates on a State law.

(55) *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.
(56) *Cunliffe v The Commonwealth* (1994) 182 CLR 272; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188.
(57) *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 55.
(58) *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
(59) *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *The Commonwealth v Tasmania* (1983) 158 CLR 1.

Clause 44(1) is no more an attempt to deny operational validity to a State law, or to exclude the operation of a State law, on a subject outside Commonwealth power than was the *Native Title Act* 1993 (Cth) (60). [GUMMOW J. Is cl 44 is closer to s 11 than to s 12 of the *Native Title Act*.] Yes. The function of cl 44(1) is to protect or immunise carriers in the performance of those activities which the holding of a carrier licence under the Telco Act authorises from the effect of State laws that discriminate against carriers or have the effect, directly or indirectly, of discriminating against them. [CALLINAN J. Could Parliament confer complete immunity against a noise tax sought to be exacted from a State in respect of a totally privatised airport?] So long as there is a sufficient connection with the trade and commerce power. [He also referred to *Queensland Electricity Commission v The Commonwealth* (61); *Waters v Public Transport Corporation* (62); and *Botany Municipal Council v Federal Airports Authority* (63).]

D F Jackson QC (with him *N Perram*), for the Optus respondents. When Parliament has power to create or authorise a body to participate in the provision of services of a kind contemplated by s 51(v) of the Constitution, it has power to enact provisions that will facilitate or promote such activities (64). The manner in which and the extent to which the power is exercised is for Parliament to determine. The suggestion that the power is limited to Commonwealth bodies or does not apply to particular classes of activities is incorrect (65). The need for provisions dealing with the application of State laws to the activities of bodies authorised by the Commonwealth to provide services contemplated by s 51(v) was adverted to by Latham CJ in *R v Brislan; Ex parte Williams* (66). In enacting cl 44, Parliament recognised that a carrier will operate in a milieu in which there is a significant body of State laws which otherwise might be applicable to it. While Parliament cannot pass a law which does no more than exclude State law from a particular area, it is just as well established that where it has established under a system of rights, liabilities, immunities, privileges or powers, it may protect that regime from the operation of State law (67). Parliament has established such a system here. Schedule 1 of the Telco Act contains a complex set of statutory obligations inhering in the holding of a carrier's licence. Provided the Commonwealth has power to make a regime it has established exclusive and exhaustive, it may do so by express declaration or by

(60) *Native Title Act Case* (1995) 183 CLR 373.
(61) (1985) 159 CLR 192.
(62) (1991) 173 CLR 349.
(63) (1992) 175 CLR 453.
(64) *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.
(65) *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453.
(66) (1935) 54 CLR 262 at 276.
(67) *Wenn* (1948) 77 CLR 84.

implication (68). There is no reason why it could not, in cl 44(1)(a), use the expression ''a law of the State ... has no effect''. The phrase is no different in effect from those of s 52B of the *Inscribed Stock Act* 1911 (Cth) in issue in *The Commonwealth v Queensland* (69) or of s 27(5)(a) of the *Re-establishment and Employment Act* 1945 (Cth) in issue in *Wenn* (70). [CALLINAN J referred to *Commissioner of Stamps (Q) v Counsell* (71).] In *Botany Municipal Council v Federal Airports Authority* (72), all Justices said there can be no objection to a Commonwealth law on a subject within a head of power providing that a person is authorised to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. The opening words of cl 44(1) are no different in effect. The only difference is that the legislature, by the restriction in ''to the extent ...'' has identified a more limited area of exclusion than it need have done.

It is erroneous to imply a need for a Commonwealth law to ''engage'', ''trigger the operation of'' or ''bring into play'' s 109. To characterise a Commonwealth law as one with respect to discrimination, or discriminatory State laws, is not fatal to validity. Commonwealth laws may have a dual, or multiple, characterisation and it is sufficient for validity that only one of them is within a head of power (73). The *Racial Discrimination Act* 1975 (Cth) is a law with respect to discrimination and discriminatory State laws. That does not deny its validity as a law with respect to external affairs. Every Commonwealth law which expresses directly the intention that State law be excluded is capable of description as a law with respect to or operating directly on State laws, yet such laws may be valid. Clause 44(1) involves acceptance of the proposition that a carrier will be subject to a law of a State to the extent to which it does not discriminate against a carrier, or against a class of carriers, or against carriers generally. The contention that cl 44(1) goes beyond power because it may apply to State laws dealing with activities of a carrier unrelated to the provision of telecommunications services should be rejected. The references to discriminate against a ''particular carrier'', ''particular class of carriers'' and ''carriers generally'' make it apparent that cl 44(1) contemplates discrimination against such persons as carriers. That is supported by a consideration of the provisions of the Telco Act dealing with carriers and is confirmed by the Explanatory Memorandum (74). The Memorandum is unusual in

(68) *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46.
(69) (1920) 29 CLR 1.
(70) (1948) 77 CLR 84.
(71) (1937) 57 CLR 248.
(72) (1992) 175 CLR 453 at 465.
(73) *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479.
(74) *Acts Interpretation Act* 1901 (Cth), s 15AB(2)(e); *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85.

that it gives as an example of the mischief to be avoided the very subject matter of this litigation.

The Victorian councils contend that the effect of a State law is not to be confused with the effect of exercises of power under that law, that cl 44 requires that the effect of State laws themselves not be discriminatory, that the State rating laws in question do not have a discriminatory effect on their face, and that any discriminatory effect occurred only when decisions to issue rates and charges was made under State laws. That argument assumes that a decision to issue rates and charges had legal effect without the law which authorised it. If a State law authorises exactions to which cl 44(1) would otherwise apply, it has the ''effect'' referred to in cl 44(1). In addition, a charging notice issued under the *Local Government Act* 1993 (NSW) only creates a legal obligation to pay the charges by virtue of s 611(2), which provides that it may be recovered as if it were a rate. Section 695 makes rates recoverable as debts. Thus the only effect of a decision to issue a charge is by virtue of s 695.

The State laws in question give rise to discrimination in the ordinary sense of the term. Various utilities lay pipes or cables over or under public places. No charge, tax or other imposition is imposed on them for doing so. Yet Optus and Telstra are made subject to a charge for the use of the land for the purposes of their cables. That set of circumstances must have the effect of discriminating against the carriers. Hence there is operational inconsistency between the State laws and cl 44(1) of Sch 3 of the Telco Act. [He referred to *Australian Gas-Light Co v Glebe Municipal Council* (75); *Jones v The Commonwealth [No 2]* (76); *Castlemaine Tooheys Ltd v South Australia* (77); and the *Native Title Act Case* (78).]

H C Burmester QC (with him *M A Perry*), for the Attorney-General for the Commonwealth, intervening. The submissions for Telstra and Optus on the scope of cl 44 adopt the Commonwealth's position. The Commonwealth also adopts what has been said on the issue of discrimination with one minor qualification of Telstra's submission that it is sufficient that one exemption from a State law would be sufficient to show discrimination. Clause 44 requires one to look at the practical effect of the law and to see if there is an irrelevant distinction and hence discrimination. Because of the way cl 44 is framed, there is no need to delve into the situations which arise where competing considerations exist, such in s 92 cases dealt with in *Castlemaine Tooheys Ltd v South Australia* (79). Discrimination is determined by reference to whether there is an irrelevant distinction and irrelevant

(75) (1922) 6 LGR (NSW) 39.
(76) (1965) 112 CLR 206.
(77) (1990) 169 CLR 436.
(78) (1995) 183 CLR 373.
(79) (1990) 169 CLR 436.

distinction is determined by looking at the operation and effect of the Commonwealth law which provides immunity. One then looks for similar comparators; for the reasons given, those who occupy public land by infrastructure for the transmission of goods and services are appropriate, having regard to the object, purpose and scheme of the authorisation contained in the Telco Act. The fact that there is one other like person, in this case AGL, that may be taxed, does not remove the discrimination. [He referred to *Melbourne Corporation v The Commonwealth* (80); *Hudson v Venderheld* (81); *Queensland Electricity Commission v The Commonwealth* (82); and the *Native Title Act Case* (83).]

The appellant councils were given leave to file written submissions in reply.

N J Young QC, in reply. None of the constructions of cl 44(1) found in the Full Court's reasons for judgment or in the submissions of Telstra and Optus can be reconciled with the plain language of cl 44 and Sch 3 of the Telco Act or with the Explanatory Memorandum. To argue that the State laws are invalid because they are inconsistent with cl 44(1) is simply to assert that cl 44 directly invalidates the State laws, which it cannot do.

F M Douglas QC, in reply. The approach of Optus contains the same error generally made by the Full Court, to consider the validity of the law before construing it and determining its operation and effect. The Telstra submissions proceed on an assumption that if it can be established that cl 44(1) is sustained in any part of its operation by s 51(v) of the Constitution, it is valid in all parts of its operation. That is not the law.

Cur adv vult

28 April 2004

The following written judgments were delivered: —

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. These appeals are brought by a number of New South Wales and Victorian local authorities against a decision of the Full Court of the Federal Court of Australia (84) which declared invalid certain legislation of those States to the extent to which the legislation authorised local authorities to impose charges in respect of the possession, occupation and enjoyment of telecommunications cables on, under, or over a

(80) (1947) 74 CLR 31.
(81) (1968) 118 CLR 171.
(82) (1985) 159 CLR 192.
(83) (1995) 183 CLR 373.
(84) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

public place, or to levy rates in respect of land or space occupied by such cables.

2 The respondent corporations, referred to in the Federal Court collectively as the Telstra parties and the Optus parties, or simply Telstra and Optus, are carriers under the *Telecommunications Act 1997* (Cth) (the Telco Act). (Some of the local authorities that were parties to the original proceedings have also been joined as respondents.) Telstra and Optus each commenced separate proceedings in the Federal Court challenging, on a number of grounds, the lawfulness of charges and rates imposed or levied in respect of telecommunications cables by local authorities including the present appellants. All grounds of challenge failed at first instance before Wilcox J (85). Most are not in issue in this Court. The Full Court (Sundberg and Finkelstein JJ) reversed the decision of Wilcox J, upholding an argument of Telstra and Optus that the State legislation under which the rates and charges were levied and imposed was, to the extent to which such legislation authorised the rates and charges, inconsistent with a provision of the Telco Act, and invalid pursuant to s 109 of the Constitution (86). The outcome of these appeals turns upon that argument.

The broadband cable networks

3 In his reasons, Wilcox J said that part of the background to this litigation involved ''community concern at the extent of the broadband cabling that was aerially erected in many parts of Australia during the mid-1990s'' (87), and the response of local government authorities. In about 1995, Telstra and Optus commenced installing and laying broadband cable networks in the Sydney and Melbourne metropolitan areas. A broadband cable network uses a wider frequency band than is necessary to transfer speech telephonically. It comprises links between exchanges, between exchanges and a customer's tap-off point, and between a customer's tap-off point and equipment at a customer's premises. It permits a flow of information for a number of purposes, including internet services and cable television.

4 The principal functions of the Telstra broadband network are to provide pay television, high-speed internet access, and telephony services (88). By a chain of legislative title identified in *Telstra Corporation Ltd v Worthing* (89), Telstra is the successor to the Australian Telecommunications Commission which was continued as a body corporate under the name ''Telecom''; this body (Telecom) had

(85) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.
(86) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198. The third judge of the Full Court became unable to continue as a member of the Court and later resigned.
(87) *Telstra* (2000) 105 FCR 322 at 329 [2].
(88) *Telstra* (2000) 105 FCR 322 at 335 [22].
(89) (1999) 197 CLR 61 at 71 [9].

a monopoly as a telephone carrier. Telecom's telephony system originally used extensive aerial cabling, but later this was progressively placed underground (90). Telstra's cable network was designed to make use of existing infrastructure, including underground ducts and existing electricity poles. The coaxial cable component of the network is reticulated either underground or aerially. In the case of aerial reticulation, existing poles are used. In the case of underground reticulation, existing underground pipes and ducts/conduits are used. In metropolitan Sydney and Melbourne, approximately one quarter of Telstra's coaxial cables are reticulated aerially, and approximately three quarters are reticulated underground. Aerial cables are secured to poles, which typically also carry electricity conductors and cables. Underground cables may be reticulated along with other services such as water, gas, electricity and sewerage (91).

5 The Optus network comprises mainly aerial coaxial cables. Between April/May 1995 and March 1997, Optus laid cables and installed other structures on, under and over land of the appellants. As at 1 July 1997, the Optus network provided a local telephone service, some pay television, and high-speed data products. During the year ended 30 June 1998, Optus used its network to provide pay television to residential subscribers in each appellant's area.

6 The Full Court pointed out that, since Federation, telecommunications services have been provided either by the government (the Postmaster-General), or a statutory corporation (such as Telecom), or by a public company (such as Optus), including a company in which the Commonwealth holds a majority of shares (Telstra) (92). It has always been necessary for the Parliament to confer powers to install and operate facilities. The present federal regulatory regime confers such powers, but extends beyond that. It is convenient to turn to the principal features of that regime.

The federal legislation

7 In the exercise of its powers, including the power, conferred by s 51(v) of the Constitution, to make laws with respect to postal, telegraphic, telephonic, and other like services, the Parliament, in the Telco Act, provided a regulatory framework which was intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community (s 3). ''Carriage service'' is defined to mean a service for carrying communications by means of guided and/or unguided electromagnetic energy (s 7). Part 2 of the

(90) *Telstra* (2000) 105 FCR 322 at 337 [31].
(91) *Telstra* (2000) 105 FCR 322 at 335 [18]-[20].
(92) *Telstra* (2002) 118 FCR 198 at 208 [21].

Telco Act deals with network units, which include links of the kind owned by Telstra and Optus. An owner of network units wishing to supply a carriage service to the public must hold a carrier licence (s 42). Such a licence entitles the carrier to use a network unit to supply carriage services to the public. It is subject to specified conditions, including compliance with the Telco Act, and with other conditions declared by the Minister (s 63).

8 As s 3 of the Telco Act states, the regulatory framework is contained, not only in the Telco Act, but also in Pts XIB and XIC of the *Trade Practices Act* 1974 (Cth), which are to be read together with the Telco Act. Part XIB sets up what is described in s 151AA (the simplified outline) as a special regime for regulating anti-competitive conduct in the telecommunications industry. A carrier or carriage service provider must not engage in anti-competitive conduct. That ''competition rule'' is subject to the supervisory power of the Australian Competition and Consumer Commission (the Commission), which may make orders exempting specified conduct from the scope of the definition of anti-competitive conduct, direct carriers and carriage service providers to file tariff information, make record-keeping rules for carriers and carriage service providers, and direct carriers and carriage service providers to make certain reports available for inspection. The object of Pt XIC is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services (s 152AB). As explained in the simplified outline (s 152AA), the Part sets out a ''telecommunications access regime''. The Commission may declare carriage services and related services to be declared services. Providers of declared services are required to comply with standard access obligations, which facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services. Provision is made for the terms and conditions of such access, and for dispute resolution by the Commission where necessary.

9 The simplified outline of the Telco Act (s 5) refers to the obligations of carriage service providers and content service providers to comply with service provider rules. The Australian Communications Authority monitors, and reports to the Minister on the performance of, service providers. The legislation provides both for voluntary industry codes, and for mandatory industry standards. There is established what is called a universal service regime with the object of ensuring that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis, to standard telephone services, payphones and prescribed carriage services. Provision is made for regulating call charges and various aspects of the services provided pursuant to the legislation, and for standard agreements for the supply of carriage services.

10 The predecessor of the Telco Act was the *Telecommunications Act* 1991 (Cth). That Act made provision for the licensing of carriers, and

their obligations, rights and immunities. Section 116 of the 1991 Act provided for regulations exempting activities from State and Territory laws. The regulations specified activities including the construction, maintenance and repair of facilities, being part of a carrier's telecommunications network. A carrier was permitted to engage in an exempt activity despite a law of a State or Territory about the powers and functions of a local government body or the use of land. The cables the subject of the rates and charges challenged in this litigation were installed during the period of operation of the 1991 Act, and pursuant to authorities and exemptions conferred by or under that Act (93).

11 Provisions dealing with the application of State laws to the conduct of service providers carrying on activities authorised by the Commonwealth pursuant to s 51(v) are familiar. In *R v Brislan; Ex parte Williams* (94), Latham CJ said:

> ''It is a question of policy whether there should be any and what legislation upon such subjects as communication services. A telephone service may be provided by a private person or by an ordinary public company, or by a public company or other corporation operating under a franchise or other special power, or by a Government department. The necessity for acquiring rights to erect poles and to place conduits in public highways has in practice made it necessary for the Legislature to confer special powers upon a company or specially created body or upon a Government department ... It appears to me to be impossible to attach any definite meaning to s 51(v) short of that which gives full and complete power to Parliament to provide or to abstain from providing the services mentioned, to provide them upon such conditions of licences and payment as it thinks proper, or to permit other people to provide them, subject or not subject to conditions, or to prohibit the provision of such facilities altogether.''

12 To return to the Telco Act, Pt 24, headed ''Carriers' powers and immunities'' consists of a single, proleptic, provision:

> ''484. Schedule 3 has effect.''

Schedule 3 occupies fifty-seven pages of the current print of the Telco Act. The simplified outline of the general provisions contains the following summary of the Part. A carrier may enter on land and install and maintain a facility on the land. ''Installation'' is defined to include activities ancillary or incidental to installation (Sch 3, cl 2), and would embrace occupation of land by facilities. The power of installation is limited to certain kinds of facility, and its exercise requires a permit. The circumstances in which permits will be issued are defined. A

(93) *Telstra* (2000) 105 FCR 322 at 352 [92].
(94) (1935) 54 CLR 262 at 276-277.

carrier exercising these powers must comply with certain conditions. One condition is that a carrier must take all reasonable steps to ensure that it causes as little detriment and inconvenience as is practicable. Only a carrier may install (Sch 3, cl 6) or enter land to maintain (Sch 3, cl 7) a facility. Division 7 of Pt 1 of the Schedule is headed ''Exemptions from State and Territory laws''. It provides (cl 36) that activities of carriers are not generally exempt from State and Territory laws, but cl 37 goes on to provide that activities authorised by Div 2, 3 or 4 may be carried on despite certain laws of a State or Territory, including environmental, heritage, and other specified kinds of law (95). Clauses 38 and 39 are as follows:

> ''38. It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.
> 39. This Division does not affect the liability of a carrier to taxation under a law of a State or Territory.''

13 In Div 8 of Pt 1 of the Schedule there appears cl 44, which is central to the present appeals. It is in the following terms:

> ''(1) The following provisions have effect:
> (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
> (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
> (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.
> (2) The following provisions have effect:
> (a) a law of a State or Territory has no effect to the extent to

(95) Clause 42 provides for the recovery of compensation by persons suffering financial loss or damage because of anything done by a carrier under Div 2, 3 or 4 in relation to any property owned by such persons or in which they have an interest. There is no question in these appeals respecting the operation of cl 42.

which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an *eligible user*.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act* 1901.''

The State legislation

14 The *Local Government Act* 1993 (NSW) contained (96) the following provision:

''611. (1) A council may make an annual charge on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place.

(2) The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.

(96) There were inconsequential amendments in 1998 and 2000.

(3) The annual charge is to be based on the nature and extent of the benefit enjoyed by the person concerned.

(4) If a person is aggrieved by the amount of the annual charge, the person may appeal to the Land and Environment Court and that Court may determine the amount.

(5) A person dissatisfied with the decision of the Court as being erroneous in law may appeal to the Supreme Court in the manner provided for appeals from the Land and Environment Court.

(6) This section does not apply to:

(a) the Crown, or

(b) the Sydney Water Corporation Limited, the Hunter Water Corporation Limited or a water supply authority, or

(c) Rail Access Corporation, or

(d) the owner or operator of a light rail system (within the meaning of the *Transport Administration Act* 1988), but only if the matter relates to the development or operation of that system and is not excluded by the regulations from the exemption conferred by this paragraph.''

15 The exemptions contained in s 611(6) are not exhaustive. Other legislation exempts other utilities from the charges authorised by s 611. In particular, s 50 of the *Electricity Supply Act* 1995 (NSW) exempts electricity network operators and s 40 of the *Pipelines Act* 1967 (NSW) exempts licensed operators of a pipeline. On the other hand, at the relevant times, gas suppliers were not exempt.

16 The *Local Government Act* 1989 (Vict), in Pt 8, provides that, subject to certain exceptions, all land is rateable. The exceptions include land that is owned by the Crown and used exclusively for public or municipal services (which, as the Full Court said, includes water distribution to households and other premises and road structures such as signs, lights and signals) (97). Section 46(1A) of the *Electricity Industry Act* 1993 (Vict) provides:

''Despite anything to the contrary in the *Local Government Act* 1989, land is not occupied land for the purposes of that Act merely because any pole, wire or cable of a distribution company, transmission company or generation company is on, under or over that land.''

17 Section 52(2) of the *Gas Industry Act* 1994 (Vict) provides a similar exemption for retail gas suppliers.

18 The *Local Government Act* empowers a council to declare rates on rateable land. The owner, or if the owner cannot be found, the occupier, is liable to pay the rates.

(97) *Telstra* (2002) 118 FCR 198 at 206 [15].

The resolutions of the local authorities

19 The New South Wales local authorities involved in these appeals resolved to make charges, pursuant to s 611 of the *Local Government Act* (NSW), for the years ending 30 June 1998 and 30 June 1999. The charges were imposed in respect of ''cabling'' or ''cables''. Wilcox J summarised the effect of the resolutions (98): ''Sometimes the resolution was limited to cabling over (or under) 'Council property'; which includes public streets and reserves. Sometimes the charge applied to both overhead and underground cabling; sometimes only the former. Sometimes the charge was higher for overhead cabling than for underground cabling; for example, several councils charged $1,000 per km for overhead cabling and $500 per km for underground cabling.''

20 For the years ending 30 June 1998 and 30 June 1999, the Victorian local authorities involved in these appeals, pursuant to the *Local Government Act* (Vict), declared and levied rates on the land occupied by Telstra and Optus cables.

21 Reference has been made earlier to statutory exemptions from charges and rates. No charges under s 611 were made by the New South Wales local authorities in relation to structures for the transmission of electricity, or the conveyance of water; rail structures; traffic lights, signs, and signal boxes, bridges and tunnels (road structures); post boxes; and elevated public walkways, bus shelters, signs, awnings and flags, real estate advertising, other advertising signs, or waste and recycling receptacles, on public places within their respective areas. On the other hand, each local authority imposed charges under s 611 with respect to gas pipelines. As to the rates levied by the Victorian local authorities, other occupiers of the same land who were not liable to rates included occupiers for purposes of electricity distribution or transmission, or generation companies in respect of their poles, wires or cables, retail gas suppliers in respect of their pipes for conveyance of gas for sale by retail, water distribution entities in respect of pipes and valves for the distribution of water, and public transport and road traffic authorities in respect of signs, wires, signals, cabinets and other structures.

22 Telstra and Optus contend that what is involved is discrimination against carriers within the meaning of cl 44 of the Telco Act.

Clause 44

23 The appellants contest the constitutional validity of cl 44. In order to resolve that issue, it is necessary first to consider the scope of the provision in order to determine its operation and effect, for the purpose

(98) *Telstra* (2000) 105 FCR 322 at 338 [32].

of relating that to a subject matter in respect of which the Parliament has legislative power (99).

