FEDERAL COURT OF AUSTRALIA
Foxtel Management Pty Ltd v Australian Competition & Consumer Commission [2000] FCA 589

TELECOMMUNICATIONS – Promotion of competition in relation to analogue cable television programs – Facilitation of access under Part XIC of *Trade Practices Act 1974* – Purported 1997 specification by Australian Competition and Consumer Commission ("ACCC") pursuant to transitional legislation – Specification statement included not only analogue distribution service but also three optional adjunct services: network management access function, conditional access function and subscriber premises servicing function – Challenge to validity of specification – Whether validity ought to be considered having regard to delay – Effect of ACCC's omission to publish full copy of statement in Gazette – Whether ACCC was empowered to specify multiple services – Whether specification is uncertain – Whether the specified service (or any one of multiple services) is not an "eligible service" or not "necessary" for the purpose of enabling the supply of a broadcasting service – Severance of invalid elements – 1999 declaration under Part XIC of *Trade Practices Act* – Validity – Whether ACCC's power exhausted by 1997 specification – Whether improper exercise of power – Alleged failure to take into account relevant considerations – Alleged taking account of irrelevant considerations – Alleged predetermination – Alleged error of law – Whether no evidence to support conclusions – Failure to make inquiries – Alleged unreasonableness – Whether FOXTEL is a "carriage service provider".

Trade Practices Act 1974, ss152AB, 152AG, 152AH, 152AL and 152AR
Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997, s39
Telecommunications Act 1997, ss87, 88, 93 and 97
Administrative Decisions (Judicial Review) Act 1977, s5
Acts Interpretation Act 1901, ss23(b), 33(1) and 46(1)(b)

FOXTEL MANAGEMENT PTY LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
N1088 of 1999

FOXTEL MANAGEMENT PTY LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
N1150 of 1999

SEVEN CABLE TELEVISION PTY LIMITED v TELSTRA CORPORATION LIMITED & ORS
N1095 of 1999

FOXTEL MANAGEMENT PTY LIMITED & ANOR v SEVEN CABLE TELEVISION PTY LIMITED & ORS
N217 of 2000

WILCOX J
SYDNEY
8 MAY 2000

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1088 of 1999**

BETWEEN:	**FOXTEL MANAGEMENT PTY LIMITED** **Applicant**
AND:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Respondent**

JUDGE:	**WILCOX J**
DATE OF ORDER:	**8 MAY 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. It be declared that the declaration made by Australian Competition and Consumer Commission under s152AL(3) of the *Trade Practices Act 1974*, concerning the analogue subscription television broadcast carriage service, that was notified in the Commonwealth of Australia Gazette dated 8 September 1999 is valid and effective in law.

2. The applicant, Foxtel Management Pty Limited, pay the costs incurred by the respondent, Australian Competition and Consumer Commission, in respect of this proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1150 of 1999**

BETWEEN:	**FOXTEL MANAGEMENT PTY LIMITED** **Applicant**
AND:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Respondent**

JUDGE:	**WILCOX J**
DATE OF ORDER:	**8 MAY 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. It be declared that the statement dated 30 June 1997 entitled "Deeming of Telecommunications Services: A statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997" is valid and effective in law to the extent, and only to the extent, that it specifies as an access service the following service:

   "The service, being an analogue service supplied by an (access provider), necessary for the purposes of enabling the supply by an (access seeker) of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996".

2. The applicant, Foxtel Management Pty Limited, pay one half of the costs incurred by the respondent, Australian Competition and Consumer Commission, in respect of this proceeding.

   Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N1095 of 1999**

BETWEEN: **SEVEN CABLE TELEVISION PTY LIMITED**
Applicant

AND: **TELSTRA CORPORATION LIMITED**
First Respondent

TELSTRA MULTIMEDIA PTY LIMITED
Second Respondent

TELSTRA MEDIA PTY LIMITED
Third Respondent

THE NEWS CORPORATION LIMITED
Fourth Respondent

NEWS LIMITED
Fifth Respondent

SKY CABLE PTY LIMITED
Sixth Respondent

FOXTEL MANAGEMENT PTY LIMITED
Seventh Respondent

and

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Eighth Respondent

FOXTEL MANAGEMENT PTY LIMITED
First Cross Claimant

SKY CABLE PTY LIMITED
Second Cross Claimant

SEVEN CABLE TELEVISION PTY LIMITED
First Cross Respondent to First Cross Claim

TELSTRA MULTIMEDIA PTY LIMITED
Second Cross Respondent to First Cross Claim

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Third Cross Respondent to First Cross Claim

TELEVISION AND RADIO BROADCASTING SERVICES AUSTRALIA LTD
Fourth Cross Respondent to First Cross Claim

and

TELSTRA MEDIA PTY LIMITED
Fifth Cross Respondent to First Cross Claim

TELSTRA CORPORATION LIMITED, TELSTRA MULTIMEDIA PTY LIMITED and TELSTRA MEDIA PTY LIMITED
Second Cross Claimants

SEVEN CABLE TELEVISION PTY LIMITED
First Cross Respondent to Second Cross Claim

TELEVISION & RADIO BROADCASTING SERVICES AUSTRALIA PTY LIMITED
Second Cross Respondent to Second Cross Claim

FOXTEL MANAGEMENT PTY LIMITED
Third Cross Respondent to Second Cross Claim

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Fourth Cross Respondent to Second Cross Claim

JUDGE: **WILCOX J**

DATE OF ORDER: **8 MAY 2000**

WHERE MADE: **SYDNEY**

THE COURT ORDERS IN RELATION TO THE CROSS CLAIMS THAT:

1. It be declared that the statement dated 30 June 1997 and entitled "Deeming of Telecommunications Services: A statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997" is valid and effective in law to the extent, and only to the extent, that it specifies as an access service the following service:

"The service, being an analogue service supplied by an (access provider), necessary for the purposes of enabling the supply by an (access seeker) of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996".

2. It be declared that the declaration made by Australian Competition and Consumer Commission under s152AL(3) of the *Trade Practices Act 1974*, concerning the analogue subscription television broadcast carriage service, that was notified in the Commonwealth of Australia Gazette dated 8 September 1999 is valid and effective in law.

3. The cross claimants, Foxtel Management Pty Limited, Sky Cable Pty Limited, Telstra Corporation Limited, Telstra Multimedia Pty Limited and Telstra Media Pty Limited, pay to the cross respondents, Seven Cable Television Pty Limited, Australian Competition and Consumer Commission and Television & Radio Broadcasting Services Australia Pty Limited, 75% of the costs incurred by them in connection with the cross claims.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY **N217 of 2000**

BETWEEN:	**FOXTEL MANAGEMENT PTY LIMITED** **First Applicant**
	FOXTEL CABLE TELEVISION PTY LTD **Second Applicant**
AND:	**SEVEN CABLE TELEVISION PTY LIMITED** **First Respondent**
	TELEVISION & RADIO BROADCASTING SERVICES AUSTRALIA PTY LIMITED **Second Respondent**
	and
	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION **Third Respondent**

JUDGE:	**WILCOX J**
DATE OF ORDER:	**8 MAY 2000**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. It be declared that the applicants, Foxtel Management Pty Limited and Foxtel Cable Television Pty Limited, the suppliers of the service known as "FOXTEL subscription television service", together constitute a "carriage service provider" within the meaning and for the purposes of the *Telecommunications Act 1997*.

2. The said applicants pay the costs of the respondents, Seven Cable Television Pty Limited and Television Radio Broadcasting Services Australia Pty Limited, incurred in connection with this proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N1088 of 1999**

BETWEEN:	**FOXTEL MANAGEMENT PTY LIMITED** **Applicant**
AND:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Respondent**

N1150 of 1999

BETWEEN:	**FOXTEL MANAGEMENT PTY LIMITED** **Applicant**
AND:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION** **Respondent**

N1095 of 1999

BETWEEN:	**SEVEN CABLE TELEVISION PTY LIMITED** **Applicant**
AND:	**TELSTRA CORPORATION LIMITED** **First Respondent**
	TELSTRA MULTIMEDIA PTY LIMITED **Second Respondent**
	TELSTRA MEDIA PTY LIMITED **Third Respondent**
	THE NEWS CORPORATION LIMITED **Fourth Respondent**
	NEWS LIMITED **Fifth Respondent**
	SKY CABLE PTY LIMITED **Sixth Respondent**
	FOXTEL MANAGEMENT PTY LIMITED **Seventh Respondent**

and

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Eighth Respondent

FOXTEL MANAGEMENT PTY LIMITED
First Cross Claimant

SKY CABLE PTY LIMITED
Second Cross Claimant

SEVEN CABLE TELEVISION PTY LIMITED
First Cross Respondent to First Cross Claim

TELSTRA MULTIMEDIA PTY LIMITED
Second Cross Respondent to First Cross Claim

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Third Cross Respondent to First Cross Claim

TELEVISION AND RADIO BROADCASTING SERVICES AUSTRALIA LTD
Fourth Cross Respondent to First Cross Claim

and

TELSTRA MEDIA PTY LIMITED
Fifth Cross Respondent to First Cross Claim

TELSTRA CORPORATION LIMITED, TELSTRA MULTIMEDIA PTY LIMITED and TELSTRA MEDIA PTY LIMITED
Second Cross Claimants

SEVEN CABLE TELEVISION PTY LIMITED
First Cross Respondent to Second Cross Claim

TELEVISION & RADIO BROADCASTING SERVICES AUSTRALIA PTY LIMITED
Second Cross Respondent to Second Cross Claim

FOXTEL MANAGEMENT PTY LIMITED
Third Cross Respondent to Second Cross Claim

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Fourth Cross Respondent to Second Cross Claim

N217 of 2000

BETWEEN: **FOXTEL MANAGEMENT PTY LTD**
First Applicant

FOXTEL CABLE TELEVISION PTY LTD
Second Applicant

AND: **SEVEN CABLE TELEVISION PTY LIMITED**
First Respondent

TELEVISION & RADIO BROADCASTING SERVICES AUSTRALIA PTY LIMITED
Second Respondent

and

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
Third Respondent

JUDGE: **WILCOX J**
DATE: **8 MAY 2000**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

1 **WILCOX J:** These reasons for judgment relate to four proceedings, all of which are concerned with access by program providers to cable television facilities. The reasons are paragraphed as follows:

The 1997 deeming statement

The 1999 declaration

Is Foxtel a "carriage service provider"

Disposition

The proceedings

2 Two of the proceedings involve only two parties, Foxtel Management Pty Limited ("Foxtel Management") as applicant and Australian Competition and Consumer Commission ("ACCC") as respondent.

3 The first of those proceedings (N1088 of 1999) is brought under the *Administrative Decisions (Judicial Review) Act 1977*. In that proceeding Foxtel Management challenges, on various grounds, the validity in law of a declaration made by ACCC under s152AL(3) of the *Trade Practices Act 1974* "that the Analogue Subscription Television Broadcast Carriage Service (described in Annexure A) is a 'declared service' for the purposes of Part XIC of the Act". The declaration was stated to take effect on the day on which it was notified in the Commonwealth of Australia Gazette ("the Gazette"), which was 8 September 1999. The effect of the declaration (if it is valid) is to subject analogue subscription television broadcast carriage services (sometimes called "pay TV") to the competition regime set out in Part XIC of the *Trade Practices Act.*

4 The second proceeding (N1150 of 1999) is brought by Foxtel Management pursuant to s39B(1A) of the *Judiciary Act* 1903. That proceeding seeks review of a decision of ACCC recorded in a document dated 30 June 1997 and entitled "Deeming of Telecommunications Services: A statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997". If it is valid, the effect of that decision is to create access rights, under Part XIC of the *Trade Practices Act*, to the analogue cable television broadcasting system and certain adjunct services.

5 The rights made available to third parties by a declaration under Part XIC of the

Trade Practices Act are subject to certain qualifications. One qualification is that Part XIC does not impose on carriers and carriage service providers an obligation that would have the effect of "depriving any person of a protected contractual right": see s152AR(4)(d) of the Act. The term "protected contractual right" is defined by s152AR(12) as meaning "a right under a contract that was in force at the beginning of 13 September 1996" (the date of release of an exposure draft of proposed legislation).

6 Seven Cable Television Pty Limited ("Seven Cable") sought to take advantage of the declaration made by ACCC in September 1999. Apparently it gave an appropriate notice to Telstra Multimedia Pty Limited ("Telstra Multimedia"), a company concerned with the operation of the FOXTEL cable television service. However, Telstra Multimedia took the position that no obligation was imposed on it under Part XIC because of a protected contractual right arising out of an arrangement between companies associated with The News Corporation Limited ("News Corporation") and Telstra Corporation Limited ("Telstra Corporation").

7 In order to test the claim of protected contractual right, on 23 September 1999 Seven Cable instituted proceeding N1095 of 1999. It named as respondents Telstra Corporation, Telstra Multimedia, Telstra Media Pty Limited ("Telstra Media"), News Corporation, News Limited, Sky Cable Pty Limited ("Sky Cable", a company in the News group) and Foxtel Management. Foxtel Management is owned partly (50%) by Telstra Corporation, partly (25%) by Sky Cable and partly (25%) by Publishing and Broadcasting Limited. The applicant sought two declarations, both of which were concerned with the claimed protected contractual right.

8 In October 1999 two cross claims were filed in this proceeding; one by Foxtel Management and Sky Cable, the other by the three Telstra respondents. The cross respondents named in the cross claims included Seven Cable, Television and Radio Broadcasting Services Australia Pty Limited ("TARBS", another access seeker) and ACCC. Each cross claim raised issues about the validity of the 1997 deeming statement and the 1999 declaration. These were the same issues as were raised in proceedings N1088 of 1999 and N1150 of 1999, both of which had been assigned to my docket.

9 Proceeding N1095 of 1999 was assigned to Tamberlin J. However, the parties

recognised the inappropriateness of two judges each being concerned with the validity of the deeming statement and declaration. They suggested to Tamberlin J that the issues raised by the cross claims, which they referred to as the "public law" aspects of the proceeding before his Honour, should be referred to me, whilst Tamberlin J retained and heard the protected contractual right ("private law") issue. Tamberlin J assented to that suggestion. On 28 January 2000 he made a direction in the following terms:

> *"4. Issues dealing with the validity of:*
>
> *(a) the statement dated 30 June 1997 under which the Australian Competition & Consumer Commission ("ACCC") purported to specify a broadcasting access service as an eligible service pursuant to section 39 of the* Telecommunications (Transitional Provisions & Consequential Amendment) Act *1997 (Cth); and*
>
> *(b) the instrument dated 1 September 1999 and gazetted on 8 September 1999 under which the ACCC purported to declare an analogue subscription television broadcast service pursuant to section 152AL(3) of the* Trade Practices Act *1974,*
>
> *including the issues raised by paragraphs 33 to 42 inclusive of the Amended Cross Claim of Foxtel Management Pty Limited and Sky Cable Pty Limited be tried at the same time as proceedings Nos. N1088 of 1999 and N1150 of 1999."*

10 On 27 March 2000 Tamberlin J delivered reasons for judgment in respect of the portion of N1095 of 1999 he had retained: see *Seven Cable Television Pty Ltd v Telstra Corporation Ltd* [2000] FCA 350. His Honour held there was no relevant protected contractual right. On 31 March 2000 Tamberlin J made the following declarations:

> *"THE COURT:*
>
> *1. Declares that the Respondents (or any of them) do not have a 'protected contractual right' within the meaning of that term as used in section 152AR(4)(d) of the* Trade Practices Act *1974, in relation to the declared services requested by the Applicant and by Television & Radio Broadcasting Services Australia Pty Limited.*
>
> *2. Declares that the supply of the declared services requested by the Applicant and by Television & Radio Broadcasting Services Australia Pty Limited will not have the effect that the Respondents (or any of them) will be deprived of a 'protected contractual right' within the meaning of that term as used in section 152AR(4)(d) of the* Trade Practices Act *1974."*

11 The fourth proceeding (N217 of 2000) was instituted on 14 March 2000. During the

hearing of the three earlier proceedings, it became clear Foxtel Management was contending, not only that the 1997 deeming statement and 1999 declaration were invalid, but that those instruments had no application to the service Foxtel Management conducts in conjunction with Foxtel Cable Television Pty Limited ("Foxtel Cable"). In order to regularise the situation procedurally, without opposition from any party, I gave leave to Foxtel Management and Foxtel Cable to make instantly returnable a new application seeking appropriate declarations. This was done. During the course of the hearing, the applicants amended the form of the proposed relief. Ultimately, they sought only one declaration:

> *"A declaration that neither the first nor second applicant is a 'carrier' or 'carriage service provider' within the meaning of and for the purposes of the* Telecommunications Act *1997."*

The facts

(i) The contractual framework

12 The subscription television service known as "FOXTEL" is based on a complex of, at least, three agreements. The earliest of the three agreements is an "Umbrella Agreement" between News Corporation and Telstra Corporation made on 9 March 1995. It was amended and restated on 14 April 1997. The purpose of the agreement was to state the terms of an "Alliance" between the two companies, whose objectives include the establishment, through joint venture entities, of "leading businesses within the broadband video home entertainment sector in Australia". The agreement identifies the "Services" within the scope of the Alliance, including providing "to a Residential Subscriber either a Video Program on a Television … via a Set-Top Unit or an Audio Program via a Set-Top Unit". The parties agreed that Telstra Corporation and Telstra Multimedia must be the exclusive supplier of all broadbanding services used by any joint venture entity. The agreement details Telstra Corporation's responsibility to provide broadband access to homes and the financial obligations and entitlements of the parties.

13 On 14 April 1997 two subsidiary agreements were executed. The first of them, called "Foxtel Partnership Agreement", was made between Sky Cable, Telstra Media and Foxtel Management. It provides for Sky Cable and Telstra Media to carry on the FOXTEL business in partnership. Foxtel Management, a company controlled by a board comprising the Chief Executive Officer and three directors appointed by each partner, is appointed the partners'

exclusive agent to manage the business.

14 The other agreement of 14 April 1997 is called "Broadband Co-operation Agreement". The parties to this agreement are Telstra Multimedia and Foxtel Management, acting on behalf of the Foxtel Partnership referred to above. This agreement deals in detail with the provision of broadband facilities by Telstra Multimedia to FOXTEL.

15 The evidence also includes a copy of the standard terms and conditions that govern the supply by FOXTEL to subscribers of residential cable television. In the document, the word "FOXTEL" is a reference to Foxtel Cable: see cl 15.6. The acronym "TMPL" refers to Telstra Multimedia: see cl 15.16. The word "Service" is defined as "the provision of Channels": see cl 15.13. "Channels" means "the programming package which you have requested and FOXTEL has agreed to supply": see cl 15.3. "Retransmitted Free-to-Air Broadcasts" are the programs of the subscriber's local commercial television stations and the Australian Broadcasting Corporation and Special Broadcasting Service, where available: see cl 13.1.

16 The key obligation undertaken by FOXTEL towards subscribers is expressed in cl 1.1 in these terms:

> *"FOXTEL will provide the Channels and FOXTEL Management will provide the Retransmitted Free-to-Air Broadcasts to you. FOXTEL and FOXTEL Management will use reasonable skill and care in providing the Channels and Retransmitted Free-to-Air Broadcasts (as applicable). FOXTEL may vary Channel content or transmission times, the Channels that make up the Services or stop providing Channels without notice. FOXTEL is not liable for any loss or disappointment you may suffer as a result."*

17 Clause 2.1 contains a permit by Foxtel Cable for the subscriber "to use FOXTEL's Equipment in accordance with the terms of this Agreement". The term "FOXTEL's Equipment" is defined by cl 15.7 as meaning "the set-top unit, the remote control, the cabling from the wall plate to the set-top unit and from the set-top unit to your television or video equipment and any other equipment added or substituted by FOXTEL …" By cl 2.1 this equipment remains the property of Foxtel Cable.

18 Clause 5 deals with ownership and use of "the Facilities"; a term defined by cl 15.4 as "the equipment and facilities installed to your home to be used to supply the Channels and the

Retransmitted Free-to-Air Broadcasts, including optical fibre, coaxial cable, ducts, conduits and the wall plate but excluding FOXTEL's Equipment". The Facilities and the smart card remain the property of Telstra or Telstra Multimedia (cl 5.1).

(ii) The FOXTEL system in operation

19 The evidence includes an affidavit of Peter Glen Smart, Foxtel Management's Director of Engineering and Technology, in which he describes the operation of the FOXTEL system. There was no challenge to the accuracy of Mr Smart's account. Apparently Mr Smart gave similar evidence before Tamberlin J. His Honour summarised that evidence at paras 10 to 17 of his judgment. There is no need for me to repeat the summary. However, a short description may be helpful.

