Chapter Five

The National Broadband Network and the Acquisition of Property

Grant Donaldson, SC, and Richard Douglas

When asked to speak about this issue, it was in one sense far more interesting than it is now and, in another sense, far less interesting.

Everyone is aware of the political issues that are presently unresolved and the apparent situation that various of the Independents with whom the Government and Opposition are now liaising have seemingly very different positions in respect of the National Broadband Network. That is the interesting bit as regards this topic.

The circumstance that has led to a lesser degree of interest is that at the end of June 2010 (after I was asked to do this paper) the Government, NBN Co Limited – I will come to explain what this is below – and Telstra entered into a Heads of Agreement that would seem to have resolved or put to one side many of the issues that might otherwise have arisen as regards the National Broadband Network and s. 51(xxxi) of the Constitution.

That said, the story or the context is an interesting one – even to those not remotely interested in technology such as me – and warrants a telling.

The "National Broadband Network"

Fibre optic technology

The National Broadband Network is simply the laying of fibre optic cable to what is said to be 90 per cent of Australian homes, businesses, etc. The other 10 per cent that cannot be (presumably economically) reached by fibre optic cable will be connected to the National Broadband Network by what are described as advanced wireless and satellite technologies.

The 10 per cent of users are those in the most remote areas of Australia.

The fibre optic cable (which transmits data by pulses of laser light rather than by pulses of electricity) is primary designed to enhance internet services, though it can also carry information such as television and radio programming and telephone services. It would seem that pretty much everything that is today "carried" by means of existing copper wire technology (most home telephones), or wireless technology (radio, television and much internet) and satellite (no idea) can be carried more quickly and more densely by use of the fibre optic cable. Fibre optic cable is, for example, the means by which most subsea intercontinental cables now carry data.

The fibre optic cable is a corporeal thing. It is essentially a glass and plastic strand with "information" carried along it in light that is shone down the cable by lasers. Receivers at various places can collect (and decode) information sent by laser.

The benefit of the fibre optic cable is that much more information can be carried and the speed of the system is much greater than the current system. Fibre optic cable operates, unsurprisingly, at the speed of light which the physicists tell us is – for most purposes – as fast as possible.

Events culminating in NBN Co Limited

Unfortunately I am not much interested in these matters and so I did not follow all that carefully the various dramas that culminated in the Commonwealth Government announcing that the National

Broadband Network would be delivered or provided by the means currently proposed. I will explain these means presently.

That said, it seems to me that the position that has been arrived at is one that was driven in part – if not in large part – by s. 51(xxxi) of the Constitution and the limitations that this provision places on Commonwealth government action.

The provision of broadband by means of the laying of fibre optic cabling was a policy taken to the 2007 federal election by the ALP. In 2008 the Labor Government sought tenders to lay and provide the fibre optic cable and other necessary services. Famously, Telstra did not meaningfully respond and none of the other proposals was accepted. Frankly, it is hard to imagine – for reasons that I will explain – that any private body other than Telstra could have submitted a meaningful proposal.

After this debacle, the Government abandoned this process – which was in effect for the private sector to lay and provide the fibre optic cable and other necessary services. Instead of this, the Government announced at the end of July 2009 that a corporation, the shares of which were owned by the Government (NBN Co Limited), would build and operate the National Broadband Network. Until fairly recently the board of NBN Co Limited comprised three senior Commonwealth public servants.

In May 2010 the Government released an "implementation study", commissioned by it and prepared by McKinsey and KPMG.[1] The report "suggested" that the National Broadband Network could not be practically implemented, or not at the projected cost, without participation by Telstra.[2]

In June 2010 the Government and NBN Co Limited announced that NBN Co Limited and Telstra had entered into a "Financial Heads of Agreement" pursuant to which Telstra would provide to NBN Co Limited access to its facilities and over time Telstra would transfer its traffic onto the National Broadband Network. As part of this transfer Telstra would decommission its copper cable network. I assume that what this means is that over time all of the services which Telstra currently provides via its copper cable network will be delivered via the fibre optic cable.

If the "Financial Heads of Agreement" is publicly available I have not been able to find it and consequently I have not read it. Common sense would suggest, however, that in light of this agreement the likelihood of dispute with Telstra is less likely than it otherwise would have been, even if the prospect of such dispute has not been excluded completely.