24 There is a question as to the extent of the application of cl 44, and, in particular, cl 44(1)(a). That question is to be resolved primarily by reference to the legislative context in which the clause appears. The general context is that of a federal regulatory framework for the telecommunications industry, including the supply of carriage services. The more specific context, contained in Pt 24 of the Telco Act, concerns what the heading to the Part refers to as the powers and immunities conferred upon carriers. In that respect, Div 7 of Pt 1 of Sch 3 deals with the extent to which activities of carriers are exempt from State and Territory laws of general application. The terms of cll 36, 37, 38 and 39 are set out above. Subject to certain exceptions, Divs 2, 3 and 4 of Pt 1 of Sch 3 do not authorise an activity if it is inconsistent with State law. Clause 37 is one exception, and cl 44 is another. Clause 39 deals with general State taxes. Clause 44 addresses a more particular issue. In accordance with settled principles of construction, when a law of a State or Territory is of a kind dealt with in the particular provision, then cl 44 prevails over the general provision. ''The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative . . .'' (100). Clause 44 deals with the effect of special kinds of State or Territory laws, that is to say, discriminatory laws. It will be necessary later to address the question whether the New South Wales and Victorian laws presently in question are discriminatory within the meaning of cl 44(1)(a). For the present, it is sufficient to note that, if a State or Territory law is discriminatory in one of the ways referred to in cl 44, and that discrimination involves adverse treatment that is differential by reference to an appropriate standard of comparison, it will attract the operation of that provision. Sub-clause (1) of cl 44 deals with discrimination, either against a particular carrier, or against a particular class of carriers, or against carriers generally. Sub-clause (2) deals with discrimination either against a particular eligible user of carriage services, or against a particular class of eligible users, or against eligible users generally. To the extent covered by sub-cl (2), cl 44 goes beyond the topic of powers and immunities of carriers, but that does not alter materially the context as described in the heading to Pt 24. A particular eligible user of carriage services might have a number of other capacities as well. Plainly, it is discrimination against such a person or corporation in the capacity of a user of carriage services, as distinct from discrimination in some other capacity, that attracts the

(99) *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 186, per Latham CJ.

(100) *Pretty v Solly* (1859) 26 Beav 606 at 610 [53 ER 1032 at 1034], per Romilly MR.

potential operation of cl 44. Similarly, having regard both to the general and to the more specific context of the legislation, the kind of discrimination against carriers that attracts the potential operation of cl 44 is discrimination against them in their capacity as carriers. Clause 44 is concerned with State or Territory laws which impose discriminatory burdens upon carriers in carrying on activities as carriers authorised by the Telco Act.

25 Telstra and Optus are public companies although, in the case of Telstra, at the relevant times a majority of the shares was held by the Commonwealth. In that respect, the case is different from *Australian Coastal Shipping Commission v O'Reilly* (101). It will be necessary to return to what was said there about s 109 of the Constitution (102). What is of immediate relevance, however, is that, in *O'Reilly*, the test applied in determining the validity of the law of the Commonwealth conferring a general exemption from State taxes upon the Commission established in exercise of the trade and commerce power was the relevance of that law to, or its connection with, the head of power exercised in establishing the Commission (103).

26 The power conferred by s 51(v) of the Constitution, to make laws with respect to postal, telegraphic, telephonic and other like services, includes a power to make laws with respect to telecommunications services. So far as presently relevant, it extends to making laws regulating the terms and conditions upon which such services may be provided, the licensing of carriers, their conduct as licensees, and the conferring upon them of powers and immunities in connection with the activities undertaken by them pursuant to the chosen regulatory framework. The federal object of promoting the development of the telecommunications industry, and ensuring that telecommunications services would be provided to meet the needs of the Australian community, falls within a head of the legislative power of the Parliament of the Commonwealth. Conferring upon carriers an immunity from discriminatory burdens imposed upon them by State or Territory laws in their capacity as carriers has a direct and substantial connection with the power.

27 It is not to the point to say that cl 44 is also a law with respect to discrimination. A law may bear more than one character, but that does not make it possible to ignore the character (if there be one) of constitutional relevance. The law protecting trading corporations from boycotts, held to be valid in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (104), was a law with respect to boycotts, as well as a law with respect to trading

(101) (1962) 107 CLR 46.
(102) *O'Reilly* (1962) 107 CLR 46 at 56-57, per Dixon CJ.
(103) *O'Reilly* (1962) 107 CLR 46 at 55-56, per Dixon CJ.
(104) (1982) 150 CLR 169.

corporations. As Stephen J pointed out in that case (105), and after contrasting the situation in Canada, the pattern of distribution of legislative power in Australia is not based on a concept of mutual exclusiveness, and it is inappropriate to seek one sole or dominant character in every law. A law may possess a number of characters. He said (106):

> ''Once it is recognised that a law may possess several distinct characters, it follows that the fact that only some elements in the description of a law fall within one or more of the grants of power in s 51 or elsewhere in the Constitution will be in no way fatal to its validity. So long as the remaining elements, which do not fall within any such grant of power, are not of such significance that the law cannot fairly be described as one with respect to one or more of such grants of power then, however else it may also be described, the law will be valid. If a law enacted by the federal legislature can be fairly described both as a law with respect to a grant of power to it and as a law with respect to a matter or matters left to the States, that will suffice to support its validity as a law of the Commonwealth.''

28 The general principles which are to be applied to determine whether a law is ''with respect to'' a head of legislative power are well settled and have been considered on many occasions, including recently (107). One principle that commands universal concurrence is that stated by Mason and Deane JJ in *Re F; Ex parte F* (108):

> ''In a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two subject matters.''

Melbourne Corporation doctrine

29 It was argued for the appellants that cl 44 is an attempt to dictate the content of State law and offends the principle enunciated in *Melbourne Corporation v The Commonwealth* (109). A similar submission troubled Wilcox J, who considered that cl 44 ''has a propensity to disturb the federal/State balance by influencing the manner in which a State legislates in respect of a subject within its own legislative domain'' (110). Whatever the balance struck by the Constitution, it

(105) *Fontana Films* (1982) 150 CLR 169 at 191.
(106) *Fontana Films* (1982) 150 CLR 169 at 192.
(107) *Leask v The Commonwealth* (1996) 187 CLR 579; *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 at 492 [16].
(108) (1986) 161 CLR 376 at 388.
(109) (1947) 74 CLR 31.
(110) *Telstra* (2000) 105 FCR 322 at 372 [187].

must give effect to ss 51(v) and 109. Clause 44 is no less a law with respect to services of the kind described in s 51(v) by reason of the fact that the immunity it confers, or attempts to confer, covers only discriminatory State laws.

30 A law conferring upon carriers an immunity from all State taxes and charges would be a law with respect to telecommunications services; and so is a law conferring an immunity from some State taxes and charges. It does not make a difference that the chosen discrimen requires not only examination of the content of the State law but also comparison with the operation of other State laws. The clause does not affect the capacity of the States to function as governments. Their legislative capacity remains unimpaired, except to the extent to which otherwise s 109 provides. That is a matter to be considered below. There is, in cl 44, no more an attempt to dictate the content of State revenue laws than there was, in *Botany Municipal Council v Federal Airports Corporation* (111), an attempt to dictate the content of State environmental laws.

31 The *Melbourne Corporation* doctrine presents an inquiry whether the federal law in question, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments (112). In *Re Lee; Ex parte Harper* (113), in a passage later approved by six Justices in the *Native Title Act Case* (114), Mason, Brennan and Deane JJ emphasised that, although the purpose of the doctrine (115)

> ''is to impose some limit on the exercise of Commonwealth power in the interest of preserving the existence of the States as constituent elements in the federation, the implied limitations must be read subject to the express provisions of the Constitution. Where a head of Commonwealth power, on its true construction, authorises legislation the effect of which is to interfere with the exercise by the States of their powers to regulate a particular subject matter, there can be no room for the application of the implied limitations.''

32 The States are left by the relevant federal law in cl 44 free to exercise their legislative powers to impose liability to taxation, as cl 39 envisages. All that is forbidden by cl 44 is the imposition of a State law which discriminates against a carrier or person or corporation in the nominated categories. The enactment by federal law of this prohibition is within the ambit of the legislative powers of the Parliament. The prohibition is designed to ensure the effectiveness of

(111) (1992) 175 CLR 453.
(112) *Austin v The Commonwealth* (2003) 215 CLR 185 at 219 [27], 265 [168], 299 [275].
(113) (1986) 160 CLR 430.
(114) *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 477.
(115) *Re Lee; Ex parte Harper* (1986) 160 CLR 430 at 453.

the law with respect to carriers and others which is enacted under those powers and attracts the operation of s 109 of the Constitution.

33 Thus, there remains applicable the primary proposition stated by Dixon J in *Melbourne Corporation* (116):

> ''The prima facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies. That, as I have pointed out more than once, is the effect of the *Engineers' Case* (117) stripped of embellishment and reduced to the form of a legal proposition.''

Constitution, s 109

34 Telstra and Optus contend that, if and to the extent to which the provisions of the Local Government Acts of New South Wales and Victoria, pursuant to which the charges and rates in question were imposed or levied, fall within the description of laws which discriminate, or would have the effect (whether direct or indirect) of discriminating, against carriers generally, then they are inconsistent with the Telco Act and invalid.

35 In *The Commonwealth v Queensland* (118), this Court held that a provision in the *Commonwealth Inscribed Stock Act* 1911 (Cth) that ''interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State'' unless a certain condition was satisfied was a law supported by the power in s 51(iv) of the Constitution to make laws with respect to ''[b]orrowing money on the public credit of the Commonwealth'', and declared that Queensland legislation which made interest derived from Commonwealth stock or Treasury bonds liable to State income tax was to that extent invalid. That decision was referred to by Dixon CJ, in *Australian Coastal Shipping Commission v O'Reilly* (119), as the first in a line of cases in which ''[t]he argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect''. The appellant in *O'Reilly* was established as a body corporate by the *Australian Coastal Shipping Commission Act* 1956 (Cth) which also provided that the Commission was not subject to taxation under State laws to which the Commonwealth itself was not subject. The Commonwealth law was held to be a law relevant to, and falling within, the power conferred by ss 51(i) and 98 of the Constitution. It prevailed over a law of the State of Victoria requiring payment of stamp duty on receipts given by the Commission in the course of its

(116) (1947) 74 CLR 31 at 78.
(117) *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
(118) (1920) 29 CLR 1.
(119) (1962) 107 CLR 46 at 56.

trading activities. Similarly, in *Botany Municipal Council v Federal Airports Corporation* (120) a federal regulation which authorised licensed contractors to carry out works at the Sydney Airport in spite of a law of the State of New South Wales relating to environmental assessment was held to be effective to exclude the operation of State environmental legislation. In a joint judgment of all members of the Court it was said (121):

> ''There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorised to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity. Indeed, unless the law expresses itself directly in that way, there is the possibility that it may not be understood as manifesting an intention to occupy the relevant field to the exclusion of State law.''

36 The argument for the appellants invoked the idea, expressed by Evatt J in *West v Commissioner of Taxation (NSW)* (122), that attempts by the Parliament of the Commonwealth to manufacture inconsistency between its own legislation and that of the States could result in a law of the Commonwealth which is itself ultra vires. A description of inconsistency as ''manufactured'' may beg the question. In *Wenn v Attorney-General (Vict)* (123), Dixon J said:

> ''There is no doubt great difficulty in satisfactorily defining the limits of the power to legislate upon a subject exhaustively so that s 109 will of its own force make inoperative State legislation which otherwise would add liabilities, duties, immunities, liberties, powers or rights to those which the Federal law had decided to be sufficient. But within such limits an enactment does not seem to me to be open to the objection that it is not legislation with respect to the federal subject matter but with respect to the exercise of State legislative powers or that it trenches upon State functions. Beyond those limits no doubt there lies a debatable area where federal laws may be found that seem to be aimed rather at preventing State legislative action than dealing with a subject matter assigned to the Commonwealth Parliament.''

37 It is inconsistency between a valid law of the Commonwealth and a law of a State that is involved, and, to be valid, the federal law must be a law with respect to a subject of federal legislative power. This case does not enter upon what Dixon J in *Wenn* (124) described as ''a

(120) (1992) 175 CLR 453.
(121) *Botany Municipal Council* (1992) 175 CLR 453 at 465.
(122) (1937) 56 CLR 657 at 707.
(123) (1948) 77 CLR 84 at 120.
(124) (1948) 77 CLR 84 at 120.

debatable area'' in the law of the Constitution and so does not require consideration of the existence of such an area. The concern indicated by Dixon J appears to arise where a law on its face made in exercise of a head of concurrent legislative power in s 51 of the Constitution is ''aimed at'' preventing the exercise of State legislative power and accordingly is not ''a law of the Commonwealth'' for the purposes of s 109 of the Constitution and cannot prevail over legislation of a State passed in exercise of its concurrent power.

38 It appeared to Wilcox J that, in the application of s 109, there is a material difference between a federal law which provides, for example, that a carrier shall not be liable to any State tax, and a law which provides that a carrier shall not be liable to any discriminatory State tax (125). If the difference is thought to be that a law of the second kind is a law with respect to discrimination and not a law within s 51(v), then the answer to that is given above. Beyond that, the difference is elusive. If protecting carriers against the imposition of burdens, such as taxation, by State law has a sufficient connection with the power confined by s 51(v), then it is difficult to understand why protecting carriers against discriminatory burdens does not have the same connection with the power. Nor does such a limited protection become a bare attempt to exclude State power upon a subject as to which the Parliament has not chosen to legislate exhaustively.

39 In cl 39, the Parliament declared an intention not to protect carriers from State taxes of general application, but the scheme of powers and immunities created by Sch 3, which was to govern the operations of the carriers, was to include (by virtue of cl 44) a protection from discriminatory State taxes and charges. The reasons of policy underlying the distinction are a matter for the legislature, although the responses of local authorities to what Wilcox J described as community concern at the cabling may indicate some of the policy considerations at work. The legislative history shows that an attempt to impose discriminatory taxes or charges, perhaps in order to discourage cabling, or at least overhead cabling, or perhaps simply to raise revenue, was foreseen. As a matter of power, the narrower immunity is as easily sustained as a wider immunity. The enactment of a valid federal law pursuant to the power engages s 109.

Discrimination

40 Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison (126), and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by

(125) *Telstra* (2000) 105 FCR 322 at 370-374 [179]-[198].
(126) *Street v Queensland Bar Association* (1989) 168 CLR 461 at 506, per Brennan J.

reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.

41 In the present case, the basis for the claim of discrimination is in a comparison between, on the one hand, the charges and rates imposed and levied in respect of the Telstra and Optus cables, and, on the other hand, the treatment of facilities, which are installed or operated above, on or under public land, by utilities or other users of such space and are said to be comparable. The exemptions from charges and rates generally applicable to those facilities (except gas pipelines in New South Wales) are referred to above. As Gibbs J pointed out in *Victoria v The Commonwealth* (the *Payroll Tax Case*) (127), it is in the nature of taxing statutes that not all taxpayers are treated with absolute equality, and the fact that some taxpayers enjoy exemptions that are not available to others does not necessarily involve discrimination. It may involve nothing more than differentiation based upon criteria within its constitutional power which it is well open to the legislature to regard as appropriate. In the present case, however, Telstra and Optus point to a general pattern of State legislative treatment of facilities to which their cables have been made an exception.

42 Clause 44 does not, in terms, identify the kind of comparison that is appropriate for the purpose of considering whether a State law discriminates against carriers generally. (The comparison involved in deciding whether a State law discriminates against a particular carrier, or a particular class of carriers, is more straightforward.) There is extrinsic material capable of assisting in the ascertainment of the meaning of cl 44 (128). The Explanatory Memorandum said:

> ''The clause is intended to deal with laws which have an indirect effect of discriminating against carriers or users of carrier services, not just a law which, for example, on its face treats a person differently to someone else. The indirect discrimination which this clause is intended to prevent includes the following examples:
>
> - laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax);
>
> . . .''

43 In relation to aerial cabling, which appears to be what primarily attracted the attention of the local authorities, the facilities installed by

(127) (1971) 122 CLR 353 at 425-426.
(128) *Acts Interpretation Act* 1901 (Cth), s 15AB.

electricity authorities constitute an obvious basis of comparison. The fact that they are singled out in the Explanatory Memorandum confirms that the kind of discrimination with which cl 44 is concerned, in its reference to discrimination against carriers generally, is the subjection of carriers, in that capacity, to a burden of a kind to which others in a similar situation are generally not subject, and that a similar situation includes the use of public space for the installation and maintenance of facilities such as cables, pipes, ducts and conduits. In relation to underground facilities, the position is somewhat more complex, but gas pipelines in New South Wales are, apart from the facilities in question in this case, the exception to a general pattern of exemption.

44 It is not necessary to resolve the question, raised by a submission of Telstra and Optus, whether it would be sufficient to constitute discrimination that there was even one substantial utility that received the benefit of exemptions denied to Telstra and Optus. Here there is a clear general pattern of exemptions, and it is sufficient to say that the existence of one other significant exception to that pattern (gas pipelines in New South Wales) does not negate discrimination. In addition, in the case of aerial cabling, there is an obvious basis of comparison, namely electricity facilities, which enjoy an exemption.

45 The appellants point out that the exemptions are granted directly by State laws, whereas the charges and rates are imposed or levied by local authorities acting pursuant to State laws. They also point out that the differential treatment to which the telecommunications cables are subject is a consequence of the combined operation of the exemptions and the impositions or levies. Why, it is asked, does cl 44 prevail over the laws that authorise the charges and rates, rather than the laws that grant the exemptions? The charges and rates take legal effect by virtue of the State laws pursuant to which the resolutions of the local authorities were passed. Clause 44 refers to laws that discriminate, or have the effect of discriminating against carriers. Those are the laws that are of no effect. The laws that confer favourable treatment upon others are not declared by cl 44 to be ineffective. Their existence may give to the laws pursuant to which the charges and rates in issue are imposed or levied the character of being discriminatory, but they do not themselves discriminate, or have the effect of discriminating, against carriers under the Telco Act.

46 It would be inconsistent with the scheme of the Telco Act, and the context of cl 44, to assert that, in its reference to discrimination, the Telco Act contemplated as a legitimate and appropriate basis of differential imposition of burdens the circumstance that carriers were authorised by a law of the Commonwealth, whereas other utilities or bodies owning or operating comparable facilities were authorised by

State laws (129). Nor is it possible to account for, or justify, the difference on the basis of a distinction between public ownership and private enterprise.

47 The Full Court was right to hold that Telstra and Optus have made out a case of discrimination within cl 44.

Conclusion

48 The appeals should be dismissed with costs.

49 The result is that the following declaration made in each set of proceedings below by the Full Federal Court stands:

> ''3. The Court declares that each of
> (a) section 611 of the *Local Government Act* 1993 (NSW), to the extent that it authorises the first to eleventh respondents to make, levy and recover from the appellants charges in respect of the possession, occupation and enjoyment of telecommunications cables erected or placed on, under or over a public place; and
> (b) Part 8 of the *Local Government Act* 1989 (Vict), to the extent that it authorises the twelfth to fifteenth respondents to declare and recover from the appellants rates and charges on land occupied by telecommunications cables;
> discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within clause 44(1) of Schedule 3 to the *Telecommunications Act* 1997 (Cth), and is to that extent inconsistent with clause 44(1) and invalid pursuant to section 109 of the Constitution.''

50 MCHUGH J. These cases involve appeals against declarations made by the Full Court of the Federal Court of Australia (130) concerning the validity of certain sections of the *Local Government Act* 1993 (NSW) and the *Local Government Act* 1989 (Vict). The Full Court declared that, to the extent that the sections empower local government councils to impose rates or charges on certain cables owned by telecommunications carriers, they discriminate against the carriers and are invalid under s 109 of the Constitution. The questions in the appeals are whether cl 44(1) of Sch 3 to the *Telecommunications Act* 1997 (Cth) is valid and, if so, whether the clause operates to invalidate Victorian and New South Wales provisions that impose charges or rates on licensed telecommunications carriers.

51 In my opinion, cl 44(1) is valid and operates to invalidate the Victorian and New South Wales provisions that impose discriminatory

(129) cf *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478, per Gaudron and McHugh JJ; *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118], per Gaudron, Gummow and Hayne JJ.

(130) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

charges or rates on telecommunication carriers licensed under the *Telecommunications Act*.

Statement of the case

52 The Telstra companies — Telstra Corporation Ltd and Telstra Multimedia Pty Ltd (Telstra) — and the Optus companies — Optus Vision Pty Ltd and Optus Networks Pty Ltd (Optus) — commenced proceedings in the Federal Court against a number of Victorian and New South Wales local government councils. All four companies are ''carriers'' under the *Telecommunications Act* (131). In the proceedings, Telstra and Optus sought declarations that Pt 8 of the *Local Government Act* 1989 (Vict) and s 611 of the *Local Government Act* 1993 (NSW) did not authorise the imposition of rates or charges on cables owned by the companies.

53 Two of the proceedings — S79/2003 and S80/2003 — arose from activities in Victoria and concern Pt 8 of the *Local Government Act* (Vict). The other two proceedings — S83/2003 and S84/2003 — arose from activities in New South Wales and relate to s 611 of the *Local Government Act* (NSW). The Telstra companies are the respondents in matters S79 and S84. The Optus companies are the respondents in matters S80 and S83.

54 In the proceedings, Telstra and Optus claimed that the rates and charges were invalid for a number of reasons. The reasons included:

- the rates and charges were excises and, under the Constitution, only the Commonwealth could impose an excise; and
- the rates and charges discriminated against Optus and Telstra contrary to cl 44 of Sch 3 to the *Telecommunications Act* and were invalid by operation of s 109 of the Constitution.

55 Wilcox J, who tried the actions, dismissed the claims (132). His Honour held that, although rates imposed under Pt 8 of the Victorian Act were taxes, they were not taxes on goods and therefore not excises (133). His Honour held that the charges imposed by s 611 of the New South Wales Act were not taxes and accordingly not excises (134). Paragraphs (b) and (c) of cl 44(1) of Sch 3 to the *Telecommunications Act* were devoid of legal effect because they purported directly to invalidate State law or actions under State law. Accordingly, they were beyond the constitutional power of the federal

(131) Under the Act, the holder of a carrier licence is known as a carrier. A carrier is an owner of a ''network unit'' — essentially, any communication line or designated radiocommunications facility in Australia — which may be used to supply ''carriage services'', namely, ''a service for carrying communications by means of guided and/or unguided electromagnetic energy'': ss 7, 26-29, 42. Carriers are one of the primary suppliers of telecommunications services in Australia.

(132) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.

(133) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 350-351.

(134) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 350-351.

Parliament (135). Further, cl 44(1)(a) of Sch 3 was not a law upon which s 109 of the Constitution was capable of operating (136).

56 An appeal by Telstra and Optus to the Full Court of the Federal Court succeeded. The Full Court (Sundberg and Finkelstein JJ (137)) held that:

- cl 44 of Sch 3 to the *Telecommunications Act* was a valid exercise of the power conferred on the Commonwealth Parliament by s 51(v) of the Constitution (138);
- Pt 8 of the Victorian Act and s 611 of the New South Wales Act discriminated against Optus and Telstra (139); and
- to the extent that those provisions authorised councils to impose rates or charges on telecommunications carriers licensed under the *Telecommunications Act*, they were invalid under s 109 of the Constitution (140).

The material facts and circumstances

New South Wales

57 The appellants in the New South Wales matters are bodies corporate under the *Local Government Act* (NSW). They are Hurstville City Council, Kogarah Municipal Council, Leichhardt Municipal Council, Parramatta City Council, Penrith City Council, Randwick City Council, Hornsby Shire Council, Drummoyne Council, Burwood Council, Concord Council and Strathfield Municipal Council. Section 611(1) of the *Local Government Act* (NSW) confers power on a council to make an annual charge on a ''person ... in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place''. However, the New South Wales Act exempts a number of bodies from the operation of the power, either under s 611(6) of the Act or pursuant to other New South Wales laws. Those protected under s 611(6) of the *Local Government Act* include the Sydney Water Corporation, the Hunter Water Corporation, any water supply authority, the New South Wales Rail Access Corporation (now the Rail Infrastructure Corporation) and, in some circumstances, the owner or operator of a light rail system. Section 611(6)(a) provides that the section does not apply to the Crown. This immunity protects,

(135) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 369.
(136) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 374.
(137) After the hearing of the appeal, Katz J became unable to continue as a member of the Full Court. The parties consented to the appeal being completed by the Full Court constituted by Sundberg and Finkelstein JJ.
(138) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 213.
(139) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215-217.
(140) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 218.

relevantly, the Roads and Traffic Authority of NSW (141). Those protected under other Acts include electricity network operators pursuant to s 50 of the *Electricity Supply Act* 1995 (NSW) and a person constructing or operating a pipeline authorised by a licence under s 40(1) of the *Pipelines Act* 1967 (NSW).