20 Mr Smart said there were two components to FOXTEL's business that permit it to offer pay television services to subscribers: first, the supply of programs for broadcast and, second, the provision of information and associated facilities which confine subscribers' program access to the channels to which they have subscribed. The first component is called "the program signal". The second, consisting of the subscriber's unique smart card number and the subscriber's program entitlements, is called "conditional access data". Both streams of information are provided by the Foxtel companies and transmitted to subscribers' reception equipment.

21 FOXTEL operates a play out centre at Pyrmont, Sydney. Programs are there assembled as a continuous stream of information. From Pyrmont the programs are broadcast in digital form to headends located in Sydney, Melbourne, Brisbane, Gold Coast, Adelaide and Perth. For this purpose FOXTEL uses the hybrid fibre coaxial ("HFC") network owned by Telstra Multimedia. At each headend the program signal is converted to an analogue signal, encrypted and combined with the conditional access data, which is in digital form. The combined information stream is then broadcast to subscribers over the Telstra HFC network, which currently passes about 2.5 million homes in Sydney, Melbourne, Brisbane, Gold Coast, Adelaide and Perth.

22 If a person wishes to subscribe to FOXTEL, and the network passes the person's home but is not already connected to a wall plate on the person's property, it will be

connected by a lead in cable to a wall plate. The lead in cable and wall plate are installed by Telstra Multimedia. Beyond the wall plate, FOXTEL equipment is used to connect the new subscriber to the HFC network: fly cables that connect the wall plate to the set top unit, and the set top unit to the subscriber's television receiver, and the set-top unit itself.

23 Mr Smart described the function of the set top unit in this way:

> *"The set top unit normally sits on or by the subscriber's television receiver. The set top unit receives the combined information stream from the HFC network. In conjunction with the smart card, the set top unit decrypts the program signal component of the combined information stream in accordance with the subscriber's entitlements. The program signal is transmitted by the set top unit to the subscriber's television receiver."*

The statutory provisions

(i) *Trade Practices Act*

24 The legislative provisions relevant to these proceedings are scattered amongst a number of statutes, requiring extensive cross-referencing. It is convenient to commence with Part XIC of the *Trade Practices Act.* This Part was introduced into the *Trade Practices Act* by the *Trade Practices Amendment (Telecommunications) Act 1997*. It came into effect on 30 April 1997.

25 Division 1 of Part XIC is an introduction to the Part. It commences with s152AA, which sets out a "simplified outline" of the Part, as follows:

> *". This Part sets out a telecommunications access regime.*
>
> *. The Commission may declare carriage services and related services to be '**declared services**'.*
>
> *. Carriers and carriage service providers who provide declared services are required to comply with '**standard access obligations'** in relation to those services.*
>
> *. The '**standard access obligations**' facilitate the provision of access to declared services by service providers in order that service providers can provide carriage services and/or content services.*
>
> *. The terms and conditions on which carriers and carriage service providers are required to comply with the '**standard access obligations**' are subject to agreement.*

. *If agreement cannot be reached, but the carrier or carriage service provider has given an '**access undertaking**', the terms and conditions are as set out in the access undertaking.*

. *If agreement cannot be reached, but no access undertaking is in operation, the terms and conditions are to be determined by the Commission acting as an arbitrator.*

. *An access undertaking may adopt the terms and conditions set out in a '**telecommunications access code**'.*

. *The Commission may conduct an arbitration of a dispute about access to declared services. The Commission's determination on the arbitration must not be inconsistent with the standard access obligations or an access undertaking.*

. *The Commission may register agreements about access to declared services.*

. *A carrier, carriage service provider or related body must not prevent or hinder access to a declared service."*

The emphasised words are defined terms.

26 Section 152AB sets out the objects of the Part. Relevantly it provides:

"(1) The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

*(2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users of either of the following services (the '**listed services**'):*

(a) carriage services;
(b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

(c) the objective of promoting competition in markets for listed services;
(d) ...
(e) the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.

(3) Subsection (2) is intended to limit the matters to which regard may be had.

(4) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(c), regard must be had to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services.

(5) Subsection (4) does not, by implication, limit the matters to which regard may be had.

(6) In determining the extent to which a particular thing is likely to result in the achievement of the objective referred to in paragraph (2)(e), regard must be had to the following matters:

(a) whether it is technically feasible for the services to be supplied and charged for, having regard to:

(i) the technology that is in use or available; and
(ii) whether the costs that would be involved in supplying, and charging for, the services are reasonable; and
(iii) the effects, or likely effects, that supplying, and charging for, the services would have on the operation or performance of telecommunications networks;

(b) the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope;

(c) the incentives for investment in the infrastructure by which the services are supplied.

(7) Subsection (6) does not, by implication, limit the matters to which regard may be had.

(8) ..."

27 The term "carriage service" has the same meaning in Part XIC as in the *Telecommunications Act 1997* and includes a proposed carriage service: see s152AC of the *Trade Practices Act.* In the *Telecommunications Act,* "carriage service" means "a service for carrying communications by means of guided and/or unguided electromagnetic energy". It is common ground that the service by which the information streams generated by FOXTEL are carried to subscribers' television sets is a "carriage service" within this definition. It is also common ground that this is a "listed carriage service", a term that includes "a carriage service between a point in Australia and one or more other points in Australia": see s16 of the *Telecommunications Act.*

28 A key concept in Part XIC is that of "access seeker", a term described in s152AG. A person is taken to be an "access seeker", in relation to a declared service, if three conditions are fulfilled. First, the person must be a "service provider", within the meaning of the *Telecommunications Act* – see the definition in s152AC of the *Trade Practices Act* - that is, "a carriage service provider" or "a content service provider": see s86 of the *Telecommunications Act.* The term "carriage service provider" is defined by s87 of the *Telecommunications Act.* It is common ground that Telstra Multimedia is a "carriage service provider" but Foxtel Management and Foxtel Cable dispute that either of them has that status. I will return to the s87 definition in considering that issue.

29 Section 97 of the *Telecommunications Act* defines the term "content service provider" in this way:

> *"(1) For the purposes of this Act, if a person uses, or proposes to use, a listed carriage service to supply a content service to the public, the person is a* ***content service provider****.*
>
> *(2) For the purposes of subsection (1), a content service is supplied to the public if, and only if, at least one end-user of the content service is outside the immediate circle of the supplier of the content service."*

30 The term "content service" is defined by s15 of the *Telecommunications Act* in such a manner as to include "a broadcasting service". By s7, that term bears the same meaning as in the *Broadcasting Services Act* 1992 viz:

> *"a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, ..."*

The definition contains some presently irrelevant exclusions.

31 In reading the definition of "broadcasting service" in s6 of the *Broadcasting Services Act*, it is necessary to bear in mind the meaning of "program" in that Act. This is also set out in s6 viz:

> *"(a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or*
>
> *(b) advertising or sponsorship matter, whether or not of a commercial kind."*

32 Both Foxtel Cable and Foxtel Management accept that they fall within the definition of "content service provider" provided by s97 of the *Telecommunications Act,* and so within the meaning of that term in Part XIC of the *Trade Practices Act.* In the case of Foxtel Cable, this is because it provides subscription programs. In the case of Foxtel Management, it is because it uses the cable service to supply retransmitted free-to-air programs.

33 All parties accept that Seven Cable and TARBS also fall within the definition of "content service provider"; each company proposes to use the broadband cable (a "listed carriage service") to supply a "content service", that is a "broadcasting service" that delivers television programs to the public. It follows that each company is also a "service provider" within the meaning of the *Telecommunications Act*.

34 The second requirement, if a particular person is to be regarded as an "access seeker" in relation to a particular declared service – that is a service declared by ACCC under Part XIC - is that the person must wish to have access to that service, or to change existing access arrangements: see s152AG(3) of the *Trade Practices Act*.

35 Finally, the person must have requested, or must propose to request, access to the service under s152AR of the *Trade Practices Act*: see s152AG(2).

36 It is common ground that both Seven Cable and TARBS wish to have access to the service described in each of the 1997 deeming statement and the 1999 declaration and have made requests for access. It follows that Seven Cable and TARBS is each to be regarded as an "access seeker" for the purposes of Part XIC.

37 Section 152AH(1) of the *Trade Practices Act* sets out six matters to which regard must be had in determining whether particular terms and conditions are reasonable. They are:

> *"(a) whether the terms and conditions promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;*
>
> *(b) the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;*

> *(c) the interests of persons who have rights to use the declared service concerned;*
>
> *(d) the direct costs of providing access to the declared service concerned;*
>
> *(e) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;*
>
> *(f) the economically efficient operation of a carriage service, a telecommunications network or a facility."*

Section 152AH(2) provides that subsection (1) does not, by implication, limit the matters to which regard may be had.

38 Division 2 of Part XIC relates to the declaration of services. Declarations are made by ACCC. They may be made on the recommendation of the Telecommunications Access Forum, an industry body constituted under s152AI of the *Trade Practices Act*: see s152AL(2). Declarations may also be made after the holding by ACCC of a public inquiry and the publication of a report: see s152AL(3). However, the relevant service must be an "eligible service", a term that is defined by s152AL(1) as:

> *"...*
>
> *(a) a listed carriage service (within the meaning of the* Telecommunications Act *1997); or*
>
> *(b) a service that facilitates the supply of a listed carriage service (within the meaning of that Act);*
>
> *where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider (whether to itself or to other persons)."*

39 Section 152AL(3) also requires that ACCC be "satisfied that the making of the declaration will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services". As will appear, ACCC expressed itself as so satisfied in relation to the subject 1999 declaration.

40 A declaration under s152AL has effect (s152AL(4)) and is to be published in the Gazette (s152AL(5)). If a declaration is made, the access provider must, upon request, make access available to service providers in accordance with obligations imposed by s152AR, as set out below.

41 Section 152AM deals with inquiries about proposals to declare services. As no complaint is made about the inquiry held in this case, I need not set out its terms. Section 152AN permits ACCC to combine two or more public inquiries regarding the declaration of a service.

42 Section 152AO permits variation or revocation of declarations. However, except in the case of a minor variation, this may only be done after ACCC has held a public inquiry about the proposed variation or revocation.

43 Division 3 stipulates the standard access obligations imposed on access providers. It commences with s152AR. As this section is at the heart of several submissions in these proceedings I will set it out in full:

> *"(1) This section sets out the '**standard access obligations**'.*
>
> *(2) For the purposes of this section, if a carrier or a carriage service provider supplies declared services, whether to itself or to other persons:*
>
> *(a) the carrier or provider is an '**access provider**'; and*
> *(b) the declared services are '**active declared services**'.*
>
> *(3) An access provider must, if requested to do so by a service provider:*
>
> *(a) supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and*
> *(b) take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and*
> *(c) take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.*
>
> *(4) Paragraph (3)(a) does not impose an obligation to the extent (if any) to which the imposition of the obligation would have any of the following effects:*
>
> *(a) preventing a service provider who already has access to the declared service from obtaining a sufficient amount of the service to be able to meet the service provider's reasonably anticipated requirements, measured at the time when the*

request was made;

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

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

(d) depriving any person of a protected contractual right.

(5) If an access provider:

(a) owns or controls one or more facilities; or

(b) is a nominated carrier in relation to one or more facilities;

the access provider must, if requested to do so by a service provider:

(c) permit interconnection of those facilities with the facilities of the service provider for the purpose of enabling the service provider to be supplied with active declared services in order that the service provider can provide carriage services and/or content services; and

(d) take all reasonable steps to ensure that:

(i) the technical and operational quality and timing of the interconnection is equivalent to that which the access provider provides to itself; and

(ii) if a standard is in force under section 384 of the Telecommunications Act *1997 – the interconnection complies with the standard; and*

(e) take all reasonable steps to ensure that the service provider receives, in relation to the interconnection, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.

(6) If a service provider uses active declared services supplied by an access provider in accordance with subsection (3), the access provider must, if requested to do so by the service provider, give the service provider billing information in connection with matters associated with, or incidental to, the supply of those active declared services.

(7) The billing information referred to in subsection (6) must:

(a) be given at such times or intervals as are ascertained in accordance with the regulations; and

(b) be given in a manner and form ascertained in accordance with the regulations; and

(c) set out such particulars as are ascertained in accordance with

the regulations.

(8) If an access provider supplies an active declared service by means of conditional-access customer equipment, the access provider must, if requested to do so by a service provider who has made a request referred to in subsection (3), supply to the service provider any service that is necessary to enable the service provider to supply carriage services and/or content services by means of the active declared service and using the equipment.

(9) This section does not impose an obligation on an access provider if there are reasonable grounds to believe that:

(a) the access seeker would fail, to a material extent, to comply with the terms and conditions on which the access provider complies, or on which the access provider is reasonably likely to comply, with that obligation; or
(b) the access seeker would fail, in connection with that obligation, to protect:

(i) the integrity of a telecommunications network; or
(ii) the safety of individuals working on, or using services supplied by means of, a telecommunications network or a facility.

(10) Examples of grounds for believing as mentioned in paragraph (9)(a) include:

(a) evidence that the access seeker is not creditworthy; and
(b) repeated failures by the access seeker to comply with the terms and conditions on which the same or similar access has been provided (whether or not by the access provider).

(11) An obligation imposed by this section does not arise before 1 July 1997.

(12) In this section:

*'**pre-request right**', in relation to a request made for the purposes of paragraph (3)(a), means a right under a contract, or under a determination (within the meaning of Division 8), that was in force at the time when the request was made.*

*'**protected contractual right**' means a right under a contract that was in force at the beginning of 13 September 1996."*

44 Sections 152AS and 152AT provide for certain exemptions from standard access obligations. Those sections are not presently relevant.

45 Section 152AY requires carriers and carriage service providers to comply with standard access obligations on such terms and conditions as may be agreed between the carrier or carriage service provider and the access seeker or, failing agreement, on terms and conditions specified in a relevant undertaking or as are determined by ACCC. Orders may be made in this Court to enforce the obligation: see s152BB. The obligation of compliance is also a condition of a carrier's licence: see s152AZ.

46 Division 5 deals with access undertakings. An "access undertaking" is a written undertaking by a carrier or carriage service provider to ACCC under which the carrier or carriage service provider undertakes to comply with specified terms and conditions in relation to standard access obligations. This Division is not relevant to any of the present cases; no access undertaking has been given.

47 Division 8 concerns disputes about access. It is necessary to note only the provisions empowering ACCC to arbitrate disputes (ss152CO – 152DM) and this Court to enforce ACCC's determinations (ss152DU – 152DZ). The matters that ACCC must take into account in determining an access dispute include:

> *"...*
> *(b) the legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the declared service;*
>
> *(c) the interests of all persons who have rights to use the declared service; ..."* (see s152CR)

(ii) The 1997 transitional Act

48 The *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (No.59 of 1997) was referred to by counsel in submissions as the "Telco Act". It is convenient to adopt that abbreviation. The Telco Act was enacted at about the same time as the *Telecommunications Act 1997* (No.47 of 1997) and the *Trade Practices Amendment (Telecommunications) Act* (No. 58 of 1997) which inserted Part XIC into the *Trade Practices Act.*

49 As its name suggests, the Telco Act was concerned with transitional matters. One of these matters was the specification of eligible services covered by access agreements registered under the earlier legislation, the *Telecommunications Act* 1991. However, the

opportunity was taken to bring Part XIC of the *Trade Practices Act* into immediate service, without waiting for either a request by the Telecommunication Access Forum (s152AL(2)) or a public inquiry and report (s152AL(3)). Section 39 of the Telco Act relevantly provided:

> *"(1) As soon as practicable after this section commences, but, in any event, before 1 July 1997, the ACCC must prepare a written statement specifying each eligible service that was covered by an access agreement registered under section 144 of the* Telecommunications Act *1991 as at the beginning of 13 September 1996.*
>
> *...*
>
> *(5) The ACCC must also specify in the statement an eligible service that is:*
>
> *(a) necessary for the purposes of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users; and*
> *(b) of a kind that was used for those purposes on 13 September 1996.*
>
> *...*
>
> *(7) The ACCC must consult AUSTEL about the preparation or variation of the statement.*
>
> *(8) The ACCC must not prepare or vary the statement unless the ACCC has first:*
>
> *(a) published a draft of the statement or variation and invited people to make submissions to the ACCC on the draft; and*
> *(b) considered any submissions that were received within the time limit specified by the ACCC when it published the draft.*
>
> *(9) A copy of the statement, and of any variation of the statement, is to be published in the Gazette.*
>
> *(10) Part XIC of the* Trade Practices Act *1974 has effect, in relation to an eligible service specified in the statement, as if the ACCC had:*
>
> *(a) made an instrument under subsection 152AL(3) of the Act declaring the service to be a declared service; and*
> *(b) complied with the requirements set out in subsection 152AL(3) of that Act in relation to the instrument.*
>
> *(11) This section does not prevent the instrument referred to in paragraph (10)(a) from being varied or revoked by the ACCC in accordance with section 152AO of the* Trade Practices Act *1974.*

...

(15) In this section:

***ACCC** means the Australian Competition and Consumer Commission.*

...

***AUSTEL** means the Australian Telecommunications Authority.*

***broadcasting service** has the same meaning as in the* Broadcasting Services Act 1992.

***eligible service** has the same meaning as in section 152AL of the* Trade Practices Act *1974*.

***line link** has the same meaning as in the* Telecommunications Act 1997.*"*

The 1997 deeming statement

(i) The facts

50 Section 39(1) of the Telco Act commenced to operate on 3 May 1997, three days after the commencement of Part XIC of the *Trade Practices Act.* It required ACCC to make a written statement within less than two months, before 1 July 1997. On 30 June 1997, in purported compliance with this requirement, ACCC published a statement that ran to a total of 80 pages, including a two page summary and two Attachments.

51 In the Introduction (chapter 1 of the statement) ACCC explained the situation:

"Access obligations in relation to a particular service are established by the declaration of that service by the Commission. Transitional arrangements provide for an initial list of declared services. In particular, section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act *(the Transitional Act) requires the Commission to prepare a statement, in consultation with AUSTEL, deeming certain services as declared services with effect from 1 July 1997.*

The deeming process is intended to achieve a smooth introduction of the new telecommunications access regime by essentially retaining existing access rights for carriers, extending those rights to existing service providers and new entrants and providing access to the carriage of broadcasting services over cable networks. On an ongoing basis, declarations may take place on the recommendation of the Telecommunications Access Forum (TAF) or after a public inquiry by the Commission.

Carriage services and services that facilitate the supply of carriage services will be eligible for declaration under the regime. ..."

52 In chapter 2 of the statement, ACCC set out its understanding of the rationale of legislation requiring access:

> *"The primary rationale underlying the telecommunications access regime is that the interests of end-users of telecommunications services can be promoted through the introduction of effective competition into potentially competitive markets which require the services of certain 'bottleneck' infrastructure. In particular, certain network elements may exhibit natural monopoly characteristics such that a single network element can produce all relevant market output at a lower cost than two or more elements. Typically, this will reflect economies of scale and scope in production.*
>
> *In the absence of an access regime, the owners of such natural monopoly network elements may be in a position to inhibit or distort competition in markets which require the use of the bottleneck services. For instance, the owner of a local CAN* [ie customer access network] *may be able to obstruct competition in the market for long-distance telephone services through denying or restricting access to the local network. The incentive to try to limit competition in the related market may be present where the owner of the bottleneck facility has a commercial arm in the related market.*
>
> *The access regime establishes rights for service providers to negotiate access to bottleneck services on reasonable terms and conditions. This is designed to create greater competition in the markets which rely on the bottleneck services, and thereby promote more efficient production and lower prices for consumers."* (footnotes omitted)

53 Chapter 3 of the statement deals with the process of, and framework for, the consideration of relevant issues. The chapter includes a comment pertinent to issues argued in these proceedings:

> *"The types of services that are eligible for declaration under the telecommunications access regime are:*
>
> - *carriage services supplied between two or more points, at least one of which is in Australia; or*
> - *services that facilitate the supply of such carriage services;*
>
> *where the service is supplied, or is capable of being supplied, by a carrier or a carriage service provider.*
>
> *Consistent with Part IIIA, the telecommunications access regime provides for the declaration of a service provided by means of an infrastructure facility rather than declaration of the infrastructure itself. This recognises that a facility may be used to provide multiple services, only some of which it might be in the interests of end-users to declare.*

The declaration of services that facilitate the supply of carriage services is intended to allow for access obligations to be attached to blocks of functionality, or other inputs, which, while not carriage services themselves, may be used to produce a carriage service. In this regard, it will facilitate the efficient unbundling of services." (footnotes omitted)

54 Chapter 4 of the statement relates to services covered by existing access agreements and chapter 5 with mobile phone services. They are not here relevant. However, it is desirable to set out the whole of chapter 6 of the statement, dealing with broadcasting carriage services:

"Section 39(5) of the Transitional Act provides that the ACCC must specify in its deeming statement eligible services necessary for the supply of broadcasting services by means of line (as distinct from air) links and that was of a kind used for supplying broadcasting services on 13 September 1996.