Necessary interaction between the National Broadband Network and existing Telstra infrastructure

The National Broadband Network seemed always to contemplate use of at least part of the existing Telstra infrastructure. I can explain my incomplete understanding of this shortly.

Telstra had over time obtained the public switched telephone network which had since Federation until the 1980s been operated by the Commonwealth government. The public switched telephone network is a massive piece of infrastructure involving copper-based cabling (or wire) to most houses and businesses in Australia. The public switched telephone network involves this wire running from a home or business premise to a local exchange. The wire from the home or business premise is known as a "local loop" and there are over 10 million of these currently in operation. Telstra owns and operates the local exchanges and there are over 5 000 of these.

Initially the public switched telephone network could only transmit sounds and was used exclusively for telephones though, for some time, the Telstra local loops carried other things including internet access services.

As part of the privatisation of Telstra and the injection of competition into the telecommunications industry, Telstra was required to provide access to certain parts of this infrastructure to competitors. This was principally provided for by means of the "telecommunications access regime" found in Part XIC of the *Trade Practices Act* 1974.

In *Telstra Corporation Limited v The Commonwealth* (2008) 234 CLR 210, Telstra unsuccessfully contended that the forced "telecommunications access regime" imposed upon it in Part XIC of the *Trade Practices Act* 1974 effected an acquisition of its property in some of its local loops, other than on just terms.

In *Telstra Corporation Limited v The Commonwealth* the matter at issue involved a requirement that Telstra provide to competitors use of local loops in the sense of permitting competitors to use the copper wire and, in some cases, to allow competitors to install its equipment in Telstra's local exchanges. Again, a local exchange is a physical thing and place.

As I understand it, what is proposed to occur with the National Broadband Network is that the fibre optic cable, which as a corporeal thing, will be owned by NBN Co Limited. The broadband service will be delivered by cable in one of two ways. First, a "fibre to premises" mode, by which a fibre optic cable will run from Telstra's local exchange to (in effect) every separate home and business premise with an optical splitter splitting the cable at each necessary point. Second, a "fibre to node" mode by which the fibre optic cable is run from Telstra's local exchange to a node at which the fibre optic cable terminates. From the node to each home or business premise, the broadband service is carried on the existing Telstra copper wire.

Various splitters, routers and other transmission infrastructure owned by Telstra, if any, will be required for the non-fibre optic aspects of the National Broadband Network. The cost of building parallel structures which duplicate the existing Telstra infrastructure is not fully costed by the KPMG McKinsey report, presumably because such a cost not with anything approaching desirable parameters from the government's capital outlay obligations.

Issues that may arise

As noted above, the Financial Heads of Agreement that NBN Co Limited and Telstra had entered into have not been publicly disclosed and so I have no idea whether there are any remnant issues with s. 51(xxxi). It would be odd if there were, particularly as the Government, NBN Co Limited and Telstra all announced at the time of the Heads of Agreement that the arrangement had a value of $11 billion *to Telstra* [emphasis added]. Interestingly, within this $11 billion is the following: "… the Federal Government has agreed to progress public policy reforms with an attributed value of approximately $2 billion". It is not at all clear what this is or was intended to be.

Of course, what might come to pass in all of this is dependent upon political considerations that are being worked through at the present time, and it may well be that acquisition issues may arise at some time in the future.

There are a number of acquisition issues that could possibly arise. Some have been considered in *Telstra Corporation Limited v The Commonwealth* (2008) 234 CLR 210, others not.

Many of the issues that could arise are of great complexity having regard to the manner in which Telstra has come to have vested in it certain rights. Further, certain of these rights are themselves unique and the nature of proprietary right or interest held by Telstra is complex. To resort to terminology commonly used, Telstra's bundle of rights in certain of its property is difficult to characterize and define. I cannot and am not going to expand on this in full, other than to set out a passage from a native title judgment of Sundberg J which dealt with a very large part of the Kimberley area of Western Australia; see *Neowarra v Western Australia* [2003] FCA 1402 at [648]-[649].