58 Telstra and Optus have installed underground coaxial cable and aerial coaxial cable in local government areas under the responsibility of each of the appellant councils. Acting under s 611 of the *Local Government Act*, each of the New South Wales appellants has imposed annual charges, at a rate per kilometre, in respect of these cables. Each appellant has also imposed charges under s 611 in respect of Australian Gas Light Co (AGL) pipelines. No charges under s 611 were made in relation to a range of other structures in public places — for instance, electricity wires, rail structures, traffic lights, post boxes, bus shelters and advertising signs.

Victoria

59 Each appellant in the Victorian matters is a body corporate established under the *Local Government Act* (Vict). The appellants are Bayside City Council, Moreland City Council, Frankston City Council and Yarra City Council. Part 8 of the *Local Government Act* (Vict) empowers local government councils in Victoria to levy rates and charges on rateable land. Section 154(1) declares that, except as provided in s 154, all land is rateable. Sections 154 and 155 empower the Victorian councils to declare rates and charges on all land, except land exempted by s 154(2). The categories of land listed in s 154(2) include land that is the property of the Crown and land that is used exclusively for public or municipal services. Other uses of land are exempted from rates and charges by other legislation. At the relevant time, electricity companies were exempt (142), as were retail gas suppliers (143). Section 156 of the Victorian Act imposes primary liability for rates on the owner of the land.

60 Telstra and Optus have each installed underground coaxial cable and aerial coaxial cable in local government areas under the responsibility of each of the appellant councils. Each of the appellants declared and levied rates on Telstra and Optus in respect of the land occupied by the cables. The rates were calculated by reference to one of the three

(141) This is the combined effect of s 611(6)(a) of the *Local Government Act* and s 46(2)(b) of the *Transport Administration Act* 1988 (NSW).

(142) *Electricity Industry Act* 1993 (Vict), s 46(1A). This Act was replaced by the *Electricity Industry Act* 2000 (Vict), which commenced on 1 January 2001. Section 94(4) of that Act exempts only electricity generation companies and associated entities from liability to pay rates in respect of land used for generation functions. (Such companies may elect to pay amounts agreed or determined under s 94(5).)

(143) *Gas Industry Act* 1994 (Vict), s 52(2). This Act was replaced by the *Gas Industry Act* 2001 (Vict), which commenced on 1 September 2001. Section 145 of that Act is in the same terms as s 52(2) of the 1994 Act.

systems of valuation permitted by s 157(1) of the Victorian Act: the site value, net annual value or capital improved value system.

The Commonwealth

61 Clause 44 of Sch 3 to the *Telecommunications Act* is directed at State and Territory laws that discriminate against carriers. Clause 44(1) provides:

> ''The following provisions have effect:
> (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
> (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
> (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.''

The issues

62 In this Court, the following issues fall for determination:

(1) Within the meaning of cl 44(1) of Sch 3 to the *Telecommunications Act*, does Pt 8 of the *Local Government Act* (Vict) and/or does s 611 of the *Local Government Act* (NSW) discriminate, or have the effect of discriminating against, carriers?
(2) Is cl 44(1) a valid exercise of the power conferred on the Commonwealth Parliament by s 51(v) of the Constitution?
(3) Is cl 44(1) invalid because it intrudes into State power and infringes the implied limitations on federal legislative power inherent in the Constitution by virtue of the federal structure?
(4) Does cl 44(1) validly engage s 109 of the Constitution, or is it a law which merely seeks to deny effect to a State law?

Do the State laws discriminate against carriers?

63 On their face, the Victorian and New South Wales laws operate generally. If those laws do not discriminate, or do not have the direct or indirect effect of discriminating, against Telstra and Optus, then cl 44(1) has no application to the New South Wales or Victorian laws. On that hypothesis, the constitutional issues do not arise.

64 However, the Full Court concluded that, because many bodies which would otherwise be required to pay the council rates or charges were exempt from the State laws, those laws had the ''direct or

indirect effect of discriminating'' against carriers (144). The Full Court concluded that the word ''discrimination'' in cl 44(1) should be given its ordinary meaning: ''differential treatment . . . the failure to treat all persons equally where there is no reasonable distinction to justify different treatment.'' (145) The Full Court addressed the question whether the State laws discriminated, in this sense, against the carriers. The Court said (146):

> ''In our view there is discrimination when a tax is imposed on a carrier in respect of certain of its activities, for example, on the occupation of a public place by underground or aboveground cables through which communications are sent, but is not imposed on other bodies which make a similar use of public places, such as electricity, gas or water utilities which lay pipes or cables over or under public places to transmit their 'goods'. It is discrimination against the carrier because it accords to it less favourable treatment than to the other occupiers of public space.''

65 The appellants contended that a law of general application does not discriminate merely because it exempts a ''small group of identified entities'' from its operation. I cannot accept this argument. The reference in cl 44(1) to direct and indirect effect focuses on the actual effect of the State law. That the New South Wales and Victorian provisions are of general application is of no relevance if every entity that could conceivably be charged for their use of public land — other than carriers — is exempted from the operation of the provisions. To describe the exempted entities as a small group is to ignore that they are the *only* entities other than carriers on which charges could be imposed under the Victorian and New South Wales provisions. Later in this judgment, I consider the significance to this issue of the liability of retail gas suppliers to pay charges in New South Wales.

66 The appellants submitted that, while the State laws differentiate between the exempted entities and other persons — including carriers — they do not ''discriminate against'' carriers in the relevant sense. The appellants contended that different treatment of two entities or classes will only be discrimination where the different treatment is based on some impermissible ground or, in the case of indirect discrimination, where apparently equal treatment has a differential impact according to a criterion which is impermissible. They relied on statements by Gaudron J in *Street v Queensland Bar Association* (147) and by Gaudron J and myself in *Castlemaine Tooheys Ltd v South Australia* (148) to support this proposition.

(144) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 213, 215.
(145) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.
(146) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.
(147) (1989) 168 CLR 461 at 569-574.
(148) (1990) 169 CLR 436 at 478.

67 However, the distinction between the ''constitutional'' meaning of discrimination — the sense in which the concept is used in s 117 and in ss 51(iii) and 99 of the Constitution — and the ''ordinary'' meaning of the term is of little importance in the context of this case. The Full Court held, correctly in my opinion, that the State legislation discriminated against Telstra and Optus even if the apparently narrower scope of the constitutional meaning of that word were applied (149).

Reasonable distinction?

68 The Full Court accepted that different treatment amounts to discrimination only if there is no reasonable distinction to justify different treatment (150). The appellants submitted that the key difference between Telstra and Optus on the one hand and the exempted bodies on the other is that the latter occupy land under statutory authorities granted by the States, while the appellants occupy land under authority granted by the Commonwealth. A State, they submitted, is entitled to prevent councils, which are the custodians of its land, from charging rates to the State's agents.

69 However, the question whether a reasonable distinction exists must be examined in light of the law prohibiting discrimination, not the potentially discriminatory law. As Gaudron J and I said in *Castlemaine Tooheys Ltd v South Australia* (151), a law ''is discriminatory if it operates by reference to a distinction which some *overriding law* decrees to be irrelevant''. It is of no present relevance whether or not, in exercising their powers under the applicable *Local Government Act*, councils are acting reasonably in perceiving a difference between State agencies and bodies authorised to carry out functions under federal law, such as Optus and Telstra. The question is whether the *Telecommunications Act* permits Optus and Telstra to be treated differently from State agencies in respect of rates and charges.

70 It is true, as Wilcox J noted (152), that cl 44(1) of Sch 3 to the *Telecommunications Act* provides no criteria by which a court may determine what differences are legitimate and what are illegitimate. His Honour observed that in this respect it differs from other federal statutes which prohibit discrimination and which provide such criteria, for example, the *Racial Discrimination Act* 1975 (Cth), the *Sex Discrimination Act* 1984 (Cth) and the *Disability Discrimination Act* 1992 (Cth) (153).

71 For the purposes of this case, it is unnecessary to determine whether

(149) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.
(150) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.
(151) (1990) 169 CLR 436 at 478 (emphasis added).
(152) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 363.
(153) See, for instance, s 30 of the *Sex Discrimination Act*, which permits discrimination in employment on the ground of sex if it is a ''genuine occupational qualification'' to be a member of the other sex.

cl 44(1) prohibits *all* differential treatment of carriers. It is sufficient to say that the wide and unconditional language of cl 44(1) suggests that the Commonwealth Parliament intended to protect carriers from special burdens without regard to any policy objective of a State or Territory law which imposed that burden. If the Parliament had intended to allow such policy objectives to be relevant, it would have framed cl 44(1) so as to prohibit only *unreasonable* discrimination.

72 If the term ''discriminate'' in cl 44 is ambiguous, the proposition that the Parliament intended to allow State legislatures to treat carriers differently where this serves a policy objective of the State receives no support from either the Explanatory Memorandum or the Second Reading Speech to the Telecommunications Bill 1996 (Cth). The Explanatory Memorandum states (154):

> ''The indirect discrimination which this clause is intended to prevent includes the following examples ... Laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax) ...''

73 The Second Reading Speech states (155):

> ''The bill continues and reinforces the provisions in the [*Telecommunications Act* 1991 (Cth)] which prevent the law of a State or Territory from operating so as to discriminate against a carrier or a class of carrier. It provides that a State or Territory law has no effect to the extent that it discriminates, or has the effect of discriminating, either directly or indirectly against a carrier or a user or potential user of a carrier's services. An example of one kind of discrimination that this provision deals with are State or Territory laws which give special powers or immunities to public utilities such as electricity suppliers or railways where these are not also given to any carrier in that State or Territory in like circumstances.''

74 Neither the Explanatory Memorandum nor the Second Reading Speech refers to any policy objective of a State as a legitimate basis upon which either carriers may be treated differently from other public utilities or the facilities of carriers may be treated differently from similar facilities.

75 Wilcox J said (156) that Telstra and Optus were inviting the Federal Court to use the above example in the Explanatory Memorandum not

(154) Telecommunications Bill 1996 (Cth) Explanatory Memorandum, vol 3, p 27.

(155) Australia, Senate; *Parliamentary Debates* (Hansard); 25 February 1997, p 944 (Ian Campbell).

(156) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 363-364.

to determine any ambiguity about the word ''discriminate'', but to decide how cl 44(1) may be applied in a particular factual situation. However, in so far as an Explanatory Memorandum indicates Parliament's purpose is enacting a term, the Memorandum indicates that the Commonwealth Parliament, in using the term ''discriminate'', had the purpose of striking down laws similar to those in the present case. Further, it shows that the Parliament intended cl 44 to invalidate a law which treats a State authority or State-owned entity that provides an essential public service more favourably than carriers. For example, assuming that a Victorian instrumentality still owned and operated an electricity transmission and distribution network, cl 44 would operate in respect of a law which treated that entity more favourably than carriers (157).

76 For this reason, it is unnecessary to evaluate the appellants' arguments as to why the States might reasonably have treated Telstra and Optus differently from other public utilities.

With whom is the appropriate comparison?

77 Clause 44(1) prohibits discrimination against a particular carrier, class of carriers or carriers generally. If the discrimination alleged was against a particular carrier, the appropriate comparison would probably be other carriers. Where the discrimination is alleged to be against ''carriers generally'', however, the issue arises as to the appropriate entity with which ''carriers'' should be compared. Was the Full Court correct to conclude that the appropriate comparison here was between Optus and Telstra on the one hand and ''other bodies which make a similar use of public places'' (158) on the other?

78 The appellants were unable to suggest any alternative point of comparison. Instead, they resorted to the suggestion that cl 44(1) is designed to prevent only laws *aimed* at carriers, rather than to ensure that carriers receive equal treatment. Such a narrow interpretation of ''discrimination'' is incompatible with the breadth of cl 44(1). In

(157) Following the disaggregation of the electricity industries in Victoria and New South Wales, transmission and distribution networks are owned and operated by different entities. Private entities own, operate and maintain electricity distribution assets (poles and wires) in both States. The transmission network in Victoria is owned and operated by a private entity, SPI PowerNet Pty Ltd, while in New South Wales a government owned statutory corporation which operates under the *State Owned Corporations Act* 1989 (NSW), TransGrid, owns and operates the transmission network.

In the other States and Territories, private entities own and operate or lease and operate the electricity distribution networks in South Australia and the ACT. Government owned corporations own and operate electricity distribution networks in Queensland, Tasmania, Western Australia and the Northern Territory. In South Australia private entities lease and operate the electricity transmission network. Government owned corporations own and operate electricity transmission networks in Queensland, Tasmania, Western Australia and the Northern Territory.

(158) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

particular, the reference to the ''direct or indirect'' *effect* of a State or Territory law leaves no room for such an argument.

79 In cases like the present, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). The New South Wales and Victorian Acts confer a power to levy charges or rates on the owners or occupiers of public land, that is, land used for a public purpose. This indicates that the Full Court was correct in comparing the position of carriers with that of other owners or occupiers of public land. In turn, this invites a comparison with electricity suppliers, water suppliers, gas suppliers and other pipeline users. These entities resemble Telstra and Optus in their ownership and/or occupation and use of public land, a use which involves putting wires, cables or pipes over or under the land. Other owners or occupiers of public land, whose use of the land is perhaps less directly comparable with that of Telstra and Optus, include rail authorities, road traffic authorities and public transport authorities. Whether the comparison is made with the first group or the second group, the New South Wales and Victorian Acts exempt all — or in the case of New South Wales, almost all — of these entities from the operation of the legislation. This has the effect that the New South Wales and Victorian Acts authorise charges or rates that discriminate against Telstra and Optus.

The significance of the liability of gas suppliers in New South Wales

80 In New South Wales, gas suppliers are the only bodies apart from Telstra and Optus that are subject to the charges. Section 51 of the *Gas Supply Act* 1996 (NSW) provides an exemption for gas network operators from local council charges, although this provision has not yet been proclaimed. The Full Court assumed, correctly in my opinion, that this liability on the part of gas network operators did not mean that the New South Wales councils did not discriminate against Telstra and Optus (159). A person may be discriminated against even if some other person is treated equally unfavourably.

81 If *many* other persons were also treated unfavourably, a question might arise whether the law discriminated against a particular person. This question does not arise in the present case. The great majority of occupiers of public space in New South Wales are exempt from local government charges. That gas suppliers remain subject to these charges does not alter the fact that carriers are treated less favourably than most comparable entities.

The constitutional issues

82 The central claim of the appellants is that cl 44(1) is a law about the power of State parliaments, rather than about telecommunications. On their analysis, and for essentially this reason, they claimed that cl 44 is unsupported by s 51(v) of the Constitution, breaches an implied

(159) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 215.

limitation of the Constitution and does not engage s 109 of the Constitution so as to render the New South Wales and Victorian laws invalid. The Attorneys-General for Victoria, Western Australia and Queensland intervened to support the appellants' submissions. The Attorney-General for the Commonwealth intervened to support Telstra and Optus.

The scope of cl 44(1)

83 As the Full Federal Court noted, it is necessary to consider the scope of cl 44(1) before considering its constitutional validity. The text of cl 44(1) is set out at 636 [61] above.

84 The Full Court thought that cl 44 had two possible interpretations. One was that it granted carriers exemption from all discriminatory State and Territory laws (160). The second was that it prevented discrimination against a carrier by laws that affect the provision of telecommunications services (161).

85 Each appellant criticised the Full Court's reasoning and submitted that the Court put forward two different interpretations of cl 44(1). The Full Court, after referring to the content of Divs 2, 3 and 4 of Pt 1 of Sch 3 to the *Telecommunications Act* — which relate respectively to the inspection of land and the installation and maintenance of facilities — said that the ''protection must relate to the carrying out of those activities'' (162). Secondly, the Court said that cl 44(1) was designed to prevent State and Territory legislatures from enacting discriminatory legislation ''which would burden the activities of a carrier in the course of *providing the telecommunications services* for which the carrier holds a permit'' (163).

86 The appellants contended that, on the first construction, cl 44(1) does not operate with respect to the Victorian and New South Wales provisions. In addition, Divs 2, 3 and 4 of Pt 1 of Sch 3 do not relate to occupation and enjoyment of telecommunications facilities. If the scope of cl 44(1) derives from those Divisions, the appellants argued, it does not extend to the kind of activities that Telstra and Optus were carrying out, namely, activities that had nothing to do with such inspection, installation or maintenance.

87 However, I do not think that the Full Court intended to suggest that cl 44(1) was limited to the activities listed in Divs 2, 3 and 4 of Pt 1 of Sch 3. Rather, the Court was suggesting that these Divisions, together with the remainder of the *Telecommunications Act*, indicate that the Act is concerned with the regulation of carriers acting in their capacity as telecommunications carriers. Schedule 3 is titled ''Carriers' Powers

(160) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 207.
(161) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 207-208.
(162) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210.
(163) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210 (emphasis added).

and Immunities'' and confers a variety of powers and immunities on carriers. The Schedule should not be read so that the immunities contained in it are limited to the powers contained in it. Such a construction is at odds with the accepted purposive approach to statutory interpretation.

88 The appellants also criticised the second construction of cl 44. They contended that the concept of ''telecommunications services'' is so vague that it does not identify a particular set of activities which cl 44(1) protects. The Commonwealth Parliament may have intended to protect carriers in the particular activities which their carrier licences, under the *Telecommunications Act*, allow them to undertake — but it may equally have intended to cover a wider or narrower set of activities. This argument is unpersuasive. When cl 44(1) is viewed in the context of the rest of the Act, it is limited to protecting carriers only in relation to the provision of telecommunications services. The Act authorises the provision of those services. It seems natural to regard cl 44(1) as protecting carriers in so far as they carry out those services. It was not necessary for cl 44(1) to refer specifically to the provision of telecommunications services in cl 44 because this was the subject matter of the entire Act. If this meaning was not clear from the nature of the Act, s 15A of the *Acts Interpretation Act* 1901 (Cth) would require the clause to be read down so as to protect carriers only in relation to the provision of telecommunications services (164).

Is cl 44(1) *a law with respect to telecommunications?*

89 The appellants in each proceeding claimed that, on its proper characterisation, cl 44(1) is not a valid exercise of the power conferred by s 51(v) of the Constitution. Section 51(v) provides that the Commonwealth may make laws for the peace, order and good government of the Commonwealth with respect to ''postal, telegraphic, telephonic, and other like services''.

90 The *Telecommunications Act* provides for the licensing of an organisation to act as a carrier, and establishes the powers, rights, duties and immunities of a carrier. The Act also regulates the activities the subject of a carrier licence. These provisions are within s 51(v) (165). Further, that head of power entitles the Commonwealth to confer protection on carriers when they engage in activities the subject of the carrier licence, including protection against discriminatory State or Territory legislation (166). Because s 51(v) gives the

(164) Section 15A provides: ''Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.''

(165) *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 277, per Latham CJ.

(166) *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.

Commonwealth power to license and regulate telecommunications carriers and to confer powers and immunities on them, the conferring on carriers of an immunity from discriminatory State laws, including taxes, has a clear and direct connection with the head of power (167).

91 A s 51 power extends beyond laws that authorise, regulate or prohibit subjects that fall within or are incidental to that head of power. A s 51 power also authorises a law that expressly limits the operation of a State law in relation to a subject matter authorised, regulated or prohibited under that head of power. This Court has held on many occasions that, where the Commonwealth has power to regulate an area, it has power to protect entities which operate in that area from the effect of State laws. The cases, where the Court has so held, include *Australian Coastal Shipping Commission v O'Reilly* (168), *Botany Municipal Council v Federal Airports Corporation* (169) and *Western Australia v The Commonwealth* (the *Native Title Act Case*) (170). In *O'Reilly*, Dixon CJ said (171):

> ''The argument that under a legislative power of the Commonwealth the operation of State laws cannot be directly and expressly excluded has been used without effect in a succession of cases beginning with *The Commonwealth v Queensland* (172). It may be worth remarking that the interpretation, long since adopted by this Court, of s 109 is hardly consistent in thought with such an argument. The Court has interpreted s 109 as operating to exclude State law not only when there is a more direct collision between federal and State law but also when there is found in federal law the manifestation of an intention on the part of the federal Parliament to 'occupy the field' ... Surely, consistency with that doctrine demands that a legislative power ... must extend to a direct enactment which expressly excludes the operation of State law provided the enactment is within the subject matter of the federal power. Indeed there can really be no other way of expressing the intention and accomplishing the federal legislative purpose.''

92 The appellants and the State Attorneys-General submitted that cl 44(1) is a law about discrimination and the operation of State laws, rather than a law about telecommunications. This argument ignores the principle that a law of the federal Parliament is valid if it is a law with

(167) *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79, per Dixon J; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 490-491, per Barwick CJ; *Leask v The Commonwealth* (1996) 187 CLR 579 at 591, per Brennan CJ; at 605, per Dawson J; at 616, per McHugh J; at 621-622, per Gummow J.

(168) (1962) 107 CLR 46.

(169) (1992) 175 CLR 453.

(170) (1995) 183 CLR 373.

(171) *O'Reilly* (1962) 107 CLR 46 at 56-57.

(172) (1920) 29 CLR 1.

respect to a s 51 head of power even if it may also be characterised as a law with respect to a subject that is outside the grant of federal power (173). Clause 44(1) is a law which confers rights, powers and immunities on carriers *and* a law which deals with the effect of State and Territory laws on those carriers. Even if cl 44(1) can be characterised as a law with respect to the effect of State and Territory laws, that characterisation does not prevent it from being a law ''with respect to'' the head of power described in s 51(v). This is because it is a law with respect to telecommunications carriers, a subject that is within the scope of s 51(v).

93 The appellants' submission on this point cannot stand with the decisions of this Court in *O'Reilly* (174), *Botany Municipal Council* (175) and the *Native Title Act Case* (176). As the Court stated in its unanimous decision in *Botany Municipal Council* (177):

> ''There can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorised to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity.''

94 The appellants relied on two points to distinguish the current case from these decisions. First, they suggested that the Commonwealth is entitled to protect its own agent, but not an independent commercial enterprise, such as Optus and (to a lesser extent) Telstra from the operation of State and/or Territory laws. Second, the appellants contended that the partial nature of the protection conferred on carriers distinguishes this case from the earlier decisions.

Must the entity protected be a statutory authority?

95 The appellants and the State interveners observed that many of the decisions referred to by the Full Court involved the protection of the Commonwealth or a Commonwealth agency from State legislation. For instance, *O'Reilly* concerned the Australian Coastal Shipping Commission, a Commonwealth statutory authority established under the *Australian Coastal Shipping Commission Act* 1956 (Cth). The Attorney-General for Western Australia suggested that *Botany Municipal Council* is also such a case. The persons exempted from the relevant New South Wales legislation, the *Environmental Planning and Assessment Act* 1979 (NSW), were contractors carrying out works for the Federal Airports Corporation, a Commonwealth statutory

(173) *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169.
(174) (1962) 107 CLR 46.
(175) (1992) 175 CLR 453.
(176) (1995) 183 CLR 373.
(177) (1992) 175 CLR 453 at 465.

authority established under the *Federal Airports Corporation Act* 1986 (Cth).

96 Although, historically, the Commonwealth has exempted Commonwealth statutory authorities from State taxes, this fact does not mean that these are the *only* bodies that the Commonwealth can exempt from State taxes or State laws. It is difficult to see why the telecommunications power, which enabled the Commonwealth to create its own telecommunications carrier (Telecom Australia, now trading as ''Telstra'' (178)) and to protect it from State laws (179), does not extend to protecting a private company operating as a telecommunications carrier from State laws.

