TELECOMMUNICATIONS NETWORKS - CARRIER POWERS CONFIRMED

Shane Barber reviews a recent decision of the Land and Environment Court in New South Wales in Hurtsville City council v Hutchison 3G Australia Pty Ltd [2003] NSWLEC 52 which confirms the sometimes controversial powers of telecommunications carriers when rolling out their networks.

At the time of deregulation of the telecommunications industry in Australia in 1997, the extensive network rollout powers enjoyed by the then two landline telecommunications carriers (Telstra and Optus Networks) and the three mobile carriers (Telstra, Optus Mobile and Vodafone) were significantly curtailed. At the time a political debate was raging in Australia following Optus' controversial decision to roll out its fibre optic cable network aerially and the resultant concern in many communities of the anticipated visual pollution it would create. At the same time, significant concern was also raised about the visual pollution then created by the proliferation of mobile phone infrastructure, especially towers, and the potential for even greater visual pollution following de-regulation.

The current powers of telecommunications carriers are contained in Schedule 3 to the *Telecommunications Act, 1997* ("**Act**"), the associated *Telecommunications Code of Practice, 1997* ("**Code**") and the *Telecommunications (Low Impact Facilities) Determination, 1997* ("**Determination**"), as amended in 1999.

While Schedule 3 to the Act gave certain powers to carriers to inspect land, to install facilities (especially low impact facilities as defined in the Determination) and, importantly, to maintain facilities, those powers do not extend to, among other things:

- rolling out aerial cable;
- installing new telecommunications towers and poles; and
- except in certain circumstances, installing other facilities which are not specifically listed in the Schedule to the Determination, or ancillary facilities required solely for the protection of persons and property.

Provided the carriers comply with the strict requirements of the Act, Code and Determination, clause 37 of Schedule 3 to the Act exempts them from the requirement to comply with many State and Territory laws when rolling out their networks.

Some 1999 amendments to the Determination confirmed the general policy adopted by the Act, being the encouragement of the co-location of facilities on existing towers and on public utility infrastructure, provided that co-location was within certain limits.

In addition to these restrictions, the Code provides some strict guidelines regarding the manner of notifying owners and occupiers of land of these limited permitted activities and details a prescriptive objection regime, in first instance to the Telecommunications Industry Ombudsman.

The fundamental difficulty faced by carriers under the current regime is that while they are encouraged to co-locate their facilities on other telecommunications or public utility infrastructure (or otherwise attach their facilities to existing buildings in a manner prescribed

by the Determination), public utilities, particular local councils, and other land owners have sought to repel the carrier's efforts to do same.

Hutchison 3G Australia Pty Limited ("**H3GA**"), a licensed telecommunications carrier currently rolling out its revolutionary third generation network, has like many other carriers come across a push back from local councils who are understandably confronted by their apparent inability to regulate the carriers in the rollout of their networks if the carriers are complying with the Act, Code and Determination.

In March 2003, Hurstville City Council ("**Council**") brought an application in the Land and Environment Court of New South Wales ("**Court**") against H3GA to test much of the scope of the carrier's powers and immunities in the Act, Code and Determination. Pain J, in a judgment which no doubt will be the subject of much discussion in the industry, provided much needed clarity in relation to those powers, in all circumstances re-enforcing the views of the carriers.

FACTS

In the case before the Court, H3GA, after examining a large number of sites in the area, determined that a sports light pole located in Oatley Park, Oatley New South Wales was the appropriate location for some panel antennas and a parabolic dish to be used as part of its proposed 3G network. H3GA proposed to install a "low impact" telecommunications facility on top of the light pole and, as a result, issued on the owners and occupiers of the land, including Council, the relevant notices required by the Act and the Code.

As permitted by the Code, the Notice contained 2 parts. The first made reference to a maintenance activity under clause 7 of the Schedule 3 to the Act pursuant to which H3GA would remove Council's existing pole and replace it with another pole to be owned by Council which was stronger and able to support the proposed telecommunications facility to be installed at the top of that light pole.

In accordance with clause 7 of Schedule 3 to the Act, the replacement pole was the same height as the existing pole, with the same apparent volume and was to be located in the same location.

The second aspect of the Notice was an installation activity pursuant to which H3GA proposed to install a parabolic antenna and 3 panel antennas on the new pole, along with the construction of the associated brick equipment shelter in another location in the park.

While Council did not formally object to the activity in the time required by the Code, H3GA agreed to hold off construction for a certain period, without prejudice to any of its rights under the Notice, to enable some further consultation with Council and some concerned local residents.

Towards the end of the agreed consultation period Council removed the existing light pole at the site, saying that the existing light pole was required for another venue.

H3GA then called off the consultation process and began work at the site, making excavations for the footings of the new light pole where the existing light pole had been removed by Council. Council then served a stop work order on H3GA under the relevant New South Wales local government and environment and planning legislation.

H3GA then advised the Council that pursuant to the Act, particularly clause 37 referred to above, such stop work order was not effective and that H3GA proposed to continue with the construction. Council then commenced the proceedings in the Court.

