Films and Computer Games) Act 1995 Cth which establishes a renamed Classification Board and National Classification Code. The scheme is given effect by complementary state and territory legislation.

33 Division 3 and Division 4 respectively, Schedule 5, *Broadcasting Services Act 1992*.

34 Clauses 8 and 3, Schedule 5 *Broadcasting Services Act 1992* and section 87 *Telecommunications Act 1997*.

35 Clause 3, Schedule 5, *Broadcasting Services Act 1992*.

36 Content which is prohibited or potentially prohibited is defined in Division 1, Schedule 5 of the *Broadcasting Services Act 1992* on the basis of how it has or would be classified by the Classification Board, established by the *Classification (Publications, Films and Computer Games Act 1995* (Cth)

37 Clause 91, Schedule 5, *Broadcasting Services Act 1992*. The High Court decision on 'subordinate distributors' in Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574 at 595 may have made this Clause unnecessary, at least in regards to those Internet Content Hosts who had no knowledge of the material made available for transmission.

38 Section 103C *Broadcasting Services Act 1992* which defines a channel provider as the person who 'assembles a package of programs'..., supplies a licensee with the package and 'carries on business in Australia... that involves the supply of the channel'. A similar concept of 'program supplier' was also introduced in 1999 amendments to the Act, (in the new Part 10A) referring to a person who supplies programming (primarily sport) to a broadcasting licensee.

39 Section 103ZB *Broadcasting Services Act 1992*.

40 Task Force Report, *Regulation of Computer Bulletin Board Systems*, 8 August 1994, at p. 12.

41 The options are summarised at Task Force Report, pp 5-9.

42 Australian Broadcasting Authority, *Investigation into the Content of On-line Services: Report to the Minister for Communications and the Arts*, 30 June 1996, Chapter 7. The recommendations were later adopted by the Minister in June 1997, although Schedule 5 of the Broadcasting Services Act 1992 does not follow the regulatory model suggested by the ABA report and adopted by the Minister.

43 Sections 10-11, *Interactive Gambling (Moratorium) Act 2000*. The definition of Gambling Service in Section 5 of the Act has four elements: the service is a gambling service (further defined), the service is provided in the course of carrying on business, the service is provided to customers using communications services including the internet or other listed carriage service, a broadcasting or other content service or a datacasting service, and the service is linked in a specified way to Australia. The Act specifically excludes a telephone betting service or, essentially, on-line trading. (Section 5(3) of the Act).

44 Section 14, *Interactive Gambling (Moratorium) Act 2000*

45 Senate Select Committee on Information Technologies, *Netbets: A Review of Online Gambling in Australia*, March 2000. Paragraphs 2.42-2.42

46 The State Ministers responsible for gambling formed the Australian Regulators Working Party which, in May 1997 released the *Draft Regulatory Code Model for New Forms of Interactive Home Gambling*, its Basic Principles included:

- Licensing of Service Providers after financial and probity checks
- Required player authentication - especially to screen minors
- Prohibition on credit betting
- Audits of provider accounts
- Reporting of transactions to AUSTRAC
- Prohibition on advertising unlicensed products
- Facility for players to specify certain protection measures
- contact information for problem gamblers
- privacy protection
- Industry Code of Conduct

47 See, for example, the *Unlawful Gambling Act 1998* (NSW), Section 8 which makes it an offence to bet on a race if, inter alia, the bet is made electronically by the Internet, subscription TV, or other online communications systems, unless the person is authorised in NSW or other states or territories to conduct totaliser betting, or the *Interactive Gambling (Player Protection) Act 1998 (Qld)*

which contemplates a cooperative scheme between Queensland and other jurisdictions for the regulation and control of interactive gambling, along the lines of the Draft Regulatory control model.

The views expressed in this article are those of the author.

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Local Councils Claw Back Powers Over Telcos

Shane Barber and Lisa Vanderwall examine the recent trend towards re-empowering local councils and the community over telecommunications rollouts.

The *Telecommunications Act 1997 (Cth)* ("Act") places limited obligations upon carriers in dealing with local councils in relation to the installation and use of telco infrastructure by a carrier.

This article will examine a recent trend towards re-empowering local councils and the community in this regard. The Australian Communications Industry Forum Draft Deployment of Radiocommunications Infrastructure Industry Code and recent Federal Court decision of Wilcox J in *Telstra Corporation Ltd. v. Hurstville City Council* [2000] FCA 1887 are given as examples of this new trend towards empowerment.

It is argued that while this means that local councils and the community may have a greater ability to influence a carrier's rollout decision, other effects such as increased costs must also be considered.