97 The decisions of this Court on which the appellants sought to rely do not support the proposition that the Commonwealth may only exempt itself and its agents from the operation of State taxes or State laws. As *O'Reilly* concerned a Commonwealth statutory authority, the Court expressed its reasoning in terms of such an authority. However, there is nothing in that decision to suggest that the Commonwealth would *only* be entitled to protect a statutory authority from State taxation. In *Botany Municipal Council*, the Court upheld a federal law that exempted licensees of the Federal Airports Corporation from compliance with the *Environmental Planning and Assessment Act* 1979 (NSW). At no point did the Court suggest that this conclusion was based on the fact that the licensees had acquired any kind of governmental authority from the Federal Airports Corporation.

Partial protection of carriers

98 The primary judge, Wilcox J, held that, while s 51(v) would have entitled the Commonwealth Parliament to protect carriers from State laws, it was not open to the Parliament to prohibit only discriminatory State laws (180). The appellants also relied on this argument — although in a slightly different form — in this Court. The appellants contended that a State law can only be rendered inconsistent with a federal law if the federal law ''exclusively and exhaustively'' covers the relevant field. Thus, the appellants claimed that in the *Native Title*

(178) Until 1975, telecommunications services were provided by a government authority, the Department of the Postmaster General. The Australian Telecommunications Commission, trading as Telecom Australia, was established as a statutory corporation in 1975 to provide Australia's domestic telecommunications services. After 1992, the entity which traded as Telecom Australia (including the Australian Telecommunications Corporation and the Australian and Overseas Telecommunications Authority) also provided Australia's international telecommunications services. Telecom Australia changed to the trading name ''Telstra Corporation Limited'' in April 1993 (trading domestically as ''Telstra'' since 1995) and, as an Australian public limited liability company, was partially privatised commencing November 1997.

(179) See, eg, *Telecommunications Act* 1975 (Cth), s 80, which operated to exempt Telecom Australia from taxation under any law of a State or Territory.

(180) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322 at 374.

Act Case the impugned provision was treated as expressing an intention that the Commonwealth law be exclusive and that it was valid only on this basis. It follows, claimed the appellants, that a provision such as cl 44(1) can *only* be valid if it is construed as indicating an intention that the federal law is to have exclusive operation — that it ''cover the field'' of telecommunications.

99 The appellants contended that the *Telecommunications Act* does not deal with carriers in such a comprehensive way. In particular, the appellants pointed to Div 7 of Pt 1 of Sch 3 to the *Telecommunications Act*, which makes it clear that State laws are generally applicable to carriers. Accordingly, they submitted that cl 44(1) is beyond the legislative power of the Commonwealth Parliament in that it constitutes a ''bare attempt to oust State law''. If the Commonwealth is entitled to prohibit the States from taxing carriers generally, however, it is equally entitled to provide for a partial prohibition. Such a partial prohibition is connected with the head of power. It does not represent a bare attempt to oust State law. In the *Native Title Act Case*, the Court said in a unanimous judgment (181):

> ''Provided it is within the legislative power of the Commonwealth to exclude completely the operation of State law extinguishing native title, it is within Commonwealth power to exclude partially or on terms the operation of a State law which has that effect.''

Implied limitation on Commonwealth legislative power

100 I also agree, for the reasons given in the joint judgment, that cl 44 does not offend the principle in *Melbourne Corporation v The Commonwealth* (182), namely, that the Constitution restricts Commonwealth legislative powers so as to prohibit discrimination which involves the placing on the States of special burdens or disabilities, and to prohibit laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments. Accordingly, that clause does not infringe any implied limitation on Commonwealth legislative power resulting from the federal structure of the Constitution.

Conclusion

101 Clause 44(1) is therefore a valid exercise of the Commonwealth's power in relation to telecommunications. Part 8 of the *Local Government Act* (Vict) and s 611 of the *Local Government Act* (NSW), to the extent to which they impose rates and charges on telecommunications facilities have a discriminatory effect in their operation in relation to carriers under the *Telecommunications Act*.

(181) *Native Title Act Case* (1995) 183 CLR 373 at 468.
(182) (1947) 74 CLR 31 at 81-83, per Dixon J; see also *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217, per Mason J.

They are inconsistent with cl 44(1) and are inoperative under s 109 of the Constitution.

Order

102 The appeals should be dismissed.

CALLINAN J.

Facts

103 These appeals were heard together. It is convenient to refer to all of the local authorities as the appellants, although at times in these proceedings their names may have appeared on the other side of the record, and to deal with the appeals together.

104 The respondent corporations (the respondents) are telecommunications companies. They are commercial corporations in every sense. Pursuant to rights conferred upon the respondents by the *Telecommunications Act* 1997 (Cth) (the Telco Act), by, for example Divs 2, 3 and 4 of Sch 3 to the Act, they have entered upon roads and other public spaces owned by the appellants, and have erected under, on, and above the surface of them, cables and other installations for the carriage of communications electronically. Almost invariably the respondents have made use of existing infrastructure such as electric light poles and subterranean pipes and conduits. It is common ground that the respondents have paid or offered no compensation to the appellants in respect of their entry upon, use and occupation of the land, air space, or existing infrastructure on or in which their installations have been erected or inserted.

105 The appellants, some in New South Wales, and others in Victoria have resolved, the former pursuant to s 611 of the *Local Government Act* 1993 (NSW) (the NLGA), and the latter, to Pt 8 of the *Local Government Act* 1989 (Vict) (the VLGA), to make, levy and recover from the respondents charges (the cable charges) in respect of the possession, occupation and enjoyment of the telecommunications cables erected or placed on, under or over public spaces. For present purposes it is sufficient to set out s 611(1), (2), (3) and (4) of the NLGA:

> ''Annual charge on rails, pipes etc
> (1) A council may make an annual charge on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place.
> (2) The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.
> (3) The annual charge is to be based on the nature and extent of the benefit enjoyed by the person concerned.
> (4) If a person is aggrieved by the amount of the annual charge, the

person may appeal to the Land and Environment Court and that Court may determine the amount.''

106 The Court did not have before it any of the relevant resolutions. The description that I have just given of them, although imprecise, is apparently the description that the parties were content to adopt, and was in terms incorporated in the declarations of the Full Court of the Federal Court from which these appeals are brought (183).

107 In 1901 the Commonwealth Government established the Postmaster-General's Department to own and manage all domestic telephone, telegraph and postal services. Subsequently, in 1946, the Commonwealth Government established the Overseas Telecommunications Commission to manage international telecommunications services. These were wholly owned organs of government. In 1975 the Australian Telecommunications Commission was established by s 4 of the *Telecommunications Act* 1975 (Cth). Although it was corporated (by s 21(1)(a)) it was wholly owned by the Commonwealth and directed by Commissioners appointed by the Governor-General (s 22). Section 6 of the *Telecommunications Amendment Act* 1988 (Cth) preserved and continued the Australian Telecommunications Commission as a body corporate under the name Australian Telecommunications Corporation (trading as Telecom).

108 In 1991 however, all of the property, rights and liabilities (actual, contingent and prospective) of Telecom were, by s 11 of the *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth) (the AOTC Act), vested in a company incorporated under the *Corporations Law* (ACT) with the name Australian and Overseas Telecommunications Corporation Ltd (AOTC). AOTC was registered under the Australian Capital Territory law on 6 November 1991 as an unlisted public company limited by shares. On 13 April 1993, AOTC was renamed Telstra Corporation Ltd. The *Transport and Communications Legislation Amendment Act* 1994 (Cth) subsequently amended the title of the AOTC Act to the *Telstra Corporation Act* 1991 (Cth). The Commonwealth is a major shareholder in Telstra Corporation but quite separate from it in all relevant respects.

109 Section 26 of the *Telstra Corporation Act* provides that, for the purposes of Commonwealth, State and Territory laws, Telstra is *not* to be taken as incorporated for a purpose of the Commonwealth, or as being a public authority, instrumentality or agency of the Crown, or as entitled to any immunity or privilege of the Commonwealth. The second Telstra respondent (Telstra Multimedia Pty Ltd) and the Optus respondents have no history of government ownership of any kind. These circumstances, it may, at the outset be noted, provide an important point of departure from the facts of *Botany Municipal*

(183) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

Council v Federal Airports Corporation (*Third Runway Case*) (184). There the respondent which sought to avoid compliance with State environmental laws was not only a corporation owned by the Commonwealth, but also had acquired under the *Lands Acquisition Act* 1989 (Cth) the fee simple in the land the subject of the proposed works and identified interests in the dredging site adjacent thereto. The work to be undertaken there, although it might be done by private contractors, was work on Commonwealth land on behalf of, and directly for the benefit of a Commonwealth body. The case has nothing of relevance to say about the Commonwealth's right to impose its own basis of charging (or not charging) for the use by its licensees of land and space in which neither it nor they have any proprietary interest.

110 Various utilities operators, owned, or licensed, or regulated by the States, or emanations of them, have erected and inserted their installations (the ''utilities installations'') for the carriage, for example, of water, gas and electricity, in the same, or similar public spaces to the respondents. So too has Australia Post, but it is entirely a department or creature of the Commonwealth and enjoys immunity from rates and like levies sought to be raised by the States or authorities of them by virtue of s 114 of the Constitution (185).

111 The States have in some instances legislated to confer exemptions upon some of the owners, occupiers and users of utilities installations (186). The activities of the respondents are not governed merely by the Telco Act. The *Trade Practices Act* 1974 (Cth) establishes a regime for the promotion and maintenance of competition in the industry in which the respondents are engaged (see Pts XIB and XIC).

112 Division 7 of Sch 3 to the Telco Act (comprising cll 36-39) is concerned with exemptions to carriers from some State and Territory laws. Clause 36 provides that, subject to cl 37, Divs 2, 3 and 4 of Sch 3 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory. Clause 37 then sets out specific exemptions from cl 36. It only applies to an activity carried on by a carrier if the activity is authorised by Div 2, 3 or 4. Clause 37 then provides as follows:

(184) (1992) 175 CLR 453.

(185) ''States may not raise forces. Taxation of property of Commonwealth or State A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.''

(186) See *Gas Industry Act* 1994 (Vict), s 52(2), *Electricity Industry Act* 1993 (Vict), s 46(1A), *Local Government Act* 1989 (Vict), s 154(2), *Gas Supply Act* 1996 (NSW), s 51, *Electricity Supply Act* 1995 (NSW), s 50, *Local Government Act* 1993 (NSW), s 611(6), and *Pipelines Act* 1967 (NSW), s 40(1).

''Exemption from State or Territory laws

. . .

(2) The carrier may engage in the activity despite a law of a State or Territory about:

(a) the assessment of the environmental effects of engaging in the activity; or

(b) the protection of places or items of significance to Australia's natural or cultural heritage; or

(c) town planning; or

(d) the planning, design, siting, construction, alteration or removal of a structure; or

(e) the powers and functions of a local government body; or

(f) the use of land; or

(g) tenancy; or

(h) the supply of fuel or power, including the supply and distribution of extra-low voltage power systems; or

(i) a matter specified in the regulations.''

113 Clauses 38 and 39 further define these exemptions. Clause 38 provides:

''Concurrent operation of State and Territory laws

It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.''

114 Clause 39 states:

''Liability to taxation not affected

This Division does not affect the liability of a carrier to taxation under a law of a State or Territory.''

115 It follows that none of the exemptions granted to a carrier engaging in activities authorised by Divs 2, 3 and 4 of Sch 3 affords immunity from liability to taxation under a law of a State or Territory.

116 The respondents asserted that they were not obliged to pay the cable charges: the purported making of the charges, when carriers of energy and electricity are exempted from them, involved unlawful discrimination against them contrary to cl 44 of Sch 3 to the Telco Act which provides as follows:

''State and Territory laws that discriminate against carriers and users of carriage services

(1) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

(2) The following provisions have effect:

(a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally;

(c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular eligible user, against a particular class of eligible users, or against eligible users generally.

(3) For the purposes of this clause, if a carriage service is, or is proposed to be, supplied to a person by means of a controlled network, or a controlled facility, of a carrier, the person is an *eligible user*.

(4) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (1).

(5) The Minister may, by written instrument, exempt a specified law of a State or Territory from subclause (2).

(6) An exemption under subclause (4) or (5) may be unconditional or subject to such conditions (if any) as are specified in the exemption.

(7) An instrument under subclause (4) or (5) is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act* 1901.''

First instance

117 Whether the respondents' assertion was correct was, together with other issues (the ''other issues''), the subject of proceedings commenced by the respondents and tried by Wilcox J in the Federal Court at first instance (187). His Honour resolved some of those other issues adversely to the respondents, and some he found it unnecessary to decide. For present purposes it is sufficient to say that the assertion of the respondents was held by Wilcox J to be incorrect.

The Full Court of the Federal Court

118 The respondents successfully appealed to the Full Court of the Federal Court (188) which came to be constituted for the purposes of its decision by two judges only, Sundberg and Finkelstein JJ (189), who made declarations as follows:

> ''(a) s 611 of the *Local Government Act 1993* (NSW), to the extent that it authorises the first to eleventh respondents to make, levy and recover from the appellants charges in respect of the possession, occupation and enjoyment of telecommunications cables erected or placed on, under or over a public place; and
> (b) Part 8 of the *Local Government Act* 1989 (Vict), to the extent that it authorises the twelfth to fifteenth respondents to declare and recover from the appellants rates and charges on land occupied by telecommunications cables;
> discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within cl 44(1) of Sch 3 to the [Telco Act], and is to that extent inconsistent with cl 44(1) and invalid pursuant to s 109 of the Constitution.''

The appeal to this Court

119 The appellants relied upon several arguments in this Court including that the cable charges did not involve discrimination within the meaning of cl 44 of Sch 3 to the Telco Act, and that sub-cl (1) was not a valid exercise of the power conferred upon the Commonwealth by s 51(v) of the Constitution, that is, to make laws with respect to postal, telegraphic, telephonic and other like services. Western Australia, intervening to support the appellants, also submitted that cl 44 was in any event invalid for infringing the restriction on Commonwealth power first explained in *Melbourne Corporation v The Commonwealth* (190). The two matters are by no means unrelated. A large or

(187) *Telstra Corporation Ltd v Hurstville City Council* (2000) 105 FCR 322.
(188) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.
(189) The third judge of the Full Court, Katz J, became unable to continue as a member of the Court.
(190) (1947) 74 CLR 31. That the restriction may apply to a law which would otherwise be characterised as being with respect to a subject matter of Commonwealth legislative power is made clear at 50, per Latham CJ; at 63-64, per Rich J; at 66-

obvious intrusion upon the capacity of a State to carry out the functions of government of that State may, of itself, provide an indication that the Commonwealth law is not sensibly related, or only tenuously so, to a Commonwealth head of power. For this reason it will be convenient to deal with these arguments together. And because I am satisfied that they are correct it will be unnecessary for me to explore any of the others.

Is cl 44 *within Commonwealth power: does the Melbourne Corporation doctrine apply?*

120 There is no doubt, as s 51(v) of the Constitution provides, that Parliament may make laws with respect to the activities in which the respondents engage, relevantly telegraphic, telephonic and like services. It is important to keep in mind however that creation of a conflict by the enactment of a Commonwealth law with a State law cannot of itself provide a basis for the validity of a Commonwealth law. Section 109 of the Constitution (191) is not, and cannot be used, either directly or indirectly as a head of power. And it is to that issue that inquiry must first be directed: is the apparently conflicting Commonwealth law within power?

121 A law enacted by the Commonwealth not sensibly related to, or, to adopt language used by this Court on other occasions, having an ''insubstantial, tenuous or distant (192)'' relationship only with a head of Commonwealth power, cannot be a valid exercise of that power. It may be accepted that for a law to be a valid exercise of a head of power it is not necessary that every one of its provisions be seen to be exclusively within the power. This is so, not simply because of the presence of the incidental power in s 51(xxxix) of the Constitution (193). Few if any human or public endeavours can be completely disconnected from others. Take for example the power of the Commonwealth to legislate with respect to weights and measures in s 51(xv) of the Constitution. An Act to require that a particular locally

(190) *cont*
67, per Dixon J; see also *Victoria v The Commonwealth* (the *Payroll Tax Case*) (1971) 122 CLR 353 at 387, per Menzies J and in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 250, per Deane J; at 260, per Dawson J.

(191) ''Inconsistency of laws 109 When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.''

(192) *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79, per Dixon J.

(193) ''Legislative powers of the Parliament 51 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: ... (xxxix) matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.''

produced commodity may not be sold over the counters of shops in New South Wales unless it be sold in boxes measuring 10 cms by 10 cms by 10 cms exactly, although it may use the language of measures and is in that sense about or related to them, is not truly a law with respect to measures. Its proper characterisation would be as a law with respect to either or all of, the particular commodity, retail trade or consumer protection in New South Wales. So too, s 51(xxviii) of the Constitution, ''the influx of criminals'' would not empower the Commonwealth to make a law prescribing a complete sentencing regime for a State, albeit that the regime might have an effect upon some criminals who might be disposed to try to enter Australia.

122 In *Leask v The Commonwealth* (194) Gummow J, before pointing out that a single law can possess more than one character, adopted a passage from the judgment of McHugh J in *Re Dingjan; Ex parte Wagner* (195):

> ''In determining whether a law is 'with respect to' a head of power in s 51 of the Constitution, two steps must be taken. First, the character of the law must be determined. That is done by reference to the rights, powers, liabilities, duties and privileges which it creates (196). Secondly, a judgment must be made as to whether the law as so characterised so operates that it can be said to be connected to a head of power conferred by s 51. In determining whether the connection exists, the practical, as well as the legal, operation of the law must be examined (197). If a connection exists between the law and a s 51 head of power, the law will be 'with respect to' that head of power unless the connection is, in the words of Dixon J (198), 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' the head of power.''

123 In argument the respondents accepted that the paragraph which has just been quoted stated the test to be applied here.

124 What rights, powers, liabilities, duties and privileges does cl 44(1) of Sch 3 to the Telco Act purport to create? In answering the question a practical view should be taken of the effect and impact of the provision (199). Subject to one qualification, it would be mere semantics to regard the right or privilege which the section seeks to create as other than a right or privilege of enjoying exactly the same immunities and exemptions from charges as all, or some of the other

(194) (1996) 187 CLR 579 at 621.
(195) (1995) 183 CLR 323 at 368-369.
(196) *The Commonwealth v Tasmania* (the *Tasmanian Dam Case*) (1983) 158 CLR 1 at 152.
(197) *Herald & Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 440; the *Tasmanian Dam Case* (1983) 158 CLR 1 at 152.
(198) *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79.
(199) cf *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479 at 492 [16], per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

operators of utilities using and occupying *public spaces which the States own or over which they have legislative power*, as the States choose to confer upon them. (The qualification relates to the meaning to be given to ''carrier'' in the clause, a matter to which I will refer later.) Of what character or characters is a law that produces that practical result? It seems to me that a characterisation of it as other than a law with respect to the use and occupation of ''State'' public spaces, or ''State activities'', or discriminatory charging in respect thereof, is artificial and strained. ''State activities'' could mean for example, the insistence on payment of registration fees on motor vehicles. Clause 44 would appear to be cast in terms wide enough to preclude a State from exempting a carrier owned and operated or regulated by the State from motor vehicle registration fees unless the respondents' vehicles were similarly exempted. Another equally accurate characterisation of cl 44, is as a law with respect to the way in which the States choose to assist, or facilitate, or make less expensive, the delivery of energy and commodities to consumers within the States, by operators of utilities over which the States have control. Such a characterisation assumes of course, in the respondents' favour, that a differential approach to charging various utilities operators, including the respondents, is within the concept of ''discrimination'' as that concept finds expression in cl 44 of Sch 3.

125 A further accurate characterisation of the law is as a law with respect to the price of the use and occupation of State controlled land in which the Commonwealth has no proprietary rights, the Commonwealth (200) (or its licensees the respondents, assuming they could) not having chosen to acquire any. The fact that the respondents may have rights of statutory user carries with it no entitlement to dictate or even influence the financial terms of their use.

126 Yet another possible characterisation of cl 44 is as a law with respect to State constitutional power, a characterisation which brings into play the *Melbourne Corporation* doctrine (201). Remarks made by Gaudron, Gummow and Hayne JJ in *Austin v The Commonwealth* (202), the most recent application of *Melbourne Corporation*, regarding the limits of federal power in relation to its operation upon the States are of relevance to a question of characterisation. It is to ''the substance and actual operation' of the federal law [cl 44]'' that regard must be had. The State of Queensland with one exception (203) correctly submits that the practical effect of cl 44 is this:

(200) The assumption is probably correct. See *P J Magennis Pty Ltd v The Commonwealth* (1949) 80 CLR 382 at 401-402, per Latham CJ. See also cl 42 of Sch 3 to the Telco Act which provides a regime for the assessment of compensation.

(201) *Melbourne Corporation* (1947) 74 CLR 31.

(202) (2003) 215 CLR 185 at 249 [124].

(203) The reference to ''tax'' is not in my opinion appropriate.

> ''[It] puts the States in a dilemma. Either they forgo revenue from licensed carriers that even in the judgment of the Commonwealth Parliament, would not be an unreasonable burden for licensed carriers to bear or, they change their own policy about a matter totally within State jurisdiction and tax hitherto exempt entities. A State could levy rates and charges against carriers' infrastructure on or over public land only if it also ensured that similar rates and charges were levied against other infrastructure owners whether or not the State wished to expose these owners to the rates and charges.''

127 Because of the other reasons which lead me to the conclusion that I reach in this appeal, it is unnecessary for me to consider whether the true and substantial effect of cl 44, if valid, would also be to confer upon the respondents, contrary to cl 39 of Sch 3, an exemption from liability to taxation, if the charges are to be so identified, and the relationship between these two clauses.

128 In a passage in *Murphyores Inc Pty Ltd v The Commonwealth* (204) Stephen J (Barwick CJ and Gibbs J agreeing) suggested that the fact that a decision when made would be expressed in terms of a constitutional power of the Commonwealth, was sufficient to enable the decision (and presumably the enactment under which it was made) to be characterised as being under and within the relevant power. This is to prefer form to substance, the latter being that to which courts now look. Accordingly, the fact that different phraseology might be used, unconvincingly in my view, to give cl 44 a flavour of the exercise of the telecommunications power cannot suffice to give it that real and true character.

129 It is difficult to see how a State law that imposes a charge for use and occupation upon an operator which is not the Commonwealth, but which merely owes its right to carry out its activities to enactments within Commonwealth power can burden the Commonwealth in any way (or for that matter the respondents as its licensees), or give rise to a need for the *protection* of the Commonwealth. Section 26 of the Telstra Corporation Act manifests a clear intention that the Telstra respondents are not to enjoy any advantages which they would have if they were in fact the Commonwealth. This litigation equally manifests a rejection of that intention as does, it must be assumed, cl 44 itself. What is somewhat unusual is that s 26 of the Telstra Corporation Act is not expressed to be subject to the Telco Act and cl 44 is not introduced by a conventional formula such as ''Notwithstanding anything herein or elsewhere . . .''. The task of interpretation and reconciliation is left therefore entirely to the courts.

130 I would say this about the respondents' submissions that the charges are a burden. The word ''burden'' is a misnomer in these

(204) (1976) 136 CLR 1 at 12.

circumstances. The New South Wales legislature was right in enacting in s 611(2) of the NLGA that the charges were not to be regarded as a ''rate''. As s 611(3) makes clear, they are based upon the nature of the benefit enjoyed. They are charges for value received personally. They are not in any sense a tax or a rate. A significant and valuable benefit not derived by the community generally is enjoyed by the respondents. The language of revenue law is inapt in the circumstances. The charges are not even burdensome in the sense of being arbitrary or excessive, because, so far as New South Wales at least is concerned, s 611(4) of the NLGA provides a mechanism for judicial assessment of quantum.