> 648 From 1901 to the present Telstra and its predecessors have exercised statutory land access powers to install telecommunications facilities on Crown land and privately owned land. The powers are not qualified by reference to the identity of the owner of the land or by reference to the nature of the interest in the land held by any person. The legislation relevant to the facilities within the claim area is the *Telecommunications Act*

1975 (s 16), the *Australian Telecommunications Corporation Act* 1989 (Cth) (s 88), the *Telecommunications Act* 1991 (Cth) (s 129) and the *Telecommunications Act* 1997 (Cth) (Sch 3, cl 5-7).

649 Telstra owns four types of telecommunications facilities within the claim area: radio system sites, customer terminals, optic fibre cabling and local distribution cabling. In the claim area it makes extensive use of digital radio concentrator systems (DRCS Systems) to deliver standard services. In a DRCS System the radio signal is carried via radio transmitters (also called "repeaters") constructed at intervals of between ten and fifty kilometres along the path of the system. Each DRCS System is usually comprised of between six and twenty repeaters. Each customer serviced through a DRCS System is either cabled from a nearby repeater or connected to it by a radio link via a mast installed at the customer's premises. The facility at the customer's premises is referred to as a "customer terminal". There are two DRCS Systems within the claim area.…

Just from this description it can be seen that in remote areas of Australia, the Telstra infrastructure involves rights that are undoubtedly proprietary in radio tower sites, customer terminals, optic fibre cabling, local distribution cabling, repeater stations and radio masts installed at customer premises. No doubt, the definition of the proprietary rights of Telstra in each of these types of infrastructure involves some complexity. Further, this list exemplifies that the value of the Telstra assets at stake is vast, not only in book value, but further by the fact that their utilization in remote areas avoids native title considerations. If NBN Co Limited was required to negotiate land access arrangements with native title holders for cable routes, tower sites and the like, there would be no prospect of the National Broadband Network being delivered within any sensible period.

It is unclear how much if any of this infrastructure will be utilized in the National Broadband Network and if so and what – how much and how. But some issues that may have to be addressed are as follows. First, it has been recognized and accepted that statutory proprietary rights, in the sense of proprietary rights created and constituted by legislation, are not excluded from the operation of s. 51(xxxi) of the Constitution simply on the basis that such rights are inherently susceptible to subsequent legislative modification or extinguishment; see *Attorney-General (NT) v Chaffey* (2007) 81 ALJR 1388 at 1393-1394. In one sense this is a trite proposition in this country having regard to the ubiquity of Torrens-type legislation.

Second, even though it was held unanimously in *Telstra Corporation Limited v The Commonwealth* that the compulsory third party access regime there considered did not constitute an acquisition of Telstra's property, this conclusion was premised upon the following critical finding (at [51]):

… the public switched telephone network which Telstra now owns (and of which the local loops form part) was originally a public asset owned and operated as a monopoly since Federation by the Commonwealth. Second, the successive steps of corporatisation and privatisation that have led to Telstra now owning the public switched telephone network (and the local loops that are now in issue) were steps which were accompanied by measures which gave competitors of Telstra access to the use of the assets of that network. In particular, as noted earlier in these reasons, the step of vesting assets of the public switched telephone network in Telstra, in 1992, was preceded by the enactment of the *1991 Telecommunications Act*. At all times thereafter Telstra has operated as a carrier, first under the *1991 Telecommunications Act*, and later under the *1997 Telecommunications Act*, within a regulatory regime by which other carriers have the right to interconnect their facilities to Telstra's network and to obtain access to services supplied by Telstra , and Telstra has like rights with respect to other carriers. Telstra has

> never owned or operated any of the assets that now comprise the public switched telephone network except under and in accordance with legislative provisions that were directed to "promoting . . . competition in the telecommunications industry generally and among carriers" and sought to achieve this goal by "giving each carrier the right . . . to obtain access to services supplied by the other carriers".

It seems to me that fundamentally different issues arise with the National Broadband Network. For instance, even if Telstra's infrastructure assets – and various of its property rights – have been held (and defined having regard to) legislative provisions that were directed to promoting competition in the telecommunications industry by giving each carrier the right to obtain access to the property of other carriers *in respect of telecommunications usage*, it might be hard for some to accept that this also involved providing access to a government monopolist, which NBN Co Limited is, for purposes not contemplated when the assets subject to the telecommunciations and TPA at the time the assets were transferred to Telstra. Further, this consideration also depends very much upon what the relevant "telecommunications industry" is.

In effect, when Telstra was granted the property rights at issue, the rights always included an obligation to share; imposing the obligation to share did not then involve an acquisition of anything.

