

Telstra -v- The Government (regardless of who's PM)

As if trying to come to grips with the FTTN and G9 wasn't enough, or trying to understand the difference between FTTN and Connect Australia, Telstra recently ran an action against the then Minister Helen Coonan. This action has seen the press, the Government, Telstra and even the federal opposition circling each other like street dogs looking for a fight. And now there has been a change of Government.

While the full impact of the communications policy under a Rudd Government has yet to be felt or fully made clear, there have already been some changes.

Senator Stephen Conroy has been appointed as Minister for the reformed and rebadged Department of Broadband, Communications and the Digital Economy (BCDE perhaps?) formerly known as DCITA.

Aside from the name change, 15 of the previous 53 pieces of legislation have now fled to other portfolios. Relevant to the new economy is the movement of the responsibility for Information and Communications Technology Industry Development to the Department of Innovation, Industry, Science and Research headed by Kim Carr.

Also moving is Sport and Recreation to Health and Cultural Affairs and the Arts to Environment.

It seems likely that these changes will have little effect on the Broadband debate, and the new Government's pre-election promise of up to \$4.7B for a new national broadband network.

The Telstra policy chief, Dr Phil Burgess, told a CommsDay audience that it was not interested in financial cooperation with the government. Mr Trujillo reiterated that last Thursday.

Just where that leaves the Broadband debate remains to be seen. It doesn't sound like a lot has changed and it seems probable that the funding handed out to the Optus and Elders JV, OPEL, prior to the election, might survive.

Telstra -v- Minister Coonan¹

To add a little spice to it all (well at least for the lawyers in the room), prior to the election Telstra was forced to hand over some documents over which it claimed Legal Professional Privilege.

¹ Telstra Corporation Ltd v Minister for Communications, Information Technology and the Arts (No2) BC200707832

The balance of this article will look at the recent brawl over privilege, look at what the documents said (at least those that were revealed in Court) and dig a little behind the former Government's Connect Australia program to see if Telstra's motives can be gleaned and then consider whether that motive would amount to an abuse of process. Along the way it may reveal a little more about the very public debate around Australia's broadband future, against the background of a new Rudd Government.

Legal Professional Privilege

Legal Professional Privilege is one of those areas like chaos theory and fractals, where the borders can be hard to make out. If you are well inside or well outside, then it's easy, it's when you are close to the edge that it gets problematic.

In house lawyers live life on the border of Legal Professional Privilege. This case does not expressly consider the role of the in house lawyer (partly because no evidence seems to have been led). Rather, a more simple problem arose, and Graham J found that a "*no sufficient claim for privilege has been made...*".

Although what seems clear is that it is harder for an in house lawyer to claim Legal Professional Privilege and extra care needs to be taken.

Why wasn't the claim for privilege sufficient?

In the action commenced against the Minister in August this year, Telstra asserts that it "*has serious concerns that it was not treated in a fair and equitable manner*"² with respect to the allocation of funds under its Connect Australia program to the Optus Elders Joint Venture, OPEL. It has sought an order that the Minister release the documents upon which she relied in awarding the funds to OPEL.

On 5 September, in response to a Notice to Produce filed by the Minister, Justice Graham ordered Telstra to produce certain documents by 5:00 pm on 12 September, including those surrounding Telstra's consideration of the Minister's notification to Telstra that it was unsuccessful for funding (which occurred on 18 June).

Amongst the documents to be produced, Telstra identified a number of internal emails and draft memos, created at or about 18 June. Telstra sought to claim privilege over many of these documents.

As is the way in highly contentious litigation, the parties' lawyers argued over whether that claim was properly made and the matter came back before Justice Graham on the night of September 12, after the 5:00 pm deadline. It is relevant that the hearing of Telstra's Application was listed for the next morning (13 Sept), so it was important and relevant that if the documents were to be disclosed, an order to that effect had to be made that night.

In short, Telstra's claim for privilege was largely comprised of language such as:

"Communication from internal legal adviser to client [or vice versa] for the dominant purpose of claiming [receiving] legal advice."

² The Australian, Sept 19 2007

or similar formulations of words. The sort of language used by most lawyers when preparing lists for discovery.

It appears that Telstra elected not to file any affidavits to support the claim for privilege and His Honour was left to make a decision on the basis of the materials then before him.

Graham J discussed the public policy reasons behind full disclosure of documents balanced with the “*obvious tension*” of the need to ensure clients are able to give their lawyer full and frank disclosure and the rationale for legal professional privilege. His Honour set out a useful summary of the principles in claiming privilege that can be summarised as follows:

1. “*It is for a party claiming privilege to show that the documents for which the claim is made are privileged.*”;
2. “*The relevant time at which a claim for privilege is to be determined is the time when the document came into existence*”;
3. “*The relevant question is whether the document came into existence for the dominant purpose of seeking legal advice*”;
4. “*The authorities emphasise the need for focused and specific evidence...where possible the Court should be assisted by evidence of the thought processes behind, or the nature and purpose of advice being sought in respect of, each particular document*”³ [emphasis added].

Acknowledging that the role of an in house lawyer makes the decision less clear and therefore more difficult, he referred to the Channel 7 litigation⁴, where Tamberlin J observed:

“...there is no bright line separating the role of an employed legal counsel as a lawyer advising in-house and his participation in commercial decisions...[and they] will often be intertwined and privilege should not be denied simply on the basis of some commercial involvement...”

