DOES REGULATING TELECOMMUNICATIONS INTERCONNECTION AMOUNT TO COMPULSORY ACQUISITION OF PROPERTY?

THE HIGH COURT'S DECISION ON THE REGULATION OF ULLS AND LSS AND ITS IMPLICATIONS FOR STRUCTURAL SEPARATION

***David Lindsay**, Senior Lecturer, Faculty of Law Monash University*

This article is a critical analysis of the High Court's decision in *Telstra Corporation Ltd v The Commonwealth,* in which Telstra argued unsuccessfully that the application of the telecommunications access regime, established under Part XIC of the Trade Practices Act, to the ULLS and LSS, was an acquisition of property on unjust terms, contrary to s 51(xxxi) of the Constitution.

Although the article does not disagree with the High Court's decision on the facts of this case, it contends that the narrow focus of the judgment, which is based mainly on the historically contingent circumstances that a telecommunications access regime was implemented prior to the privatisation of Telstra, provides little guidance about the extent to which future regulatory interventions may breach s 51(xxxi).

The court's expansive understanding of what amounts to an 'acquisition of property' under s 51(xxxi), however, suggests that proposals for greater regulatory intervention, such as proposals for structural separation involving, for example, divestiture of the CAN, may well amount to a breach of s 51(xxxi), thereby requiring payment of compensation to Telstra.

INTRODUCTION

In *Telstra Corporation Ltd v The Commonwealth* ([2008] HCA 7 (6 March 2008)), the High Court unanimously decided that the application of the telecommunication access regime, established under Part XIC of the *Trade Practices Act 1974* (the TPA), to Unconditioned Local Loop Services (ULLS) and Line Sharing Services (LSS), was not in breach of s 51(xxxi) of the Commonwealth Constitution. Section 51(xxxi) prevents the Commonwealth from acquiring property otherwise than on just terms.

The case raised potentially important issues concerning the limits of the ability of the Commonwealth Parliament to regulate essential infrastructure, most of which were successfully, if understandably, avoided by the High Court. Accordingly, the High Court missed an opportunity to provide greater consistency to the relatively incoherent law on the compulsory acquisition of property under s 51(xxxi). The case therefore provides limited assistance in determining whether or not proposals for full structural separation, such as divestiture of the customer access network (CAN), may amount to an acquisition on unjust terms contrary to s 51(xxxi).

This article is an explanation and critical analysis of the High Court's decision. First, the article explains the facts in the dispute, and Telstra's argument that the access regime infringes s 51(xxxi). Secondly, the article explains and analyses the High Court's decision, including an explanation of how the decision fits within the extensive existing case law on acquisitions contrary to s 51(xxxi). Finally, the article concludes with some observations about the approach adopted

by the High Court, and the implications of the case for proposals for full structural separation of Telstra.

THE ACCESS REGIME

Part XIC of the TPA, which forms the centrepiece of the Australian telecommunications regulatory regime, establishes the regime for regulating access to telecommunications services. The regime applies to telecommunications services that, following a public inquiry, have been declared by the ACCC. Once a service has been declared, it becomes subject to conditions, known as standard access obligations (SAOs).

The SAOs include obligations on a carrier that supplies the declared service to supply the service to competitors, and to permit competitors to interconnect their facilities with the carrier's facilities for the purpose of ensuring access to the declared service. If the terms and conditions of compliance with SAOs, including the access price, cannot be agreed between the parties, the ACCC is empowered to make determinations about the terms and conditions of access.

APPLICATION TO THE ULLS AND LSS

The ACCC has declared two important services supplied over the local loop, known as the ULLS and LSS, under Part XIC (ACCC 2006; ACCC 2007a). The ULLS involves the use of unconditioned copper pairs from a point on Telstra's network, such as a main distribution frame in a local exchange, to the end-user's premises. The ULLS is 'unconditioned' in the sense that the characteristics of the local loop are not changed by equipment on the loop. The declaration of the ULLS allows competitors to use Telstra's copper lines to connect customers to local exchanges, and to install their own equipment, such as DSLAMs, in Telstra's exchanges.

The LSS involves a service supplied over the local loop where one supplier uses part of the frequency for a voiceband PSTN service, and another supplier uses the high frequency part of the spectrum for high bandwidth carriage services. The LSS declaration allows competitors to provide high-speed broadband services to end-users by means of the higher frequency part of the copper line, while Telstra provides a PSTN voice service over the same line. The LSS has been used by ISPs to provide high-speed broadband services by ADSL2+ technology.