Third, different issues will arise with different proprietary rights held by Telstra. To illustrate: it may be that the property right which Telstra has in a local exchange to which it must give access to a competitor so that the competitor can attach its own equipment is in a different category to the right it has to the easement along a suburban street – which easement is proposed to be used by NBN Co Limited so as to render Telstra's copper wire which is in the easement completely redundant. Careful attention will of course have to be paid to the precise proprietary interest of Telstra being affected.

Fourth, the matter of greatest interest to me in the jurisprudence of s. 51(xxxi) emerges from the word *acquisition.* In the US Constitution, the relevant aspect of the Fifth Amendment has always been referred to as the "taking clause", and s. 51(xxxi) of our Constitution the "acquisition provision". The Fifth Amendment refers to a person being "deprived [. . .] of property" (in relation to due process) and that "nor shall private property be taken for public use, without just compensation". Since before the *Tasmanian Dams case* (1983) 158 CLR 1 it has been thought of as trite that a destruction of a property right is not an acquisition. As observed by Mason, J in the *Tasmanian Dams case* (1983) 158 CLR:

> It is not enough that the legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.[3]

> This is akin to an aphorism from *Mutual Pools and Staff Pty Lrd v Commonwealth*((1994) 179 CLR 155 at 185, that acquisition is distinct from deprivation. Although it can also be compared with the Court's holding that "Accordingly, 'acquisition' in paragraph 51(xxxi) extends to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes a liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law".[4]

But what about a destruction of a property right for the purpose of (of course, "for the purpose of " is a term that must be treated with care) enabling the Commonwealth to carry on a business over the carcass of the destroyed property? It is to be remembered that "property" extends to every species of valuable rights and interest including choses in action, the right to receive money and a cause of

action for damages;[5] and that "property" and "acquisition" in the constitutional guarantee are to be construed liberally.[6]

What if here Telstra is required to permit NBN Co Limited to use certain of its property rights which will have the effect of rendering other of its property rights valueless? So, Telstra must permit NBN Co Limited to use its easement like rights to lay fibre optic cabling, which will in practical terms render the copper wire cable valueless? The Commonwealth has not acquired the copper wire cable, but it has rendered it valueless. The nature of the property right will be important. It may be thought that a statutorily created property right ever susceptible to later statutory emasculation is to be considered differently from some other forms of property right.

An "acquisition" requires that there must be an acquisition whereby the Commonwealth *or another* acquires an interest in property, however slight or insubstantial.[7] The term "acquisition" directs attention to whether something is or will be received. In relation to constitutional guarantees and prohibitions, an act may not be done indirectly which would be forbidden directly.[8]

In the absence of the details of a specific proposal for compromise of property rights, it is not possible to conclude about whether a proposal infringes s. 51(xxxi) of the Constitution.

However, it is possible to identify some developments which impact on the ambit of the scope of s.51(xxxi) and may lead to it playing, as in the past, a substantial role in the life of the nation.

In *Wurridjal v Commonwealth of Australia* [2009] HCA 2, the High Court considered, and overturned, the doctrine that the territories power under s. 122 of the Constitution is not subject to s. 51(xxxi) because s. 122 is plenary in quality and unlimited and unqualified in point of subject matter (see French CJ at [54]-[55]).

The Court overturned its previous ruling (Kirby J dissenting) and held that because:

> Section 51 of the Constitution confers powers upon the Parliament to make laws for the "peace, order, and good government of the Commonwealth" with respect to the various matters set out in that section;
>
> It is hardly necessary to say that when you have, as you do in paragraph 51(xxxi), an express power, subject to a safeguard, restriction or qualification, to legislate on a particular subject or to a particular effect, it is in accordance with the soundest principles of interpretation to treat that as inconsistent with any construction of other powers conferred in the context which would mean that they included the same subject or produced the same effect and so authorized the same kind of legislation but without the safeguard, restriction or qualification: Attorney-General (Cth) v Schmidt (1961) 105 CLR 361 at 371–372 per Dixon CJ;
>
> In the absence of any indication of contrary intention, the other legislative powers reposed in the Parliament must be construed so that they do not authorize the making of a law which can properly be characterized as a law with respect to the acquisition of property for any relevant purpose otherwise than on just terms: Mutual Pools & Staff Pty Ltd v The Commonwealth (1994) 179 CLR 155 at 169;
>
> These considerations indicate that an integrated approach to the availability of legislative powers and limits on them throughout the Commonwealth is to be preferred where the language of the Constitution so permits;
>
> That conclusion favours, although it is not determinative of, the proposition that s. 122 is subject to limitations on legislative powers which are of general application; and
>
> It therefore favours, although it is not determinative of, the proposition that laws made under s 122 which effect compulsory acquisition of property must do so on just terms within the meaning of paragraph 51(xxxi);