The Commission is not required to take account of the LTIE [ie long-term interests of end-users] *criteria when deciding whether to deem services under s.39(5) (although the criteria would be relevant should a carrier seek an exemption from the standard access obligations which apply to active declared services). Consequently, the key issue is how broadcasting carriage and related support services should be specified in the deeming statement.*

The Commission understands that that [sic] *such a carriage service would include carriage services for the transmission of pay TV over the Telstra and Optus cable networks, as well as Pay TV carriage services for AUSTAR's network in Darwin and Northgate's network in Ballarat.*

The TAF has proposed a technical specification of this service which has been revised from a previous version included in the Commission's draft Statement of 2 June. The TAF's revisions reflect the concerns of the TAF to specify the service so that it is only applicable to broadcast services provided by cable networks (as opposed to other type of networks, such as satellite networks) consistent with s.39(5).

Bundled nature of service

The Commission has also received comments from a potential access seeker to this service who is concerned at the bundled nature of this product. Under the TAF's definition, an access seeker would be required to acquire not just the distribution or carriage function but also the network management access function, the conditional access function and servicing function. It can be expected that where technically feasible, such functions may be able to be carried out by the access seeker directly. As an example, an access seeker may choose to supply their own subscriber authorisation services. As technologies and markets develop, it can be anticipated that this will be a feature of the provision of such services and will provide access seekers with

greater access to, and control over, their customers.

On the present state of technology, particularly the current use of analogue-based delivery systems, the Commission understands that it may be prohibitively expensive for the access seeker to provide these functions itself. It should be noted that the service description in Attachment B is only applicable to current analogue cable technology.

In this context, it is relevant that the standard access obligations in section 152AR(8) of Part XIC of the TPA, which apply upon deeming or declaration of a service, allow an access seeker, if they choose, to request the supply of conditional access services (including the use of conditional access customer equipment) where these services are already being used by the access provider. Consistent with this optional nature of obtaining such a service, the description of the broadcasting carriage service should ensure that access seekers would only be obliged to acquire those service elements which they require. For example, it is doubtful that a free to air broadcaster would necessarily require the use of conditional access systems or equipment in providing their service on cable networks.

The description of the service in Attachment B has been accordingly amended from that proposed by the TAF, to ensure that it only applies to the current analogue environment, and that access seekers are not obliged to acquire service elements which they do not require as part of the provision of the service."

The acronym "TAF" refers, of course, to the Telecommunications Access Forum constituted under s152AI of the *Trade Practices Act.* Membership of TAF is open to carriers and carriage service providers.

55 The statement concludes with a note on the operation of the new regime (chapter 7) and a summary of services which ACCC had decided to deem, or not to deem, to be declared services.

56 Attachment A to the statement contains technical specifications for each of the deemed services. It is not presently relevant. However, the opening words of Attachment B achieved prominence in the argument. They are:

*"**Broadcasting Access Service Description***

The service, being an analogue service supplied by an AP, necessary for the purposes of enabling the supply by an AS of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996, is an access service which provides a basic carriage and distribution access function and which may also include, if requested, one or more of the following elements:

(a) network management access function;
(b) conditional access function; and
(c) subscriber premises servicing function."

The letters "AP" are, of course, an abbreviation of access provider. "AS" means access seeker.

57 Attachment B goes on to describe in some detail the elements in the "distribution access function", "network management access function", "conditional access function" and "subscriber premises servicing function". Those descriptions correspond with the characteristics of the current FOXTEL system.

58 The Summary of the deeming statement reads as follows:

> *"Section 39 of the* Telecommunications (Transitional Provisions and Consequential Amendments) Act *1997 (the Transitional Act) provides for the Australian Competition and Consumer Commission to prepare a statement, in consultation with AUSTEL, specifying certain services to be deemed as declared services. The services which are eligible to be deemed under s.39 include certain services covered by registered access agreements between the three existing carriers and certain broadcasting carriage services.*
>
> *This statement is the Commission's written statement under Section 39, and fulfils the Commission's obligation under s.39(1) and s.39(5) of the Transitional Act.*
>
> *On or after 1 July 1997, carriers and service providers will be able to be provided with the deemed services and specified ancillary services, on request, from any carrier or carriage service provider supplying the services. The terms and conditions of access may be determined by commercial negotiation, an undertaking submitted by the access provider and which has been accepted by the Commission, or, in the event that the parties are unable to agree, by arbitration by the Commission.*
>
> *The Commission in preparing this statement, published a draft and invited submissions in accordance with s.39(8). The Commission released a draft statement on 4 June 1997. Parties were provided with fourteen days to respond. Within that time the Commission met with many interested parties and received 22 written submissions. The Commission gave due consideration to all representations and submissions in relation to this matter in preparing the statement.*
>
> *Table A specifies the services deemed as declared services under s.39. The approach employed by the Commission in determining which eligible services to deem, on the basis of the legislative criteria relating to the promotion of the long-term interests of end-users, is outlined in the statement. Attachments A*

and B contain more detailed service descriptions of the services specified in the statement. The Commission has adopted service descriptions developed by the TAF for those deemed services where they have been available and are considered appropriate. The service descriptions in the attachments outline the elements and features of the service and provide guidance to access providers and access seekers in negotiating the terms and conditions under which the service will be provided.

The Commission raised in its draft deeming statement its interest in ensuring that additional eligible services, for which early access is considered important, are considered for declaration either by the TAF or the Commission under s.152AL of the Trade Practices Act. *On the basis of comments received, the Commission intends to announce a public inquiry into the declaration of additional services soon after the commencement of the new regime."*

59 Table A, referred to in the fifth paragraph of the summary, includes eleven items. The last of them is expressed in the following terms:

"(xi) ***Broadcasting access service***

An analogue service necessary for the purposes of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996. This is an access service which provides a basic carriage and distribution access function together with other functions as requested." [Original emphasis]

60 The deeming statement is dated 30 June 1997 but nothing was gazetted, in purported compliance with s39(9) of the Telco Act, until 9 July 1997. The Gazette of that day included the following notice:

*"**Deeming of Telecommunications Services:***
A statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997

Following is a copy of the summary of the Deeming of Telecommunications Services statement released by the Australian Competition and Consumer Commission on 30 June 1997. Copies of the full statement are available from the ACCC's Internet website http://www.accc.gov.au.

Section 39 of the *Telecommunications (Transitional Provisions and Consequential Amendment) Act 1997 (the Transitional Act) provides for the Australian Competition and Consumer Commission to prepare a statement, in consultation with AUSTEL, specifying certain services to be deemed as declared services. The services which are eligible to be deemed under s.39 include certain services covered by registered access agreements between the three existing carriers and certain broadcasting carriage services.*

> *This statement is the Commission's written statement under Section 39, and fulfils the Commission's obligation under s.39(1) and s.39(5) of the Transitional Act. …"*

The notice then reproduced the whole of the Summary of the statement, set out in para 58 above, including Table A, mentioned in para 59.

(ii) The bases of challenge

61 Counsel for Foxtel Management and Sky Cable (collectively "Foxtel"), Dr G Flick SC and Mr R Lancaster, and counsel for the three Telstra companies ("Telstra") that are cross claimants in proceeding N1095 of 1999 (Mr M Pembroke SC and Dr J Griffiths), submit the 1997 deeming statement is invalid. They put this submission on a number of bases.

62 Counsel for Foxtel argue four points:

(a) no copy of the statement was published in the Gazette, as required by s39(9) of the Telco Act;
(b) the service specified in the deeming statement is uncertain;
(c) if the service is certain, because regard may be had to Attachment B of the statement, it is not an "eligible service" within the meaning of s39(15) of the Telco Act;
(d) the services specified in Attachment B are not "necessary" for the purpose of enabling the supply of a broadcasting service.

63 Counsel say its clients' success on any one of the first three points would lead to a conclusion that the deeming statement is void; the result of upholding point (d) would be that the statement went beyond the Commission's power and is, for that reason, void.

64 Counsel for Telstra put submissions supporting Foxtel's points (b), (c) and (d). They also put three additional arguments:

(e) ACCC failed to "specify" a broadcasting service;
(f) the deeming statement does not specify a **single** broadcasting service; and
(g) the broadcasting access service that the ACCC purported to specify was not "of a kind" used on 13 September 1996.

65 Point (a) stands apart from the others; it does not depend upon the content of any

deeming statement but merely upon the consequences of non-compliance with s39(5) of the Telco Act. The remaining six points arise out of the wording of this particular deeming statement. They raise a question as to the extent (if any) to which it is legitimate to have regard to Attachment B. There is overlap between the six points, so I will consider them together. I will do that in a way that will not attempt to follow the order of the six points. Moreover, counsels' written submissions, though helpful, are voluminous. This is partly because they address permutations that might arise, depending on my view about anterior points. I have carefully read all the submissions, but I will not deal with every proposition they contain. I will confine myself to the points that need to be decided, having regard to my views about anterior points.

(iii) Delay in challenge

66 I should say at this stage that counsel for ACCC (Mr A Robertson SC, Mr N Williams and Ms M Painter) submit I ought not to consider the arguments about invalidity raised by Foxtel and Telstra, the reason being their delay in challenging the validity of the deeming statement. They point out that the relief sought by Foxtel Management in proceeding N1150 of 1999 is discretionary, as is the relief sought by the both Foxtel and Telstra in their cross-claims to proceeding N1095 of 1999.

67 There is evidence that, in September 1998, both Telstra Multimedia and Foxtel Management suggested to an officer of ACCC that ACCC exceeded its powers when it made the deeming statement. By letter dated 2 October 1998, Foxtel Management articulated arguments for this view. By letter dated 3 December 1998, Telstra Multimedia wrote to ACCC expressing "concerns about the validity" of the 1997 statement. These arguments and concerns were not accepted by ACCC; nevertheless, it was not until October 1999 that any Foxtel or Telstra company instituted any proceeding challenging validity. In the meantime, both TARBS and Seven Cable had apparently acted on the basis that the statement was valid. There is substance in ACCC's criticism of Foxtel's and Telstra's delay.

68 However, I have come to the conclusion that I ought to consider the arguments about validity raised by Telstra and Foxtel. The validity of an instrument such as the deeming statement is a question of public importance; the statement has potential ramifications for persons other than Telstra and Foxtel. Moreover, Seven Cable seeks, in proceeding N1095 of

1999, to enforce rights that are said to arise under the deeming statement. Provided they litigate their claim in a manner that will not cause unfairness to others, it should be open to persons against whom rights are asserted to argue the rights do not exist because the relevant instrument is invalid.

(iv) The effect of non-publication in the Gazette

69 I said that Foxtel's first point depends on the consequences of non-compliance with s39(9) of the Telco Act because I think it is clear that ACCC did fail to comply with that subsection. Section 39(9) ordained that "a copy of the statement … is to be published in the Gazette". However, as the opening words of the published notice make clear, what was published in the Gazette was not a copy of the whole statement – that is, all 80 pages – but only a summary of it. The Gazette summary reproduced the Summary at the beginning of the long document, including Table A.

70 Counsel for Foxtel make the point that s39(9) requires publication in the Gazette of a "copy of the statement"; unlike some statutory provisions, it does not simply provide for publication of a notice that a particular instrument has been made, with information as to where the instrument may be inspected. Counsel say the failure to comply strictly with s39(9) spells invalidity and cite two passages from judgments in the High Court of Australia in *Watson v Lee* (1979) 144 CLR 374.

71 The plaintiffs in *Watson v Lee* were charged with offences under the *Banking (Foreign Exchange) Regulations*. They argued that the regulations were not authorised by the *Banking Act 1974*; furthermore they were affected by irregularities in that none of the regulations were available for purchase on the day they were published in the Gazette. Two statutory provisions were relevant to the case. First, s48(1) of the *Acts Interpretation Act 1901* then provided that all regulations made under an Act:

> *"(a) shall be notified in the* Gazette*;*
>
> *(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and*
>
> *(c) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations."*

Second, s5(3) of the *Rules Publication Act* 1903 provided that:

> *"Where any statutory rules are required by any Act to be published or notified in the* Gazette*, a notice in the* Gazette *of the rules having been made, and of the place where copies of them can be purchased, shall be sufficient compliance with that requirement."*

In *Watson v Lee* the regulations that created the offences with which the plaintiffs were charged were not published in the Gazette. The making of the regulations was notified in the Gazette, but there was a question as to whether they were then available for purchase.

72 The High Court unanimously held the regulations were operative at all material times. Barwick CJ pointed out that regulations are made when signed by the Governor-General; however, they do not become operative until notified in the Gazette. That is the effect of s48(1) of the *Acts Interpretation Act*, a provision that "really requires the terms of the regulation to be published in the Gazette": see 379. However, s5(3) of the *Rules Publication Act* provides "an alternative method of notification": see 380. This method requires copies of the regulation to be available at the notified place. His Honour was of the opinion that, if it were established that the regulation was never made available at the notified place, it would be inoperative; however, as the factual position was left unclear, the presumption of regularity of official acts applied.

73 It will be noted that the Chief Justice's analysis depended entirely on the application of two statutory provisions, s48(1) of the *Acts Interpretation Act* and s5(3) of the *Rules Publication Act,* neither of which is relevant to the deeming statement under consideration in this case. Counsel for Foxtel quoted the final paragraph on 379, but that is plainly an exposition of the requirements of s48(1) of the *Acts Interpretation Act*; it is not a general pronouncement about the consequences of failure to publish a copy of an instrument in the Gazette.

74 The other members of the Court (Gibbs, Stephen, Mason and Aickin JJ) dealt with the issue in terms of the same two statutory provisions. None of them made a general pronouncement. The passage in the judgment of Stephen J at 395-396, cited by counsel, is clearly directed to the requirements of s48(1).

75 Counsel for Foxtel also referred to *McDevitt v McArthur* (1919) 15 Tas LR 6 and

Flinn v James McEwan & Co Pty Ltd [1991] 2 VR 434. However, neither of these decisions propounds a general principle.

76 *McDevitt v McArthur* was a decision of the Full Court of the Supreme Court of Tasmania concerning a prosecution for breach of a by-law. Apparently, the by-law had not been published in intelligible form. Although he did not set out its terms, Nicholls CJ (at 7) said "(t)he statute provides that, before by-laws shall bind the people, they shall be published". If that was so, it is unsurprising the Court granted prohibition.

77 *Flinn* was a decision of the Court of Appeal of the Supreme Court of Victoria. The case arose out of a defective proclamation notifying the commencement of operation of a statute. The notice in the *Government Gazette* omitted any reference to the Governor or the official seal. Section 11(2) of the *Interpretation of Legislation Act* 1984 provided that, where an Act provides that it shall come into operation "on a day to be fixed by proclamation of the Governor in Council published in the *Government Gazette,* the publication of the proclamation in the *Government Gazette* shall be a condition precedent to the coming into operation of the Act". As the proclamation was obviously defective, it is once again unsurprising that the Court held the Act had not commenced to operate.

78 Counsel for ACCC point out that s39 of the Telco Act does not make gazettal of the ACCC statement a condition precedent to its operation. On the contrary, they suggest, Parliament's intention was that the statement would take effect immediately it was made.

79 I think this suggestion is correct. Subsection (1) of s39 requires ACCC, as soon as practicable but, in any event, before 1 July 1997, to prepare a written statement specifying each eligible service that was covered by an access agreement registered under the 1991 Act. Subsection (5) requires ACCC, in that statement, to specify an eligible service meeting the description of paras (a) and (b). Subsections (7) and (8) specify steps to be taken in the course of preparation of the statement. No doubt they are conditions precedent to a valid statement. But subs (9) specifies a step that can be taken only after the statement is made. And subs (10) provides for the immediate operation of a statement: Part XIC "has effect, in relation to an eligible service specified in the statement …"

80 It seems to me ACCC created a problem for itself by describing the whole of its 80

page document as "A statement pursuant to section 39" of the Telco Act. Once it had done that, it was under an obligation to publish the whole document in the Gazette. That was obviously an inconvenient course. Sensibly, ACCC thought it would be sufficient to publish a summary that briefly explained the position, listed the selected eligible services in Table A and informed readers as to the availability of the full document on ACCC's Internet website. That course could have been taken, consistently with s39(9), if ACCC had made its Summary the statement pursuant to s39 and provided the longer document only by way of reasons for determination.

81 ACCC did not take this course. It chose a course that involved an omission to comply with s39(9). However, for the reasons I have expressed, that omission does not invalidate the statement. Point (a) must be rejected.

(v) The legitimacy of reference to Attachment B

82 Counsel for Foxtel argue that s39(1) and (5) of the Telco Act require certainty. They say this is generally a requirement of exercises of statutory power. They cite the observations of Kitto J in *Television Corporation Limited v The Commonwealth of Australia* (1963) 109 CLR 59 at 70-71. Counsel note the use of the word "specify" in s39(5) and the requirement of s39(9) for gazettal of the statement. They say "(t)he only service which has been specified is the service referred to in paragraph (xi) of Table A, since that is the service specification contained in the Gazette". It is irrelevant, they say, that ACCC has issued a more detailed service description in Attachment B.

83 The response to this submission offered by counsel for ACCC is that:

> *"(a) the duty imposed upon it by s.39(5) of the Transitional Act* [i.e. the Telco Act] *required no more than the inclusion in the statement of an eligible service described in the terms of s.39(5)(a) and (b);*
>
> *(b) the description contained in Table A should, on ordinary principles of construction, be read together with Attachment B to the report of which it formed part, and so read, is neither uncertain nor ambiguous;*
>
> *(c) Even if the inclusion of the additional elements creates uncertainty, or is erroneous for any other reason, those elements are severable, and the remaining description is valid."*

84 I accept Foxtel's argument about the need for certainty. But I do not accept that the question whether the statement was uncertain must be resolved by reference only to Table A. Table A is part of a summary that refers to Attachment B, as one of two attachments that "contain more detailed service descriptions of the services specified in this statement". A reader interested in better understanding the descriptions in Table A is directed to Attachment B.

85 Attachment B was not included in the gazetted summary. However, if it is correct to hold that gazettal is not a condition precedent to the operation of a s39 statement, it must follow that the question of uncertainty is to be resolved by reference to the whole of the statement rather than only that part which was gazetted.

86 In any case, it is not impermissible for a Gazette notice to incorporate material by reference: see Walsh J (with whom Herron J agreed) in *Wright v T.I.L Services Pty Ltd* [1956] SR (NSW) 413. At 421-422 Walsh J said:

> *"The general proposition that in no circumstances can a regulation incorporate by reference something not set forth in it is, in my opinion, unsound. It is true that a regulation should indicate with sufficient certainty, to those upon whom it imposes a penalty for a breach of it, what is the extent of the obligation. Where a regulation contains a reference to some other document the question whether or not the requirement just stated is fulfilled must depend upon a consideration of the particular regulation and of the nature and contents of the incorporated document. If there is uncertainty as to what is the document to which reference is made, no doubt the regulation would be held invalid. Again, if such document is not readily accessible it may be, in some cases, that the regulation would be held to be bad, the true ground for doing so being that it is unreasonable rather than that it is uncertain."*

In the present case requirements of certainty of reference and ready accessibility are amply satisfied.

87 The statement of Walsh J was cited with approval in this Court by Toohey J (with whom Smithers and Davies JJ agreed) in *Hoar v The Queen* (31 March 1983, unreported). The Full Court there held valid a proclamation that referred to "all waters", a term understandable only by reference to a statutory definition.

88 In the circumstances, it is unnecessary for me to consider Foxtel's criticisms of the specificity of item (xi) of Table A, considered alone. The complaint of uncertainty has to be

evaluated by reference to the whole of the deeming statement including Attachment B.