When the ACCC declares a service to be subject to the access regime, it must determine pricing principles that apply to the declared service. In 2007, as part of a general review of the regulation of fixed network services, the ACCC issued pricing principles for the ULLS and LSS. Both the LSS pricing principles, which were issued as part of a review of the LSS declaration (ACCC 2007a), and the ULLS pricing principles, which were separately issued in November 2007, adopt a well-known cost-based methodology, known as TSLRIC+ (ACCC 2007b).

TELSTRA'S CLAIMS

Telstra rejects the ACCC's approach to regulating access prices for the ULLS and LSS, claiming that they fail to allow it to recover its full costs (Telstra 2007). Consequently, Telstra brought an action before the High Court, alleging that the regulation of the ULLS and LSS under Part XIC amounted to a compulsory acquisition of property on unjust terms contrary to s 51(xxxi) of the Constitution.

The particular claims made by Telstra were that s 152AL(3) of the TPA, which provides for the declaration of services subject to Part XIC, and s 152AR, which imposes the SAOs on the supply of declared services, were in breach of s 51(xxxi) insofar as they applied to the ULLS and the LSS. In this respect, Telstra argued that, by virtue of the application of the provisions to the local loop services, it lost the use of the local loop, and that it was not adequately compensated for that loss.

In other words, Telstra maintained that the compulsory access of competitors to the local loop following the declaration of the services under Part XIC amounted to an acquisition of property by the Commonwealth, and that the regulation of the terms and conditions of access meant that the acquisition was not on just terms.

THE HIGH COURT'S DECISION

In a concise judgment, the High Court held that the application of the relevant provisions of Part XIC to the local loop services did not amount to an acquisition of property on unjust terms.

In reaching this conclusion, the court considered two main issues: first, the effect of s 152EB of the TPA, which purports to insulate ACCC determinations from invalidity under s 51(xxxi) upon payment of reasonable compensation, and, secondly, and more importantly, the application of s 51(xxxi) of the Constitution to the regulation of telecommunications interconnection.

SECTION 152EB OF THE TPA

If a Commonwealth law provides for an acquisition of property on unjust terms, the effect of s 51(xxxi) is to render the law invalid, as it is beyond the power of the Commonwealth to make such a law. Apparently to avoid the possibility of the access regime being held to be invalid, s 152EB provides that if a determination would be invalid if it would result in an acquisition of property contrary to s 51(xxxi), the determination will not be invalid if the Commonwealth pays reasonable compensation. In referring to determinations, s 152EB clearly refers to ACCC determinations of access disputes made under Division 8 of Part XIC of the TPA.

Despite the apparent intention of s 152EB, Telstra maintained that it did not have the effect of saving sections 152AL(3) and 152AR from any potential invalidity. First, Telstra argued that the acquisition of property occurred through the imposition of the SAOs under s 152AR, and not by any ACCC determination. Secondly, Telstra pointed out that the SAOs only come into operation when a competitor makes a request to use a declared service. From this, Telstra claimed that s 152EB could not cure any invalidity in s 152AR, as any acquisition of property was effected by the request of a competitor to access a declared service, and not by an ACCC determination of an access dispute.

The High Court, however, rejected Telstra's narrow reading of s 152EB. First, the court pointed out that s 152EB refers to determinations that would '*result in*' an acquisition of property on unjust terms, and not to determinations that would *'effect'* such an acquisition. Secondly, the court noted that the access disputes leading to a determination concern disputes about the terms and conditions of compliance with SAOs. Finally, as Telstra's central claim was that the application of the SAOs to the ULLS and LSS would be an acquisition of property on unjust terms, the court held that this involves a dispute about the *terms and conditions* of complying with the SAOs, which are fixed by ACCC determinations.

Consequently, the court concluded that, even though the acquisition of property may actually be effected by s 152AR and not by an ACCC determination, s 152EB should be interpreted broadly as imposing an obligation on the Commonwealth to pay reasonable compensation if the resolution of an access dispute by the ACCC would result in an acquisition of property on unjust terms. If sections 152AL(3) and 152AR resulted in such an acquisition of property, there would be an access dispute, and s 152EB would rescue the provisions from invalidity, provided that the Commonwealth paid reasonable compensation in accordance with the section.

If, on the other hand, there is no acquisition of property contrary to s 51(xxxi), s 152EB has no effect. It is to this question that the High Court next turned.