The Arguments

In its application before the Court, Council argued essentially four grounds as to why H3GA should be prevented from continuing with its work at the site. These grounds were as follows:

- the Hurstville Local Environmental Plan 1994 ("**LEP**") prohibited the works that H3GA was undertaking at Oatley Park;
- the Notice given by H3GA to the Council was defective and did not contain all the relevant detail required by the Act and Code and, further it was beyond the power of H3GA to give such a Notice to Council;
- it was not possible for H3GA to swap out a pole under the maintenance power in clause 7 of Schedule 3 to the Act, particularly given that the installation of a tower or a pole was expressly prohibited by the installation power found in clause 6 of Schedule 3 to the Act; and
- even if H3GA could use the maintenance power to swap out the pole, the proposed installation at the top of the pole did not fit within the requirements of antenna installations pursuant to the Act and the Determination as it protruded too far from the pole (Council arguing that the maximum protrusion was 3 metres rather than up to 5.8 metres).

In relation to the use of the maintenance power, there were essentially 2 key arguments. Firstly, pursuant to clause 7 of Schedule 3 of the Act, before maintenance can be undertaken, the thing being maintained, in this case the pole, had to be a "facility" for the purposes of the Act. While "facility" is defined in section 7 of the Act to mean, among other things,

> "*any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, <u>or for use</u>, in or in connection with the telecommunications network*" [our emphasis],

Council argued that, in this case, unless the pole was intended by <u>Council</u> to be used as part of a telecommunications network, it could not otherwise be considered to be "for use".

Secondly, even if the pole could somehow be determined to be a facility, Council argued that it was not possible to remove and replace that pole for a number of reasons, including noting that, if it was not possible to install a new pole under the installation powers, how could same effectively be done under the maintenance powers?

A complicating factor in the case was that the Council had already removed the pole which made H3GA's activities, in Council's submission, look more like the installation of a pole in any event.

H3GA addressed all of Council's grounds as follows:

- In relation to the view of Council that the LEP, created under State legislation, prevailed over any powers that H3GA had under the Act, H3GA pointed to the express provisions contained at clause 37 of the Act which exempted the carrier from having to obtain development consent under such State laws provided H3GA otherwise complied with the Act, Code and the Determination. H3GA stated that this was one such case.

- In relation to the invalidity of the Notice for lack of detail, H3GA pointed not only to the detail contained within its lengthy 5 page Notice, but also to the detailed drawings attached to the Notice. It noted that those drawings were all drawn to scale and contained significant notations detailing which activities were the maintenance activities referred to in the Notice and which were the installation activities. H3GA argued that the combination of the detailed Notice and the drawings was sufficient to meet the requirements of the Code (which at clause 4.27 expressly requires details).

- In relation to whether or not the pole (ignoring the fact that it had been removed) was a facility for the purposes of the Act, H3GA argued that the use of the words “for use” in the definition of “facility” simply meant that provided the carrier (and not the Council) had formed the intention to use that particular pole in its telecommunications network, that was sufficient.

  Presuming the Council’s pole was a “facility” for the purposes of the Act, H3GA argued that it was clearly intended by the Commonwealth legislature that such poles could be swapped out under the maintenance power, irrespective of the fact that new towers could not be installed under the installation power. In this regard, among other things, H3GA pointed to the express wording of Schedule 3 to the Act, relevantly clause 7(3), which provided that reference to maintenance of a facility includes a reference to, among other things,;

  > *... “removal ... of the original facility and ... the replacement of the whole or part of the original facility in its original location where the conditions specified in sub-clause 5 are satisfied”.*

  Sub-clause 7(5), among other things, expressly provides that where the original facility is a tower (which in this case includes a pole), then certain pre-conditions regarding the height and apparent volume of the tower must be met. H3GA argued that if the legislature had expressly referred to towers and poles in the context of replacement of a whole of the original facility, it questioned how there can be any argument that swapping out a tower or pole was not permitted.

- Finally, in relation to whether the total protrusion of the antennas and their mount could be 5.8 metres rather than 3 metres from the top of the tower, H3GA argued that clearly the intention was 5.8 metres. While there was ambiguity in the language of the Determination in this regard (the language working easily for horizontal protrusion but not vertical protrusion), it pointed both to the South Australian case of *Telstra Corporation Limited v City of Onkaparinga [2001] SAERDC 55* and some guideline published by the Australian Communications Authority. Both of these references made it clear that the best interpretation of the protrusion issue was that when the protrusion was vertical, the length of the mount could be up to 3 metres and the length of the antenna could be up to 2.8 metres from the top of that 3 metre protrusion.

The Findings

Ground 1

In relation to whether H3GA could be prevented from exercising its maintenance and installation powers because of the existing requirements of the relevant LEP, the Court effectively found that the provisions of clause 37 of Schedule 3 of the Act were wide enough to ensure that the LEP would not regulate the activities of H3GA, rather it would be regulated by the Commonwealth regime set out in the Act, Code and the Determination.