(vi) Whether Attachment B is uncertain

89 In para 56 above, I set out the opening words of Attachment B. The Attachment is lengthy so I will not quote the whole of it. However, in para 24 of their written submissions, counsel for Foxtel made observations about Attachment B which I find useful:

> *"(b) the Distribution Access Function described in Attachment B corresponds to the functions performed by the HFC network and the fly cables described in paragraphs 17, 18 and 19(a) of Smart's affidavit;*
>
> *(c) in broad terms, the Network Management Access Function corresponds to the subscriber management system described in paragraph 11 of Smart's affidavit;*
>
> *(d) the Conditional Access Function corresponds to the conditional access system described in paragraphs 12 to 14 of Smart's affidavit and the smartcard described in paragraph 19 of Smart's affidavit;*
>
> *(e) the Subscriber Premises Servicing Function essentially is the function of connecting and disconnecting customers and providing service calls to customers;*
>
> *(f) in broad terms, the service described in Attachment B includes all the equipment necessary to compile, broadcast, operate and manage a pay television service other than the play out centre (Smart para 10) and the inter city optic fibre cable network (Smart para 15). It also includes service functions. However, it specifically excludes subscriber billing (see para 11 of Attachment B), although subscriber billing is a function of the subscriber management system (see Smart para 11(d)). In addition, it does not include a service for converting a signal to an analogue signal capable of transmission on the HFC network. Rather, the service description assumes that the access seeker will provide the access provider with a signal in an appropriate analogue format for transmission (see para 1.1 of Attachment B)."*

90 Counsel for Telstra submit that Attachment B is uncertain. They put two arguments.

91 First, counsel note that the description of the relevant service at the commencement of Attachment B, quoted in para 56 above, includes optional elements: network management access function, conditional access function and subscriber premises servicing function. Counsel say the effect of this approach was that, "instead of the ACCC specifying with

appropriate clarity and precision the eligible service as required by s39(5), it adopted an approach which had the effect of transferring to access seekers the ACCC's responsibility for specifying the Broadcasting Access Service". One effect of this, they say, is that an "Access Provider has no way of determining in advance of receiving a request from an Access Seeker whether a particular service falls within the specification". Counsel go on to say that ACCC has abrogated its obligation under s39(5) in two ways:

> *"First, the Access Seeker's role is not simply to formulate a request which meets the terms of the specification, rather the Access Seeker's role is to finalise the specified service by nominating which of the optional elements are included in the request. A specification which contains variables or options which variables or options, are entirely at the discretion of a third party, is not a specification within the intended meaning of s 39(5), particularly when regard is had to the onerous nature of the Access Obligations and the penalties which apply in the event of default.*
>
> *Secondly, by leaving it to an Access Seeker finally to determine the specification on a case by case basis, the ACCC failed to discharge its statutory obligation of specifying the Broadcasting Access Service by no later than 30 June 1997. As noted above, that specification is not finalised until such time as each and every Access Seeker determines the terms of its request."*

92 Secondly, counsel for Telstra submit that the deeming statement "leaves entirely unclear whether the Broadcasting Access Service is that which is said to be specified in Table A, or that which is specified in Attachment B. The terms of each are quite different."

93 The first point is one of substance. Not so the second point. It may be summarily dismissed. The first sentence in para (xi) of Table A is substantially similar to the first four and a half lines in the description in Attachment B. The only difference between the two descriptions is that, whereas Table A refers to "other functions as requested", Attachment B specifies the elements that may be requested; each of which is then described in some detail. Table A is part of a summary that contains the statement that "Attachments A and B contain more detailed service descriptions of the services specified in this statement." Bearing in mind that fact, it is impossible to believe any reader, anxious to understand rather than to criticise, would suffer any uncertainty as to ACCC's meaning.

94 I return to the first point. Counsel for ACCC respond to it by saying that Telstra's submission misconceives the nature of the duty imposed on their client by s39(5). They say:

"The scheme of s.39 requires the Commission to publish a single statement listing the diverse services to which the various sub-sections of s.39 refer. All services specified in the list then attract the standard access obligations imposed by s.152AR of the Trade Practices Act *1974.*

Sub-section 39(5) does not require the Commission to identify, and specify, each particular service falling within the terms of s.39(5) which was in existence or in operation on 13 September 1996 (that being the date of release of the exposure draft of legislation dealing with telecommunications access). Rather, the intention was, as the Explanatory Memorandum makes clear, that the services specified under s.39(5) would not be limited, for example, to service providers operating on 13 September 1996 or the particular regions in which they then operated. Both the Explanatory Memorandum, and s.39(5) itself, contemplate a generic description in its statement. This is made clear by the words 'of a kind used for those purposes' in s.39(5)(b).

Within such a statutory framework, it would be a perfectly adequate specification of the service for the statement to do no more than recite the description in s.39(5)(a) and (b) itself. Such a recital would satisfy both a literal reading of s.39(5) and the purpose identified in the Explanatory Memorandum.

The drafting device or legislative scheme employed is that once specified in the statement as directed by s.39(5), the services described by s.39(5) will be subject to the same legal incidents as other services specified under s.39(1)."
(footnotes omitted)

95 Counsel go on:

"However, the Commission did not simply recite the words of s.39(5) in the specification. It imposed the significant qualification that the service must be an analogue service, reflecting the kinds of services in use at the relevant time. This is precisely the type of generic description contemplated by the words, 'of a kind used for those purposes on 13 September 1996'.

The Commission also described the service as including, if requested, ancillary elements. In doing so the statement does no more than reflect the scheme of the legislative access obligations. Once a service is specified in the statement, an access seeker may require the supply not only of the carriage service specified, but also of conditional access functions and any other service necessary to permit reception of the broadcast signal: s.152AR(8). In doing so, the legislation explicitly authorises the 'unbundling' of services: that is, the aggregation, or disaggregation, of particular elements of the signal delivery function according to the commercial requirements of the access seeker."

Section 152AR(8), it may be recalled, requires an access provider who supplies an active declared service by means of conditional access customer equipment, on request, to supply to the service provider – that is, the access seeker - "any service that is necessary to enable the

service provider to supply carriage services and/or content services by means of the active declared service and using the equipment".

96 I do not accept it would have been sufficient for ACCC "to do no more than recite the description in s39(5)(a) and (b) itself". Section 39(5) requires ACCC to "specify" an eligible service that satisfies paras (a) and (b) of the subsection. Specification of a service must require identification of the service, although not necessarily of the provider of the service. ACCC did this when, in Attachment B, it referred to "an analogue service supplied by an (access provider), necessary for the purposes of enabling the supply by an (access seeker) of a broadcasting service by means of line links that deliver signals to end-users, and of a kind that was used for those purposes on 13 September 1996". The nature of that service was further explained in section 1 of Attachment B, headed "Distribution Access Function". Technical information was set out in Attachment A. Particularly in the light of that material, it cannot be said there is any uncertainty about the ACCC's intention in relation to the basic distribution service.

97 However, Attachment B went on to refer to three adjunct services, optional inclusions: network management access function, conditional access function and subscriber premises servicing function. Did the inclusion of these options render the specification uncertain?

98 There is no uncertainty about the **nature** of the adjunct services. In Attachment B, ACCC described each of them. There is no suggestion that any of these descriptions is ambiguous or unintelligible. It is apparent from the analysis contained in para 24 of their submissions, quoted at para 89 above, that counsel for Foxtel had no difficulty in understanding the nature of the services specified in Attachment B. It is another question whether the fact that the adjunct services have been added renders the document uncertain.

(vii) The effect of adding optional adjunct services: if the statement refers to a single service: uncertainty

99 It is contended the insertion of the options renders the specification uncertain; that which is required of a particular access provider depends upon the wish of the particular access seeker, rather than the specification adopted by ACCC.

100 It seems to me the validity of this contention depends on whether the deeming statement is properly to be interpreted as specifying one service, with variable content according to the choice of the access seeker, or four services, each of which is available for access. The distinction is a technical one. It might be thought that, in practical terms, it makes no difference how one characterises the specification. But I think it makes a difference in terms of legal analysis.

101 If the statement is seen as a specification of a single service, it is uncertain as to content. A reader of the statement would not be able to determine, in advance of a particular request, what must be provided by an access provider to an access seeker. Counsel for ACCC say that the adjunct services are anyway available under Part XIC of the *Trade Practices Act.* To the extent that it is true, it was unnecessary for them to be specified in the deeming statement. At least to some extent, the statement is clearly true. But it is irrelevant. Section 39(5) of the Telco Act requires ACCC to "specify in the statement an eligible service" that meets certain criteria. That function cannot be discharged by specifying, as a single eligible service, a service of variable content. It must be remembered that, while the request for the adjunct services is optional, from the access seeker's point of view, from the viewpoint of the access provider, supply is compulsory.

102 The deeming statement exhibits some ambivalence as to whether ACCC meant to specify a single eligible service, with a variable content depending on the wishes of the particular access seeker, or a basic eligible service (the distribution network service) and a menu of other eligible services, each of which was accessible on request in conjunction with a request for access to the basic service. On the one hand, chapter 6 of the deeming statement suggests that ACCC saw itself as specifying only a single service, but with access seekers being free only "to acquire those service elements which they require": see the penultimate paragraph in the passage quoted in para 54 above. On the other hand, chapter 3 speaks of the "declaration of **services**" (see para 53 above) and the Summary refers to Attachments A and B containing "more detailed service descriptions of the **services** specified in this statement".

103 Probably, the problem should be resolved by referring to the opening words of Attachment B. This was intended as a description of the broadcasting access service the subject of ACCC's specification. Those words say "(t)he service, being an analogue service supplied by an (access provider)… is an access service which provides a basic carriage and

distribution access function and which may also include, if requested one or more of " the three adjunct elements. In other words, the specified service consists only of a distribution service to which may be added other elements at the option of the access seeker. On that interpretation, and subject to arguments about severability to which I will come later, the specification is void for uncertainty.

(viii) The effect of adding optional adjunct services: if the statement refers to multiple services: power

104 As there is a question in my mind as to whether it is correct to characterise the specification in the statement as relating only to a single eligible service, I will consider the consequences of treating it as a specification of four separate services: a basic distribution service and three optional adjunct services, each of which is separately accessible.

105 For there to be a valid specification of a plurality of services, it would be necessary, first, that the power under s39(5) extend to specification of more than one service and, second, that each of the specified services be itself an "eligible service", be "necessary for the purposes of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users" and be "of a kind that was used for those purposes on 13 September 1996".

106 Although counsel for Telstra submit otherwise, it seems to me that s23(b) of the *Acts Interpretation Act* applies to permit specification of a plurality of services. That paragraph provides:

> *"In any Act, unless the contrary intention appears:*
>
> ...
>
> *(b) words in the singular number include the plural and words in the plural number include the singular".*

In the present case, there is no indication of a contrary intention. Neither does the subject matter suggest that Parliament intended that only one eligible service could be specified under s39(5). On the contrary, it is reasonable to assume that, in transitional legislation, Parliament would have intended ACCC to deal with all eligible services that fell within the description in s39(5), if more than one; otherwise like services might have been dealt with in

an unlike way.

(ix) The effect of adding optional adjunct services: if the statement refers to multiple services: "eligible service" and uncertainty

107 Having regard to that conclusion, it is next necessary to consider whether each of the basic distribution service and the three adjunct services is itself an "eligible service". If any of the optional adjuncts falls outside the concept of "eligible service", there will be a problem. ACCC had no power to specify something that was not an "eligible service" within the meaning of s39 of the Telco Act. Subject only to the possibility of severing the invalid portion of the specification from the valid portion, the whole specification would be invalid in law.

108 As I have already noted, s39(15) of the Telco Act picks up the definition of "eligible service" contained in s152AL of the *Trade Practices Act;* that is, "a listed carriage service" or "a service that facilitates the supply of a listed carriage service". Where the service is supplied, or is capable of being supplied, by a carrier or carriage service provider, a "listed carriage service" includes "a service for carrying communications by means of guided and/or unguided electromagnetic energy" between a point in Australia and one or more other points in Australia. FOXTEL depends upon such a service. Subscribers receive FOXTEL originated programs, and retransmitted free-to-air programs, through use of a service for carrying communications (the programs themselves and the conditional access data) by means of electromagnetic energy between points in Australia (the Pyrmont playout centre and the computer centre respectively) and the subscriber's television set. Leaving aside, for the moment, the question whether this service is supplied by a carrier or carriage service provider, it is readily apparent that the service is, at least, **capable** of being supplied by a carriage service provider – either acting alone or in conjunction with a licensed carrier such as Telstra. Accordingly, it seems to me that the basic distribution service used to provide programs to FOXTEL subscribers is an "eligible service" within the meaning of the definition used for the purposes of s39 of the Telco Act.

109 During argument, counsel for Foxtel made much of the point that the communications carried by electromagnetic energy from Pyrmont and the computer centre to subscribers' wall plates are carried by Telstra, not FOXTEL. That is true but, in my opinion, irrelevant. The

scheme of the legislation is to have regard to the **nature of the service**, not the identity of the service provider. For a listed carriage service, or a service that facilitates the supply of a listed carriage service, to be an eligible service, it is sufficient it be **capable** of being supplied by a carrier or a carriage service provider; that is, it must be a service of a **nature** that a carrier or carriage service provider would be able to supply. It is not necessary that the service actually be supplied by a carrier or carriage service provider; still less that it be supplied by a particular carrier or carriage service provider. There can, I think, be no doubt that communication of the data actually transmitted from Pyrmont and the computer centre to subscribers' homes is a service that could be provided by a carrier such as Telstra, or any carriage service provider who controlled an HFC network.

110 The non-optional portion of the description of broadcasting access service in Attachment B is "an analogue service supplied by an (access provider), necessary for the purposes of enabling the supply by an (access seeker) of a broadcasting service by means of line links that deliver signals to end-users". This must be "of a kind that was used for those purposes on 13 September 1996"; that is of the same kind as the FOXTEL-Telstra service. I think it follows from what I have said that these words describe an "eligible service" within the meaning of s152AL(1) of the *Trade Practices Act* and, therefore, s39 of the Telco Act.

111 The analysis set out above suggests the conditional access function, more fully described in para 3 of Attachment B, is also a "listed carriage service". Whether or not that is correct, it is certainly a "service that facilitates the supply of a listed carriage service". As the evidence makes clear, the maintenance of a conditional access function is important to the operation of a subscription television service. Indeed, Mr Smart put the matter in stronger terms. He said:

> *"... an **essential** component of FOXTEL's cable service delivery system is the means by which it governs the access of subscribers to available programs. This system is known as the conditional access system".* [Emphasis added]

Mr Smart's assessment is readily understandable. A conditional access system is the means whereby a service provider confines access to those who have chosen to subscribe to particular programs. Without such a barrier, people who have paid only for a basic package would be free to roam amongst the optional programs for which premium subscriptions are demanded. This would obviously affect demand for premium subscriptions, with adverse revenue consequences for the service provider; possibly to the point of imperilling the

viability of the service itself.

112 I appreciate that the description of the broadcasting access service, in the opening words of Attachment B, does not contain any words of confinement to **subscription** cable television services, as distinct from free-to-air cable television services. Nor is there any such limitation in the statement of the elements of "distribution access function" in Attachment B, or in the Telco Act. This is an important point in relation to the question whether a conditional access function is "necessary" for enabling the supply of the broadcasting service, but I do not think it derogates from the conclusion that a conditional access function at least **facilitates** the supply of a cable television service. It may be a facility that the operator chooses not to use, because the service is free; but it is nevertheless a facilitating service.

113 As I understand the functions described by ACCC in Attachment B as "network management access function" and "subscriber premises servicing function", neither of them falls with para (a) of the definition of "eligible service" in s152AL(1) of the *Trade Practices Act.* The question is whether either of them falls within para (b); that is, "a service that facilitates the supply of a listed carriage service". Counsel for Foxtel submit not. They say:

> *"... neither the Network Management Access Function nor the Conditional Access Function can be described as a service which facilitates a service for carrying communications. Those services do not make it easier or possible to carry communications. At most, they make it easier or possible to offer a pay TV service because they assist in restricting access to the carried signal to those who have paid for access. An example of a service which facilitates a service for carrying communications is a service which converts one form of signal to another form which is capable of being carried. ...*
>
> *To the extent that the Subscriber Premises Servicing Function includes a service for 'providing reconnection of services, cancellation of services and network disconnections' (see para 4.2 of Attachment B), it can probably be described as a service which facilitates a service for carrying communications since connection and disconnection from the service facilitates the supply of that service. However, to the extent that the Subscriber Premises Servicing Function includes 'providing service assurance for STU ... and smartcard faults' (see para 4.1 of Attachment B), that service does not facilitate the supply of a service for carrying communications. Rather, it facilitates the supply of a pay TV service because the smartcard restricts access to the pay TV service."*

114 However, it seems to me this approach is unduly narrow. The term "eligible service" is contained in legislation concerned with the encouragement of competition in the television

industry. In that context, it is legitimate, in considering whether a particular service facilitates the supply of a listed carriage service, to have regard to commercial, as well as technical, considerations. There seems to be no doubt that, in a commercial sense, both a network management access function and a subscriber premises servicing function facilitate (and, possibly, are essential to) the supply of subscription television programs. They may not be necessary to a free-to-air cable service; but, like conditional access function, they facilitate such a service.

115 It follows, on the assumption that they specify a plurality of services, that the words adopted by ACCC in Attachment B describe what might be called a non-optional basic "eligible service" and three optional adjunct services, each of which is itself an "eligible service".

116 On this analysis, the deeming statement is not uncertain. Potential access providers may suffer some uncertainty as to which eligible services may be required by potential access seekers, just as they may be uncertain whether anybody will seek access at all. But that would be an uncertainty about prospective commercial and technical decisions, not an uncertainty as to the meaning of the deeming statement.

(x) The effect of adding optional adjunct services: if the statement refers to multiple services: necessity

117 Section s39(5) of the Telco Act requires more than that a service be an "eligible service"; it must also be "necessary" for the purposes of enabling the supply of a cable television service. Counsel for Foxtel submit none of the three adjunct services is necessary for the purpose of enabling the supply of a broadcasting service by means of line links that deliver signals to end-users. On the assumption now being made – that is, that the statement specifies a multiplicity of services – I must address that submission.

118 Counsel put two arguments. First, they note that, unlike a declaration under Part XIC of the *Trade Practices Act*, a decision to specify an eligible service under s39(5) of the Telco Act does not require a prior determination that this is in the long-term interests of end-users. Counsel say:

> *"The approach taken in s39(5) of the Telco Transitional Act is different. The relevant services are carriage services using line links. Section 39(5) is clearly directed at the broadband cables which have been laid by a number of companies – principally, Telstra Multimedia and Optus Communications. The assumption underlying sub-section (5) – at least for the purpose of transitional arrangements – is that those cable systems (no doubt because of the cost of duplication) are a bottleneck service. Consequently, the issue of the long-term interests of end-users is assumed to be in favour of specification. However, what is to be specified must be necessary for the stated purpose; and 'necessary' in this context must mean that part of the service which forms the bottleneck. Or, to put the point another way, 'necessary' in this context means services which someone wanting to offer a broadcasting service would necessarily have to acquire from an access provider because the costs to the broadcaster of providing those services itself would be prohibitive."*

119 Counsel go on to submit that, against that background, none of the three adjunct services can be described as **necessary** for the purposes of enabling supply of a broadcasting service. They make three points:

(a) none is a "bottleneck" service. On the evidence, each service may be provided by an access seeker at modest cost, relative to the cost of operating a subscription television service;

(b) in chapter 6 of the deeming statement, quoted in para 54 above, ACCC itself recognised that "it is doubtful that a free-to-air broadcaster would necessarily require the use of conditional access systems or equipment in providing their service on cable networks";

(c) both TARBS and Seven Cable have indicated it might not be necessary for them to take the adjunct services from FOXTEL.

I do not think the third point is material. If a particular service is necessary for the purposes of enabling the supply of the broadcast service, the necessity does not disappear simply because it is met by someone other than the broadcast service provider.

120 Counsel for ACCC offer a number of answers to Foxtel's submissions about the word "necessary". First, they say it is not for the Court to determine whether the specified services are necessary; this is a matter committed by Parliament to the judgment of ACCC. They refer to *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 in which the High Court held a decision by the appellant Commission to record a particular place on the Register of the National Estate was not open to judicial review. The legislation

there provided that "where the Commission considers that a place that is not in the Register should be recorded as part of the national estate it shall enter the place in the Register". There was detailed provision for public consultation prior to any such decision being made. At 306 the Court said:

> *"Those detailed mechanisms for public consultation and consideration by the Commission provide guidance on the ultimate issue in this litigation. They suggest that, on the proper construction of the Act, the Commission is given the power conclusively to determine whether or not a place should be recorded as part of the national estate and its determination of that question is not subject to review provided the Commission otherwise conducts itself in accordance with the law."* (footnotes omitted)

121 *Australian Heritage Commission* may be contrasted with a more recent decision, also cited by counsel, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400. The High Court there held it was a "jurisdictional fact", for the South Australian Supreme Court to determine, whether or not a particular development proposal fell within the definition of "special industry" contained in relevant regulations. The Court reached this conclusion from an analysis of the whole of the legislation, and notwithstanding that the regulations imposed on the respondent Commission an obligation to "determine the nature of the development".