However in the absence of any particular evidence about the individual documents or the independence of the lawyers involved in the preparation of the communications, His Honour concluded that the claim for privilege was not properly made and ordered Telstra to produce the documents.

What did those documents reveal?

The documents released remain confidential, however parts of them were read into open Court the next day.

Comments read into open Court reveal the following observations by Telstra:

“and with an election looming if there is a change of Government it would be very surprising if this proposal proceeded”

‘Given the timing and the broader context, we are taking the view that as long as we have claims that are arguable that will not be “laughed out of court” we should run them even if the prospects for success are not great’

³ Graham J quoted Barnes v Commissioner of Taxation [2007] FCAFC 88

⁴ Seven Network Ltd v News Ltd [2005] FCA 142

It is clear that at least part of Telstra's strategy in pursuing the Minister was to buy Telstra time with a federal election looming and the consequent risk of a change of Government. Even if Telstra was even able to set the Connect Australia process back by a few months, there seems every prospect that a Labor Government would put a halt to it.

It is suggested that this shows a clear intention by Telstra to use the Court process to achieve an ulterior objective, namely to defeat the Federal Government's award of funds to OPEL.

What was Connect Australia and why wouldn't Telstra win it?

The Connect Australia project was one that Telstra was, it is suggested, always going to struggle to win. Telstra itself seems to acknowledge this in the documents that were released to the Court, where it says:

"we had trouble spending \$600 million" [being the original amount to be offered]

Whilst Telstra's true motives may never be known, one interpretation of this and other comments (referred to above) can be found by looking back at the original Connect Australia EOI.

In June 2006 the Federal Government released a Request for Expressions of Interest known as "Broadband Connect"⁵, part of the Government's "Connect Australia" program, with the stated intention to:

"...drive the extension of next generation broadband infrastructure widely across Australia...in a way that stimulates competitive outcomes and competitive access to broadband networks in regional Australia..."

Telstra has made it clear that, in order to offer fibre to the node (FTTN) in Brisbane, Sydney and Melbourne, Telstra requires a regulatory holiday or reduction in competition for this new FTTN network. Against that, it is hard to see Telstra being overly excited about a competitive outcome for a broadband solution to the rest of Australia. That is, Telstra is being asked to propose a way to offer metro comparable broadband in remote and regional Australia with no regulatory holiday, whilst still seeking a regulatory holiday in metro areas. That would seem to make something of a mockery of the FTTN proposal.

Put another way, a strategy that sees Telstra submitting a bid to Connect Australia, is arguably a strategy that is directly contradictory to its (loudly) stated FTTN strategy.

It seems one interpretation of the information available, is that Telstra did not want the Connect Australia program to succeed at all, certainly not in a way that the Optus Elders JV was able to.

Additionally, the Federal Opposition and Telstra seem to have a similar view of the future of Australia's Broadband requirements⁶ which are quite different to the Connect Australia program.

If that interpretation is accepted, then Telstra's current action against the Minister seems to make sense, at least in the broader political sense, namely put the Connect Australia funding on hold at least until the federal election and if Labor win, hope the whole program is thrown away.

⁵ http://www.dcita.gov.au/__data/assets/pdf_file/39763/Broadband_Connect_EOI.pdf

⁶ <http://www.australianit.news.com.au/story/0,24897,22530018-5013038,00.html>

When is an Ulterior Motive an Abuse of Process.

In *Williams v Spautz*⁷ the High Court considered that:

“central to the tort of abuse of process is the requirement that the party who has instituted the proceedings has done so for a purpose or to effect an object beyond that which the legal process offers”

In *White Industries v Flower and Hart*⁸ Goldberg J followed *Williams v Spautz* in making and indemnity costs order against Flower and Hart. It should be noted that there is no evidence in this case that Telstra’s lawyers acted similarly to Flower and Hart, indeed the evidence led before Graham J seems to express the opinions of Telstra’s employees.

Following that reasoning, and accepting the interpretation posed above, it seems open for the Court to find that Telstra’s claim against the Minister is an abuse of process, a finding that is likely to have consequences as to costs, and add to the already strained relationship between Telstra and the current Government.

The Decision

On 10 October, Graham J dismissed Telstra’s application with costs, having found:

“In my opinion there does not exist reasonable cause to believe ...that Telstra may have or has the right to obtain relief in this Court from the Minister...”

His Honour did not find that there had been an abuse of process, however commented that the application’s *“legitimacy, in terms of its necessity, is in some doubt...”*

Conclusion

Legal Professional Privilege is a complicated area, particularly for in house lawyers. When claiming that privilege, it is clearly important, particularly for documents created by in-house lawyers to establish the claim for each document separately and not rely on standard wording. Equally it is important to ensure an in house lawyer is in fact independent and that if necessary, evidence is available to establish or support that.

In this case Telstra was forced to reveal documents that showed its attitude to the Federal Government’s Connect Australia program. It is trite to observe that Telstra is opposed to OPEL winning the award, however at least one interpretation of Telstra’s approach is that its interests are not aligned with the Connect Australia program at all, and has attempted to derail it on a number of fronts.

Whilst it is arguable that in commencing proceedings against the Minister, Telstra has engaged in an abuse of process, the Court disagreed. However the Court did cast some doubt over the application’s legitimacy.

Telstra has appealed the decision. The author is not surprised.

⁷ (1992) 174 CLR509

⁸ (1998) 29 ACSR 21

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(Disclosure: Hamish Fraser was employed at Optus from 2003 to 2007)

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