131 Another unusual feature of the Telco Act is that there is no definition, or indeed even any attempt at internal identification of those carriers with whose activities and charges made upon them, the respondents and like carriers are to be compared for the purposes of cl 44. The explanation may be that originally the relevant purpose was to prohibit discrimination between telecommunications carriers. On their faces, the expressions used in cl 44, ''particular carrier'', ''class of carriers'' and ''carriers generally'' could mean carriers by road, rail or air, and not necessarily by cable, wire or pipeline. It is quite unsatisfactory to have to resort to a Second Reading Speech and only the vaguest of indications in the Telco Act to try to ascertain at which kinds of carriers as comparators the Telco Act is aimed. It seems that the legislature may even have had in mind State railways as an appropriate comparator. Relevantly the Second Reading Speech was as follows (205):

> ''The bill continues and reinforces the provisions in the [AOTC Act] which prevent the law of a State or Territory from operating so as to discriminate against a carrier or a class of carrier. It provides that a State or Territory law has no effect to the extent that it discriminates, or has the effect of discriminating, either directly or indirectly against a carrier or a user or potential user of a carrier's services. An example of one kind of discrimination that this provision deals with are State or Territory laws which give special powers or immunities to public utilities such as electricity suppliers or railways where these are not also given to any carrier in that State or Territory in like circumstances.''

132 What had been said earlier in relation to cl 42 which was to become the present cl 44 was similarly unilluminating (206):

> ''Clause 42 State and Territory laws that discriminate against carriers
>
> This clause provides that a State or Territory law has no effect to

(205) Australia, Senate; *Parliamentary Debates* (Hansard); 25 February 1997, p 944.
(206) Explanatory Memorandum to the Telecommunications Bill 1996, vol 3, p 27.

> the extent to which it discriminates, or has the effect of discriminating, directly or indirectly against a carrier, or a user or potential user of a carrier's services. It is based on s 120 of the [AOTC Act]. The clause is intended to deal with laws which have an indirect effect of discriminating against carriers or users of carrier services, not just a law which, for example, on its face treats a person differently to someone else. The indirect discrimination which this clause is intended to prevent includes the following examples:
>
> - laws that impose a burden on facilities of a carrier that is not imposed on similar facilities (for example a tax on 'street furniture' which is in effect discriminatory against carriers because other bodies owning such equipment such as electricity authorities would be exempt from paying that tax);
> - laws which have the effect of giving powers or immunities to a person or body in relation to the installation, maintenance or operation of a facility which do not apply to carriers generally (for example, where a public utility may rely on general land access powers given to that utility under State or Territory law to install telecommunication facilities without obtaining the approvals which would ordinarily be required for that activity under the law of that State or Territory); and
> - laws which discriminate against people by reason of their use of the facilities of a carrier.''

133 Again the word ''burden'' is misused. For a person owning or controlling land or space to require user A to pay for its use and occupation and not users B and C is not to impose a burden on user A: it is simply to choose to forgo a right in respect of some but not all users. There is another misstatement. The so-called burden is not upon the facilities. It is a charge for the use and occupation of the space they occupy.

134 Here the Full Court said this (207):

> ''. . . it can be seen that the object cl 44 is designed to achieve . . . is to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier in the course of providing the telecommunications services for which the carrier holds a permit.''

135 The passage uses language which departs from the Telco Act and contains a large assumption: that the State exempting enactments were ''potentially *unfairly* discriminatory''. It is far from obvious that it is unfair to exempt the means of delivery of, for example an essential commodity such as pure water, but not the means of delivery of

(207) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 210 [24].

television programmes transmitted from a studio of a commercial broadcaster, or bounced on to or off a satellite and transmitted by cable for a substantial reward to a commercial broadcaster and the respondent carriers.

136 Nor can a court know whether, and what compromises may have been made between a State and a carrier to enable the latter to provide a service or a commodity to residents of that State. So too, a State may have chosen to exempt one or more carriers from charges, or to differentiate between carriers in order to provide employment or infrastructure in a particular area, or to provide a fundamental service to its taxpayers and residents. Intrusion into these matters represents a grave potential interference with the capacity of the States to carry out their functions of government: government in relation to essential matters of water, energy, the environment, and also therefore, health. By s 154(2)(b) of the VLGA, for example, water distributors in public ownership are exempted from charges. It is no answer to say that these are matters which may be taken into account in deciding, pursuant to cl 44 of Sch 3 to the Telco Act whether discrimination has occurred. I doubt whether any satisfactory equation exists or can be devised of the various benefits and costs of the objects a State may wish to achieve with the charges that it chooses to impose or refrain from imposing. In any event a State should not be obliged, as it would be in proceedings under or relating to cl 44, to justify and quantify the political, demographic, social and economic objectives that it sets out to achieve in the exercise of legitimate State power, particularly in respect to land which neither the Commonwealth nor a non-public licensee of the Commonwealth has sought to acquire, or has acquired. On the construction of cl 44 advanced by the respondents the States' ability to further their policies by, for example, enacting workplace safety laws, and regulating motor vehicle insurance, would all be in jeopardy so far as they related to the respondents. To give cl 44 such an operation would inevitably, to use the language of Gaudron, Gummow and Hayne JJ in *Austin* (208), involve a ''curtailment' of [the] 'capacity' of the States 'to function as governments'''.

137 Something needs to be said about the respondents' submission that the charges are taxes. *Luton v Lessels* (209) is the most recent decision of this Court as to the nature of a tax. There Gleeson CJ cited (210) a passage from the judgment of Latham CJ in *Matthews v Chicory Marketing Board (Vict)* (211):

> ''The levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered.''

(208) (2003) 215 CLR 185 at 249 [124].
(209) (2002) 210 CLR 333.
(210) *Luton v Lessels* (2002) 210 CLR 333 at 342 [10].
(211) (1938) 60 CLR 263 at 276.

138 Although Gleeson CJ offered a caution against reading the statement of Latham CJ and statements by other judges elsewhere as exhaustive definitions of a ''tax'', his Honour did not suggest that the distinction made by Latham CJ between an exaction for public purposes, and a payment for services rendered, the latter being of a very similar kind to use and occupation, was not well made. If there were any doubt about this it can be dispelled by reference to the joint judgment of Gaudron and Hayne JJ in *Luton v Lessels* in which their Honours said (212):

> ''[a]s the Court also pointed out in *Air Caledonie* (213), the reference to 'payments for services rendered', as an antonym for 'tax', is only one example of various special types of exactions of money which are not taxes. Charges for the acquisition or *use of property*, *fees for a privilege*, and fines or penalties for criminal conduct are some other examples of what are unlikely to amount to forms of tax.'' (Emphasis added.)

139 McHugh J in *Luton v Lessels* also pointed out that the fact that charges collected may go into Consolidated Revenue does not mean that they are on that account alone taxes (214). The same may equally be said of the depositing of the charges here in the appellants' general or rate accounts, or otherwise as the case may be.

140 Something additional needs to be said about the proposition that the charges are a tax by way of rates or a ''rate''. The answer to that proposition is a short one. The charges here are made not just in respect of the use and occupation of airspace and land, but for space and land owned or controlled by the appellants. However the charges are to be characterised, a characterisation of them as a rate upon land or space is inappropriate.

141 The charges are therefore neither a tax, a rate nor a burden.

142 The Full Court of the Federal Court relied, for the different view that they formed upon three cases. Each of them is distinguishable. *Australian Coastal Shipping Commission v O'Reilly* (215) was concerned, not as here with corporations separate from and mere licensees of the Commonwealth but with a corporate agency of the Commonwealth, as Dixon CJ described it (216), a Commonwealth government body. It is one thing to seek to protect as the legislation did there, a Commonwealth government body, but a quite different thing, to protect a commercial licensee forming no part of the government, a matter to which I will return. Indeed one of the main purposes of the Telco Act and the other related legislation was, as the Second Reading

(212) *Luton v Lessels* (2002) 210 CLR 333 at 352-353 [50].
(213) *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.
(214) *Luton v Lessels* (2002) 210 CLR 333 at 361-362 [80]; see also at 383-384 [177], per Callinan J.
(215) (1962) 107 CLR 46.
(216) *O'Reilly* (1962) 107 CLR 46 at 55.

Speech further stated, ''to promote fair, but vigorous, competition in this industry'' (217); a goal somewhat removed from that ordinarily pursued by a governmental, and therefore usually, a monopolistic or preferred public enterprise. There is another point of distinction. In *Australian Coastal Shipping Commission* the issue was whether the agency should bear the burden of a State tax, stamp duty, an exaction simpliciter, in exchange for which the Commonwealth body obtained no rights, property, privilege or benefits. The issue here is not whether the respondents should bear the burden of a State tax: it is whether they should be entitled to use land and space owned by the State or a State creature upon exactly the same financial terms as undefined and only at best, vaguely contextually and extraneously identified other carriers.

143 The second and third cases relied upon were *Strickland v Rocla Concrete Pipes Ltd* (218) and *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (219). Both were concerned with the validity of sections of the *Trade Practices Act*. The second held that the proscription of certain monopolies with the object of protecting Australian trade and commerce generally was valid. It has little, in my opinion, of relevance to say about a provision such as cl 44.

144 The third of the cases does not in my opinion throw much light upon the problem here. What the statement of Mason J (220) quoted by the Full Court (221) does emphasise is the need for the drawing of careful distinctions between laws going beyond the power generally, and laws which incidentally only have an operation upon objects outside the power. Here cl 44 strikes directly at, and does not merely incidentally touch or operate upon the use and occupation of State land and infrastructure and the price thereof.

145 Clause 44, in its application to State laws cannot be characterised as a law with respect to telegraphic, telephonic and other like services merely because those State laws may have application to an operator required by the Telco Act to hold a licence to engage in telecommunications services. Neither *R v Brislan; Ex parte Williams* (222) nor *Jones v The Commonwealth [No 2]* (223) which were relied on by the respondents supports a proposition that a law exempting a Commonwealth licensee from State taxes, let alone charges for the use of State land and space, must be characterised as a

(217) Australia, Senate; *Parliamentary Debates* (Hansard); 25 February 1997, p 944.
(218) (1971) 124 CLR 468.
(219) (1982) 150 CLR 169.
(220) *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 205-206.
(221) *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at 212-213 [30].
(222) (1935) 54 CLR 262.
(223) (1965) 112 CLR 206.

law with respect to postal, telegraphic, telephonic and other like services.

146 Something more needs to be said about the application of the *Melbourne Corporation* doctrine. In my opinion cl 44 answers the description of a law to prevent, control, or seriously curtail State legislative action in a manner that infringes the implied restriction recognised in *Melbourne Corporation*. In terms it is directed to the intended and legitimate effect of State laws and rights arising under State law, rather than the operation and effect of an authority given by the Commonwealth. The Commonwealth Minister's power to exempt specified State laws, and to make the exemption subject to conditions, is another indication that the focus of cl 44 is on State laws, rather than on an exercise of Commonwealth power. The connection sought to be drawn by the respondents is tenuous: between the State laws imposing charges and that a Commonwealth licensee might have to pay them at a differential rate from others. It is true therefore that it is the operation of the State laws in relation to persons other than carriers, as much as the operation of State laws in relation to ''carriers'', which cl 44 seeks to control. In the circumstances the use of the word ''protect'' by the respondents in the sense of shielding or in some way defending the respondents against an assault by way of a charge levied upon them, is as misplaced and inappropriate as the respondents' use of the words ''burden'' and ''tax''. To exempt another or others, is not to burden the respondents. Or, to impose the same or a similar charge upon others, is not to burden, or otherwise to make an imposition upon the respondents.

147 It cannot be entirely ignored that the respondents are not government agencies or part of government. Windeyer J in *O'Reilly* (224) was the only Justice who expressed the view that the fact that the Commission there was an agency of the Commonwealth, was not a decisive factor (225). At other times however emphasis has been placed on that fact. Dixon CJ in *O'Reilly* did so (226). And in *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (227), Dawson, Toohey and Gaudron JJ said (228):

> ''[B]y exercising the legislative power granted to it by the Constitution the Commonwealth Parliament can legislate to exclude the operation of a State law with respect to the *Commonwealth executive or its agencies*.'' (Emphasis added.)

148 The mere fact that the Commonwealth has the power to regulate an activity that may be engaged in by private and public bodies does not

(224) (1962) 107 CLR 46.
(225) *O'Reilly* (1962) 107 CLR 46 at 69.
(226) *O'Reilly* (1962) 107 CLR 46 at 56.
(227) (1997) 190 CLR 410.
(228) *Re Residential Tenancies Tribunal (NSW)* (1997) 190 CLR 410 at 446.

empower the Commonwealth to make a law on any subject applying to a regulated person. There is a statement to a similar effect by Rich and Williams JJ in *Bank of NSW v The Commonwealth* (*Bank Nationalisation Case*) (229): that a provision immunising the Commonwealth Bank from the operation of State taxation ''could only be valid with respect to State law if the Bank is an agent of the Commonwealth'' (230). It is also consistent, as Western Australia submits, with the manner in which decisions such as *O'Reilly* (231) and *The Commonwealth v Queensland* (232) have been subsequently viewed, as depending on a connection of the subject matter of the law with the Commonwealth itself.

149 It follows, in my opinion, that cl 44 of Sch 3 to the Telco Act is beyond the power of the Commonwealth. It also offends against the doctrine of implied restrictions upon the curtailment by the Commonwealth of the legitimate governmental functions of the States. It is unnecessary for me therefore to consider any of the other arguments in the appeals.

150 I would allow the appeals with costs, make declarations in accordance with the preceding paragraph, and order that the respondent corporations pay the appellants' costs of the appeals to the Full Court of the Federal Court.

In each matter:
Appeal dismissed with costs.

Solicitors for the appellant Victorian councils, *Maddocks.*

Solicitors for the appellant New South Wales councils, *Deacons.*

Solicitors for the respondent Telstra, *Mallesons Stephen Jaques.*

Solicitors for the respondent Optus, *Gilbert & Tobin.*

Solicitors for the interveners, *Australian Government Solicitor; C W Lohe*, Crown Solicitor for the State of Queensland; *Timothy Sharp*, Crown Solicitor for the State of Western Australia; *J H Y Syme*, Victorian Government Solicitor.

PTV

(229) (1948) 76 CLR 1.
(230) *Bank Nationalisation Case* (1948) 76 CLR 1 at 275.
(231) (1962) 107 CLR 46.
(232) (1920) 29 CLR 1.

FEDERAL COURT OF AUSTRALIA

Telstra Corporation Ltd v State of Queensland [2016] FCA 1213

File number:	QUD 202 of 2012
Judge:	**RANGIAH J**
Date of judgment:	14 October 2016
Catchwords:	**COMMUNICATIONS LAW**– whether *Land Regulation 2009* (Qld) impermissibly discriminates against carriers by imposing higher rents on carriers than on other businesses for State leases – whether *Land Regulation 2009* (Qld) discriminates by denying carriers a right to appeal against rents – construction of cl 44 of Sch 3 to the *Telecommunications Act 1997* (Cth) to determine whether market rent is a relevant, appropriate or permissible distinction
Legislation:	*Australian and Overseas Telecommunications Act 1991* (Cth) *Competition and Consumer Act 2010* (Cth) Pts XIB and XIC *Telecommunications Act 1997* (Cth) ss 3, 7, 26, 30, 42, 56, 484, cll 27, 36, 37, 38, 39, 44 of Sch 3 and Divs 2, 3, 4, 5, 7, 8 of Sch 3 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 12A *Trade Practices Act 1974* (Cth) *Environmental Planning and Assessment Act 1979* (NSW) s 96 *Land Act 1994* (Qld) ss 15, 153, 183 (repealed), 199A, 332, 448, Sch 1B and Pt 1, Chapter 5 (repealed) *Land Regulation 1995* (Qld) ss 12, 15, 19 (repealed) *Land Regulation 2009* (Qld) ss 26A, 27, 30, 33, 37A and Sch 12 *Land and Other Legislation Amendment Act 2014* (Qld) *Land Act and Other Legislation Amendment Regulation (No 1) 2014* (Qld) *Land Valuation Act 2010* (Qld) ss 5, 6, 7, 19, 26, 72, 105, 147, 155 and 172 *Lands Legislation Amendment Act 1991* (Qld) *Local Government Act 1989* (Vic) ss 154 and 155 of Pt 8 *Local Government Act 1993* (NSW) s 611

	Explanatory Notes for the *Land Bill 1994* (Qld)
Cases cited:	*Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 *Development Assessment Commission v 3GIS Pty Ltd* (2007) 212 FLR 123 *Optus Networks Pty Ltd v Rockdale City Council* (2005) 144 FCR 158 *Telstra Corporation Ltd v Hurstville City Council* (2000) 103 FCR 322 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 *Telstra Corporation Ltd v State of Queensland* [2013] FCA 1296
Date of hearing:	26, 27 and 28 April 2016
Date of last submissions:	28 April 2016
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Category:	Catchwords
Number of paragraphs:	214
Counsel for the Applicant:	Mr JD McKenna QC with Mr DS Piggott
Solicitor for the Applicant:	King & Wood Mallesons
Counsel for the Respondent:	Mr J Horton QC with Ms A Stoker
Solicitor for the Respondent:	Crown Law

ORDERS

QUD 202 of 2012

BETWEEN:	**TELSTRA CORPORATION LTD** Applicant
AND:	**STATE OF QUEENSLAND** Respondent

JUDGE: **RANGIAH J**

DATE OF ORDER: **14 OCTOBER 2016**

THE COURT ORDERS THAT:

1. The applicant provide a draft of the orders it seeks to the respondent by 4 pm on 19 October 2016.

2. The respondent provide to the applicant its response to the draft orders by 4 pm on 26 October 2016.

3. The parties are to either provide the Court with agreed draft orders or notify the Court that no agreement has been reached by 4 pm on 1 November 2016.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1 The applicant, Telstra Corporation Limited ("Telstra"), is a "carrier" under the *Telecommunications Act 1997* (Cth). Clause 44(1)(a) of Sch 3 to the *Telecommunications Act* provides that State and Territory laws have no effect to the extent that they discriminate or have the effect of discriminating against carriers.

2 The *Land Regulation 2009* (Qld) prescribes rents, or methods of calculating rents, for leases over State land in Queensland. Telstra holds approximately 488 such leases.

3 Telstra alleges that the *Land Regulation* discriminates against carriers by imposing higher rents on carriers than on other businesses. Telstra seeks declarations that provisions of the *Land Regulation* are invalid and orders for repayment of rent which it claims to have overpaid.

4 The respondent, the State of Queensland, admits that the *Land Regulation* has the effect of impermissibly discriminating against carriers in respect of State leases held by carriers in certain areas of low population density in the west and far north of Queensland ("the conceded areas"), but denies Telstra's allegations in respect of leases in the remainder of Queensland ("the disputed areas"). The State cross-claims for rent which it alleges remains due and payable by Telstra.

5 The central issue is whether provisions of Pt 4, Div 1 of the *Land Regulation* impermissibly discriminate or have the effect of discriminating against carriers by imposing higher rents for State leases held by carriers than for leases held by other businesses in the disputed areas. There is also a secondary issue as to whether the *Land Regulation* discriminates against carriers by denying them a right to appeal against rents for their leases.

6 The State contends that the *Land Regulation* provisions do not discriminate against Telstra and other carriers in respect of State leases in the disputed areas because the rents imposed on carriers approximate the market rents that carriers would be charged for leases of private land; and a distinction based on market rents is a relevant, appropriate or permissible distinction to draw between carriers and other businesses. The State also argues that the comparator which Telstra relies on to establish its case of discrimination is not an appropriate comparator.

7 The resolution of these issues requires detailed consideration of the relevant statutory provisions, as well as valuation evidence called by each party.

FACTS

8 Telstra owns and operates the largest and most comprehensive fixed line and mobile telecommunications network in Australia. It is necessary for Telstra to place infrastructure on land throughout Australia, including on State land, in order to operate its network and provide carriage services.

9 The infrastructure or facilities comprising Telstra's fixed line network includes: exchanges; optic fibre cabling (underground and overhead); copper cabling (underground and overhead); optical fibre regenerators; radio towers; and, in remote areas, digital radio communications systems, high capacity radio concentrators and multiple drop out units.

10 Additional facilities called "base stations" are needed to operate a mobile telephone network. Base stations receive and send radio transmissions to and from mobile telephones. Telstra's base stations comprise Cellular Mobile Telephone Services Base Stations ("CMTS") and microcells.

11 When a call is made on Telstra's fixed line telephone network, a signal is transmitted from the caller's telephone through a network of cables, optical fibre, radio towers and exchanges to the recipient's telephone. When a call is made on a mobile telephone, a signal is transmitted from the telephone to antennae which are linked by cabling or radio-link technology into and through the fixed line telephone network.

12 Until 1991, Telecom was the only provider of telecommunication services in Australia. By the *Australian and Overseas Telecommunications Act 1991* (Cth), the property and operations of Telecom were vested in the company now known as Telstra Corporation Ltd. A suite of legislation, including the *Telecommunications Act*, was also introduced allowing other telecommunications service providers to compete.

13 Telstra is the only carrier with a fixed line telephone network in Queensland. It was unnecessary for competitors to replicate Telstra's fixed line network as Telstra is required to give other carriers reasonable access to its fixed line network. Three carriers, Telstra, Vodafone and Optus, operate retail mobile telephone networks in Queensland. All three have set up mobile telephone infrastructure in populated areas and along some major highways.

However the vast majority of the land area of Queensland is not covered by any mobile telephone service.

14 Telstra's infrastructure is situated in a wide variety of urban and rural locations. When Telstra selects sites for the installation of the infrastructure required to provide fixed line or mobile telephone networks, the factors it considers include its universal service obligation, technical constraints, construction and maintenance costs and co-location of services.

15 Pursuant to s 12A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), Telstra is subject to a universal service obligation. That obligation requires Telstra to ensure that all Australians, no matter where they live or conduct business, have reasonable access on an equitable basis to a standard telephone service and payphone service. This means that Telstra must install infrastructure to provide standard telephone services and payphone services in rural and remote areas of Australia, as well as urban areas. The universal service obligation does not apply to mobile telephone services.

16 In rural and remote areas, Telstra uses radio towers to transmit radio signals via microwave link over long distances from exchange to exchange. It is necessary for there to be a clear line of sight between radio towers, typically requiring an elevated site. Such sites require good road access and electricity. Telstra also requires land to install exchanges and other facilities.

17 In selecting a site for a CMTS facility in more urbanised areas where mobile telephone services are provided, it is necessary for the area of the signal from that facility to overlap with the area of signals from other facilities to ensure continuity of coverage (ie no drop-outs) as a user moves between areas.

18 Once infrastructure has been installed, it can be difficult to relocate. For example, the cost of relocating a radio tower can be more than $1 million.

19 Telstra prefers to enter some form of tenure agreement with land owners, rather than relying on statutory rights to enter and occupy land. Telstra's portfolio of leases in Queensland includes leases obtained in the private market, leases of freehold land from government entities, and leases of State land. Telstra also holds licences and permits for installation of facilities on land in Queensland.

20 Telstra holds about 894 leases over private land in Queensland. The vast majority of these leases are over land in south-east Queensland or along the east coast, with only about

62 outside these areas. About 83% of Telstra's private leases are used for CMTS sites in urban areas for its mobile network.

21 Apart from the south-east corner and the eastern coast, the vast majority of land in Queensland consists of State land. Telstra has about 488 State leases in Queensland. Telstra's State leases spread throughout Queensland, although there are relatively few in south-east Queensland.

22 The vast majority of Telstra's State leases are used for radio towers for the fixed line network. Many of these towers are in rural or remote Queensland. Many of the radio tower sites in rural or remote Queensland are in locations where there is no human occupation or alternative use being made of the land.

23 Telstra has installed CMTS mobile telephone facilities on only about 53 of its 488 State lease sites.

24 What emerges from the evidence is that carriers have an imperative need to install infrastructure on many parcels of land across Queensland in order to operate their telephone networks and other carriage services. Telstra's need is particularly acute because of its universal service obligation. Unlike other carriers, Telstra requires the use of land in even remote parts of Queensland. The bulk of the land in rural and remote areas of Queensland is government-owned.

THE STATUTORY PROVISIONS

The Telecommunications Act 1997 (Cth)

25 The *Telecommunications Act* provides a regulatory framework for the provision of carriage services by carriers.

26 Under s 7 of the *Telecommunications Act*, a "carrier" is the holder of a carrier licence granted under s 56 by the Australian Communications and Media Authority ("ACMA"). Telstra holds a carrier licence.