122 In arguing that s39(5) of the Telco Act committed to ACCC the final determination of what was "necessary" for the supply of a broadcasting service, counsel said the legislature did not itself specify the services, but conferred a power to do so on ACCC; the issue of necessity involves a question of fact and degree; and the power was exercisable only following publication of a draft and consideration of submissions.

123 Whether a particular service is "necessary" for the purpose of enabling the supply of a broadcasting service is certainly a question of fact. However, I do not think it raises a question of degree; a service is either necessary or not necessary for the specified purpose. That conclusion suggests that, notwithstanding the provision for public consultation, the existence of necessity is a jurisdictional fact. If a court of competent jurisdiction is satisfied, on the evidence, that a particular service is not necessary for the stated purpose, it is under an obligation to say so and to hold the declaration invalid. The case is unlike *Australian Heritage Commission*, in which a specialist agency was charged with the task of making a judgment upon an issue as subjective and value-laden as whether a particular place "should

be recorded as part of the national estate". Moreover, in that case the condition precedent to action was the subjective opinion of the Commission ("the Commission considers"); here the condition precedent is the existence of a particular fact "an eligible service … is necessary".

124 The issue of necessity is reviewable in this Court.

125 Against the possibility of such a conclusion, counsel for ACCC advanced reasons why the Court should conclude that each of the adjunct services is in fact necessary for the purposes of enabling the supply of a cable broadcasting service to end-users.

126 The first point argued by counsel for Foxtel – that none of the adjunct services is a "bottleneck" service - has some attraction. There seems to be no doubt, as counsel suggest, that a dominating reason for the enactment of s39(5) of the Telco Act was to open up use of the HFC cable system. The cost of replicating that system would run into billions of dollars. It would be a wasteful community expenditure and the need to take that course would represent a major barrier to others wishing to offer cable television services. However, I have concluded I should not give effect to counsel's submission. To do so, would be to impose an unwarranted qualification on the word "necessary". If Parliament had wished to confine the concept of necessity to "bottleneck" services, it could readily have made that clear. Instead, it chose to use an unqualified word of wide connotation.

127 Foxtel's second point, relating to free-to-air services, raises a matter of construction. There is ample evidence that each of the three adjunct services is – and, at all material times, was – necessary for the supply of a subscription cable television service. There is no evidence that any of them would have been necessary for a free-to-air service. ACCC said it is "doubtful" that a free-to-air broadcaster would require the use of conditional access systems or equipment in providing their service on cable networks. This seems to be an understatement; having regard to the purpose of a conditional access system, it is possible to say this service would **not** be necessary. A free-to-air broadcaster might require aspects of the network management access function and subscriber premises servicing function described by ACCC in Attachment B of the deeming statement, but it seems unlikely such a broadcaster would require all aspects of them.

128 The situation, as I see it, is that each of the adjunct services is necessary for a

subscription cable television service, but not for a free-to-air service. If the deeming statement is to be read as specifying four separate eligible services, and s39(5) of the Telco Act is to be read as relating only to **subscription** cable television services, ACCC validly specified each of the adjunct services as eligible services. On the other hand, if a relevant broadcasting service may be free-to-air, it cannot be said each of the specified adjunct services is "necessary" for the purposes of enabling the supply of that service.

129 Counsel for ACCC say:

> *"The context in which the issue arises is not the theoretical one of whether it might be possible to deliver by means of line links a hypothetical broadcasting service that is not a subscription service. The context in which the issue arises is one in which the eligible services being used for supplying broadcasting services on 13 September 1996 were all subscription services using conditional access functions."*

130 This submission raises a question as to the meaning of the word "kind" in s39(5)(b). Does the word refer only to technical characteristics? Or does it also extend to the method of financing the service? With some hesitation, I have concluded the word does not require reference to the manner of financing. I reach that conclusion largely because of the Explanatory Memorandum relating to the Bill that became the Telco Act. That document contained the following paragraph:

> *"In addition to the general obligation, the ACCC must also specify in the statement an eligible service that is necessary for the purposes of enabling the supply of a broadcasting service by means of line links and was of a kind that was used for those purposes on 13 September 1996 (cl. 39(5)).* ***This is intended to require the ACCC to include in its statement****, and thus provide regulated access under Part XIC to,* ***a service for the carriage of broadcasting (particularly, subscription television broadcasting services) over cable networks generally****. Reference to 13 September 1996 is to the date of the release of the exposure draft of the access legislation and is primarily intended to direct the ACCC's attention to services currently being used to supply broadcasting services over cable based networks.* ***Reference to 'of a kind' is intended to avoid suggestions that the declaration should be, for example, restricted only to service providers operating on 13 September 1996*** *or to the particular geographical regions in which they were operating on that date."* [Emphasis added]

131 The word "particularly", in the parenthesis in the second sentence of the paragraph, would have been unnecessary if the Bill contemplated **only** subscription services. Also, I note the disclaimer in the last sentence of any intention to confine the concept of "kind" to

existing service providers. This impersonal approach is consistent with the interpretation of Gummow J, in *Hygienic Lily Ltd v Deputy Commissioner of Taxation* (1987) 13 FCR 396, of the words "Goods … of a kind ordinarily used for household purposes", in legislation concerning sales tax. At 399 his Honour said the phrase is directed "to the nature, quality and adaptation of goods in the class or genus in question".

132 In the light of the Explanatory Memorandum, it seems to me it would be erroneous to treat the circumstance that, as at 13 September 1996, the only cable television services offered in Australia were subscription services, as opposed to a free-to-air broadcasting service, as requiring a conclusion that Parliament intended to indicate that a free-to-air service is not to be regarded as the "kind" of service used on 13 September 1996.

133 As there is no difference between the nature and quality of the broadcasting service received by an end-user of a subscription cable television service on 13 September 1996 and that of a hypothetical free-to-air cable television service, it should be concluded that a free-to-air service is of the same "kind". As it cannot be said that each of the adjunct "eligible services" is necessary for a free-to-air service, I must hold the deeming statement includes specification of services that are not "necessary" for the purposes of enabling the relevant supply. Specification of these services exceeded ACCC's powers.

(xi) Severability

134 Counsel for ACCC submit that if, contrary to their submissions, it is held the deeming statement includes elements that fall outside the power conferred on their client under s39(5) of the Telco Act, this does not mean the whole instrument is invalid; the invalid portions are severable from the valid portion. They refer to s46(1)(b) of the *Acts Interpretation Act I901* which reads:

> *"46(1) Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then:*
>
> *(a) ...*
>
> *(b) any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, granted or issued, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall*

> *nevertheless be a valid instrument to the extent to which it is not in excess of that power."*

135 The word "authority" is not defined in the *Acts Interpretation Act* but I have no doubt it includes ACCC, a Commission established as a body corporate under s6A of the *Trade Practices Act* and which has been invested with significant statutory powers. The deeming statement is undoubtedly an "instrument" within the meaning of s46(1)(b) of the *Acts Interpretation Act*.

136 Section 46(1)(b) of the *Acts Interpretation Act,* and the analogous s15A of that Act, have been discussed in numerous High Court decisions. Those to that date were collected by Dixon J in *Fraser Henleins Proprietary Limited v Cody* (1945) 70 CLR 100 at 127. His Honour there remarked that the "device of expressly providing against the consequence of some parts of a statute proving *ultra vires*" originated in the United States. He said such provisions "establish a presumption in favour of the independence, one from another, of the various provisions of an enactment, to which effect should be given unless some positive indication of interdependence appears from the text, context, content or subject matter of the provisions".

137 In an earlier case, *The King v Poole; Ex parte Henry [No.2]* (1939) 61 CLR 634, Dixon J made a more elaborate comment. He said at 651-652:

> *"The view established in the United States is that such enactments reverse the presumption that the legislature intended its will on any particular matter as expressed in a statute to operate in its entirety and had no intention that something less should be law. The presumption is reversed so that legislation, found partially invalid, must be treated as distributable or divisible, unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what is bad. If the valid provisions unqualified and unaffected by the invalid provisions would operate in a different manner upon the persons whom they would govern, or the events or conduct they would regulate, then they are shown to be inseparable.*
>
> *...*
>
> *Two types of case present themselves under provisions such as secs. 15A and 46(b) of the* Acts Interpretation Act, *provisions which require that an entirely artificial construction shall be placed on a statute found to be invalid in part in order to save so much of it as might have been validly enacted. In one type it is found that particular clauses, provisos or qualifications, which are the*

> *subject of distinct or separate expression, are beyond the power of the legislature. In the second type, a provision which, in relation to a limited subject matter or territory, or even class of persons, might validly have been enacted, is expressed to apply generally without the appropriate limitation, or to apply to a larger subject matter, territory or class of persons than the power allows. In the first case, the question usually is whether the operation or effect of the remainder of the Act upon the persons or things to which it would apply would be changed if the clauses, provisions and qualifications held bad were excised. In other words, in such a case the right question to ask may be whether liabilities or rights of a different tenor, measure or nature would result. In the second case, the question may simply be whether the legislature intended the provision to have a distributive operation or effect. That is to say, did it intend that the particular command or requirement expressed in the provision should apply to or be fulfilled by each and every person within the class independently of the application of the provision to the others; or were all to go free unless all were bound?"*

See also the statement to similar effect of Williams J in *Pidoto v Victoria* (1943) 68 CLR 87 at 130-131. It will be apparent that the present case is an example of the first of Dixon J's two types of case: particular elements of ACCC's specification of services are beyond its power.

138 There are decisions relating to the first type of case where the relevant provision was held inseverable: see, for example, *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116 and *The Victorian Chamber of Manufactures v The Commonwealth* (1947) 67 CLR 413. But this was because, to use the words of Starke J in the former case at 154, "these Regulations are so bound up with invalid provisions that they cannot be severed". In both these examples, it was held that severance would give to the Regulations an effect contrary to that which had been intended.

139 The evidence in the present case indicates ACCC did not intend access providers would necessarily make the distribution access function available to access seekers without the three optional elements specified in Attachment B. ACCC was concerned to make the optional elements available to access seekers. However, s46(1)(b) of the *Acts Interpretation Act* does not depend upon the subjective intention of the relevant authority. It provides a rule of general application, designed to save from invalidity as much as possible of an instrument made by an authority.

140 In the present case, I do not think it can be said that the valid and invalid points of the specification are so interlinked that one cannot stand without the other or that severance

would yield a contrary effect. If the portion of the broadcasting access service description in Attachment B that commences with the words "and which may also include" were severed from the remainder of the description, this would leave a comprehensible description that would be entirely valid. It cannot be – and has not been - disputed that the distribution access function is necessary for any cable television service, whether subscription or free-to-air.

(xii) Conclusion about validity

141 I have examined the validity of the specification on two alternative hypotheses; first, that the statement specifies a single service with optional elements and, second, that it specifies a menu of four separate services. I have concluded that, on either hypothesis, that part of the specification that mentions the three optional services is invalid. However, in each case, it is possible to sever the invalid material from the valid portion of the statement.

142 I conclude that the 1997 deeming statement is invalid inasmuch as it refers to the three optional elements identified in Attachment B, but is otherwise valid. I propose to make a declaration to that effect.

The 1999 declaration

(i) The ACCC report

143 As previously mentioned, the 1999 declaration was made under s152AL(3) of the *Trade Practices Act.* It took effect on 8 September 1999. Shortly before that day, ACCC issued a 48-page document entitled: "Declaration of Analogue Subscription Television Broadcast Carriage Service: A report on the declaration of an analogue-specific subscription television broadcast carriage service under Part XIC of the *Trade Practices Act 1974*". The service the subject of the declaration was described in Appendix 3 of the report in this way:

> *"A service for the carriage, by means of lines, of analogue signals used for the purposes of transmitting a subscription television service from a facility owned, controlled or operated by a carrier or carriage service provider to any point on, or in, a line link, customer cabling, or customer equipment connected to that facility.*
>
> *Examples of this service are the delivery of analogue signals used for the purposes of transmitting a subscription television service to:*
>
> *(a) an end-user's television set;*

(b) conditional-access customer equipment of an end-user, or potential end-user, of a subscription television service;

(c) a wall socket at the premises of an end-user, or potential end-user, of a subscription television service;

(d) a point on a line link from which a lead-in connection may be run to the premises of an end-user, or potential end-user, of a subscription television service.

For the avoidance of doubt:

(1) this declaration covers a service even if the service is not provided exclusively by means of lines, e.g. if it is also provided by means of conditional-access customer equipment;

(2) this declaration does not cover a service provided partly by means of lines where the signals are carried to the boundary of a telecommunications network by means other than lines, e.g. by means of radiocommunication, and

(3) customer equipment and customer cabling shall be taken to be connected to a facility if it is connected to a line connected to that facility."

144 It will be noted that this description contrasts in at least two significant respects with the description used in the 1997 deeming statement:

(a) it is confined to a service for transmitting a **subscription** television service; that is, it does not include a free-to-air service; and

(b) it does not include reference to any of the three optional adjunct services described in Attachment B of the 1997 deeming statement.

However, the declaration covers a service extending to any one of several end-points: ranging from a point on the line link leading to the end-user's premises to the end-user's television set. This means it not only covers that portion of the line link owned by Telstra Multimedia (the HFC cable) but, at least potentially, facilities owned by subscription television providers like FOXTEL and C&W Optus.

145 Having regard to some of counsel's arguments, it is desirable to summarise the report. It consists of seven chapters and three Appendices.

146 Chapter 1 of the report is an introduction that describes the course of the public

inquiry that preceded the report. It appears ACCC commenced the inquiry on 23 December 1998. At that time it issued a discussion paper setting out what ACCC perceived as the main issues. Apparently, ACCC received numerous submissions, which it reviewed. It discussed specific issues with economic, legal and industry experts. In June 1999 ACCC issued a draft report which concluded that "declaration of the service would promote the long term interests of end-users". It will be recalled that satisfaction about that issue is a condition precedent to a declaration under s152AL(3) of the *Trade Practices Act* – see s152AL(3)(d) – although it was not relevant to ACCC's task under s39(5) of the Telco Act.

147 Chapter 1 of the report includes the following material:

> *"Following consideration of the information received over the course of the inquiry, the Commission proposes to declare* ***an analogue-specific subscription television service limited to line links****.*
>
> *The Commission expects that declaration will influence the development of competition for subscription television services, primarily in those areas where a subscription television service using line links is currently operating.*
>
> *Declaration of the subscription television service enables service providers to reach end users in order to deliver a wider range of services than currently available, and reduces the need for full duplication of communications networks.*
>
> *The Commission expects that declaration of subscription television services will promote competition and provide end-users with the ability to choose between different suppliers of subscription television program packages, particularly in areas of niche programming."* [Original emphasis]

148 Chapter 2 of the report describes the "declaration process" undertaken by ACCC. It contains a reference to the 1997 deeming statement and refers to concerns raised about its validity. The report says:

> *"The Commission considers that the existing service declaration is valid. However, in order to provide certainty, the Commission commenced inquiries into whether to declare 'analogue-specific subscription television broadband carriage services' and 'technology-neutral subscription television broadband carriage services'".*

The report goes on to deal with a submission by Telstra as to the consequence of the 1997 deeming statement being valid:

> *"Telstra has argued that, given the Commission considers the original declaration is valid, it can only justify declaration of the proposed service if*

> *that would promote the long-term interests of end-users more than the original.*
>
> *The Commission considers that the greater certainty provided by the proposed declaration would promote competition beyond the level that could be expected under the existing declaration. Although the Commission considers the existing declaration to be valid, the Commission considers that access seekers may be reluctant to seek to enforce their rights under it while there is uncertainty in the industry as to its validity. The Commission considers it unlikely that the advantages which might otherwise arise from increased competition would be realised in these circumstances.*
>
> *The Commission considers that there is no legal impediment to the Commission declaring the proposed service while the existing one is in force. However the Commission would be concerned at any confusion which arose because of the existence of two declarations covering similar services. Given that the declarations are likely to overlap, the Commission intends to hold a public inquiry under Part 25 of the* Telecommunications Act 1997 *to consider revocation of the existing declaration".*

149 The remainder of chapter 2 deals with two subjects: long-term interests of end-users and industry maturity. ACCC thought any declaration that is likely to result in the achievement of one or more of the objectives specified in s152AB(2) of the *Trade Practices Act* (which include "promoting competition in markets for listed services") "will generally promote the long-term interests of end-users". In relation to industry maturity, ACCC quoted some figures supplied by Foxtel: in the period since January 1995, when pay TV commenced in Australia, over 900,000 households had subscribed to pay TV. The national total pay TV penetration rate is 15%; the cable penetration rate is 9.5%. Forty-five per cent of Australian homes are passed by cable.

150 Chapter 3 of the report discusses, but rejects, the idea of declaring a "technology neutral subscription television broadband carriage service"; that is, a service described in terms sufficiently wide to cover digital services. It also revisits the argument about "bundling" and "unbundling" services that had been important in 1997. ACCC said:

> *"In developing appropriate service descriptions, the Commission considered whether to prepare service descriptions for individual elements or whether to bundle particular elements together. Unbundling services completely to their component elements ensures that access seekers need only acquire the individual elements which they want, but has the potential to increase costs for the access provider.*
>
> *Access seekers provided a range of models in their submissions. These*

ranged from a service which consisted purely of carriage of broadcasting signals to a bundled or 'integrated' service which consisted of carriage, modulation and demodulation, encryption and decryption, installation and maintenance of set-top units, marketing, billing and revenue collection.

A number of submitters criticised the Commission's draft report for favouring a model of 'direct access' to customers, in which access seekers had a direct retail relationship with the customer. The Commission does not favour any model in particular. The service description, when combined with the access obligations in Part XIC of the Act, allows access seekers some flexibility in whether they acquire a bundled or an unbundled service. Direct access to customers is possible, under the declaration, if access seekers wish to provide services in this manner, but it is not mandatory.

In addition to the carriage service element, the Commission considered a Network Management Service that included conditioning of customer access equipment and maintaining a database of end-users. After considering submissions, the Commission considers that the standard access obligations imposed on access providers by section 152AR cover services ancillary to the carriage of pay television signals sufficiently to enable service providers to supply pay television content, if they obtain access to the proposed declared service. It is therefore considered unnecessary to declare the Network Management Service (included at Attachment B to the service description proposed in the Commission's discussion paper).

Of the services that together make up a subscription television service, the Commission considers that carriage, modulation and demodulation, encryption and decryption, installation and maintenance of set-top units would either fall under the Standard Access Obligations or be matters about which the Commission could make an arbitral determination under Division 8 of Part XIC of the Act. Access seekers are free to negotiate for the access provider to provide additional elements such as sales and marketing support, or retail services such as billing and revenue collection. Access seekers are not obliged to accept such services if they do not require them, and access providers are not obliged to provide them.

To ensure that deletion of the Network Management Service did not have the unintended consequence that the service description would operate to allow access seekers to have their programming carried only to existing pay television subscribers, it was necessary to amend the description of the carriage service (Annexure A of the service description included in the discussion paper). In particular, the service description was amended to apply to both the carriage of signals to the conditional access customer equipment of existing subscribers and also to potential points of interconnection with the access provider's cable network (to allow access seekers to connect up households that are not currently subscribers in order that the cable network can be used to deliver content to them). The Commission intends that there should be an obligation upon access providers to provide access to a service that includes conditional access functions performed by set-top units, where these are required by access seekers. The

service description has been amended to make this clear.

The revised service description is at Appendix 3.

Submitters have raised questions about whether an access provider who provides a carriage service to a set-top unit, but who does not own the set-top unit, could be required to provide access to the set-top unit. The Commission considers that to the extent that access providers exercise control over set-top units, they will be required by the Standard Access Obligations to supply access to the units".

151 ACCC went on to say it preferred "the service description did not specify the identity of the access provider". It thought this approach best reflects the intent of the legislation and noted the provisions for exemption (s152AT) from a standard access obligation.