Consequently, the exercise of Commonwealth legislative power in respect of the territories was subject to the limitations inherent in paragraph 51(xxxi): French CJ at [73] to [81].

This decision, overturning the 40-year position that the territories power is not subject to the limit in s. 51(xxxi)[9] may suggest a revival of the idea of s. 51(xxxi) as much a limit on Commonwealth power as it is a warrant to exercise eminent domain.

Such a view is not novel. That the Commonwealth acquisition clause bears similarities to the takings clause in the Fifth Amendment of the US Constitution is a reflection of the actual deliberations of the Constitutional Convention.

Dixon J, as he then was, said in 1941 that the source for s. 51(xxxi) was the Fifth Amendment of the US Constitution: *Andrews v Howell* (1941) 65 CLR 255 at 282. As recently as 2009, Kirby J agreed with this characterization, stating that Australia's acquisition clause was "inspired by the Fifth Amendment to the Constitution of the United States": *Wurridjal v Commonwealth* (2009) HCA 2 at [306].

That Crown seizure of property is to be confined is an old English principle in the construction of statutes. As Bowen LJ held in *London and North Western Railway Co v Evans* [1893] 1 Ch 16 at 28:

> [T]he Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him.
> See also *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

However, s. 51(xxxi) goes further, identifying a power that the Imperial Parliament already had – exercising eminent domain – a subjecting its exercise to justiciable limits. In a recent article, Duane L. Oster has drawn our attention to the significance of the Fifth Amendment to the US Constitution to the drafters of the Australian Constitution: Ostler, Duane L., *The Drafting of the Australian Commonwealth Acquisition Clause*, (2009) 28 U Tas LR 211.

He reminds us that, on 25 January 1898, Edmund Barton made a new proposal to the Constitutional Convention. He suggested that a general acquisition clause should be inserted into the then clause 52 (subsequently renumbered as clause 51), to the effect that the Commonwealth Parliament would have power to make laws regarding "[T]he acquisition of property on just terms from any State or person for the purposes of the Commonwealth". That language is very similar to the final form of words adopted in s.51(xxxi).

Sir Isaac Isaacs had already informed the Convention that, in his view, the power of eminent domain was already possessed by the colonies without further warrant: On 25 and 28 January 1898; *Official Report of the National Australasian Constitutional Debates (Third Session)* at http://www.aph.gov.au/senate/pubs/ records.htm.

In *NSW v Commonwealth* (1915) 20 CLR 54, 78, Barton subsequently made the observation that, in "some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms". Barton's apprehension of the US State constitutions accords with what the Fifth Amendment does provide, namely, "just compensation".

In *Georgiadis*, as mentioned (another occasion on which Telstra sought to invoke s. 51(xxxi)), the Court held that at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes a liability being brought to an end without payment or other satisfaction) and the cause of action is one that arises under the general law, an "acquisition" has occurred.

This is consistent with the tenor of the US Supreme Court decisions, which have held that regulatory extinguishment of certain property rights amounts to a "taking", although – formally – an asset is not taken by the Federal or State Government.

Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it

was generally thought that the Takings Clause reached only a "direct appropriation" of property, or the functional equivalent of a "practical ouster of [the owner's] possession". That doctrine will be familiar to readers of the judgments of the High Court. Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the "police power", "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared". These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking".

In *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992), a dispute arose after the petitioner purchased certain beachfront property in South Carolina. In 1988, the South Carolina Legislature enacted the *Beachfront Management Act*, which had the direct effect of barring Mr Lucas from erecting any permanent habitable structures on his two parcels of land. A State trial court found that this prohibition rendered Lucas's parcels "valueless".

Scalia J recalled that *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "set formula" for determining how far is too far, preferring to "engage in . . . essentially ad hoc, factual inquiries".