THE TELECOMMUNICATIONS ACT 1997 (CTH)

As a general principle, carriers installing telecommunications infrastructure must seek development and other approvals from the relevant local council. However, Schedule 3 to the Act, complemented by the *Telecommunications Code of Practice 1997* ("Code") and expanded upon by the *Telecommunications (Low Impact Facilities) Determination 1997* as amended in 1999 ("Determination") set up a regime pursuant to which "low impact" telecommunications facilities do not require such approval prior to installation.[1]

In addition the Act provides that, in certain circumstances, carriers do not have to seek local council approval when maintaining existing telecommunications facilities.[2]

The power to install low impact facilities and maintain certain existing telecommunications facilities without local council approval derives from clause 37 of Schedule 3 to the Act. Among other things clause 37 provides that a carrier may undertake such activities despite a law of a State or Territory about the powers and functions of a local government body.

The result of this scheme is that while the Act, the Determination and the Code require a carrier to inform owners and occupiers of land on which the carrier intends to install low impact telecommunications facilities, or maintain existing ones, the carrier is not required to either advise or consult with the local council or community in relation to a proposed installation.[3]

DRAFT DEPLOYMENT OF RADIOCOMMUNICATIONS INFRASTRUCTURE INDUSTRY CODE

In September 2000 the Australian *Communications Industry Forum* ("ACIF") issued the *Draft Deployment of Radiocommunications Infrastructure Industry Code* ("Draft Code").

According to the Explanatory Statement to the Draft Code ("Explanatory Statement"), the Draft Code is intended to supplement the present regulatory regime by clarifying the actions to be undertaken by Suppliers[4] particularly in relation to aspects of community consultation. This has been included to address the common perception in some communities that Suppliers when designing, building and operating a network do not properly account for the protection of people or the environment, irrespective of whether risk has been conclusively proven.[5]

The Draft Code appears principally aimed at allaying public concerns in relation to exposure from radio emissions from a carrier's mobile network infrastructure, despite the mandatory standard under section 162 of the *Radiocommunications Act 1992 (Cth)*. Among other things, one of the anticipated benefits of the Draft Code is that it seeks to minimise unnecessary and incidental radio emissions from each facility.[6]

According to the Explanatory Statement the Draft Code will:

- standardise the obligations on Suppliers by providing a set of clear guidelines so that Suppliers are made aware of their increased responsibilities;
- encourage all participants in the industry to responsibly exercise the powers and immunities described in current telecommunications legislation; and
- require Suppliers to notify Councils[7] about proposals for installation of all radiocommunications facilities prior to construction.[8]

At the time of writing, ACIF was considering public comments that had been received from the public comment phase of the Draft Code. ACIF intends to register the Draft Code under the provisions of section 117 of the Act. Following registration of the Code by the Australian Communications Authority ("ACA"), the obligations on Suppliers will become mandatory. The ACA may issue a written notice to a Supplier to direct them to comply with the Draft Code under section 121 of the Act and/or impose financial penalties for non-compliance.[9]

Notification to and consultation with Councils

The Draft Code outlines a consultation process with which carriers will be required to comply.[10] The principle of the consultation process is that a carrier:

> *"should make every effort to integrate consultation requirements in this Code with the requirements of local planning controls and State Planning and Environmental legislation. This initial consultation process provides Councils with the opportunity to examine and to engage in meaningful dialogue with [carriers] about their radiocommunications infrastructure proposals early in the planning process."*[11]

The Draft Code provides that carriers must notify Councils not only about any propobsed new facility under the carrier's control, but also about all proposed site alterations which extend the maximum site configuration. This includes any alteration to the maximum power, maximum usage or full antenna pan and tilt range. It also includes non-maintenance activities which change the site above that which was originally notified (although the Draft Code does not specify to whom it must have been notified) and which would create a major aesthetic difference to the site.[12]

Among other things a notification to a Council about a proposal must include:

- a written description including dimension plans;
- legislative context;
- proposed location;
- a declaration that the infrastructure which a carrier intends to install or alter complies with the ACA's mandatory standards for radio frequency electromagnetic radiation; and
- references to information on the effects of radio emissions on health.

Community Consultation

In addition to consulting with the relevant Council, the Draft Code requires carriers to undertake certain minimum consultation processes with affected communities at the locality where the carrier intends to install the telecommunications infrastructure, or change an existing site.[13]

In this regard the Draft Code goes further than the Act, the Code and the Determination in certain respects. For example, the Draft Code requires a carrier to place signs on the site including information on how to register comments with the carrier responsible for the installation or alteration.[14]

The Draft Code also provides that a Council may request additional consultation processes, over and above the minimum requirements specified in the Draft Code.[15] This may be in recognition of the fact that some installations of telecommunications infrastructure have been particularly contentious in the past. Delay in the form of additional consultation may, however, result in a carrier suffering increased costs. These increased costs may ultimately borne by the consumer.[16]

Arguably, the Draft Code is a victory for local councils, given among other things increased power to control the installation of telecommunications. The approach taken by a carrier to its responsibilities under the Draft Code may, however, impact significantly upon the extent of the benefit ultimately resulting to the public. The least cost solution would be for carriers to approach the Draft Code more as a positive obligation and less as an administrative hurdle to clear prior to installation of telecommunications infrastructure.