152 Chapter 4 of the report is entitled "Promoting competition". It is a lengthy chapter that sets out the substance of ACCC's reasons for reaching its conclusions. First, ACCC noted its obligation to consider "whether declaration is likely to promote competition in markets for particular services; namely, markets for carriage services or services supplied by means of carriage services", ACCC explained:

"In general, declaration of an eligible service is likely to promote competition where:

- *the eligible service is an input used for the supply of carriage services or services provided by means of carriage services; and*
- *the supplier (or suppliers) of the eligible service has (or have) substantial market power which can be used to influence competition between suppliers of carriage services or services provided by means of carriage services.*

This is because declaration constrains the ability of the supplier of the eligible service to exercise market power in respect of the supply conditions. This constraint on market power may enable more efficient competitors to enter markets for carriage services or services supplied by means of carriage services, win custom from less efficient competitors, and thereby promote competition in those markets).

These are not the only circumstances in which declaration is likely to promote competition.

To examine whether declaration would be likely to promote competition, often it will be appropriate for the Commission to consider the market in which the eligible service is or would be supplied in addition to the market in which

competition would be promoted (where these are separate markets).”

153 ACCC referred to market definition principles, as stated in the *Trade Practices Act* and elaborated by the High Court in *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177. However, ACCC noted the limited relevance of market definition:

> *“In identifying relevant markets, Part XIC of the Act does not require the Commission to take a definitive stance on market definition. Furthermore, over time, declaration itself might affect the dimensions of these markets, particularly in relation to the functional dimension. Accordingly, market analysis under Part XIC should be seen in the context of shedding light on how declaration would promote competition rather than in the context of developing ‘all purpose’ market definitions.”*

154 After describing the elements of the service proposed for declaration, ACCC considered the proper identification of the relevant market. It did so by reference to what it called the “product dimension” (distinguishing cable TV from multipoint distribution systems (MDS)) and broadband wireless (LMDS), satellite, digital free-to-air and import competition. ACCC concluded that “all retail pay TV services are part of one market irrespective of delivery means”. ACCC rejected the view that cinema, radio, newspapers, magazines and home video rentals are sufficiently close substitutes to be considered part of the same retail market as pay TV. ACCC came to the same conclusion, for reasons it gave, about free-to-air television, although describing this as “potentially the closest substitute” for pay TV.

155 Turning to what it called “the geographic dimension”, ACCC indicated a view that “the most significant effects on competition of declaration would be felt in … the market for the supply of retail pay TV services in cabled metropolitan areas”. ACCC said “(t)his is the geographic market for the supply of retail pay TV services which would attract the most interest from pay television service providers”. It supported that statement by detailing present and proposed subscription services.

156 Under the sub-heading “Effect on competition”, ACCC noted what it called “significant barriers to entry for carriage service providers”. These barriers included not only economies of scale and the high sunk and fixed costs involved in cable deployment, and technical and economic difficulties associated with MDS and satellite transmission, but the fact that “most key sports and movie programming rights have been exclusively tied up by either Foxtel or C&W Optus”. ACCC said:

"Compounding the delivery and programming constraints is the fact that the relevant retail pay TV markets in Australia are relatively small. The 6.2 million television households in Australia compare with 99 million in the US and 22 million in the U.K.

Because the most attractive programming is now held exclusively by Foxtel and C&W Optus on a long term basis, declaration would not be likely to result in competition in the mainstream of the retail pay television market. Pay television service providers would not be able to acquire the subscription drivers needed to compete effectively with Foxtel and C&W Optus for customers who subscribed on the basis of movies and sports."

ACCC then dealt with niche programming:

"In Australia, niche entry into pay TV markets has been generally achieved through suppliers of programming content compiling their own channels and wholesaling them to the existing vertically-integrated pay TV service providers for distribution as part of their branded packages. For example, the 'World Movie' service is distributed as a tier in the Foxtel and Optus Vision services. Dergat Pty Limited's 'Greek Australian Television' (GAtv) has recently been launched as a separate tier in the Optus Vision service.

TARBS entry has been unique in that it acquired its initial channel line-up and its MDS distribution network relatively cheaply from the receivers of Australis. The Commission understands that neither Foxtel, C&W Optus or Austar bid for the channels or the network.

Pursuant to s152AB(4), the Commission considered the extent to which declaration would remove obstacles to end-users of retail pay television services gaining access to those services. The explanatory memorandum adds:

> *... it is intended that particular regard be had to the extent to which the particular thing would enable end-users to gain access to an increased range or choice of services.*

End users already have access to some niche programming through existing pay TV suppliers. ...

The Commission considered whether declaration would lead to a more competitive situation for these niche services in terms of diversity and price." (footnotes omitted)

157 ACCC noted that, where "niche programs" have been available as part of the Optus or FOXTEL packages, this has been only on a "buy-through" basis at premium prices. Persons who wish to acquire niche programs must first buy a basic program package. ACCC commented:

"TARBS and other access seekers with similar kinds of programming submit that they have the potential to better serve the consumers of such programming by providing a wider range, more cheaply and with greater flexibility of packaging. In particular, subscribers would not be required to 'buy-through', with the attendant additional expense, but could simply subscribe to the channel or channels of their choice.

Having considered the submissions received in response to the draft report, the Commission's view is that acquiring services on a per channel basis would have limited advantages. In particular, the cost of providing access to households which did not subscribe to one of the existing retail pay television services is likely to be significant enough to make it commercially unattractive to access seekers for large scale deployment. In households which already subscribed to an existing pay television service, the costs of providing access would be less, but there would not be any advantage to consumers from avoiding the cost of a basic package.

The principle advantage of declaration is likely to be increased competition by niche service providers in those households which are already subscribers to an existing service. The problem that access seekers want to overcome is the lack of access to premium programming, which limits their opportunity to be the platform of first choice for a significant proportion of the market. Almost all submitters agree that there is consumer resistance to installing a second set-top unit in a household. Declaration would offer the opportunity for greater competition among niche services beyond the basic tier. It would also offer the opportunity of a wider range of niche services being offered, many of which are not currently available.

The Commission notes that competition at this level may offer trade-offs between diversity on the one hand, and more intense competition between similar services on the other. Given that access seekers tend to offer a relatively wide range of niche services, this would only become an issue where capacity is limited. Further, given the rights to which access providers and others are entitled under s.152AR(4) of the Act, no programming will be displaced in providing access.

The Commission considers that competition will be promoted to a noticeable extent. Consumers of niche services (particularly foreign language services) are widely spread throughout Australian society, and will be likely to benefit in terms of price, quality and diversity of services.

The Commission considers that declaration of an analogue pay TV cable carriage service would be likely to result in the achievement of the objective of promoting competition in markets for the supply of pay TV services in cabled metropolitan areas to a material degree through customers gaining access to a wider range of services.

In summary, it would be likely to promote competition because:

- *the high entry barriers in the retail pay TV industry caused by delivery*

and programming constraints would be alleviated by requiring access to the existing Telstra and C&W Optus broadband cable networks [in areas in which market entry by another delivery infrastructure is least likely]

- *niche pay TV service providers (as typified by TARBS, Multicultural Marketing Network) can offer an alternative range of programming to those offered by Foxtel and C&W Optus (which often offer the same niche channels)*

The Commission considers that declaration would promote competition to a greater extent in single-cabled metropolitan areas than in dual-cabled metropolitan areas. The market structures of single-cabled and dual-cabled areas are similar but with the significant difference that single-cabled markets are more highly concentrated and far less competitive. Currently, competition only occurs at the niche end of the market and in those areas where MDS is receivable and TARBS competes with one or other of the cable services or the Foxtel satellite service. In certain areas there is currently no competition at all."

158 Chapter 5 of the report concerns "any-to-any connectivity". For present purposes, it may be ignored. Chapter 6 is entitled "Encouraging efficiency". It deals at length with a number of important considerations. I need do no more than quote ACCC's conclusion:

"In the Commission's view:

It is technically feasible for the subscription television broadband carriage service to be supplied and charged for. While there will be costs in complying with the standard access obligations, these costs are reasonable, and can be met by access seekers without affecting their commercial viability.

Access providers and access seekers can negotiate access prices which enable the access provider to earn a commercially acceptable return on investment. These prices would protect incentives for investment in alternative infrastructure.

Declaration of the subscription television broadband carriage service will enable service providers to make efficient decisions about whether to roll out alternative infrastructure.

Declaration of the subscription television broadband carriage service is likely to facilitate investment in telecommunications infrastructure by reducing the risks associated with entry, leading to more innovative services and greater competition on price and quality of service."

159 In the final chapter of the report (chapter 7 "Conclusions") ACCC referred again to the promotion of competition. It set out this conclusion:

"The fundamental argument put by submitters opposed to declaration of the analogue service is that regulatory intervention should only address clear market failure, and that no such failure is evident in any of the markets relevant to this inquiry. Telstra, Foxtel and Cable & Wireless Optus argue that the necessary conditions for the exercise of market power do not exist in these markets. In particular, they argue that there is no 'bottleneck' in the market for carriage of subscription television services, and that without such a bottleneck, there is no basis for the Commission finding that declaration would be in the long term interests of end users. Further, they argue that prices being charged are close to or below cost, so that no monopoly pricing is involved.

The Commission notes that there is competition between the major providers of retail subscription television services over cable. Nonetheless, the Commission considers that the structure of the markets is such that regulatory intervention is necessary. Each of the carriage providers has an incentive to restrict access to the infrastructure it controls, because of the vertical links between the carriage and retail pay television services. Subscription television services provided by access seekers over the cable infrastructure would compete with the retail services provided by the owners of infrastructure, or by companies in which the owner has a major shareholding. Submitters have described the difficulties they have faced in negotiating access to the cable infrastructure.

Because of their vertical integration with the retail pay television services, the carriage providers can restrict access to their cable infrastructure without serious penalties in terms of loss of wholesale business. In these circumstances, programming services that might otherwise compete successfully with existing retail pay television services or channels cannot do so effectively. The Commission considers competition in the retail pay television market would be promoted if such programming services were given the opportunity to be provided to customers. Therefore the key issue is not merely one of whether existing pay television charges are excessive, but whether there is sufficient choice of programming.

The Commission notes the submissions that draw attention to the costs to access providers and seekers that may accrue from declaration. Where such cost [sic] *do arise, the Commission notes that access seekers have shown a preparedness to meet the reasonable costs to cable owners of providing the service.*

The Commission would be concerned if declaration of the analogue service inhibited the deployment of infrastructure to deliver broadband services, including pay television. However, the Commission notes that the declaration of a similar service in July 1997 had no noticeable effect on the existing or proposed roll out of services. In addition, the regulatory framework provides for exemptions from the standard access obligations where this will promote the long term interests of end users.

In the Commission's view, declaration of the analogue specific broadband

carriage service will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services".

160 Appendix 1 of the report sets out the service description initially used by ACCC. Appendix 2 records the organisations from whom ACCC received submissions. Appendix 3 sets out the revised service description quoted in para 143 above.

(ii) Admissibility of Professor Williams' evidence

161 Counsel for Foxtel sought to read an affidavit made by Philip Laurence Williams, director of Frontier Economics and Professor of Management (Law and Economics) Melbourne Business School at the University of Melbourne. Counsel for ACCC objected to the relevance of this affidavit but intimated that, if the affidavit was admitted into evidence, they would seek to read the affidavit of another economic expert, John Wesley Logan, Senior Lecturer in the Department of Economics, Faculty of Economics, at the Australian National University. Seven Cable also objected to Professor Williams' affidavit.

162 After extensive argument, I ruled that Professor Williams' affidavit was not admissible, with the consequence that counsel did not read Dr Logan's affidavit.

163 I promised to explain the basis of my ruling in my reasons for judgment on the substantive issues in the proceedings. I now do so.

164 Professor Williams attached a curriculum vitae to his affidavit. There is no question about his competence to express views about any matter of economic theory, or involving economic expertise, that falls for determination by the Court. The question was whether the views expressed by him in his affidavit went to any such issue.

165 Professor Williams' affidavit annexed a copy of a report made by him to the solicitors acting for Foxtel, the accuracy of which he confirmed in his affidavit. The first part of the report, an introduction, noted he had been instructed to provide a report on "the declaration of a service under Part XIC of the *Trade Practices Act*" and "the approach, analysis and tests employed by (ACCC) in its inquiry into the declaration of the analogue pay TV cable carriage service". In terms at least, neither of these topics involves economic theory or expertise.

166 The second part of the report contains a synopsis of Part XIC of the *Trade Practices Act*, with comments upon the objectives of the Part and perceived problems in its application. Although Professor Williams is entitled to his views about these matters, they have no relevance to the issues falling for determination in this case. These are not matters of economic theory or expertise. Nor are they issues in these proceedings.

167 The irrelevance of this part of the report is highlighted by the summary of the part, at para 2.5, in which Professor Williams sets out the steps "an economist" would take in determining whether a declaration under Part XIC will promote the long-term interests of end-users. It is not clear how Professor Williams is able to speak confidently for each one of his colleagues; economists are not famous for unanimity of view. More importantly, reference to the actions and views of a hypothetical economist is irrelevant. Parliament chose to assign the decision about declaration, not to a hypothetical economist, but to a statutory body invested with a discretionary power. It is true Parliament provided that the statutory body might make a declaration only if it was satisfied that to do so would promote the long-term interests of end-users (s152AL(3)(d)) and specified the matters that must be considered in that regard (s152AB(2)); but it was for ACCC (not a hypothetical economist) to determine what steps it needed to undertake in order to consider those matters and achieve satisfaction.

168 Building on the false foundation enunciated in part two of his report, Professor Williams devotes the third part to an examination of "the economic analysis and economic tests employed by the ACCC in forming the view that declaration of the analogue pay TV cable carriage service will promote the long-term interests of end-users". Professor Williams says:

> *"My aim is not to examine the merits of the ACCC's conclusions. Rather, my aim is to examine whether the ACCC adopted a sound economic approach and conducted the tests an economist would employ in reaching its view."*

169 However, the whole of the part is an exercise in prescribing the steps "an economist" would take if charged with the task committed to ACCC. Elevating his personal views to general propositions, Professor Williams offers the opinion that ACCC failed to do various things "an economist" would do. He also quarrels with ACCC's view that free-to-air television is not in the same retail market as subscription television.

170 Professor Williams is entitled to his opinion about identification of the market. However, the challenge to the 1999 declaration is made under the *Administrative Decisions (Judicial Review) Act*. *Wednesbury* unreasonableness aside, it was for ACCC to determine the facts pertinent to its exercise of statutory power.

171 It cannot be (and has not been) suggested that ACCC's identification of the market is "so devoid of any plausible justification that no reasonable body of persons could have reached (it)", to apply the vivid test for *Wednesbury* unreasonableness enunciated by Lord Diplock in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 821. It must be remembered that market identification is not a mechanical task. Inevitably, it involves an exercise of judgment, about which reasonable minds may differ.

172 Unlike the situation that sometimes arises in litigation under Part IV of the *Trade Practices Act,* in reviewing a decision under the *Administrative Decisions (Judicial Review) Act,* this Court is not required to identify the market, or entitled to act on any view it may form about is proper delineation. It follows that Professor Williams' views about market definition concern something that is not an issue for determination in this proceeding.

173 I add that even if – contrary to my opinion – ACCC's identification of the market was vulnerable to challenge in this case, it does not appear the identification played an operative part in its conclusions about the benefits of making the proposed declaration.

174 Although ACCC gave some attention to identification of the market, and the question whether free-to-air television was in the same market as subscription television, this was really for purposes related to earlier issues than that upon which it based its ultimate conclusion. As the extracts from its report set out in paras 157 above make clear, ACCC's decision about the competitive benefit of making a declaration was narrowly based. The decision was founded solely upon ACCC's view about the potential for a declaration to open up competition amongst program providers for the supply of "niche programs"; that is, competition between niche programmers and comprehensive programmers, and between niche programmers themselves. If such a potential does exist - and that was a matter for ACCC to determine – it cannot make any difference whether or not one regards free-to-air television as being in the same retail market as subscription television. The issue upon which Professor Williams concentrates in the third part of his report is really a false issue.

175 Having given the matter careful consideration, I reached the conclusion that nothing contained in Professor Williams' report would assist in determining any issue facing the Court. That being so, it was appropriate to regard Professor Williams' affidavit as irrelevant and, therefore, inadmissible.

(iii) The Telstra contention: no second exercise of power

176 Counsel for Telstra advanced only one argument in support of their contention that the 1999 declaration was invalid. They said it was not open to ACCC to make a declaration under Part XIC of the *Trade Practices Act* while the deeming statement remained in place; this was so whether or not the deeming statement was a valid exercise of power. Counsel point out that both the instruments made by ACCC are intended to have the effect of declaring Telstra Multimedia's analogue subscription television broadcast carriage service a "declaration service" for the purposes of Part XIC of the *Trade Practices Act.* They say:

> *"There is therefore, at one and the same time, a* 'deemed declaration' *pursuant to s152AL(3) and an actual declaration pursuant to s152AL(3) in relation to the same or overlapping subject matter."*

Against this background, counsel argue:

> *"Telstra contends that s152AL(3) does not, on its proper construction, contemplate or authorise concurrent declarations (whether deemed or actual) of the same or overlapping services. The obvious statutory intention is that the power to declare that a specified eligible service is a declared service be exercised once, unless the prior declaration is revoked. Once the statutory power has been exercised to declare a specified eligible service, the power has been exercised and is spent. The ACCC is functus officio in relation to the exercise of that power and the exercise of the power is ultra vires.*
>
> *This is the natural result of the nature of the power in question. Once a service is* 'declared' *it acquires a legal quality which attaches to it. That legal quality attracts the operation of the standard access obligations which are triggered upon request by a service provider. Certain legal consequences follow which effect the obligations of Telstra Multimedia and the rights and entitlements of third parties. Those rights, entitlements and obligations only apply in respect of a service which is* 'declared'. *In accordance with those obligations, the carrier or carriage service provider must supply the service on such terms and conditions as are agreed with a service provider must supply the service on such terms and conditions as are agreed with a service provider seeking access (ie the access seeker), or failing agreement, in accordance with an access undertaking accepted by the ACCC or an arbitration determination of the ACCC ."*

177 In support of their contention that a statutory discretion may be of such a character that it is not exercisable from time to time, counsel cite *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193. The respondent, a non-citizen, was convicted of manslaughter. The Minister made, but then revoked, an order for his deportation from Australia. After comment in the Supreme Court of New South Wales about the revocation, the respondent was interviewed and a new deportation order made. Einfeld J quashed the deportation order on grounds that included estoppel and denial of natural justice. The Full Court upheld his Honour's order, but only on the latter ground. The Full Court held there was no estoppel. At 211 Gummow J referred to the common law rule, quoted in the first edition of *Halsbury's Laws of England* (vol 27, p131), that "a power conferred by statute was exhausted by its first exercise". But he noted s33(1) of the *Acts Interpretation Act* which provides:

> *"Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."*

His Honour went on:

> *"But in any given case, a discretionary power reposed by statute in the decision maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representations in question, treating them as a substantive exercise of the power. The result is that when the decision maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be ultra vires. The matter is one of interpretation of the statute conferring the particular power in issue."*

178 Gummow J held (at 218) that there was nothing in the case at bar which suggested an intention contrary to the presumption embodied in s33(1) of the *Acts Interpretation Act*.

179 In the present case, counsel for Telstra argue that an intention to exclude s33(1) ought to be inferred from the nature of the subject power; once a service is declared it attracts certain rights, entitlements and obligations; no utility attaches to a second declaration.

180 I do not find this to be a compelling reason for inferring the existence of a contrary

intention. The same comment may be made about any exercise of power. If that approach were to be adopted generally, a statutory functionary could not confidently use s33(1), without first obtaining a ruling as to the validity of the first exercise of power. This would prevent the subsection fulfilling one of the purposes for which it was presumably designed: putting to rest doubts about the validity of an earlier exercise of power or discharge of duty.

181 Counsel for ACCC say it is not necessary for their client to rely on s33(1) of the *Acts Interpretation Act*; "the powers in question are contained in different Acts, and are formulated in different terms". Counsel liken the case to *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400. That was also a criminal deportation case, the point at issue being whether the Minister was free to use powers granted to him under ss 501 and 502 of the *Migration Act* 1958 effectively to nullify the respondent's success in an appeal to the Administrative Appeals Tribunal against the making of a deportation order. At 408 the Full Court (Heerey, Lindgren and Emmett JJ) said:

> *"Sections 501 and 502 are quite separate sources of power. The criteria for the exercise of those respective powers are by no means co-extensive, although there is an overlap. The fortuitous circumstance that two separately-sourced powers might be exercised in respect of the same collocation of facts cannot affect the construction of the relevant statutory provisions, which must be given a meaning as at the time of their enactment."*

182 I accept ACCC's submissions on this aspect of the case. Although there is no substantial difference in effect, between a specification under s39(5) of the Telco Act and a declaration under s152AL of the *Trade Practices Act,* these are exercises of distinct statutory powers. Even under the common law rule noted in *Kurtovic*, the exercise of the first power would not preclude the exercise of the second. If, contrary to that view, the two provisions confer a single power, there is nothing in either of them that evidences an intention to exclude s33(1) of the *Acts Interpretation Act*.