27 Section 42 allows a carrier to use a network unit to supply a carriage service to the public. A "network unit" is defined in ss 26(1) and 30 as a "line link" which connects distinct places in Australia. A "line" is defined in s 7 to include a wire, cable, optical fibre, tube, conduit or other physical medium used as a continuous artificial guide for carrying communications by means of guided electromagnetic energy.

28 Section 7 defines "carriage service" as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

29 The effect of these provisions is that a carrier is permitted to provide carriage services, such as telephone services, to the public. A telephone service can be a fixed line service or a mobile telephone service.

30 Part 24 consists of a single provision, s 484, which states, "Schedule 3 has effect". Schedule 3 of the *Telecommunications Act* has the heading "Carriers' powers and immunities".

31 The powers given to carriers are set out in Divs 2, 3 and 4 of Pt 1, Sch 3. Division 2 allows a carrier to enter on and inspect land. Under Div 3, the power to install a facility may be exercised where, relevantly, the carrier holds a facility installation permit (which may only be issued by the ACMA if the carrier has made reasonable efforts to negotiate in good faith with the relevant proprietors and administrative authorities), or if the facility is a low-impact facility. Division 4 allows a carrier to maintain the facility once installed.

32 Division 7 deals with the relationship between Divs 2, 3 and 4 and State and Territory laws. Clause 36(1) provides:

> Divisions 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.

33 Clause 37 applies to activities authorised by Divs 2, 3 and 4. Despite cl 36(1), cl 37(2) provides that a carrier may engage in such activities despite a law of a State or Territory about a number of specified subjects, including town planning, powers and functions of a local government body, the use of land and tenancy.

34 Clause 38 provides:

> **38 Concurrent operation of State and Territory laws**
>
> It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.

35 Clause 39 provides:

> **39 Liability to taxation not affected**
>
> This Division does not affect the liability of a carrier to taxation under a law

of a State or Territory.

36 Although Telstra has the power under Div 3 to compulsorily install facilities on both privately owned and State land (subject to obtaining a facility installation permit where the facility is not a low-impact facility), its policy is to avoid exercising such power, and to instead negotiate leases which allow it to install and maintain such facilities.

37 Clause 44 appears in Div 8, which has the heading "Miscellaneous". Clause 44 provides, relevantly:

> **44 State and Territory laws that discriminate against carriers and users of carriage services**
>
> (1) The following provisions have effect:
>
> (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
>
> (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
>
> (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

38 Clause 44 is the critical provision in this proceeding. The resolution of the proceeding requires consideration of its meaning and effect.

The Land Act 1994 (Qld)

39 In 1990, the Wolfe Committee conducted a review of land regulation in Queensland. The Wolfe Committee considered the way rents for State leases should be fixed, concluding that the preferred mechanism was to apply a percentage to the unimproved capital value of land. The Committee said:

> The use of unimproved value as a factor in determining rents for Crown leaseholds is soundly based as it measures the value of Crown land, and disregards the improvements and development works either owned by the lease holder or for which he may claim compensation. A rental percentage applied to the unimproved value is

> a fair way of determining a rent for the use of Crown land. Once a percentage rental is established the rent is then directly related to the unimproved value of and will change as the unimproved value changes.

40 The Committee suggested that the rental percentage should vary within the range of 3% (for residential land) to 6% (for commercial and industrial land).

41 By the *Lands Legislation Amendment Act 1991* (Qld), Parliament gave effect to the Wolfe Committee's recommendations in relation rents for State land. The *Land Act 1994* (Qld) later finalised the implementation of the recommendations of the Wolfe Committee, as explained in the Explanatory Notes for the *Land Bill 1994* (Qld).

42 Section 15(2) of the *Land Act* provides that the Minister may lease unallocated State land for either a term of years or in perpetuity. Section 153 provides that a lease must state the purpose for which it is issued, while s 199A(2) provides that leased land must only be used for the purpose for which the lease was issued.

43 Section 448 and Sch 1B provide that the Governor in Council may make regulations about matters including payment of rent, the calculation or setting of rent payable and categories of leases.

44 Until 1 July 2014, Pt 1, Ch 5 of the *Land Act* provided that rental periods and rents, or methods of calculating rents, were to be determined by regulation. Section 183 provided:

> **183 Rent payable generally**
>
> (1) The rent for a lease, licence or permit is –
>
> (a) if a regulation prescribes an amount for all leases in a category of lease (a prescribed category) – the amount prescribed; or
>
> (b) otherwise – the amount calculated by multiplying the rental valuation prescribed under a regulation by the rate prescribed under a regulation.
>
> …
>
> (3) The rate may be a single rate applying to all leases, licences or permits, or a series of rates applying to different categories of leases, licences or permits prescribed under the regulations.
>
> (4) The rent for a lease, licence or permit –
>
> (a) must not be less than the minimum prescribed under a regulation, unless the lease is of a prescribed category; and
>
> (b) must be calculated in whole dollars.

45 The *Land and Other Legislation Amendment Act 2014* (Qld) deleted Pt 1, Ch 5 of the *Land Act*, including s 183. The *Land Act and Other Legislation Amendment Regulation (No 1) 2014* (Qld) then enacted provisions in the *Land Regulation* with effect from 1 July 2014 to replace the deleted *Land Act* provisions.

The Land Regulation 1995 (Qld)

46 The *Land Regulation 1995* (Qld) gave practical effect to the Wolfe Committee's recommendations concerning the way in which rents for State leases should be calculated.

47 The *Land Regulation 1995* identified 13 categories of leases, licences or permits. The two categories of relevance were categories 4 and 7.

48 Section 12 defined a category 4 lease as a lease used for commercial, industrial or business purposes, which does not fulfil the requirements for another category.

49 Section 15 defined a category 7 lease, relevantly, as a lease used for the provision, relay or transmission of telephonic, television, radio or other electronic communication services for commercial, domestic, emergency or essential services activities. Telstra's leases fell within category 7.

50 Under s 19, the rate of rent prescribed for both category 4 and category 7 leases was 5% of the valuation of the lease for rental purposes.

51 It may be seen that under the *Land Regulation 1995*, the rents to be paid by Telstra and other carriers were calculated on the same basis as the rents for other businesses.

The Land Regulation 2009 (Qld)

52 When it commenced on 1 July 2010, s 27 of the *Land Regulation* prescribed nine categories of leases, numbered from 11 to 16. The *Land Regulation* has since been amended a number of times. It is enough for present purposes to refer to the *Land Regulation* in its current form.

53 There are now 13 rental categories prescribed under s 27. Those categories are numbered from 11.1 to 16. The categories can be described as follows:

- Categories 11.1 and 11.2 – primary production;
- Categories 12.1 and 12.2 – residential;
- Category 13 – business and government core business;

- Categories 14.1 and 14.2 – charities and sporting or recreational clubs;
- Categories 15.1, 15.2, 15.3, 15.4 and 15.5 – communication sites;
- Category 16 – divestment.

54 The categories of primary relevance to this case are categories 13, 15.4 and 15.5.

55 Section 30 of the *Land Regulation* deals with category 13 leases. That section provides:

> **30 Category 13 lease**
>
> (1) A lease is a category 13 lease if –
>
> (a) under its conditions the lease may be used for, or it is being used for, a business, commercial or industrial purpose; and
>
> (b) the lease does not meet the requirements for another category.
>
> (2) Also, a lease is a category 13 lease if –
>
> (a) the lessee is a government leasing entity; and
>
> (b) the use of the lease is essential for conducting the lessee's core business.
>
> *Examples of a lessee's core business –*
>
> operating hospitals, police stations, schools, offices and depots
>
> …

56 Section 33 of the *Land Regulation* deals with category 15 leases. It provides, relevantly:

> (4) A lease is a category 15.4 lease if –
>
> (a) the lease may be used for, or it is being used for, the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity; and
>
> (b) the lease land is in a rural area.
>
> (5) A lease is a category 15.5 lease if –
>
> (a) the lease may be used for, or it is being used for, the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity; and
>
> (b) the lease land is in an urban area.
>
> (6) In this section—
>
> ...
>
> ***non-community service activity*** means an activity relating to the provision of

commercial or domestic services…

Example of commercial or domestic services—

mobile phone or cable television services

rural area means a part of the State that is not an urban area.

urban area means a part of the State in the area of a following local government –

- Brisbane City Council
- Gold Coast City Council
- Ipswich City Council
- Logan City Council
- Moreton Bay Regional Council
- Redland City Council
- Sunshine Coast Regional Council.

57 Telstra's leases fall within categories 15.4 and 15.5. It may be seen that the difference between category 15.4 and 15.5 leases is that the former applies to land in rural areas and the latter to land in urban areas.

58 Section 37A of the *Land Regulation* provides, relevantly:

37A Rent for leases of particular categories

(1) The rent for a rental period for the following leases is the amount calculated by multiplying the rental valuation for the particular lease by the following percentage –

…

(e) for a category 13 lease – 6%;

…

(2) The rent for a rental period for the following leases is –

…

(d) for a category 15.4 lease – $12,302;

(e) for a category 15.5 lease – $18,453.

59 The expression "rental valuation" is defined in Sch 12 of the *Land Regulation* as a "Land Act rental valuation" under the *Land Valuation Act 2010* (Qld).

60 A "rental period" for a lease is defined in s 26A of the *Land Regulation* as a period of one year starting on 1 July.

61 When the *Land Regulation* commenced on 1 July 2010, the prescribed rents for category 15.4 and 15.5 leases (then known as category 15.2 and 15.3 leases) were $10,000 and $15,000 respectively. There have been annual increases in the rents for category 15.4 and 15.5 leases of around 3.5% since then. The rents at the date of trial were $11,886 and $17,829 respectively, but have now been increased to the amounts set out in [58] above.

62 It may be seen that under s 37A of the *Land Regulation*, the annual rent for category 13 leases is calculated at 6% of the rental valuation for the lease, but that a fixed annual rent is imposed for category 15.4 and 15.5 leases. That distinction results in carriers usually paying higher rents than other businesses for a lease of State land. The distinction is at the heart of this proceeding.

The Land Valuation Act 2010 (Qld)

63 Under s 5 of the *Land Valuation Act*, the Valuer-General must decide the value of land as provided for under that Act.

64 Section 72 requires the Valuer-General to make annual valuations of all land in a local government area.

65 Section 6(1)(c) provides that one of the purposes of such a valuation is the calculation of rent under the *Land Act*.

66 Section 7 provides that the value of land for non-rural land is its site value. Under s 19(1) if the land is improved, its site value is its expected realisation under a bona fide sale assuming all non-site improvements for the land had not been made.

67 Section 7 provides that the value of land for rural land is its unimproved value. Under s 26(1) if the land is improved, its unimproved value is its expected realisation under a bona fide sale assuming all site improvements and non-site improvements on the land had not been made.

68 Section 105(1) allows an owner to object to the valuation of the owner's land. An "owner" is defined in the Schedule to the *Land Valuation Act* to include a lessee of land held from the State where the lessee must pay *Land Act* rental for the land.

69 Section 147 requires the Valuer-General to consider and decide a properly made objection. Under s 155, an objector may appeal to the Land Court against an objection decision, and has, under s 172, a right to a further appeal to the Land Appeal Court.

70 The significance of these provisions is that a business which leases category 13 land has a right to object to and appeal from the land valuation and thereby challenge the annual rent. On the other hand, a carrier which leases category 15.4 or 15.5 land has no such rights.

THE AUTHORITIES

71 There are three cases that have construed and applied cl 44 of Sch 3 to the *Telecommunications Act*. I will discuss each of these cases in turn.

Bayside City Council v Telstra Corporation Ltd

72 In *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, the High Court considered the validity of s 611 of the *Local Government Act 1993* (NSW) ("the NSW Act") and Pt 8 of the *Local Government Act 1989* (Vic) ("the Victorian Act").

73 Section 611 of the NSW Act conferred power on local Councils to make an annual charge on a person in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place. However, s 611(6) and other legislation exempted a number of bodies from the operation of the power, including the Crown, water supply authorities and railway, electricity network and pipeline operators. However, carriers and gas pipeline providers were not exempt.

74 Sections 154 and 155 in Pt 8 of the Victorian Act declared that all land in Victoria was rateable and empowered Councils to declare rates and charges on such land. Crown land and land used exclusively for public or municipal services land was exempted from such rates and charges, as were electricity companies and gas suppliers. Carriers were not exempt.

75 Telstra and Optus had each installed underground and aerial cables in local government areas. A number of Councils imposed charges or levied rates in respect of the land occupied by the cables. Telstra and Optus brought proceedings against the Councils alleging that s 611 of the NSW Act and Pt 8 of the Victorian Act discriminated, or had the effect of discriminating, against carriers.

76 At first instance, Wilcox J dismissed the proceedings, holding that cl 44(1) of Sch 3 was not a law under s 51(v) of the Constitution upon which s 109 of the Constitution could operate so as to render State laws invalid: see *Telstra Corporation Ltd v Hurstville City*

Council (2000) 103 FCR 322. Having reached that conclusion, Wilcox J did not go on to consider whether the NSW and Victorian legislation had a discriminatory effect on carriers.

77 The Full Court of the Federal Court allowed the appeal, holding that cl 44(1) of Sch 3 was a valid exercise of the Commonwealth's legislative power, and that the NSW and Victorian legislation discriminated against carriers to the extent that they authorised local government authorities to impose rates and charges on carriers: see *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

78 By majority, the High Court dismissed an appeal from the judgment of the Full Court. Callinan J, in dissent, would have upheld the appeal on the basis that cl 44 of Sch 3 was beyond the legislative power of the Commonwealth. His Honour did not go on to consider the question of discrimination.

79 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ held that cl 44 was constitutionally valid and that the NSW and Victorian legislation discriminated against carriers. McHugh J gave separate reasons, agreeing in the result.

80 The plurality considered the scope of cl 44, saying:

> 24 There is a question as to the extent of the application of cl 44, and, in particular, cl 44(1)(a)…[I]f a State or Territory law is discriminatory in one of the ways referred to in cl 44, and that discrimination involves adverse treatment that is differential by reference to an appropriate standard of comparison, it will attract the operation of that provision…Similarly…the kind of discrimination against carriers that attracts the potential operation of cl 44 is discrimination against them in their capacity as carriers. Clause 44 is concerned with State or Territory laws which impose discriminatory burdens upon carriers in carrying on activities as carriers authorised by the Telco Act.
>
> (Footnote omitted.)

81 Their Honours then dealt with the application of the law to the facts as follows:

> 40 Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.
>
> 41 In the present case, the basis for the claim of discrimination is in a comparison between, on the one hand, the charges and rates imposed and

> levied in respect of the Telstra and Optus cables, and, on the other hand, the treatment of facilities, which are installed or operated above, on or under public land, by utilities or other users of such space and are said to be comparable…In the present case, however, Telstra and Optus point to a general pattern of State legislative treatment of facilities to which their cables have been made an exception.
>
> 42 Clause 44 does not, in terms, identify the kind of comparison that is appropriate for the purpose of considering whether a State law discriminates against carriers generally. (The comparison involved in deciding whether a State law discriminates against a particular carrier, or a particular class of carriers, is more straightforward.)…
>
> 43 In relation to aerial cabling, which appears to be what primarily attracted the attention of the local authorities, the facilities installed by electricity authorities constitute an obvious basis of comparison. The fact that they are singled out in the Explanatory Memorandum confirms that the kind of discrimination with which cl 44 is concerned, in its reference to discrimination against carriers generally, is the subjection of carriers, in that capacity, to a burden of a kind to which others in a similar situation are generally not subject, and that a similar situation includes the use of public space for the installation and maintenance of facilities such as cables, pipes, ducts and conduits. In relation to underground facilities, the position is somewhat more complex, but gas pipelines in New South Wales are, apart from the facilities in question in this case, the exception to a general pattern of exemption.
>
> 44 …Here there is a clear general pattern of exemptions, and it is sufficient to say that the existence of one other significant exception to that pattern (gas pipelines in New South Wales) does not negate discrimination. In addition, in the case of aerial cabling, there is an obvious basis of comparison, namely electricity facilities, which enjoy an exemption.
>
> (Footnotes omitted.)

82 Justice McHugh considered what would amount to a reasonable or permissible distinction in the treatment of carriers and others. His Honour said:

> 68 The Full Court accepted that different treatment amounts to discrimination only if there is no reasonable distinction to justify different treatment. The appellants submitted that the key difference between Telstra and Optus on the one hand and the exempted bodies on the other is that the latter occupy land under statutory authorities granted by the States, while the appellants occupy land under authority granted by the Commonwealth. A State, they submitted, is entitled to prevent councils, which are the custodians of its land, from charging rates to the State's agents.
>
> 69 However, the question whether a reasonable distinction exists must be examined in light of the law prohibiting discrimination, not the potentially discriminatory law. As Gaudron J and I said in *Castlemaine Tooheys Ltd v South Australia*, a law "is discriminatory if it operates by reference to a distinction which some *overriding law* decrees to be irrelevant". It is of no present relevance whether or not, in exercising their powers under the applicable Local Government Act, councils are acting reasonably in perceiving a difference between State agencies and bodies authorised to carry

out functions under federal law, such as Optus and Telstra. The question is whether the *Telecommunications Act* permits Optus and Telstra to be treated differently from State agencies in respect of rates and charges.

70 It is true, as Wilcox J noted, that cl 44(1) of Sch 3 to the *Telecommunications Act* provides no criteria by which a court may determine what differences are legitimate and what are illegitimate. His Honour observed that in this respect it differs from other federal statutes which prohibit discrimination and which provide such criteria, for example, the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth).

71 For the purposes of this case, it is unnecessary to determine whether cl 44(1) prohibits *all* differential treatment of carriers. It is sufficient to say that the wide and unconditional language of **cl** 44(1) suggests that the Commonwealth Parliament intended to protect carriers from special burdens without regard to any policy objective of a State or Territory law which imposed that burden. If the Parliament had intended to allow such policy objectives to be relevant, it would have framed cl 44(1) so as to prohibit only *unreasonable* discrimination.

(Footnotes omitted.)

83 His Honour went onto consider the identification of the appropriate comparator:

77 Clause 44(1) prohibits discrimination against a particular carrier, class of carriers or carriers generally. If the discrimination alleged was against a particular carrier, the appropriate comparison would probably be other carriers. Where the discrimination is alleged to be against "carriers generally", however, the issue arises as to the appropriate entity with which "carriers" should be compared. Was the Full Court correct to conclude that the appropriate comparison here was between Optus and Telstra on the one hand and "other bodies which make a similar use of public places" on the other?

78 The appellants were unable to suggest any alternative point of comparison. Instead, they resorted to the suggestion that cl 44(1) is designed to prevent only laws *aimed* at carriers, rather than to ensure that carriers receive equal treatment. Such a narrow interpretation of "discrimination" is incompatible with the breadth of cl 44(1). In particular, the reference to the "direct or indirect" *effect* of a State or Territory law leaves no room for such an argument.

79 In cases like the present, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). The New South Wales and Victorian Acts confer a power to levy charges or rates on the owners or occupiers of public land, that is, land used for a public purpose. This indicates that the Full Court was correct in comparing the position of carriers with that of other owners or occupiers of public land. In turn, this invites a comparison with electricity suppliers, water suppliers, gas suppliers and other pipeline users. These entities resemble Telstra and Optus in their ownership and/or occupation and use of public land, a use which involves putting wires, cables or pipes over or under the land. Other owners or occupiers of public land, whose use of the land is perhaps less directly comparable with that of Telstra and Optus, include rail authorities, road traffic authorities and public transport authorities. Whether the comparison is made with the first group or

> the second group, the New South Wales and Victorian Acts exempt all – or in the case of New South Wales, almost all – of these entities from the operation of the legislation. This has the effect that the New South Wales and Victorian Acts authorise charges or rates that discriminate against Telstra and Optus.

(Footnote omitted.)

84 As to the fact that the NSW legislation also imposed charges on gas suppliers, McHugh J said:

> 80 In New South Wales, gas suppliers are the only bodies apart from Telstra and Optus that are subject to the charges...The Full Court assumed, correctly in my opinion, that this liability on the part of gas network operators did not mean that the New South Wales councils did not discriminate against Telstra and Optus. A person may be discriminated against even if some other person is treated equally unfavourably.
>
> 81 If *many* other persons were also treated unfavourably, a question might arise whether the law discriminated against a particular person. This question does not arise in the present case. The great majority of occupiers of public space in New South Wales are exempt from local government charges. That gas suppliers remain subject to these charges does not alter the fact that carriers are treated less favourably than most comparable entities.

(Footnote omitted.)

Development Assessment Commission v 3GIS Pty Ltd

85 In *Development Assessment Commission v 3GIS Pty Ltd* (2007) 212 FLR 123, the respondent, a joint venture company formed by two carriers, applied for a development approval for a telecommunications facility, but the planning authority refused the application.

86 In obiter, Bleby J (within whom Doyle CJ and Sulan J agreed) said:

> 65 In short, the argument is that to the extent that a demand need might be required to be established and measured against its effect on visual amenity, a telecommunications provider is singled out and treated differently from any other applicant for development approval. A carrier would be subject "to a burden of a kind to which others in a similar situation are generally not subject".
>
> 66 The Telecommunications Facilities provisions of the Development Plan apply only to telecommunications carriers licensed under the *Telco Act*. No-one else is authorized to operate a facility. Whether the applicant for development approval is the carrier or a third party as lessor of the facility, it is a facility dedicated to a carriage service. The ability of the carrier to provide the service depends on the installation of the facility. The burden of establishing the relevant demand need will therefore fall on the carrier. Alternatively, it is the carrier and only the carrier who will be adversely affected if the burden is not discharged. No other applicant for development approval, including any other infrastructure provider, is required to prove such a need. The carrier is therefore singled out and treated differently from any other applicant for development approval.

> 67 Accordingly, on the information available and if it were necessary to do so, I would hold that the requirements of the Development Plan, insofar as they require proof of demand need in the area covered by the proposed facility, would be invalid by virtue of the operation of clause 44 of Sch 3 as discriminating against carriers generally or at least the class of carriers who are required to obtain development approval for the installation of facilities in accordance with the requirements of the Development Act.
>
> (Footnote omitted.)

Optus Networks Pty Ltd v Rockdale City Council

87 In *Optus Networks Pty Ltd v Rockdale City Council* (2005) 144 FCR 158, Tamberlin J held that s 96(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) was invalid to the extent that it purported to authorise the Council to delete conditions of development approval requiring the developer to "underground" Optus' television cables. The developer, Meriton, had originally been required to arrange for overhead powerlines belonging to two electricity suppliers and overhead cables owned by Optus to be placed underground. The practical effect of deleting the condition in respect of the television cables was that Optus had to meet the costs of undergrounding the cables instead of the developer. On the other hand, the developer was still required to negotiate the costs of undergrounding the powerlines with the electricity suppliers.

88 Tamberlin J noted the breadth of cl 44, saying:

> 22 The first matter to note is that the language of the clause is broad. It is not limited to the direct effect of the exercise of power under a law. It is not limited to direct or indirect effect. Nor is it limited to the direct or indirect effect of the operation of the law itself but rather it extends to the exercise of a power **under** the law. The expression "under" is extensive and in the context of discriminatory provisions it is appropriate to give it a broad meaning. The provision is not concerned with motive or intent but rather with the consequence or effect of the exercise of authority of power under the law. Sch 3 is expressly concerned with the powers and immunities of carriers and should be interpreted with this in mind. Accordingly, it is not relevant that s 96(1A) is non-discriminatory on its face. The issue is whether the law confers an authority which, if and when it is exercised, leads to discrimination against the carrier. The proper approach is to examine the operational effect or result or outcome of the exercise of the power.