Ground 2

The Court found that the Notice given by H3GA to Council was adequate for the purposes of clause 4.27 of the Code and was not invalid. Her Honour found that while clause 4.27 required that details of the activities which the carrier expects to undertake must be given, there was no specific requirement as to the extent of those details. On the facts of the case, the Court reviewed each of the alleged inadequacies identified by the Council and found that those inadequacies were not sustained on a close examination of the Notice itself. The Court found that even if, as Council had argued, a very high level of detail was necessarily required, H3GA had met all of those requirements given the scope of details contained in both the Notice and its associated drawings.

Ground 3

In relation to the maintenance power, the Court determined that there were three issues it must consider. These were:

- whether H3GA had power to remove the pole and replace it with a new pole, relying on the maintenance power under clause 7 of Schedule 3 to the Act;

- to answer this question, it was first necessary to consider whether the pole falls within the definition of "facility" under section 7 of the Act, which involves interpreting the meaning of "for use"; and

- whether the removal of the pole by the Council prevented H3GA from relying on the maintenance power.

In relation to the use of the words "for use" in the definition of "facility" in section 7 of the Act, the Court found that those words have a plain and ordinary meaning in that they would generally be understood to mean that the structure or thing will be used in the future. In reviewing this issue further, the Court dismissed the submissions of Council which relied on sales tax exemption decisions to indicate that the intention of "for use" rests with the Council. The Court equally dismissed the English criminal law cases used by H3GA which tended to indicate the relevant intention had to be that of a carrier.

Instead, the Court referred to other references to the words "for use" throughout the Act. For example, the Court noted that the words "is installed, ready for use or intended for use" are used in sections 20 and 21 of the Act. In this regard, the Court found:

> *"The fact that the words "intended for use" are not included in the definition of section 7 may be supportive of H3GA's interpretation of "for use", that is, that facilities which when built were not intended for use in a*

telecommunications network can become so if the carrier identifies them for that purpose, but that is far from conclusive in this matter".

Ultimately, the Court held that H3GA's interpretation of the use of the expression "for use" was preferred given that there is a wide range of structures or things that can be used or be for use in or in connection with the telecommunications network including buildings etc. The Act anticipates that new telecommunications infrastructure will be placed on existing structures not owned by carriers and carriers would therefore need to maintain those existing structures before it can undertake some of the installation works (re-enforcing etc).

Further, the Court dismissed an argument raised by the Council that the "facilities" referred to under the maintenance power had to be the same facilities that were installed under the installation power. The Court found that there was no provision in Schedule 3 of the Act linking the powers in this manner.

The Court accepted H3GA's submission that while the carrier's intention is the relevant one, it did not need to consider the exact time when that intention manifested itself and Council's pole became a facility, suffice to say that it certainly was a facility at the time that H3GA served its Notice on the Council.

It having been determined that the light pole in Oatley Park was a facility for the purpose of the maintenance power, the Court then found that H3GA may remove and replace the original facility, in this case the pole, presumably because of the clear wording of clause 7 of Schedule 3 in this regard.

As to the effect of Council's removal of the pole before the maintenance activity was undertaken, the Court agreed with H3GA's interpretation that Council had simply undertaken the first of the two tasks that H3GA would otherwise undertake i.e. the removal of the pole. It was then possible for H3GA to erect the replacement pole (provided it was the same height, same apparent volume and in the original location as the old one) and still remain within the scope of the maintenance powers and not the installation powers.

Finally, while not a key part of the decision, the Court did put to rest an argument frequently raised by Councils when opposing use of their infrastructure for telecommunications facilities. Councils often raise the argument that the carrier's interpretation of their maintenance and installations powers cannot be correct as the carriers, in the Council's view, assume ownership of what to that point had been a piece of Council's infrastructure. The Court found however that clause 47 of Schedule 3 of the Act provided that the pole remained in the ownership of Council notwithstanding that it is swapped out by the carrier. The Council continues to own it and is able to use that infrastructure in the normal cause, subject always of course to section 85ZJ of the *Crimes Act* (Cth) which places limitations on the Council's ability to interfere with certain infrastructure of telecommunications carrier placed on the top of the pole.

Ground 4

In relation to whether the mount and the antennas on the top of the new pole were low impact installations, the Court saw no reason to depart from the approach taken in the *Onkaparinga* case, noting that the literal approach to the Determination produced a result that is unlikely to be the intention of the drafters of the Determination. As a result, the Court confirmed that when installing antennas and mounts that have a vertical protrusion from the structure, the mount can extend from the top of the structure to the base of the antenna up to 3 metres and then the antenna can rise up to 2.8 metres on top of that.

Conclusion

It may put to bed the long standing concern of Councils as to the extent of carrier's maintenance powers, re-enforcing the apparent intention of the legislature to encourage the co-location of telecommunications infrastructure on existing structures to prevent the proliferation of new towers and poles (the installation of such towers and poles still, of course, being permitted provided local government approvals are obtained).

At the time of writing, Hurstville City Council has commenced an appeal in the Court of Appeal of the Supreme Court of New South Wales which is due to be heard in May 2003.

The views express in this article are those of the author and not necessarily those of the firm or its client.

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