183 There is no substance in Telstra's argument as to the invalidity of the 1999 declaration.

(iv) Foxtel's contentions

184 Foxtel advances several administrative law grounds by way of challenge to the validity of the 1999 declaration:

(a) failure to take into account relevant considerations;
(b) the taking into account of irrelevant considerations;
(c) predetermination;
(d) error of law in relation to consideration of the long-term interests of end-users;
(e) the making of findings of fact of which there was no evidence;
(f) failure to make inquiries; and
(g) unreasonableness.

185 I have reached the conclusion there is nothing in any of these grounds. I will deal with each of them separately.

(v) Failure to take into account relevant considerations

186 Failure to take into account a relevant consideration may lead to the quashing or setting aside of a decision taken in exercise of a statutory discretion: see ss5(1)(e), 5(2)(b) and 16 of the *Administrative Decisions (Judicial Review) Act.* Whether it will do so depends upon the significance of the omission; in particular, whether it might have materially affected the decision: see per Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40-41.

187 A statutory decision is liable to be quashed or set aside for failure to take into account a relevant consideration only where the statute governing the making of the decision requires that consideration to be taken into account. The requirement may be express. It may arise by implication, having regard to the terms, and scope and purpose, of the statute. However, there must be a **requirement**; it is not enough that a reviewing court think it would have been desirable for attention to be paid to a particular matter.

188 In the case of a declaration made after public inquiry, s152AL(3)(d) of the *Trade Practices Act* requires that ACCC be satisfied "that the making of the declaration will

promote the long-term interests of end-users of carriage services or of services provided by means of carriage services". Counsel for Foxtel criticised ACCC's treatment of this subject, but they did not suggest ACCC failed to take it into account. Nor could they reasonably do so; the whole of chapter 4 of the report, "Promoting competition", addresses the position of long-term users. The passages in this chapter quoted in paras 152, 156 and 157 above demonstrate that ACCC directly founded the proposed declaration on its perception of the long-term interests of end-users.

189 Counsel for Foxtel suggest ACCC was required to take into account each of the matters set out in s152AB(6) of the *Trade Practices Act*, those matters being relevant to determining the extent to which a declaration would achieve the objective of encouraging the economically efficient use of, and the economically efficient investment in, the infra-structure by which listed services are supplied. They say the matters set out in s152AB(6) require consideration, not only of the current competitive regime, but also of the effect of a declaration on access providers and other users. In particular, ACCC ought to have examined the viability of proposals for niche programming.

190 Counsel for ACCC accept that the matters listed in s152AB(6) arise at the stage of their client considering whether to make a declaration. This is because s152AB(6) makes those matters relevant to determination of the extent to which a declaration is likely to result in the achievement of the objective referred to in s152AB(2)(e). This is a matter relevant to determination of the question whether a declaration will promote the long-term interests of end-users; something about which ACCC must be satisfied before making a declaration. Counsel assert ACCC did take into account the matters listed in s152AB(6). They say it is not bound, at declaration stage, to go beyond those matters; in particular, it is not bound to consider the commercial viability of persons who may enter the market pursuant to the declaration. Counsel point out that the standard access obligations imposed on an access provider by a declaration are subject to limitations designed to take account of other interests: see s152AR(4). The proper time to take them into account, according to counsel for ACCC, is when a service provider seeks access to a declared service. Counsel cite, by way of analogy, the decision of the Australian Competition Tribunal in *Sydney International Airport* [2000] A Comp T 1. In that case the Tribunal (Goldberg J, Dr B Aldrich and Mr M Waller) examined a submission by Sydney Airports Corporation Limited ("SACL"), the party exposed to potential competition as a result of a declaration, that it ought to consider the

financial viability of SACL's prospective competitors. The declaration was made under Part III of the *Trade Practices Act.*

191 The Tribunal rejected the SACL submission, saying in paras 19 and 20:

> *"The Tribunal is of the view that evidence of the financial viability of a party who desires access to the relevant service is not admissible or relevant on a consideration of what the Tribunal calls the first stage of the access regime provided by Pt IIIA of the Act. The task to be undertaken by the Minister, and on re-consideration by the Tribunal, is to determine whether, in accordance with the statutory criteria in s44H(4), a service should be declared. If a service is declared then, in the absence of an access regime being put in place in accordance with s44ZZ of the Act, a party seeking access to the service is to negotiate such access with the provider of the service. If such negotiations are unsuccessful it is open to the party seeking access to have the issue of its access arbitrated by the Commission. It is at that stage of the inquiry that the financial viability of the party seeking access may be relevant.*
>
> *It was put by SACL that, in order to determine whether access or increased access to the service would promote competition in the relevant market, it was necessary to have regard to the financial viability of the party seeking the declaration, as such financial viability would be relevant as to whether or not competition would be promoted in the future in the relevant market. However, the Tribunal thinks this is a misunderstanding of what occurs at the first stage. The declaration of a service pursuant to s44H of the Act is akin to unlocking the door, but whether or not a particular party can then go through the door depends on the party's ability to negotiate an access agreement with the provider or, in default of an agreement, to have an arbitrated outcome of that situation."*

192 I think there is a similarity between the Part IIIA situation described by the Tribunal and that arising under Part XIC. A declaration under Division 2 of Part XIC (for example, under s152AL(3)) also merely "opens the door". Whether any particular access seeker can pass through that door depends upon determination of whatever issues arise under Division 3, including any issues under s152AR(4).

193 In their written submissions, counsel for Foxtel itemised a number of matters, relating to competition, that they say ACCC ought to have considered, but failed to do so. I do not propose to go through those points seriatim. I am not persuaded that ACCC failed to consider the substance of the issues specified by counsel, although I agree it did not, in its report, state those issues in the same words as those used by counsel. To the extent that counsel suggest ACCC failed carefully to consider the extent of existing competition in the

subscription television market, and the extent to which competition might be promoted by a declaration, the suggestion is unfounded. ACCC devoted many pages of its report to these matters and made clear findings about them.

194 I also reject the submission that ACCC failed to consider the effect of a declaration on the two prospective access providers. Chapter 6 of the report is substantially concerned with this subject. It deals with the feasibility of the prospective access providers providing services to access seekers, the likely cost of doing so and the effect of access on the operation of the networks and future infrastructure supply. ACCC specifically noted the need to establish, at a later stage, reasonable terms and conditions for access.

195 Underlying Foxtel's submissions on this aspect of the case, there appears to be a belief that ACCC was obliged to deal in its report with every point put to it by Foxtel – and I suppose, every other person or organisation who put a submission during the course of the inquiry; failing which the decision would be vitiated by failure to take into account a relevant consideration. However, what is a "relevant consideration", for the purposes of a provision such as s5(2)(b) of the *Administrative Decisions (Judicial Review) Act*, depends on the terms of the relevant statute, not upon what happens to be put before the decision-maker by an interested person. If the relevant statute does not **require** consideration of a particular subject, the decision is not vitiated by failure to consider that subject, however much others may think it desirable that the decision-maker had done so: see *Peko-Wallsend* at 39 where Mason J emphasised the word "bound".

(vi) Taking into account an irrelevant consideration

196 The result, in law, of taking into account an irrelevant consideration is identical to that of failing to take into account a relevant consideration: see *Administrative Decisions (Judicial Review) Act*, ss5(1)(e), (2)(a) and 16. There is no question about the relevant principle but it is not clear to me on what basis Foxtel contends that ACCC committed this error. Counsel argue that the question "whether the long term interests of end-users will be promoted by declaration under Part XIC depends on identifying whether the service proposed to be declared is a bottleneck service". They describe "bottleneck services" as services that are uneconomic to duplicate or which "occupy a strategic position in the industry in the sense that access to the elements of the service is necessary to compete effectively in upstream or

downstream markets". The contention, apparently, is that ACCC went beyond its proper function, of considering only whether the service proposed to be declared is a "bottleneck service", and thereby fell into the error of taking into account an irrelevant consideration. Allied to this appears to be a complaint that ACCC did not even consider whether cable television is a "bottleneck" service; thereby presumably failing to take into account a relevant consideration.

197 There are at least two answers to these contentions. First, Part XIC does not use the term "bottleneck services". Section 152AB(2)(c) speaks of the objective of "promoting competition in markets for listed services". According to Foxtel's own argument that is a wider objective than the elimination of "bottleneck services". Second, counsel's description of what constitutes a "bottleneck service" is close to the situation found by ACCC in this case. It will be recalled ACCC found there were "significant barriers to entry for carriage service providers" because of the high cost of replicating the two existing broadband systems. It further found that FOXTEL and Optus occupy strategic positions in the television subscription industry, not only by reason of their control of the existing broadband systems, but also because they had exclusively tied-up "most key sports and movie programming rights".

(vii) Predetermination

198 In supporting this ground of challenge to ACCC's decision, counsel for Foxtel referred to various assertions of fact and arguments which, they claimed, were put to ACCC by Foxtel during the course of its inquiry, but were not mentioned in ACCC's final report. Counsel suggested these assertions and arguments were ignored by ACCC. According to counsel, ACCC simply ploughed ahead on a predetermined course, not allowing itself to be distracted by their client's submissions from reaching the conclusion upon which it was all along resolved. This resulted, say counsel, in error of law, denial of procedural fairness and *Wednesbury* unreasonableness.

199 Counsel for ACCC reacted strongly to this submission, describing it as an unwarranted slur on the integrity of the officers involved in the inquiry. I agree. I have not been referred to any documents that might be argued to support Foxtel's claim of predetermination. This cannot be because of any lack of access to, and knowledge of, the

documents relevant to the inquiry. Counsel for Foxtel put into evidence 11 Lever-arch folders of documents related to the inquiry. I admitted them into evidence with some hesitation, inquiring whether all this material was relevant to issues I had to determine. Counsel assured me it was, and promised to take me, in due course, to the material which showed failure to conduct the inquiry in an open-minded way. However, despite the fact that counsel for Foxtel provided an 82 page final written submission, and elaborated that submission orally for over a day, they did not refer to any of this material in support of their allegation of predetermination. Further, the officer in charge of the inquiry, Osmond Alexander Hay Borthwick, made two affidavits; but counsel for Foxtel did not require him to attend for cross-examination. If counsel had intended to persist with this allegation, they ought to have required Mr Borthwick to attend and put the allegation to him. That course not having been taken, I agree with counsel for ACCC that this accusation ought not to have been made. The fact that Foxtel's submissions were not traversed, in terms, in ACCC's report does not mean they were ignored. Appendix 2 of the report identifies 16 organisations who made written submissions. Not all of these organisations were named in the body of the report. None of their submissions was canvassed in detail. This was to be expected. The purpose of the report was to reveal the factual findings and reasoning of ACCC, not to engage in detailed debate with submitters.

(viii) Error of law

200 Error of law enlivens the jurisdiction of the Court to quash or set aside a decision: see *Administrative Decisions (Judicial Review) Act*, s5(1)(f). Foxtel argues ACCC made two errors of law in arriving at its decision:

> *"(a) it applied the* 'with and without test' *erroneously or inconsistently when considering the long-term interests of end-users;*
>
> *(b) it misconstrued the phrase* 'long-term interests of end-users' *or misconstrued the manner in which the ACCC could be 'satisfied' that declaration would promote the* 'long-term interests of end-users*."* (footnotes omitted)

201 Counsel say, in relation to the first matter, that ACCC's application of the "with and without test" is legally flawed. The argument proceeds:

> *"If the 1997 Deeming Statement is valid, there is simply no basis upon which*

> *the* 'with and without test' *can be applied – the environment within which the 1999 Declaration will operate is substantially the same. It is only if the 1997 Deeming Statement is invalid that there exists a basis for comparison. Moreover, if the Deeming Statement is valid, the Declaration could not have any effect on competition since it does not materially change the environment in which competition takes place. In those circumstances, it would not be open to the ACCC to be satisfied of the matters in s152AL(3)(d).*
>
> *Although the ACCC asserts its belief as to the validity of the Deeming Statement, it also assumes elsewhere in its Report that the Deeming Statement is invalid. Thus:*
>
> *(a) when assessing the potential for the 1999 Declaration to discourage efficient investment, the ACCC assumes the validity of the 1997 Deeming Statement when it notes that* 'a similar service is already declared' *and* 'the effect of … declaration … should not be material'*;*
>
> *but*
>
> *(b) when assessing the benefits of declaring the analogue cable carriage service, the ACCC assumes the invalidity of the 1997 Statement when it notes that* 'competition will be promoted to a noticeable extent …'
>
> *The consequence is that the ACCC has applied its own methodology inconsistently and the 1999 Declaration is, accordingly, not authorised by the TPA."* (footnotes omitted)

202 This argument misunderstands ACCC's reasoning. It is true that ACCC asserted its belief in the validity of the 1997 deeming statement; but it was faced with the situation that concerns had been expressed about validity. At an early point in its report (para 2.3), the Commission explained that, although it considered the existing declaration to be valid, "in order to provide certainty" it had initiated inquiries into whether to declare "analogue-specific subscription television broadband carriage services" and "technology-neutral subscription television broadband carriage services". The report was the culmination of the first of those inquiries. In para 2.3.1 ACCC said:

> *"The Commission considers that the greater certainty provided by the proposed declaration would promote competition beyond the level that could be expected under the existing declaration. Although the Commission considers the existing declaration to be valid, the Commission considers that access seekers may be reluctant to seek to enforce their rights under it while there is uncertainty in the industry as to its validity. The Commission considers it unlikely that the advantages which might otherwise arise from increased competition would be realised in these circumstances."*

203 These passages make apparent that ACCC believed that, even though the 1997 deeming statement was valid, there was a case for making a new declaration, in order to put to rest the concerns that had been expressed. This itself would stimulate competition. Given the financial commitment any access seeker would need to make, that was a readily understandable position.

204 The statement quoted in para (a) of Foxtel's submission was made by ACCC in the context of discussing whether a declaration would discourage investment on infrastructure. ACCC said in its report:

> *"The Commission believes that the impact of declaration on the current environment should be considered in forming a view on this issue. Since a similar service is already declared (pursuant to the deeming statement), the effect of the analogue-specific declaration on the decision to invest should not be material. The deeming statement was issued on 30 June 1997, effectively declaring pay television services. At that time C&W Optus and Telstra were still in the process of building their networks and did not cease further buildout until well after this date.*
>
> *Similarly, new infrastructure providers such as Austar, NorthPower, and ACTEW either continued their buildout or continued their plans to develop a broadband network. If declaration were a significant deterrent to infrastructure buildout, it would have been expected that no development or further expansion would have taken place after the deeming statement was issued.*
>
> *The Commission would be concerned should declaration lead to Telstra and/or C&W Optus not expanding their networks but is of the view that such an outcome is not made more likely by declaration."* (footnotes omitted)

205 By way of comment on a factual matter, it may be that ACCC put too much weight on the circumstance that infrastructure providers continued their buildout, or their plans to develop a broadband network, after the deeming statement was made. It is possible, although perhaps unlikely, that the infrastructure providers all thought the deeming statement was invalid, and therefore were content to ignore it. I do not know whether ACCC had information negativing that possibility. If not, it would have been advisable to take the possibility into account. But omission to do so would not have been an error of law; it would merely make questionable the opinion expressed in the last sentence of the passage quoted in para 204.

206 Counsel's second "error of law" point arises out of the requirement of s152AL(3)(d)

that ACCC be satisfied, before making a declaration, that it "will promote the long-term interests of end-users of carriage services or of services provided by means of carriage services". Counsel say that, in reaching its state of satisfaction, "ACCC failed to address or reach any requisite state of 'satisfaction' that elements of the service it declared were 'bottleneck services'". It did not need to do this.

(ix) No evidence

207 Counsel for Foxtel say "ACCC made findings of fact for which there was no evidence and which did not exist". In putting the matter in that way, counsel undoubtedly had in mind the terms of the *Administrative Decisions (Judicial Review) Act.* Section 5(1)(h) makes it a ground of review "that there was no evidence or other material to justify the making of the decision". Section 5(3) explains what that entails:

> *"(3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless –*
>
> *(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or*
>
> *(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."*

As I understand their submission, counsel for Foxtel place no reliance on para (a); they rely on para (b).

208 The relevant findings of fact fall into two categories:

> *"(a) facts relevant to the ACCC's determination as to market; and*
>
> *(b) facts relevant to the ACCC's determination as to niche programming."*

209 In support of para (a), counsel set out 12 pages of submissions in favour of the proposition that ACCC should have defined the market as including free-to-air television. The submissions reproduce Professor Williams' argument to that effect.

210 These submissions are misconceived. As I have already stated, this is not a case in

which this Court has to form a view about the proper delineation of a market. The facts were for ACCC to determine, including the factual questions of the identity and extent of any relevant market. For that reason, I rejected Professor Williams' evidence. For the same reason, I decline to consider Foxtel's submissions about market definition.

211 In any event, as I pointed out in paras 173 to 174 above, ACCC did not base its decision to make a declaration on its view that the relevant market did not include free-to-air television.

212 In relation to the findings of fact in category (b), I agree that ACCC based its decision on its view about niche programming; but I do not think Foxtel can make out a case falling within s5(3) of the *Administrative Decisions (Judicial Review) Act*. In their written submissions, counsel for Foxtel complain that "ACCC failed to provide evidence" to support their assertions that a declaration would be likely to promote competition to a material degree. They go on to identify, and criticise, the evidence placed before ACCC about niche programming opportunities. In their submissions, counsel concede that "the extent to which competition will be promoted (by a declaration) is largely a matter of judgement". This concession demonstrates their submission is really a quarrel with the ACCC's judgment about the matter. However, it was for ACCC to make the judgment, not Foxtel or this Court. Even if it could be said that the material before ACCC relating to niche programming opportunities was unpersuasive (and I would not myself say that), that would not establish the negative proposition required by s5(3) of the *Administrative Decisions (Judicial Review) Act.* For that subsection to be satisfied, Foxtel would have to establish, by evidence in this Court, that a declaration **would not** be likely to promote competition in respect of niche programming to a material degree. This is an onerous requirement. It was deliberately made that way: see *Television Capricornia Pty Ltd v Australian Broadcasting Tribunal* (1986) 13 FCR 511 at 519-520 and *Curragh Queensland Mining Limited v Daniel* (1992) 34 FCR 212 at 223-224. As the history set out in those decisions demonstrates, Parliament adopted the policy position that, where the facts were obscure (or unknowable), the statutory decision-maker's view about them should prevail.

213 In the present case, the critical factual matter is unknowable; what will be the result of a declaration, in terms of niche programming competition, can be no more than an educated guess. In the nature of things, it is virtually impossible to demonstrate that ACCC's view is

incorrect. And that is what Foxtel needs to establish in order to make out this ground of challenge.

(x) Failure to make inquiries

214 This ground, although raised, is scarcely argued by Foxtel. Foxtel's counsel content themselves by alluding to what I said about the duty to make inquiries in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170. They might have added a reference to *Luu v Renevier* (1989) 91 ALR 39, where a Full Court (at 49) endorsed my comment in *Prasad* and noted its consistency with the approach of Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. However, counsel seem to overlook the limitations I indicated in *Prasad.* At 170 I said:

> *"It is no part of the duty of the decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it."*

It will be a relatively rare case in which a statutory decision is vitiated because of the decision-maker's failure to make inquiries. It will need to be apparent that relevant material was readily available to the decision-maker, but ignored.

215 In the present case no attempt has been made to identify material that was available to ACCC but ignored. This ground of attack fails.

(xi) Unreasonableness

216 The *Administrative Decisions (Judicial Review) Act* includes, as a ground of review, what lawyers call *Wednesbury* unreasonableness; the name coming from the decision of the English Court of Appeal in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. The formulation of the ground in the *Administrative Decisions (Judicial Review) Act* is "an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power": see s5(2)(g) of the Act. It is a ground frequently asserted but rarely established.