89 His Honour said that in considering the indirect effect of the deletion of the condition, it was useful to consider Optus' position before and after the condition was deleted. His Honour said:

> 27 After the deletion of the requirement affecting Optus, which imposed a condition on Meriton to underground the Optus lines, the result was that Meriton, in practical terms, would need to negotiate the undergrounding with

> EA and SRA but was no longer required to negotiate with Optus for removal of the Optus cable. The obligation on Meriton to underground the lines carried with it in its practical operation an obligation on Meriton to arrange for this to be permitted by the three authorities. As a result of the deletion of the condition in respect of the Optus cable, there was no obligation to negotiate with Optus because cl 51 of the *Telco Act* operated to require Optus to **remove** the cables. This meant that while EA and SRA could demand payment or other terms to carry out the Council conditions in relation to conduits and undergrounding, Optus could not demand terms for removal of its cable. Therefore, the effect of the decision to remove the requirement only as against Optus placed Optus in a disadvantageous position in comparison with the positions of EA and SRA in respect of lines and cables suspended over the same spaces from the same poles.

90 The Council sought to contend that the different treatment of Optus was permissible on the basis that there was no clear class of comparators. Tamberlin J rejected that submission holding that the electricity authorities were relevant comparators as they used the same poles for overhead lines and cables, and because the cables could reasonably be considered to have had similar visual and environmental effects.

91 His Honour also rejected a submission that the differential treatment of Optus was permissible because there was differential treatment by the Council as between the two electricity entities.

ACCOUNTING EVIDENCE

92 Telstra called an accountant, Natalie McKay, to give evidence.

93 Ms McKay has calculated that the total amount of rent payable under the *Land Regulation* by Telstra to the State in the period from 1 July 2010 to 30 June 2016 for Telstra's category 15.4 and 15.5 leases was $32,913,145. In contrast, the rent payable if Telstra's leases instead fell within category 13 would be $3,176,007. That is a difference of $29,737,138.

94 Telstra has stopped paying rent at the rates prescribed for category 15.5 and 15.5 leases and has instead been paying rent at the rate for category 13 leases. Telstra's conduct was the subject of an unsuccessful application for interlocutory relief: *Telstra Corporation Ltd v State of Queensland* [2013] FCA 1296. Ms McKay has calculated that if Telstra has only been required to pay category 13 rent since 1 July 2010, Telstra has overpaid rent to the State in the amount of $7,827,967 in the period to 30 June 2016.

95 Ms McKay was cross-examined as to matters she had and had not taken into account, but not as to the figures she had arrived at. I accept Ms McKay's evidence.

THE SUBMISSIONS

96 Telstra submits that the provisions of the *Land Regulation* which determine the rent payable for State leases are laws that discriminate, or which have the effect (directly or indirectly) of discriminating against carriers. Telstra argues that carriers are treated adversely in comparison to other businesses which hold State leases because, firstly, carriers pay higher rents and, secondly, carriers have no statutory right to appeal against the rents that are prescribed.

97 Telstra notes that the annual rents for category 13 leases are set at 6% of the land valuation, but the rents for categories 15.4 and 15.5 are fixed amounts, currently $12,302 and $18,453 respectively. Telstra argues that if carriers' rents were calculated in the same way as the rents for other businesses, they would pay much less rent. In aggregate, it is presently required to pay 10 times more than it would be required to pay under category 13. Telstra has not attempted a lease-by-lease comparison of the rent it pays compared to the rent that would be payable under category 13. It also argues that other businesses are treated more favourably than carriers because other businesses effectively have a right to object to and appeal against rents, whereas carriers do not.

98 In its written submissions, the State concedes that the *Land Regulation* does treat carriers detrimentally by charging them more than other leaseholders, and that it does so based on the fact that carriers use the leased areas for communications purposes or their purposes as carriers. However, the State submits that, other than in the conceded areas, such detrimental treatment does not contravene cl 44 of Sch 3.

99 The State's argument starts with the premise that the rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases, except in the conceded areas in the north and western regions of Queensland, approximate the market rents payable by carriers for leases over privately owned land. The State, at least implicitly, accepts that market rents for leases granted to other businesses over privately owned land are lower.

100 However the State argues that that it is entitled to take a "market approach" and to "seek market rates for making available for use" State land. The State submits that the distinction drawn by the *Land Regulation* between carriers and other businesses on a market basis is a "relevant, appropriate or permissible distinction" that the *Telecommunications Act* allows to be made.

101 The State's pleading and written submissions also raise an argument that category 13 leases are not an appropriate comparator to use when deciding whether there is discrimination within cl 44(1) of Sch 3 because Telstra's leases and circumstances are different to those of other businesses; and because the rental calculation used for category 13 leases cannot be used for category 15.4 and 15.5 leases. That argument seemed somewhat inconsistent with the State's concession that it does treat carriers detrimentally by charging them more than other leaseholders. By the end of the State's oral submissions, I understood the State to no longer pursue that argument and to instead argue that, once it is seen that a distinction on the basis of market rents may lawfully be applied, it is apparent that it is not appropriate to make a comparison between rents payable under category 13 and those payable under category 15. However, the State's initial argument was not expressly abandoned and I will consider it in case my understanding of the State's position is wrong.

102 The State's premise that the rents for category 15.4 and 15.5 leases, except in respect of the conceded areas, approximate the rents payable for leases granted to carriers in the private market relies upon the evidence of a valuer, Rodney Brett. Mr Brett applies a "mass appraisal system", rather than a valuation of market rent on a lease-by-lease basis. Mr Brett's methodology is to start with the *Land Regulation* system under which there is a rural zone (category 15.4) and an urban zone (category 15.5), but then split the rural zone into two zones. He assesses the low population density parts of the rural zone as having a lower market rent than the medium density parts of that zone. Mr Bretts' opinion is that rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases approximate the rents in the private market for the medium density parts of the rural zone and the urban zone respectively, but not the low density parts of the rural zone.

103 Telstra's response to the State's submissions is that the *Telecommunications Act* cannot be construed as allowing State and Territory legislation to treat carriers detrimentally on the basis that the market rents for carriers for leases over private land are higher. Telstra also argues that category 13 lessees are an appropriate comparator.

104 Telstra also relies on the evidence of a valuer, Lawrence John Hamilton, to dispute the factual premise of the State's argument, namely that rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases approximate rents for carriers for private land in areas other than the conceded areas. Mr Hamilton's opinion is that Mr Brett has not applied a mass appraisal process, or has not properly applied such a process.

CONSIDERATION

The issues

105 The State admits that the *Land Regulation* impermissibly discriminates against carriers contrary to cl 44 of Sch 3 to the *Telecommunications Act* by imposing higher rents on carriers than other businesses in respect of State leases in the conceded areas. The conceded areas are described more precisely at [178] of these reasons.

106 That leaves for determination the question of whether the *Land Regulation* impermissibly discriminates against carriers in its operation on leases in the disputed areas, namely the remainder of Queensland. There is also a second question, whether the *Land Regulation* impermissibly discriminates or has the effect of discriminating against carriers by allowing other businesses, but not carriers, to appeal against the rents for leases over State land.

107 The first question requires consideration of two issues. The first is whether the *Telecommunications Act* allows State and Territory governments to treat carriers adversely by imposing higher rents in the disputed areas on the basis that market rents for leases over private land are higher for carriers than for other businesses. The second is whether rents for State leases in the disputed areas in fact approximate the market rents that carriers would be charged by the owners of private land.

108 Before directly addressing the issues in dispute, it is useful to consider some aspects of the parties' submissions concerning the operation of the *Land Regulation*.

109 Section 33 of the *Land Regulation* deals with leases granted for communications purposes. Under that section, a category 15.4 or 15.5 lease "may be used for…the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity." It is not in dispute that the activities of carriers performing functions under the *Telecommunications Act* come within this description.

110 It may be noted that leases held by television and radio providers which are not carriers, also fall within categories 15.4 and 15.5. In *Bayside,* the High Court alluded to an argument that if many businesses are treated unfavourably, a question might arise as to whether the law can be said to discriminate against carriers. No such argument has been raised in this case.

111 The difference between category 15.4 and category 15.5 leases is that the former are over land in "rural areas", while the latter are over land in "urban areas". An "urban area" is defined in s 33(b) of the *Land Regulation* as one within the local government area of the Brisbane City Council, Gold Coast City Council, Ipswich City Council, Logan City Council, Moreton Bay Regional Council, Redland City Council or Sunshine Coast Regional Council. A "rural area" is any other area in Queensland.

112 The holder of a category 15.4 lease is required to pay an annual rent which is currently $12,302, while the holder of a category 15.5 lease pays $18,453. The rents are fixed under the *Land Regulation*, and there is no provision for any challenge to the amount of rent.

113 Under s 30 of the *Land Regulation*, a lease is a category 13 lease if the lease may be used for a business, commercial or industrial purpose and the lease does not meet the requirements for another category; or if the lessee is a government leasing entity and the use of the lease is essential for conducting the lessee's core business. Telstra's case of discrimination focuses on a comparison of the treatment of carriers with the treatment of businesses with category 13 leases. Telstra does not rely upon any favourable treatment of government leasing entities. Nor does it rely on the favourable treatment of primary producers, charities, sporting or recreational clubs.

114 Under s 37A of the *Land Regulation*, the annual rent payable for category 13 leases is 6% of the rental valuation calculated under the *Land Valuation Act.* The rental valuation is effectively the unimproved value of the particular land that is leased. The rent for category 13 leases is calculated on a lease-by-lease basis; whereas there is a single fixed rent for a category 15.4 lease and a single fixed rent for a category 15.5 lease. A category 13 lessee is entitled to appeal against such a valuation, allowing the lessee to challenge the amount of the annual rent.

115 The State concedes that the *Land Regulation* "*does* treat Telstra and Carriers detrimentally by charging them more than other leaseholders". That blanket concession makes it is unnecessary for Telstra to undertake a lease-by-lease comparison between the rent it pays for its category 15.4 and 15.5 leases and the rent that businesses with category 13 leases would pay.

116 The State also concedes that the *Land Regulation* treats carriers detrimentally "based on a material attribute (i.e. the fact they use leases for communications/carrier purposes)".

This amounts to a concession that the detrimental treatment of carriers is in their capacity as carriers.

117 Telstra submits that the provisions of the *Land Regulation* are discriminatory on their face, or, alternatively, that the direct and indirect effects of the provisions are discriminatory. Telstra has not specified precisely what provisions are discriminatory, but presumably refers to at least ss 30, 33 and 37A.

118 Contrary to Telstra's submission, s 37A of the *Land Regulation* does not, on its face, discriminate against carriers. It sets a method for calculating rents for category 13 leases and prescribes fixed rents for category 15.4 and 15.5 leases. That does not mean that the rent for a particular category 15.4 or 15.5 lease will necessarily be higher than for a category 13 lease – it depends on the land valuation for each particular lease. Sections 30 and 33 could have no adverse effect on carriers in the absence of s 37A having such an effect. Therefore, the provisions of the *Land Regulation* are not discriminatory on their face.

119 However, cl 44 of Sch 3 extends to laws that "would have the effect…of discriminating" against carriers. The State's concession that the *Land Regulation* does treat carriers detrimentally by charging them more than other leaseholders amounts to an admission that the *Land Regulation* has a detrimental effect.

Whether market rent is a relevant, appropriate or permissible distinction

120 I will turn to the first of the issues identified earlier, namely whether cl 44 of Sch 3 to the *Telecommunications Act* allows State and Territory governments to treat carriers adversely by imposing higher rents on the basis that market rents for leases held by carriers over private land are higher than for other businesses.

121 The State submits that the provisions of the *Land Regulation* which have the effect of imposing higher rent on carriers than other businesses are not invalid under cl 44 of Sch 3 because a "market approach" is a "relevant, appropriate or permissible distinction". That language is taken from the judgment of the plurality in *Bayside* at [40], which, in turn, seems to be largely drawn from the judgment of Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478, where their Honours said:

> A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not

> appropriate and adapted to the difference or differences which support that distinction.

122 In *Bayside*, McHugh J explained at [69] that in considering whether a distinction is relevant or permissible, the question is whether the *Telecommunications Act* permits carriers to be treated differently. The State correctly accepts that if applying a market approach is to be regarded as producing a relevant, appropriate or permissible distinction, that must appear as a matter of construction of the *Telecommunications Act.*

123 There are two possible ways of conceiving the State's argument. The first is that the *Telecommunications Act* allows the *Land Regulation* to treat carriers adversely on the basis that the market rent for carriers is different to the market rent for other businesses. The second is that the *Land Regulation* treats carriers and other businesses equally by charging each of them the market rate applicable to their respective leases, with differential but permissible effect. The State's characterisation of its case was inconsistent. The State's concession that it treats carriers detrimentally by charging them more than other leaseholders seems to indicate that it characterises its argument in the first of these ways, but the State's submissions also seemed to rely on the alternative characterisation at times. I will deal with both characterisations of the State's argument together because both rely upon construction of the *Telecommunications Act*.

124 The State's submission that the distinction drawn by the *Telecommunications Act* between carriers and other businesses on the basis of market rents is made by reference to the objects of that Act, to the fact the regulatory framework incorporates a special regime for regulating anti-competitive conduct and from the objects of the *Land Act*.

125 The objects of the *Telecommunications Act* are set out in s 3. That section provides, relevantly:

> **3 Objects**
>
> (1) The main object of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, 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; and
>
> (c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.

> (2) The other objects of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, are as follows:
>
> (a) to ensure that standard telephone services and payphones are:
>
> (i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and
>
> (ii) are supplied as efficiently and economically as practicable; and
>
> (iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;
>
> …
>
> (d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;
>
> …
>
> (g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:
>
> (i) the provision of telecommunications networks and facilities; and
>
> (ii) the supply of carriage services;
>
> …

126 The State relies on the objects set out in ss 3(2)(a)(ii), (d) and (g), which, it submits, use "market terms". The State argues that these objects show that telecommunications "is not to be a protected industry any longer", and is intended to be a "competitive industry".

127 The State reinforces its submission by pointing to the references in the objects to Pts XIB and XIC of the *Competition and Consumer Act 2010* (Cth). In *Bayside*, the plurality noted that Pts XIB and XIC of what was then the *Trade Practices Act 1974* (Cth) formed part of the regulatory framework for carriers. Part XIB sets up a special regime for regulating anti-competitive conduct in the telecommunications industry and prohibits carriers from engaging in anti-competitive conduct. The object of Pt XIC is to promote the long-term interests of end-users of carriage services or services provided by carriage services.

128 The State also relies on the objects of the *Land Act*, a Queensland statute. Under s 4, those objects include managing land for the benefit of the people of Queensland by having regard to "a market approach in land dealings". The State contends that this object can be

taken into account in the construction of the *Telecommunications Act* because of the operation of cl 38 of Sch 3 to the *Telecommunications Act.*

129 I understand the State's overall submission to be that the *Telecommunications Act* does not seek to immunise carriers from the forces operating in a competitive market, and, in fact, deliberately seeks to expose them to such forces. This is said to promote a construction of the *Telecommunications Act* that allows State and Territory legislation to treat carriers adversely, or with adverse effect, by imposing higher rents on the basis that market rents for leases over private land are higher for carriers than for other businesses.

130 It can be accepted that the *Telecommunications Act* does not purport to give carriers complete immunity from the operation of market forces. However, the question is whether cl 44(1) of Sch 3 operates to give carriers some protection from the discriminatory application of such forces under State or Territory legislation, and the extent of that protection. That question must be answered by reference to the language and purpose of cl 44(1) in the context of Pt 1 of Sch 3 and the *Telecommunications Act* as a whole.

131 Schedule 3 to the *Telecommunications Act* deals with the powers and immunities of carriers. Divisions 2, 3 and 4 of Pt 1 describe the powers of carriers to enter and inspect land and install and maintain facilities on that land. Carriers may install facilities on land if, relevantly, they have a facility installation permit, or the facility is a low-impact facility.

132 Division 5 sets out conditions relating to the carrying out of authorised activities. Div 6 deals with applications for facility installation permits.

133 Division 7 and, in part, Division 8 regulate the relationship between carriers' powers and immunities under the *Telecommunications Act* and the operation of State and Territory laws.

134 Division 7 commences with cl 36(1), which provides that Divs 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.

135 Clause 36(1) is subject to cl 37, which provides that a carrier may engage in an activity authorised by Divs 2, 3 or 4 despite laws of a State or Territory about specified matters, including town planning, the powers and functions of a local government body, the use of land and tenancy. Telstra submits that cl 37 applies only to installation and

maintenance of low-impact facilities as defined in cl 6(3), but in my view it also applies to, relevantly, the installation of facilities under a facility installation permit.

136 Clause 38 then provides that it is the intention of Parliament that if cl 37 entitles a carrier to engage in activities despite particular laws of the State or Territory, nothing in Div 7 is to affect the operation of any other law of the State or Territory, so far as such other laws are capable of operating concurrently with the *Telecommunications Act*.

137 Clause 39 provides that Div 7 does not affect the liability of a carrier to taxation under the law of a State or Territory.

138 Clause 44 is then found in Div 8, Pt 1 of Sch 3. Clause 44(1)(a) provides that the law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating against a particular carrier, a particular class of carriers or against carriers generally. Under cl 44(1)(b) a person must not exercise a power under such a law to the extent to which the law so discriminates; and under cl 44(1)(c) a person is not required to comply with such a law to the extent to which the law discriminates.

139 The purpose of cl 44(1) can be discerned from its context in Pt 1 of Sch 3 and the objects of the *Telecommunications Act*. Section 3(1) provides that the main objects include providing a regulatory framework that promotes the long-term interests of end-users of carriage services and the availability of accessible and affordable carriage services that enhance the welfare of Australians. Under s 3(2), the other objects of the Act include ensuring that standard telephone services and payphones are reasonably accessible to all people in Australia on an equitable basis and supplied as efficiently and economically as practicable.

140 These objects are reflected in the powers and immunities granted to carriers under Pt 1 of Sch 3. The provision of carriage services requires the transmission of electromagnetic energy through a network of infrastructure to connect distant places in Australia. This requires carriers to have access to many parcels of land in a wide range of areas for the installation of infrastructure essential for the network. Telstra's universal service obligation, recognised in cl 27 of Sch 3, means that it requires land throughout Australia, urban, rural and remote. There is a risk that land owners, private or government, will inappropriately or unreasonably resist the installation of infrastructure on their land. This is addressed by Pt 1

giving carriers the power to compulsorily enter land and install a low-impact facility or, by obtaining a facility installation permit, install another facility.

141 There is also a risk that State and Territory governments will jeopardise the availability and affordability of carriage services by taking undue advantage of the particular needs of carriers for the use of government-owned land to the detriment of the wider Australian community. To address this problem, cl 44(1) provides protection for carriers against the effects of discriminatory laws, including protection against the imposition of discriminatory taxes, rents and charges. Clause 39 confirms the liability of a carrier to taxation under the laws of a State or Territory, but cl 44(1) prevents such laws from discriminating against carriers or having the effect of discriminating against carriers. In *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at [24], the Full Court described the object of cl 44 as "to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier". More specifically, cl 44(1) can be seen as a legislative mechanism to promote and protect the long-term interests of end-users of carriage services and promote accessible and affordable carriage services, including the provision of standard telephone services and payphones to all Australians. This purpose is particularly evident when viewed against Telstra's universal service obligation and the fact that the bulk of rural and remote land, at least in Queensland, is government-owned.

142 Clause 44(1) is cast in broad and absolute terms. It does not, on its face, allow any exception to the prohibition against the law of the State or Territory discriminating against carriers. Nor is any such exception expressly contained in any other provision of the *Telecommunications Act.* If any exception, such as the exception contended for by the State, is to be found, then it must be found by implication from the subject matter, scope and purpose of the *Telecommunications Act*.

143 The objects of the *Telecommunications Act* relied on by the State and Pts XIB and XIC of the *Competition and Consumer Act* appear to be concerned with the promotion of competition *between* carriers within the telecommunications industry and the prevention of anti-competitive conduct *by* carriers for the benefit of end-users. That is consistent with the legislative movement away from a government monopoly towards a competitive industry, and is supported by the references in the objects of the *Telecommunications Act* to the interests of end-users and affordability of carriage services. If, as the State submits, the

objects are intended to indicate that carriers as a class are not to be protected *from* competitive market forces, such an intention is not directly expressed.

144 The State's submission that the objects of the *Land Act* can be taken into account in the construction of the *Telecommunications Act* because of the operation of cl 38 of Sch 3 to the *Telecommunications Act* is innovative. The State has not referred to any authority in support of its proposition that the objects of a State Act can be used to construe a Commonwealth Act. In any event, the effect of cl 38 is no more than that the operation of State and Territory legislation is not affected except to the extent provided in cl 37. It does not purport to import State or Territory legislation such that it can be used in the construction of the *Telecommunications Act*.

145 Even accepting the objects of the *Telecommunications Act* can be construed as not seeking to protect carriers from competitive market forces, or even deliberately seeking to expose them to such forces, such an intention appears at a very broad level. The State's contention is that such an intention implies that carriers may be treated adversely under State or Territory legislation on the basis that the market rent for leases over private land for carriers is higher than for other businesses, or that such legislation may impose upon carriers the market rent for communications leases even if that produces a differential effect.

146 The *Telecommunications Act* allows individuals and corporations to discriminate against carriers. That is apparent from the fact that neither cl 44(1) nor any corresponding provision restricts the behaviour of such individuals or corporations. In contrast, cl 44(1) expressly prohibits discrimination against carriers under State or Territory legislation. It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments. Individuals and corporations are free to charge carriers whatever rent the market commands, just as they are free to charge other businesses whatever rent they are able to extract. Clause 44(1) is quite inconsistent with the submission that State and Territory governments are in the same position. If State and Territory governments were intended to be free to charge carriers different rents on the basis that carriers are charged more rent in the private market, the exception would have been directly expressed. The State relies on the objects of the *Telecommunications Act* to infer such an exception, but those objects, unsupported by any substantive provision, are too imprecise and indefinite to overcome the express and explicit prohibition of discrimination against carriers under State and Territory legislation contained in cl 44(1).

147 In addition, the purpose of cl 44(1), namely to promote and protect the long-term interests of end-users of carriage services and to promote accessible and affordable carriage services, is inconsistent with the submission that State and Territory governments are permitted to charge carriers higher rents on the basis that carriers are charged more rent in the private market. In fact, price-gouging of this type by State and Territory governments seems precisely the type of conduct that cl 44(1) is designed to prevent.

148 I therefore reject the State's submission that the imposition of higher rents on carriers than on other businesses under the *Land Regulation*, on the basis of market rents for communications leases in the private market, is a relevant, appropriate or permissible distinction.

The appropriate comparator

149 Telstra submits that in deciding whether the *Land Regulation* discriminates against carriers contrary to cl 44(1), it is not appropriate to compare the treatment of carriers in category 15 with the treatment of other businesses in category 13. As I have said, I understand the State's ultimate submission to be that such a comparison is not appropriate if the distinction drawn between carriers and other businesses on the basis of rents charged in the private market is a relevant, appropriate or permissible distinction. As I have rejected the State's submission that such a distinction is relevant, appropriate or permissible, the State's argument concerning the comparator falls away.

150 However, in case I have misunderstood the State's ultimate submission, I will consider the argument as it was pleaded and described in the State's written submissions. That submission is that leases held by carriers are too dissimilar to those held by businesses in category 13 to provide an appropriate basis for comparison. The submission continues that as the only comparator Telstra points to are businesses holding category 13 leases, there is no other category of persons or entities to which the treatment of carriers can be compared. It concludes that as there is no appropriate comparator, there can be no finding of discrimination.

151 The State argues that category 13 leaseholders are too dissimilar to provide an appropriate comparator because: such businesses are not bulk leaseholders as Telstra is; the land the subject of category 13 leases varies widely in size, whereas Telstra's leases are more uniformly sized; the uses of category 13 land are diverse, whereas Telstra uses the land it

leases for the same main purpose; and carriers are able to derive co-location revenue, whereas category 13 leaseholders are not.

152 Clause 44(1) prohibits discrimination under State and Territory laws against a particular carrier, a class of carrier or against carriers generally. The identification of an appropriate comparator is not likely to be difficult where the discrimination alleged is against a particular carrier or a particular class of carriers, but may be more difficult where, as in this case, the discrimination is alleged to be against carriers generally.