SECTION 51(xxxi) OF THE CONSTITUTION

Section 51(xxxi) of the Constitution states that the Commonwealth Parliament has the power to make laws with respect to:

> the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

As is clear from its terms, s 51(xxxi) both confers a power on the Commonwealth – the power to acquire property – and limits that power – the property must be acquired on 'just terms'. Moreover, the limitation in s 51(xxxi) is interpreted as applying to those sources of Commonwealth power, so as to prevent other sources of power being used to evade the property rights guaranteed by s 51(xxxi).[1]

Clearly, for s 51(xxxi) to apply there must be both an 'acquisition', and an acquisition of 'property'. As s 51(xxxi) operates as a constitutional guarantee of rights, a long line of cases have held that both terms are to be interpreted liberally. Thus, in the *Industrial Relations Act Case*, members of the High Court observed that:

> It is well established that the guarantee effected by s 51(xxxi) of the Constitution extends to protect against the acquisition, other than on just terms, of 'every species of valuable right and interest including ... choses in action'. It has been held to prohibit the extinguishment of vested causes of action. At least that is so if the extinguishment results 'in a direct benefit or financial gain ... and the cause of action is one that arises under the general law'.[2]

It is also clear that depriving someone of a right may be regarded as an 'acquisition', even if no-one else acquires that right, so long as there is some benefit that accrues to another person. In *Georgiadis v AOTC* (1994) 179 CLR 297, for example, legislation that removed a common law right to sue for workers' compensation was held, by a majority of the High Court, to be an acquisition of property on unjust terms, and invalid under s 51(xxxi).

LAWS THAT FALL OUTSIDE S 51(xxxi)

Regardless of the generous interpretation of the scope of s 51(xxxi), there have always been laws that amount to an acquisition of property, but which do not attract the obligation to provide just terms. For example, laws that impose a tax[3] or provide for the forfeiture of illegally imported

goods,[4] clearly involve the acquisition of property, but just as clearly do not require the payment of just terms.

The main problem in applying s 51(xxxi) has, in fact, been a complete failure on the part of the High Court to provide any coherent account of why some laws are not subject to the constitutional limitation; the court dealing with disputes largely on a case-by-case basis (Evans 2000; Dixon 2005).

Despite the reluctance to establish any unifying principles, in a number of cases members of the court have made general statements about the sorts of laws that will be excepted from the operation of s 51(xxxi). For example, in *Mutual Pools & Staff Pty Ltd v The Commonwealth*, Deane and Gaudron JJ stated that laws would be outside of the operation of s 51(xxxi) if they:

> … provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of, or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest. ((1994) 179 CLR, 155, 190).

Subsequently, in *Australian Tape Manufacturers Association Ltd v The Commonwealth*, Mason CJ, Brennan, Deane and Gaudron JJ maintained that a law would fall outside of s 51(xxxi) if it involved 'a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity'((1993) 176 CLR 480, 510). It has also been suggested that the modification or extinguishment of rights that are 'inherently susceptible of statutory modification or extinguishment' is excepted from the operation of s 51(xxxi).[5]

While some commentators have formulated catalogues of exceptions from the operation of s 51(xxxi) (Dixon 2005; Evans 2006), the High Court has rejected this approach. For example, in *Commonwealth v WMC Resources Ltd*, Kirby J stated that:

> No formula of universal application can be expressed. This is because the task of characterisation which is invoked obliges the Court to evaluate all of the features of the law in question in order to classify it as falling within, or outside, the operation of the guarantee in s 51(xxxi). ((1998) 194 CLR 1, 99.)

THE ARGUMENTS IN THE CASE

In *Telstra Corporation Ltd v The Commonwealth*, the High Court continued this established approach of focusing closely on the facts of the particular law at issue, rather than providing any general guidance about when a law falls outside of the scope of s 51(xxxi).

In this case, Telstra's central argument was that, compliance with the access regime resulted in it losing the use of the local loop to its competitors, amounting to an acquisition of property, and that the failure to receive adequate payment under the access regime was an acquisition on 'unjust terms'.

The Commonwealth and the ACCC, on the other hand, argued that there was no acquisition of property as Telstra remained in effective possession of the local loop. Moreover, they claimed that the use of the local loop by Telstra's competitors was transient, being determined by the choice of carrier made by end-users.