However, the Court described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

The second circumstance in which the Court found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of the asset. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate State interests or denies an owner economically viable use of his land".

Similar issues to those considered by the High Court in *Telstra* have arisen in the United States under the US *Telecommunications Act* 1996. While signing the 1996 Act into law, President Clinton said, "[T]oday, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light". In summary, under the 1996 Act, FCC rule-making increased access of competitive local exchange carriers ("CLECs") to the facilities of incumbent local exchange carriers ("ILECs") by removing certain competition barriers.

In a 2002 decision, *Verizon Corp. v. FCC*, 535 U.S. 467 (2002), the US Supreme Court broadly upheld the provision of the US Federal *Telecommunications Act* 1996 regulations against statutory and administrative law challenge, but largely declined to review the incumbents' constitutional claims under the Takings Clause. The Court held that the incumbent telecommunications corporations (who were being required to make their networks available) were misconceived to argue "to the effect that there may be a taking challenge if a ratemaking body makes opportunistic methodology changes just to minimize a utility's return on capital investment. There is no evidence that the decision [. . .] was arbitrary, opportunistic, or undertaken with a confiscatory purpose": cf *Duquesne Light Co. v. Barasch*, 488 U. S. 299 (1989).

What might this import for the NBN and Telstra? (a company representing 4 per cent of the S&P/ASX 200, and therefore comprising a material part of the retirement savings of a large number of Australians). To answer that question is to engage in a speculation, but not, I hope, an uninformed one.

First, the "just terms" qualification to the power of s. 51(xxxi) can be seen, in the wake of *Wurridjal* decision, to have reemerged as a confinement of the legislative power of the Commonwealth and

not merely a qualification upon a power. I say "re-emerge" because that quality is one which Justice Dixon and, I suggest, Justices Barton, Isaacs and O'Connor appreciated.

Second, an acquisition may more readily comprehend the extinguishment of rights to the benefit of another. The NBN proposal may, for practical purposes, depend upon the taking of access from Telstra for last mile and transmission infrastructure access not for telephonic communications – which was held to be lawful in the 2008 *Telstra* decision – but for the purpose of non-telephonic data transmission.

Third, the US Supreme Court's construction of the word "taking" in the Fifth Amendment – namely, that the exercise of regulatory power to effect a practical extinguishment of rights is unlawful (even where there is no reciprocal "receipt" of the extinguished right) – is reconcilable with Australian cases which have considered the ambit of s. 51(xxxi).

Fourth, were the Commonwealth to seek to commandeer or regulate the Telstra infrastructure for the purpose of the NBN project, that may well constitute an acquisition (whether by the Commonwealth or its emanation) which would fall outside the power granted by s.51(xxxi) and infringe the just terms confinement.

Whether this question will be pressed by the Government or by Telstra itself remains to be seen.

I would conclude:

If the English constitution was the mother the Australian Constitution, we should not lose sight of the US Constitution being, in respect of s. 51(xxxi), as elsewhere, very much its older brother.

National policy at the highest level has foundered upon the reefs of s. 51(xxxi), as Prime Minister Chifley learned to his cost in the Bank Nationalisation case.

The confinements upon power adopted by the Australian people in the referenda held during 1898 to 1900 retain their capacity to surprise the executive, the legislature and ourselves. It is not beyond the 26 plain words of s. 51(xxxi) to do so again.

Endnotes

1. http://www.dbcde.gov.au/nbn_implementation_study.
2. See 1.4.3 at pages 34-35, 43, 94, 113, 245, 336, 349 "The commercial logic for both NBN Co and for Telstra to share dark fibre on reasonable terms is compelling. An agreement would reduce NBN Co's capital expenditure significantly", 397 (". . . . in the worst case, fibre deployment costs blow out [. . . . and] the Government's funding requirement is $32.6 billion" as compared with the estimated $26 billion in the preferred scenario:) and 398.
3. See also *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.
4. *Georgiadis* at 305.
5. *Georgiadis* at 303-4.
6. *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 349-350.
7. *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304 per Mason CJ, Deane and Gaudron JJ.
8. *Georgiadis* at 304-5.
9. *Teori Tau v The Commonwealth* (1969) 119 CLR 564, 44 ALJR 25, [1969] HCA 62, [1971] ALR 190.