TELSTRA CORPORATION LTD. V. HURSTVILLE CITY COUNCIL

The decision of Wilcox J in *Telstra Corporation Ltd. v. Hurstville City Council* appears to have further strengthened the position of local councils. In broad terms, the decision confirmed the principle that telecommunications facilities are subject to local government levy rates and charges. The decision also highlighted the manner in which sections of the *Telecommunications Act 1991* ("1991 Act") and the Act ought be read with the *Local Government Act 1993 (NSW)* and the Constitution.

Exemption Rejection

The Court rejected the argument that telecommunications facilities were exempt from State levy requirements under the Act and upheld the submission by local councils that telecommunications facilities constructed under the 1991 Act were never intended to be exempt from the effects of all State law. The Court confirmed that carriers were exempt from such laws only in relation to "specified exempt activities", such as construction, maintenance and repair of facilities.[17]

Discrimination against carriers undecided

The Court, however, expressly declined to rule on whether the application of levies and charges was in breach of the non-discriminatory principle in the Act (ie that State and Territory laws must not discriminate against carriers) as that provision did not express any criteria as to what differences are discriminatory.[18] As examples, the Court explored several ways that discrimination could occur, including distinguishing between:

- underground and overhead cables;
- infrastructure that had an environmental impact or otherwise;
- infrastructure providing essential services (such as water, sewerage and electricity) and non-essential services (such as telecommunications cables providing telephone and internet services); and
- privately owned commercial entities and publicly owned entities.[19]

In the end, the Court concluded that it did not have the power to interpret the types of discrimination the legislation intended to address, and therefore left this issue undecided.[20]

Arguably, the failure of the Court to express the criteria upon which to measure discrimination and the consequent uncertainty this creates affords local councils an opportunity to discriminate against carriers in other ways.

Occupation of land confirmed

Finally, Wilcox J confirmed that the non-discriminatory provisions of the Act were not invalid as effecting an acquisition of property contrary to the "just terms" requirement of section 51(xxxi) of the Constitution. The Court found that clause 44(1) of Schedule 3 to the Act assumes a right to occupy land, rather than acquire it, and is therefore not regulated by section 51(xxxi) of the Constitution.[21]

CONCLUSION

Both the decision in *Telstra Corporation Ltd. v. Hurstville City Council* and the Draft Code are examples of a shift in power towards local councils. Although the full impact of this shift may not be apparent for some time, the approach taken by carriers and local councils to their obligations may determine the extent of the shift.

If the parties approach their obligations in a non-genuine way this may filter through as an additional cost to the community. For example, local councils may use the Draft Code to delay a proposed installation or change to telecommunication facilities and impose additional costs on a carrier's infrastructure in the name of their constituents. Rather than a carrier absorbing these additional costs, however, these may ultimately be borne by the consumer in the form of additional charges to be paid to a carrier.

The Explanatory Statement anticipates the prospect that consumers may ultimately bear certain additional costs consequent upon implementation of the Draft Code. The issue then becomes whether such cost is outweighed by any potential benefit to the community from the implementation of the Draft Code.

Of course, if local councils and carriers take the opportunity to work together in matters affected by the Draft Code, there may be less additional cost to consumers. Arguably, this will be more difficult for carriers, who may find it difficult to both provide sufficient network coverage for their customers and control the costs of compliance with the additional obligations placed on them by *Telstra Corporation Ltd. v. Hurstville City Council* and the Draft Code.

1 See clause 6 of Schedule 3, *Telecommunications Act* 1997 Cth

2 See clause 7 of Schedule 3, *Telecommunications Act* 1997 Cth

3 In relation to the obligation to notify an owner or occupier, see cl.17 of Schedule 3, *Telecommunications Act* 1997 Cth

4 The term "Supplier" is defined by the Draft Code as, "a Carrier, Carriage Service Provider or Content Service Provider, as defined in the Telecommunications Act 1997, providing telecommunications products or services. Specifically the term covers organisations and their Dealers and Agents responsible for building infrastructure."

5 See the Explanatory Statement

6 See for example, the Explanatory Statement

7 The term "Council" is defined by the Draft Code to mean, "the authority in a local area responsible for land use planning decisions. This is usually the Local Government Authority although this may vary in places such as Territories."

8 See the Explanatory Statement

9 See the Explanatory Statement

10 See Section 6 of the Draft Code

11 Draft Code at para 6.1.1

12 Draft Code at para 6.1.3

13 Draft Code at para 6.2

14 See para 6.2(f) of the Draft Code

15 See para 6.2 of the Draft Code

16 See for example the discussion of "Anticipated Costs to Industry" and "Anticipated Costs to Consumers and the Public" in the Explanatory Statement

17 [2000] FCA 1887 at paras 102- 106

18 [2000] FCA 1887 at paras 131- 160 especially paras 150, 159

19 [2000] FCA 1887 at paras 143- 149

20 [2000] FCA 1887 at paras 131- 160 especially para 159

21 [2000] FCA 1887 at paras 199- 203

The views expressed in this article are those of the authors and not necessarily those of the firm or its clients.

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