THE HIGH COURT'S APPROACH TO S 51(xxxi)

The High Court rejected all of these attempts at characterising the rights at issue in the case. First, the court turned its attention to the question of what may amount to 'property' for the purpose of the constitutional guarantee. In this respect, the court adopted an extremely broad and flexible approach, concluding that 'property' may either be the more conventional 'bundle of rights', or the broader 'legally endorsed concentration of power over things and resources' (Gray 1991). Secondly, applying this approach, the court held that drawing analogies between control of the local loop and tangible property rights was an unhelpful way to understand Telstra's control of the local loop.

Thirdly, and importantly, the court rejected attempts to identify an exhaustive catalogue (or taxonomy) of exceptions to s 51(xxxi) drawn from previous cases maintaining, instead, that the starting point for understanding the application of s 51(xxxi) is that all species of rights and interests are subject to the guarantee. Fourthly, the court held that claims that statutory rights are excluded from the operation of s 51(xxxi) on the basis that such rights are 'inherently susceptible of modification' were too broad, as statutory rights and interests are not automatically excluded from the guarantee.

APPLYING THE COURT'S APPROACH TO THE ULLS AND LSS

It therefore seems that the High Court held that there was no rule that automatically applied to exclude laws, such as sections 152AL(3) and 152AR of the TPA, which provide for compulsory access to Telstra's network, from the scope of s 51(xxxi). As a practical matter, however, the court held that there were three key factors based on the history of telecommunications that led to the conclusion that the access regime was not an acquisition of property on unjust terms.

First, Telstra's PSTN, including the local loop, was originally a public asset that was operated as a monopoly. In this respect, the court pointed out that it was only in 1991 that Telstra was first incorporated as AOTC, with property rights in the PSTN being vested in the new corporation in February 1992. Secondly, the High Court pointed out that, prior to the vesting of the PSTN in the corporation, the *Telecommunications Act 1991* had commenced on 1 July 1991, establishing an access regime that gave Telstra's competitors rights to interconnect facilities to Telstra's network, and to obtain access to services supplied by Telstra. Thirdly, the court pointed out that when the PSTN vested in AOTC in 1992, the company was wholly owned by the Commonwealth, and it was not until completion of the three share offerings in 1997, 1999 and 2006 that Telstra was privatised.

Therefore the High Court held that, since the point in time that the PSTN vested in the predecessor to Telstra, Telstra's rights over the network had been subject to the access rights of competitors. In other words, when the PSTN was effectively transferred from the Commonwealth to Telstra, it was subject to a regulatory regime that provided for access by Telstra's competitors to Telstra's network and services.

Although a new access regime was established with the introduction of Part XIC of the TPA in 1997, as Telstra's rights over its network were already limited, this did not amount to an acquisition of property under s 51(xxxi). The conclusion that sections 152AL(3) and 152AR do not, in their application to the ULLS and LSS, amount to an acquisition of Telstra's property on unjust terms contrary to s 51(xxxi) is therefore based, predominantly, on the purely contingent

historical fact that the PSTN was vested in Telstra's predecessor only after it had been made subject to the 1991 access regime.

IMPLICATIONS FOR PROPOSALS FOR STRUCTURAL SEPARATION

By basing its reasoning on an analysis of the sequence of historical events relating to the corporatisation, and eventual privatisation, of Telstra on the one hand, and the introduction of a statutory access regime, on the other hand, the High Court was able to conclude that s 51(xxxi) had no application because Telstra's rights over the local loop, at all relevant times, have been limited by an access regime. In adopting this approach, the court was able to reach a conclusion on the facts of this dispute without addressing the more difficult, and much more important, legal issues relating to the extent to which the Commonwealth can regulate essential infrastructure without infringing s 51(xxxi).

In the course of the judgment, however, there are some comments that may throw some, albeit limited, light on the future approach to regulatory legislation under s 51(xxxi). First, the court continues to apply an extremely expansive understanding of what amounts to 'property' for the purpose of s 51(xxxi). Furthermore, the approach may be even more expansive than previous decisions, as the court seems to suggest that the starting point for analysing s 51(xxxi) matters is the assumption that every species of right or interest is subject to the guarantee.

Secondly, the High Court has completely rejected the approach of identifying a catalogue of discrete exceptions to s 51(xxxi) as likely to 'invite error'.[6] What this means for propositions such as those of Deane and Gaudron JJ, in the *Mutual Pools* case referred to previously, that general regulation involving an adjustment of rights in the common interest may be exempt from s 51(xxxi), remains to be seen. To date, however, the only member of the court to indicate a willingness to bring greater coherency and clarity to this area of the law by more precisely identifying the purpose of the s 51(xxxi) guarantee has been Kirby J.[7] For the rest, we appear to be left with a formalistic, and relatively ad hoc approach, that focuses on the particular features of the impugned law in each case.