217 In *Taveli v Minister for Immigration, Local Government and Ethnic Affairs* (1989) 86 ALR 435, I observed at 453 that "(p)robably the ground has its most frequent application in cases in which the challenger can demonstrate an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the final result is perverse, by the decision-maker's own criteria". I cited as examples *Parramatta City Council v Pestell* (1972) 128 CLR 305 and *Prasad* and went on:

> *"There may be cases – although I think that they are likely to be rare – in which all of the factors germane to a particular decision point in one direction. If such a case arose, it would seem proper to brand as unreasonable a decision to the contrary effect. But ordinarily there will be factors pointing in each direction. Where that is the situation, the weight of those factors is a matter for evaluation by the decision-maker. In such a case, even though a particular judge might feel that the preferable decision would have been otherwise, that feeling would not be sufficient to justify the condemnation of the decision as unreasonable, in the relevant sense. As Menzies J said in* Pestell *(at 323):*
>
> *'There is, however, a world of difference between justifiable opinion and sound opinion. The former is one open to a reasonable man; the latter is one that is not merely defensible – it is right. The validity of a local rule does not depend upon the soundness of a council's opinion; it is sufficient if the opinion expressed is one reasonably open to a council. Whether it is sound or not is not a question for decision by a court.'"*

218 These words are apposite to the present case. The submission of counsel for Foxtel is that ACCC failed "to give adequate weight" to matters set out in Foxtel's submissions to it. These matters include delineation of the relevant market but extend to other subjects as well; notably the extent of existing, and likely future, competition amongst subscription television program providers. I understand the points made by Foxtel but I have not attempted to form a view about their substance; this is not a matter for the Court. That there was material pointing the other way is conceded by counsel's reference to weight. The concession is rightly made. Submissions from several would-be "niche" providers supported ACCC's conclusion. The submission of unreasonableness must fail.

(xii) Conclusion on 1999 declaration

219 None of the grounds of challenge to the validity of the 1999 declaration is made out. The claim made by Foxtel for an order quashing or setting aside the declaration must be refused. Instead, it is appropriate for me to make a declaratory order as to the validity of

ACCC's declaration. I will do so.

220 The declaratory relief sought by Foxtel Management in N1088 of 1999 concerns that company's status as a "carrier", "carriage service provider" or "access provider", within the meaning of s152AR(2). That issue is now committed to proceeding N217 of 2000.

Is Foxtel a "carriage service provider"

(i) Background

221 In matter N217 of 2000 Foxtel seeks various declarations, all of which depend upon the proposition that it is not a "carrier" or "carriage service provider" which supplies declared services, with the meaning of s152AR(2) of the *Trade Practices Act*. If it does not have that status, it is also not an "access provider" within the meaning of s152AR, and is not affected by either of the subject ACCC instruments.

222 For the purposes of Part XIC of the *Trade Practices Act*, "carrier" has the same meaning as in the *Telecommunications Act*: see the definition in s152AC of the *Trade Practices Act*. In the *Telecommunications Act*, the word "carrier" means the holder of a carrier licence: see s7 of the *Telecommunications Act.* It is common ground that Foxtel is not the holder of a carrier licence. Therefore, it is not a "carrier" for the purpose of s152AR of the *Trade Practices Act.*

223 However, Seven Cable and TARBS argue Foxtel is a "carriage service provider", within the meaning of s152AR, and therefore an "access provider" of the services specified in the 1997 deeming statement and the service declared in 1999. Foxtel disputes this.

224 For the purposes of Part XIC of the *Trade Practices Act*, the term "carriage service provider" has the meaning ascribed to it in the *Telecommunications Act*: see s152AC. That is the meaning set out in s87 of the latter Act: see s7 of the *Telecommunications Act.*

225 During argument of the issues in N217 of 2000, Foxtel was represented by Mr A J Meagher SC and Mr M Leeming, Seven Cable by Mr C Moore and TARBS by Mr N A Cotman SC. ACCC did not participate in the argument of those issues.

(ii) Section 87(1) of *Telecommunications Act*

226 Section 87(1) of the *Telecommunications Act* contains a definition which, according to Seven Cable and TARBS, covers Foxtel's situation:

> *"(1) For the purposes of this Act, if a person supplies, or proposes to supply, a listed carriage service to the public using:*
>
> *(a) a network unit owned by one or more carriers; or*
> *(b) a network unit in relation to which a nominated carrier declaration is in force;*
>
> *the person is a* ***carriage service provider****."*

227 Sections 89 to 96 create, or provide for the creation of, certain exclusions of s87(1). For present purposes, it is necessary to note only s93(1), as follows:

> *"(1) If:*
>
> *(a) the sole or principal use of a carriage service is use to carry communications that are necessary or desirable for either or both of the following purposes:*
>
> *(i) the supply of broadcasting services to the public;*
>
> *(ii) the supply of a secondary carriage service by means of the main carrier signal of a primary broadcasting service; and*
>
> *(b) those communications are neither:*
>
> *(i) communications carried between the head end of a cable transmission system and the equipment used by an end-user to receive a broadcasting service; nor*
>
> *(ii) communications carried from a broadcasting transmitter transmitting a signal of a broadcasting service to its intended audience;*
>
> *subsections 87(1) and (2) do not apply to the carriage service."*

228 It is not suggested by any party that there is a nominated carrier declaration in force in relation to a network unit. Consequently para (b) of s87(1) does not apply. The issue under s87(1) is whether FOXTEL "supplies … a listed carriage service to the public using a network unit owned by one or more carriers".

229 As I mentioned in para 27 above, it is common ground that the services by which the information streams generated by FOXTEL (that is, Foxtel Cable and Foxtel Management) are carried to subscribers' television sets are a "listed carriage service". The service is supplied to the public.

230 The FOXTEL service uses the broadband network unit owned by Telstra Multimedia which, it is agreed between the parties, is a holder of a carrier licence under the *Telecommunications Act*, and so a "carrier" within the meaning of s87(1) of that Act. However, counsel for Foxtel point out that some elements in the communication system used for the FOXTEL service are not owned by a "carrier"; they are supplied by one of the Foxtel companies. They cite the playout centre at Pyrmont and the fly cables, set top units and remote controls located in subscribers' premises. The Pyrmont playout centre is to be disregarded for present purposes because it is upstream of the headends: see s93(1)(b)(i) of the *Telecommunications Act* set out in para 227. However, the fly cables and set top units are an integral part of the relevant "carriage service"; to use the words of the definition in s7 of the *Telecommunications Act*, a "service for carrying communications by means of guided and/or unguided electromagnetic energy". Yet, say counsel, they are not owned by a "carrier", but supplied by FOXTEL.

231 Counsel accept that, on this argument, FOXTEL is engaged in supplying a service, but they say the facilities provided by FOXTEL do not constitute a "network unit". That term is explained in Division 2 of Part 2 of the *Telecommunications Act.* Relevantly, it involves either a minimum line link length or multiple line links. Nobody contends the fly cable–set top unit system in a single subscriber's premises falls within Division 2 of Part 2 of the *Telecommunications Act.*

232 Counsel for Foxtel accept that Foxtel Cable and Foxtel Management is each a "content service provider" within the meaning of s97 of the *Telecommunications Act* (see para 29 above). They say that is all they are.

233 In their written submissions, counsel for Foxtel contend that "the Act exhibits a clear distinction between carriage services and content services, such that the two are mutually exclusive". They concede that one person may be both a carriage service provider and a content service provider. But they say:

"That is not the case in these proceedings. There is only one activity undertaken by FOXTEL: the supply of pay television services by use of a carriage service owned by Telstra Multimedia. The real question is whether the pay television service provided by FOXTEL may be characterised both *as a listed carriage service* and *as a content service."*

234 Responding to opening submissions made by counsel for Seven Cable, counsel for Foxtel warn against confusing communications and communications services. They say:

"An end user only receives a carriage service if he or she receives a ***service*** *for conveying communications by means of electromagnetic energy. FOXTEL's customers do not receive any service for conveying communications. They merely receive the communications themselves. A person who receives a letter in the post does not receive a postal communications service. The person receives what has been conveyed by the postal communications service.*

It is true, of course, that pursuant to the Broadband Co-operation Agreement, Telstra Multimedia supplies the Broadband System Service in order that FOXTEL may supply content to its customers. That is undoubtedly the supply to FOXTEL of a carriage service. But that merely confirms (what is not in dispute) that Telstra Multimedia is a carrier service provider as well as a carrier.

If Seven's submission were correct, then the mere fact that an end-user received any form of communication would mean that a carriage service was being provided to the end-user. That would entirely elide the distinction between carriage services and content services, a construction which cannot have been intended by Parliament having regard to the structure of the legislative regime." [Original emphasis]

235 Counsel go on:

"... Seven makes the further submission that:

> *'both Foxtel Cable and Foxtel Management agree to provide a cable television service. This includes, as a necessary element, a service of carrying the channels to the end-user. Foxtel may outsource this carriage function to Telstra Multimedia, but this is irrelevant to the consideration of whether Foxtel is supplying a carriage service to the public.'*

That submission repeats the same error. FOXTEL has agreed to provide to the public a cable television service, ie content. It is a content service provider. FOXTEL has not agreed to provide a communications service to the public, and it has not outsourced this service. It is not a carriage service provider. If FOXTEL's agreement to supply television channels to the public

> *rendered it a carriage service provider, then every content service provider would, on Seven's argument, also be a carriage service provider."*

236 Counsel for Seven Cable responds to this aspect of Foxtel's argument by saying its effect would be that nobody provided to the public the listed carriage service constituted by FOXTEL's programs. Yet, says counsel:

> *"The relevant end-users are having conveyed to them a set of pay television channels, being visual images (communications) supplied from point to multipoint by guided electromagnetic energy. They are therefore receiving a carriage service. The carriage service is supplied between two points in Australia and is therefore a listed carriage service."*

237 Counsel for Seven Cable referred to s88 of the *Telecommunications Act*. That section identifies the circumstances under which a service is "supplied to the public". It is a feature of all three situations postulated in s88 that there is supply to at least one "end-user" outside the immediate circle of the supplier: see subss 88(2)(3) and (4). Having regard to this section, says counsel, it cannot be postulated that Telstra Multimedia supplies the FOXTEL service to the public; Telstra Multimedia only takes the signal to wall plates at the subscriber's premises; it does not supply end-users, that is, the subscribers.

238 Further, says counsel, Foxtel's submission overlooks the terms of the agreement between Foxtel Cable and subscribers. The critical clause is set out at para 16 above. It requires Foxtel Cable to provide "the Channels" – that is, the programming package selected by the subscriber – and Foxtel Management to provide the Retransmitted Free-to-Air Broadcasts. Counsel for Seven Cable contends this clause requires the two companies who conduct the service known as FOXTEL, not only to provide content but to provide delivery of the content; indeed, in the case of Foxtel Management, only delivery is to be provided. Counsel draws attention to the words used in cl 4.1 of the FOXTEL customer agreement:

> *"TMPL,*(i.e. Telstra Multimedia) ***on behalf of FOXTEL****, will install the Facilities to your home and maintain those facilities, whilst you receive the Service."* [Emphasis added]

239 Counsel for Seven Cable says:

> *"Under the customer contracts, both Foxtel Cable and Foxtel Management agree to provide a cable television service. This includes, as a necessary element, a service of carrying the channels to the end-user. Foxtel may*

> *outsource this carriage function to Telstra Multimedia, but this is irrelevant to the consideration of whether Foxtel is supplying a carriage service to the public. A freight company which offered an air freight service might engaged an airline to carry the freight from one city to another, but this does not prevent the freight company from supplying a service of carrying freight by air to its customers."*

240 Counsel submits it is not correct to say, as does Foxtel, that his client's argument means every content service provider is also a carriage service provider; there are some situations – for example, a dial-up information service – in which the provider of the content gives no commitment about delivery, but merely makes information available to those who choose to access it.

241 Counsel for TARBS supplemented the Seven Cable submissions on this issue by referring to material published on FOXTEL's website. That material advertises its packages and seeks subscriptions. The solicitors acting for Foxtel in these proceedings formally admitted their client solicits subscriptions. This is consistent with the financial arrangements between Foxtel and Telstra, as set out in the Broadband Co-operation Agreement. Clause 11 of that agreement requires Telstra Multimedia to pay the Foxtel Partnership a marketing incentive and marketing bonus in relation to recruitment of subscribers.

242 I prefer not to commit myself on the question whether, if Foxtel's argument is accepted, the result is that there is no carriage service provider. That question does not arise for me; I do not think Foxtel's argument should be accepted. I think the fundamental argument put on behalf of Seven Cable and TARBS is correct. I agree that the *Telecommunications Act* draws a distinction between a carriage service provider and a content service provider. The roles are conceptually distinct. However, if one person may fulfil both roles, as I agree, I do not understand how it can properly be said that the roles "are mutually exclusive". The question whether a particular person has both roles is a question of fact in each case. In the present case, it is apparent that Foxtel Cable and Foxtel Management do more than provide content. They contract to **deliver** content. And they do so. They deliver to the public the listed carriage service known as FOXTEL subscription television. They do so by using the Telstra broadband, which is a network unit owned by a licensed carrier.

243 It is true that Foxtel Cable and Foxtel Management also use facilities that are not

owned by Telstra, and are not part of a network unit; but that does not matter. Section 87(1) of the *Telecommunications Act* does not require that the network unit be the **only** element in the supply of the listed carriage service; it is sufficient that a network unit be **used** in that supply.

(iii) Section 87(5)

244 As an alternative to their submissions about s87(1), counsel for Seven Cable and TARBS rely on s87(5) of the *Telecommunications Act*. This subsection reads:

> *"(5) For the purposes of this Act, if:*
>
> *(a) a person (the first person), for reward, arranges, or proposes to arrange, for the supply of a listed carriage service by a carriage service provider to a third person; and*
>
> *(b) the first person would be a carriage service provider under subsection (1) or (2) if the person had supplied that carriage service; and*
>
> *(c) the commercial relationship between the first person and the third person is, or is to be, governed (in whole or in part) by an agreement between the first person and the third person that deals with one or more matters relating to the continuing supply of the service (whether or not that supply is, or is to be, for a readily ascertainable period); and*
>
> *(d) the conditions (if any) specified in a determination under subsection (8) are satisfied:*
>
> *the person is a* ***carriage service provider****".*

It is agreed between the parties that there has been no determination under s87(8) of the *Telecommunications Act*. Consequently there are no conditions requiring satisfaction under para (d) of s87(5). For present purposes that paragraph may be disregarded.

245 Counsel for Seven Cable and TARBS argue the arrangement between FOXTEL and Telstra falls within subs (5). Considering separately each of paras (a), (b) and (c), they say:

(a) FOXTEL (the first person) for reward arranges for the supply of a listed carriage service by a carriage service provider (Telstra Multimedia) to a third person (each subscriber); and

(b) FOXTEL would be a carriage service provider under subs (1) if it supplied the

carriage service; and

(c) The commercial relationship between FOXTEL and Telstra Multimedia is governed by an agreement between those parties that deals with matters relating to the continuing supply of the service.

246 The Foxtel argument is that s87(5) does not apply because the "listed carriage service" is not provided to a third person; it is supplied by Telstra Multimedia to FOXTEL. Counsel say that FOXTEL arranges for Telstra Multimedia to provide the service to itself (at the wall plug) to enable it to supply a content service.

247 In support of their argument, counsel for Foxtel refer to a paragraph in the Explanatory Memorandum relating to the *Telecommunications Bill* 1996, the Bill that became the *Telecommunications Act* of the following year. The provision that is now s87(5) of the Act was cl 86(5) of the Bill. The Memorandum said:

> *"Clause 86(5) is intended to ensure that persons generally known in the industry as switchless resellers and/or aggregators, and who, in a particular case, may not themselves be* ***supplying*** *a listed carriage service, are to be considered to be carriage service providers and subject to relevant obligations. The requirement for the agreement to deal with matters relating to the continuing supply of the service is intended to exclude retailers of customer equipment, such as mobile phone retailers, who sign the customer with a carriage service provider, but take no part in the continuing supply of the carriage service (for example, by subsequently billing the customer for the continuing supply of the service)."* [Original emphasis]

248 This extract does not assist Foxtel's argument. FOXTEL may properly be regarded as an aggregator of programs. Upon the assumption – contrary to my view – that it is not a supplier of a listed carriage service, according to this extract, it is "to be considered" by cl 86(5) a carriage service provider and subject to relevant obligations.

249 The words used in s87(5) should be given their natural meaning, reading them in the context in which they are used. FOXTEL uses Telstra Multimedia to enable it to supply to subscribers, not only the content aggregated by FOXTEL, but also the carriage service necessary to enable that content to appear on subscribers' television sets. It does this for reward. If FOXTEL did not make that arrangement, but provided the broadband service itself, it would undoubtedly be a "carriage service provider". Paragraph (c) is clearly satisfied in this case; there is a detailed ongoing relationship between FOXTEL and Telstra in

relation to the supply of the service.

250 If, contrary to my view, s87(1) does not make FOXTEL a "carriage service provider", s87(5) does so. On either approach, the claim made by Foxtel in proceeding N217 of 2000 must fail. I propose to dispose of the matter by making a declaration to the contrary of that sought in the Application.

Disposition

(i) Orders in matter N1095 of 1999

251 I recounted at para 9 above the direction made by Tamberlin J for separate trial of the issues, raised in the cross claim in proceeding N1095 of 1999, concerning the validity of the 1997 deeming statement and the 1999 declaration. Those issues are the subject, respectively, of the claims made in matters N1150 of 1999 and N1088 of 1999 respectively. I think it is appropriate for me to dispose of the issues by repeating, in respect of the cross claims in N1095 of 1999, the declarations I have announced in relation to matters N1150 of 1999 and N1088 of 1999.

(ii) Costs

252 Foxtel has substantially failed in proceedings N1088 of 1999 and N1150 of 1999. However, with assistance from Telstra, Foxtel succeeded in persuading me that the specification in the 1997 deeming statement of the optional adjunct services was invalid. Although I held that the invalid portion could be severed, so the deeming statement is not totally invalid, the issue about the optional adjunct services involved significant hearing time and effort. Accordingly, in the case of matter N1150 of 1999, I propose to award ACCC only one half the costs incurred by it. In matter N1088 of 1999, in relation to which it has been wholly successful, ACCC should have a full costs order.

253 The addition to the hearing of matters N1150 of 1999 and N1088 of 1999 of the issues raised in the cross claims in matter N1095 of 1999 had no effect on the duration of that hearing, or the extent of work in respect of it. However, it did have the effect of involving additional parties in the resolution of those issues: Seven Cable and, to a much lesser extent, TARBS. I think those parties should have an order for the costs incurred by them in relation to the issues raised in the cross claim. However, reflecting the limited success of the cause

espoused by Seven Cable and TARBS in relation to the 1997 deeming statement, the order should cover only 75% of the incurred costs.

254 In matter N217 of 2000 there ought to be a costs order in favour of Seven Cable and TARBS, against the applicants, Foxtel Management and Foxtel Cable.

255 A difficulty may arise concerning the apportionment of hearing time between issues. It may assist if I indicate my view that issues relating to the 1997 deeming statement and issues relating to the 1999 declaration each occupied about 40% of the total hearing time, and issues relating to Foxtel's status as a "carriage service provider" the remaining 20%.

I certify that the preceding two hundred and fifty-five (255) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 8 May 2000

Counsel for the Foxtel Management Pty Limited and Sky Cable Pty Limited in N1088 of 1999, N1095 of 1999 and N1150 of 1999:	Dr G Flick SC and Mr R Lancaster
Counsel for Foxtel Management Pty Limited and Foxtel Cable Pty Limited in N217 of 2000:	Mr A J Meagher SC and Mr M Leeming
Solicitors for all the above parties:	Allen Allen & Hemsley
Counsel for Telstra Corporation Limited, Telstra Multimedia Pty Limited, Telstra Media Pty Limited:	Mr M A Pembroke SC and Dr J Griffiths
Solicitors for Telstra	Mallesons Stephen Jaques

Corporation Limited, Telstra Multimedia Pty Limited, Telstra Media Pty Limited:	
Counsel for Seven Cable:	Mr C Moore
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Counsel for Television & Radio Broadcasting Australia Pty Limited – N271 of 2000:	Mr N A Cotman SC
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Counsel for Australian Competition and Consumer Commission:	Mr A Robertson SC, Mr N J Williams and Ms M Painter
Solicitors for Australian Competition and Consumer Commission:	Australian Government Solicitor
Date of Hearing:	13, 14, 15, 16, 20, 21, 22 and 23 March 2000
Date of Judgment:	8 May 2000