153 However, in this case, as in *Bayside*, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). Only carriers and certain other businesses such as television and radio providers fall into categories 15.4 and 15.5 under s 33 of the *Land Regulation*. The State has not pleaded or argued that such other businesses have any relevance to the question of discrimination under cl 44(1). Therefore the application of categories 15.4 and 15.5 to leases held by such other businesses can be left aside for the purpose of the comparison exercise. Neither has the State contended that leases held by businesses for primary production, which have their own distinct category, have any relevance. They can also be left aside. In these premises, the categorisation of leases held by businesses involves a dichotomy between carriers and other businesses. If State land is leased by a carrier for the purposes of providing carriage services the lease will fall into category 15; if leased by another business, it will fall into category 13. This dichotomy makes it appropriate to compare the treatment of carriers with leases in category 15 with the treatment of other businesses with leases in category 13.

154 The fact that businesses holding category 13 leases may have a differing number of leases, different sized leases and carry out different business activities does not matter for the purpose of selecting an appropriate comparator. All State leases held by carriers are in one category (with two sub-categories), while all such leases held by other relevant businesses are in another. The *Land Regulation* itself selects the appropriate comparator.

155 Under s 332 of the *Land Act,* the holder of any State lease may, with the Minister's approval, sublease the land. It is possible for the holders of category 13 leases to derive income from subleasing. Therefore, the fact that it is possible for carriers to derive co-location revenue does not mean that businesses holding category 13 leases are not an appropriate comparator.

156 The State's pleadings and written submissions also contend that businesses in category 13 are not an appropriate comparator because the method of rental calculation applicable to category 13 leases cannot be used for category 15 leases. This submission is difficult to understand. Until the commencement of the *Land Regulation* on 1 July 2010, the rent for leases held by carriers was ascertained in exactly the same way as it was for other businesses, namely by taking 5% of the unimproved land value. Under s 5 of the *Land Valuation Act*, the Valuer-General must decide the value of all land in Queensland. A purpose of the valuation exercise is the calculation of rent under the *Land Act*. The calculation of rent for category 15 leases has been done in the past, and can be done, in the same way as for category 13 leases. I therefore reject this aspect of the State's argument.

Whether there is discrimination because the Land Regulation imposes more rent on carriers than other businesses

157 Businesses holding leases in category 13 are an appropriate comparator. The State concedes that the *Land Regulation* treats carriers detrimentally by imposing more rent on carriers than other leaseholders. This concession encompasses the treatment of carriers in comparison to businesses holding category 13 leases. The distinction made by the *Land Regulation* is not a relevant, appropriate or permissible distinction.

158 I find that ss 30, 33 and 37A of the *Land Regulation* have the effect of discriminating against carriers, including Telstra, which hold leases over State land in Queensland for the purpose of carrying on activities authorised by the *Telecommunications Act*.

159 Telstra's case is that the *Land Regulation* has had the effect of discriminating against carriers generally since its commencement. The State has not suggested that its concessions are limited to the current position. I also find that ss 30, 33 and 37A of the *Land Regulation* have had the effect of discriminating against carriers which hold leases over State land in Queensland for the purpose of carrying on activities authorised by the *Telecommunications Act* since the commencement of those provisions on 1 July 2010.

160 Clause 44(1)(a) of Sch 3 to the *Telecommunications Act* provides that a law of a State or Territory has no effect "to the extent to which" the law would have the effect of discriminating against carriers generally. Sections 30, 33 and 37A of the *Land Regulation* have the effect of discriminating against carriers generally to the extent that they have the effect of imposing higher rents on carriers which hold leases over State land for the purpose of carrying on activities allowed under the *Telecommunications Act* than for businesses which

hold category 13 leases. In other words, those provisions have no effect to the extent that they impose annual rents on such carriers that exceed 6% of the "rental valuation" of the leased land as defined in Sch 12 of the *Land Regulation*.

161 The effect of cl 44(1)(b) is that a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under *Land Regulation* to the extent identified above. Further, the effect of cl 44(1)(c) is that carriers are not required to comply with the *Land Regulation* to the extent identified above.

162 Telstra advanced an argument that where carriers are affected because their subsidiaries or related entities are treated adversely, the subsidiaries or related entities are not required to comply with the *Land Regulation* to that extent. The evidence does not allow me to reach any conclusion on that issue.

163 The State's cross-claim depends upon a finding that the *Land Regulation* does not amount to discrimination against carriers within cl 44 of Sch 3 to the *Telecommunications Act*. As I have found to the contrary, the cross-claim must fail.

Whether there is discrimination because there is no right to appeal against category 15.4 and 15.5 rents

164 Telstra also argues that the *Land Regulation* discriminates against carriers because businesses holding category 13 leases have the right to, in effect, appeal against the rents they are charged, whereas carriers do not have such a right.

165 Under s 37A(1)(e) of the *Land Regulation*, the rent for a category 13 lease is calculated at 6% of the "rental valuation for the particular lease". The expression "rental valuation" is defined in Sch 12 of the *Land Regulation* as a "Land Act rental valuation" under the *Land Valuation Act*.

166 Section 105 of the *Land Valuation Act* allows an owner to object to the valuation of the owner's land. "Owner" is defined in the Schedule to the *Land Valuation Act* to include a lessee of land leased from the State where the lessee must pay *Land Act* rental for the land. Section 155 allows an objector to appeal to the Land Court and s 173 allows a further appeal to the Land Appeal Court.

167 The holder of a category 13 lease is entitled to object to and appeal against the land valuation and, in this way, challenge the annual rent that is imposed under s 37A(1) of the

Land Regulation. In contrast, there is no mechanism which allows carriers to appeal against the rents fixed under s 37A(2) of the *Land Regulation*.

168 By imposing a method of determining rents for category 13 leaseholders that allows those leaseholders the opportunity to appeal against the rents assessed as payable, s 37A of the *Land Regulation* has the effect of treating category 13 leaseholders more favourably than carriers. This amounts to discrimination within cl 44(1) of Sch 3.

169 It follows that s 37A of the *Land Regulation* is of no effect to the extent to which it has the effect of denying carriers a right to appeal against the rent they are charged. It is unclear what this means in practical terms. There was no argument as to whether the words "of no effect" in cl 44(1)(a) give rise to a positive obligation on the part of the State to allow carriers a right to appeal against rents.

Whether the rents imposed for category 15.4 and 15.5 leases approximate the rents charged for private leases held by carriers

170 The State contends that the rents imposed by the *Land Regulation* for category 15.4 and 15.5 leases held by carriers reasonably approximate the market rents carriers are charged for private leases in Queensland. That is the factual premise underlying the State's principal argument that the distinction made by the *Land Regulation* between carriers and other businesses on the basis of market rent is a relevant, appropriate or permissible distinction. In light of my rejection of the State's principal argument, the correctness or otherwise of the factual premise cannot affect the outcome. However, I will proceed to consider the premise in case I am wrong.

171 The State seeks to demonstrate that if State land the subject of Telstra's leases were leased as private land instead of under the *Land Regulation*, the annual rents achieved for those leases would be approximately the same as the rents imposed for category 15.4 and 15.5 leases. The State accepts that it bears the onus of proving that the rents for category 15.4 and 15.5 leases reasonably approximate the market rates for private leases held by carriers.

172 The State contends that a "mass appraisal basis", rather than a lease-by lease valuation, is an appropriate way to conduct the valuation exercise. In support of this contention, it submits the *Land Regulation* itself adopts such an approach by dividing leases held by carriers into two categories, rural land and urban land. The State also relies on the

opinion of Mr Brett that the large number and diversity of the leases held by Telstra makes it preferable to adopt a mass appraisal basis.

Mr Brett's evidence

173 Mr Brett states that the principal factor relevant to assessment of the market for communication leases is the rents paid for similar sites throughout the State. Mr Brett was provided with data concerning 894 private leases held by Telstra in Queensland, as well as 75 private leases held by other carriers. He has not taken into account 103 of Telstra's leases where the annual rent is nominal (ie $0 or $1).

174 Mr Brett comments that the homogenous nature of the category 15.4 and 15.5 leases, lessees and uses lends them to a prescribed rent approach under the *Land Regulation* within appropriately defined regions. Mr Brett points out that all the sites are owned by one lessor (the State) and most are leased to a single lessee (Telstra). All are used for the same or substantially the same purpose, on the same terms and conditions, with rent to be assessed annually on the same day. He says that while the sites are geographically diverse, they can reasonably be grouped together in a manner accommodating locational differences.

175 Mr Brett states that land in the seven category 15.5 local government areas in the south-east corner of Queensland, with their high urban and commercial density, attracts significantly higher rents than the rest of the State.

176 Mr Brett's opinion is that it is appropriate to divide the category 15.4 local government areas into two categories, which he describes as medium density areas and low density areas.

177 The medium density areas have been selected on the basis that they contain the State's major provincial towns, a reasonable level of urbanisation and major connecting highways. These areas are local government areas of the Bundaberg Regional Council, Burdekin Shire Council, Cairns Regional Council, Douglas Shire Council, Fraser Coast Regional Council, Gympie Regional Council, Gladstone Regional Council, Lockyer Valley Regional Council, Scenic Rim Regional Council, Southern Downs Regional Council, Mackay Regional Council, Rockhampton Regional Council, Toowoomba Regional Council, Townsville City Council and Whitsunday Regional Council.

178 The low density areas comprise the remainder of the category 15.4 local government areas. These are the areas that I have described as "the conceded areas". They are in the west and far north of Queensland.

179 Mr Brett calculates that the median rent for private leases held by carriers in the seven urban local government areas is $19,547 per annum and the average rent is $19,871 per annum. He considers the market rent for private leases in such urban areas is $20,000 per annum. He notes that this market rent exceeds the amount prescribed under s 37A for category 15.5 leases. On this basis, Mr Brett concludes that the prescribed rent for category 15.5 leases reasonably approximates the market rent for private leases.

180 Mr Brett states that data for the private leases held by Telstra and other carriers in the category 15.4 areas demonstrate that significantly different rents are achieved for the medium density areas than for the lower density areas. Mr Brett calculates that the average annual rent for private leases in the medium density areas is $10,556, while the median is $9,773. He seems to consider that the market rent for private leases in the medium density local government areas is $10,360 per annum. Mr Brett concludes that the prescribed rent for category 15.4 leases reasonably approximates the market rent for private leases in the medium density areas.

181 Mr Brett calculates that for the low density areas, the average annual rent is $6,187 and the median is $5,732. He further divides the low density areas into eastern and western parts and calculates a weighted average of $4,500 per annum. He concludes that the prescribed rent for category 15.4 leases significantly exceeds the market rent for private leases in the category 15.4 area. That conclusion forms the basis of the State's concession that the *Land Regulation* does discriminate against carriers in respect of the conceded areas.

Mr Hamilton's evidence

182 In response to Mr Brett's evidence, Telstra relies on the evidence of another expert valuer, Mr Hamilton.

183 Mr Hamilton agrees with Mr Brett that given the large number and geographical spread of category 15.4 and 15.5 leases, it is preferable to adopt a mass appraisal process to ascertain the private market rates for leases of land to carriers. Mr Hamilton's evidence seems to be that either Mr Brett has not properly applied a mass appraisal process, or that Mr

Brett's method is not a mass appraisal process at all. Mr Hamilton's evidence is unclear in this respect.

184 Mr Hamilton describes the method of valuation performed by the Valuer-General under the *Land Valuation Act* as a form of mass appraisal. He states that it is not feasible to revalue each property in Queensland individually and mass appraisal methodology is an effective and legitimate method for the creation of updated values in an efficient and timely manner. He states that mass appraisal depends upon a valuer being able to identify subgroups of properties whose valuation is likely to move "in step". It first requires identification of a subgroup of properties, known as a sub-market area. A sub-market area is a grouping of properties with either a highest and best usage within an area readily defined by an administrative or geographic boundary, or readily associated with a geographic or topographic feature where the market movement is similar for all properties. The set of properties is definable by common attributes that are perceived to be similarly affected by common market forces and will therefore likely move in unison. Subsets of properties may be created where the market evidence identifies a subgroup that responds differently and supports a separate factor.

185 Mr Hamilton's opinion is that mass appraisal then requires the identification of typical, or benchmark, properties within a sub-market area that will be inspected and valued in the conventional way against the available sales evidence to test the proposed market changes for that area. A benchmark property is an individual property within a sub-market area that is representative of a larger group of similar properties, based on land value, land use or other property characteristics. Other relevant characteristics may include location, area, zoning and topography.

186 Mr Hamilton states that mass appraisal of individual lots is only valid if the value attached to each property meets the definition of market value, namely the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties each acted knowledgeably, prudently and without compulsion.

187 Mr Hamilton states that the use of a mass appraisal process for the valuation of assessable properties is not an exercise in averaging. He says that aggregating and averaging sales evidence is contrary to good valuation practice because the resulting values do not necessarily reflect market value.

188 Mr Hamilton indicates that he could support one of two mass appraisal techniques to assess the rent for leases that fall into category 15.4 or 15.5 that would be achieved in the private market. The first technique would be to adopt the same approach as for category 13 leases, but to determine the percentage of the individual valuation which represents an appropriate rent. It may be noted that neither Mr Hamilton nor Mr Brett have attempted to apply this method.

189 The second mass appraisal technique which Mr Hamilton could support is a market based approach analysing comparable rentals for properties leased for a similar purpose. Mr Hamilton says that to apply this technique, it would be necessary to carefully define the subcategories of category 15.4 and 15.5 leases, since the type of telecommunication installation varies significantly from site to site. The market rent appears to vary from location to location even within similar locations and the market places greater value on CMTS installations, compared to installations such as radio towers.

190 Mr Hamilton states that in developing a system of subgroups for mass appraisal purposes, geographical location would plainly be useful, but is not the only determinant of the appropriate subgrouping. He says that this is most clearly demonstrated by the fact that different market rents are paid for CMTS installations compared to other installations in the same locality.

191 Mr Hamilton accepts that a mass appraisal process could be adopted provided that the rent is determined based on market rental evidence, the grouping of leases takes into account the type of installation on the land and there is a sufficient number of subgroupings to reflect the diversity of leases, including the location and type of infrastructure installed.

192 Mr Hamilton disagrees with Mr Brett's view that three sub-market areas are adequate for mass appraisal purposes. He does not consider that it is possible to accurately assess the market rental based on only three geographical sub-regions.

193 Mr Hamilton's written reports are not clear as to precisely what he regards as a "mass appraisal process" and what its function is. In his oral evidence, he seemed to indicate that a mass appraisal process is one that is used to determine the *change* in the value of a basket of properties within a sub-market area. His evidence, as I understand it, was that before such a mass appraisal process can be used, there must be a valuation of each individual property. The change in value of each individual property can be assumed to be the same as the change

in the value of a benchmark property within the sub-market area. The effect of Mr Hamilton's oral evidence is that a mass appraisal process is not used to determine the value of an individual property, but merely the change in the value of a property. On this basis, and contrary to some indications in his reports, Mr Hamilton does not seem to accept that Mr Brett is applying a recognised mass appraisal process at all.

194 Mr Hamilton states that Mr Brett's method contains insufficient sub-market areas, given the geographical spread of Queensland and the different types of infrastructure installed on the leased areas. He also says that the comparable evidence has been broadly averaged and very limited direct comparisons have been undertaken. Further, he says that the averaging process, apart from dividing the leased areas into three broad geographical areas, does not take into account other factors that impact on rent including the commencement date of the leases, the state of the market for Telstra leases, terms and conditions of the leases, rent review provisions and works required by the lessee to prepare for the installation of equipment.

195 Mr Hamilton disagrees with Mr Brett's assessment that Telstra's State leases have a homogenous nature. He notes that Telstra's lease sites vary widely in terms of the infrastructure involved, property location, the services available, vehicular access, land area and topography.

196 Mr Hamilton notes that for approximately 80% of Telstra's State leases, the prescribed rent exceeds the Valuer-General's appraisal of the value of the land itself. This is contrary to what he would expect if the rents reflected market rates.

Mr Brett's response to Mr Hamilton's criticism

197 Mr Brett agrees that it is appropriate to establish sub-market areas, and notes that he has referred to these as categories. He says his method seeks to achieve a reasonable balance between the number of categories and the efficiency and cost effectiveness of rent valuations in each category. He notes that division into additional sub-market areas requires an ever-increasingly detailed examination of lease, location or physical features of each property. He notes that given the State-wide spread of leases with different sub-characteristics, it is not possible to select a single benchmark property that is representative of an identified sub-market.

198 Mr Brett accepts that averaging of rents would be contrary to good practice in circumstances where the value of a single property is assessed by averaging the prices paid for a number of other properties, some of which may be quite dissimilar to the property being valued. However, he says that his intention here is to establish a rent applicable to a number of properties within identifiable sub-markets, some of which will have different characteristics, by reference to a body of rents being paid for a range of other properties within the same sub-market and used for the same or a similar purpose.

Consideration of valuation evidence

199 Mr Brett's opinion is that the rents imposed by the *Land Regulation* for category 15.4 and 15.5 leases reasonably approximate the market rents carriers are charged for private leases in the disputed areas. Mr Hamilton has challenged the methodology applied by Mr Brett in arriving at that opinion, but has not himself expressed an opinion on the issue. It follows that the issue to be determined is whether Mr Brett's opinion is based upon a sufficiently reliable methodology to allow me to accept his opinion.

200 It is necessary to bear in mind the nature and limits of the exercise that Mr Brett was asked to perform by the State and the relevance of that exercise in the context of the proceeding. The State's case is that the *Land Regulation* sets the rents for category 15.4 and 15.5 leases by reference to the market rents that carriers would pay for private leases, or at least has that effect in the disputed areas. This is consistent with a Regulatory Impact Statement ("RIS") laid before the Legislative Assembly with the new *Land Regulation* on 9 February 2010. The RIS discussed the difficulty involved in ascertaining market rents for telecommunication sites and proposed that rents for such sites be set according to their purpose and location. The RIS continued:

> It is considered that in the current market, appropriate fixed rents would be $10,000 per annum for rural leases and $15,000 per annum for urban uses. These rates are consistent with market rates and rates charged by other government departments for such sites.

201 The figures proposed in the RIS for fixed rents were adopted in the *Land Regulation* and it may be inferred that they were adopted on the basis that they were thought to be consistent with market rates. The Governor in Council's purpose or intention in setting the fixed rents is not relevant to the question of whether there is discrimination against carriers for the purpose of cl 44 of Sch 3 to the *Telecommunications Act*. However, the question presently being considered is a different one, namely whether the rates for category 15.4 and

15.5 leases reasonably approximate market rates. I accept that the Governor in Council's intention was that the prescribed rents should approximate market rents. The issue is whether the State can demonstrate that the Governor in Council achieved that intention.

202 In attempting to impose market rates of rent for category 15.4 and 15.5 leases, s 37A of the *Land Regulation* is a blunt instrument. It takes into account only the purpose of the lease and the classification of the leased land as either rural or urban. It does not take into account other factors that might be relevant to the rental value of such land, such as the precise location, the size of the leased land, zoning, topography and the type of facility installed. The rates for category 15.4 and 15.4 leases attempt to approximate the market rental for private leases, but do not purport to precisely reflect the market. That approach is unsurprising given the legislative function of the *Land Regulation* and its application to every lease of State land in Queensland for communication purposes.

203 The approach taken by the State to the valuation exercise in this case reflects the approach taken under the *Land Regulation*. The State has asked Mr Brett to provide his opinion as to whether the fixed rents for category 15.4 and 15.5 leases reasonably approximate the market rents for private leases. Mr Brett was not asked for his opinion as to whether the fixed rents are in fact market rates for private leases. That exercise would have required individual assessment of each of Telstra's 488 State leases.

204 Mr Hamilton criticises the exercise performed by Mr Brett and says, in effect, that it is too imprecise to allow Mr Brett's opinions to be relied on. Mr Hamilton particularly criticises the averaging exercise performed by Mr Brett and the limited number of sub-market areas he has used. He also notes that there were a number of features of the leases which could affect the rental value which were not considered by Mr Brett.

205 Mr Brett's methodology is to divide Queensland into three zones, namely urban, medium density rural and low density rural, on the basis that the median and average rents for land used for communication purposes within each of these zones is different. The State's case is to the effect that each State lease within a particular zone has approximately the same rental value. Mr Brett's view is that this rental value is approximately the median rent for private leases in each zone. An important feature of Mr Brett's methodology is his reasoning that State leases are sufficiently homogeneous that all communications leases within a particular zone can be taken to have approximately the same rental value.

206 Category 15.4 and 15.5 leases do have a broad level of homogeneity. The State is the lessor for each lease and the lessee in each case is Telstra, or one of only several carriers. The predominant type of facility installed on the leased land is broadly similar, namely radio towers in rural land and CMTS in urban land. The terms and conditions of the leases are the same and rent is payable annually at the same time. I accept Mr Brett's evidence that two major factors affecting the market rent for private telecommunication leases are the purpose for which the land is to be used and the location of the land. Mr Brett's methodology takes into account both factors at a broad level.

207 However, I consider that Mr Brett's methodology is too imprecise to give rise to an opinion that can be accepted. The division of land into only three sub-market areas is not adequate to reflect the diversity of areas and corresponding different market rents for communications leases in Queensland. It does not adequately take into account the nature of the facilities to be installed. For example, rents are generally higher where CTMS facilities are to be installed. It fails to take into account the timing of lease negotiations. There is evidence that the introduction of competition amongst mobile telephone carriers in 1991 led to a period of anxiety amongst lessees and higher rents, which has abated since 2002/2003. It does not take into account whether the land is occupied or unoccupied as existing infrastructure can be used for CTMS facilities. It does not take into account other market factors such as access to roads and electricity, opportunity cost to the lessor and community perception as to adverse health risks.

208 Mr Brett acknowledges that he has not taken into account all the factors relevant to the rental valuation of category 15.4 and 15.5 land. I am not satisfied that his evidence is reliable in the absence of such factors being taken into account, or in the absence of firm evidence that these factors would not make a significant difference to his opinion as to whether the prescribed category 15.4 and 15.5 rents reasonably approximate the private market.

209 Mr Brett's method produces seemingly incongruous results. For example, his evidence is to the effect that the rental value of land leased by Telstra in the Brisbane City Council area for a radio tower where the underlying land value is $540,000 is the same as for land leased in the Ipswich City Council area for a CMTS facility where the value of the land is $41,500. A factor which demonstrates the unlikelihood of the proposition that category 15.4 and 15.5 rents reflect private market rents is the observation of Mr Hamilton that over

80% of Telstra's State leases have annual rents that exceed the Valuer-General's valuations of the land itself.

210 I broadly accept Mr Hamilton's criticisms of Mr Brett's methodology, with one qualification. I do not think it matters whether Mr Hamilton considers that Mr Brett's methodology can or cannot be regarded as a mass appraisal approach. If Mr Brett had gone further by using more sub-market areas and taking into account more variables, the methodology he used might well have been adequate to allow a single rental value for each sub-market area to be accepted. While such an exercise would have been time consuming and expensive, the State has conceded that it carries the onus of proof on the issue.

211 I am not satisfied that the methodology used by Mr Brett is sufficiently reliable to allow me to accept his opinion that the approximate annual market rent is $10,360 for category 15.4 leases and $20,000 for category 15.5 leases in the disputed areas.

212 I find that the State has not proved that the rents prescribed for categories 15.4 and 15.5 reasonably approximate the market rents for leases over private land for communication purposes in the disputed areas.

CONCLUSION

213 The findings I have made mean that Telstra's application must succeed and the State's cross-claim must be dismissed.

214 The relief sought by Telstra includes various declarations and orders for the repayment of rent overpaid by Telstra. I indicated in the course of the trial that I would provide my reasons and then hear from the parties as to the precise form of relief that should be granted. I will make orders requiring Telstra to provide draft orders to the State so that the parties can attempt to agree upon a form of orders.

I certify that the preceding two hundred and fourteen (214) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate:

Dated: 14 October 2016