Thirdly, and consistently with its generally expansive approach, the High Court rejected any suggestions that statutory rights are automatically excepted from s 51(xxxi), saying that such claims are too broad. It therefore seems that, regardless of the source of rights, all rights and interests are presumptively subject to s 51(xxxi).[8]

CONCLUSION

The decision of the High Court in *Telstra Corporation Ltd v The Commonwealth* ([2008] HCA 7 (6 March 2008)) therefore leaves us with very little in the way of guidance about the general principles to apply in determining whether or not a particular law, such as a regulatory statute, is excluded from the operation of s 51(xxxi).

The narrow focus on the historical sequence of events, however, suggests some interesting possibilities, especially now that Telstra has been fully privatised. In particular, given that Telstra's rights over the PSTN were held to be subject to an access regime only because the 1991 access regime was imposed prior to the PSTN formally vesting in Telstra, this form of reasoning cannot

be used to exclude the operation of s 51(xxxi) from any future regulatory dilution of Telstra's control over its network.[9]

Consequently, proposals for the full structural separation of Telstra, such as proposals involving the divestiture of the CAN, must take into account the likelihood that they will amount to an acquisition of property under s 51(xxxi). Meanwhile, the extent to which legal guidance may be reasonably given regarding the acquisitions of property that are excluded from the operation of s 51(xxxi), and to which the policies underlying any such exclusions may be clarified, has been diminished and not improved, by the High Court's approach to the issues in this particular dispute.

ACKNOWLEDGEMENT

The author is grateful to Professor Jeff Goldsworthy, Monash law school, who provided comments on a draft of this article. As usual, the author is responsible for the legal analysis and views expressed in the article.

ENDNOTES

1 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

2 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 559.

3 *MacCormick v Commissioner of Taxation* (Cth) (1984) 158 CLR 622; *Australian Tape Manufacturers Association v Commonwealth* (1993) 176 CLR 480.

4 *Burton v Honan* (1952) 86 CLR 169.

5 *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Georgiadis v AOTC* (1994) 179 CLR 297; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1.

6 [2008] HCA 7 (6 March 2008), para [49].

7 *Attorney-General (NT) v Chaffey* (2007) 81 ALJR 1388.

8 This proposition must be subject to qualification. The point is, however, that there is nothing in the court's decision to suggest what the qualifications might be.

9 Although the access regime introduced in 1997 differed in detail from the 1991 regime, the High Court held that the differences did not amount to an acquisition of property.

REFERENCES

ACCC. 2006. Declaration inquiry for the ULLS, PSTN OTA and CLLS, *Final Declaration*, July 2006.

ACCC. 2007a. Review of the Line Sharing Service Declaration, *Final Decision*, October 2007.

ACCC. 2007b. Unconditioned Local Loop Service (ULLS), *Final Pricing Principles*, November 2007.

Blackshield, Tony; Williams, George. 2006. *Australian Constitutional Law and Theory.* 4th edn. Sydney: The Federation Press.

Dixon, Rosalind. 2005. 'Overriding guarantee of just terms or supplementary source of power?: Rethinking s 51(xxxi) of the Constitution' *Sydney Law Review* 27 (4): 639–664.

Evans, Simon. 2000. 'When is an acquisition of property not an acquisition of property? – The search for a principled approach to section 51(xxxi' *Public Law Review* 11: 183.

Evans, Simon. 2006. 'Constitutional property rights in Australia: Reconciling individual rights and the common good'. In *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform*

in Australia, edited by Goldsworthy, Jeffrey; Campbell, Tom; and Stone, Adrienne. Aldershot, England: Ashgate.

Gray, Kevin. 1991. 'Property in thin air'. *Cambridge Law Journal* 50 (2) (July): 252–307.

Hanks, Peter; Keyzer, Patrick; Clarke, Jennifer. 2004. *Australian Constitutional Law: Materials and Commentary*. 7th edn. Sydney: LexisNexis Butterworths.Telstra. 2007.

'High Court asked to enforce shareholders' constitutional rights'. *Media Release*, 24 January 2007.

Cite this article as: Lindsay, David. 2008. 'Does Regulating Telecommunications Interconnection amount to Compulsory Acquisition of Property?: The High Court's Decision on the Regulation of ULLS and LSS and its Implications for Structural Separation'. *Telecommunications Journal of Australia* 58 (1): pp. 6.1 to 6.9. DOI: 10.2104/tja08006.