harm and distress caused. As the new law is unrelated to the *Privacy Act*, the defences and exemptions in that Act do not apply, although a defence of public interest may be available.

Also, under Australia's current employment laws, the types of conduct that Judge Skoien found to constitute invasion of privacy, are dealt with under equal opportunity legislation (harassment and discrimination) and occupational health and safety legislation (bullying).

It is unlikely that an employer would be found vicariously liable for the tort of invasion of privacy, as such behaviour is unlikely to be in the ordinary course of conduct as an employee. However, Australian employers should consider their general duty under the law of negligence to prevent reasonably foreseeable harm. An employer who had reason to suspect that an employee was engaged in a highly offensive invasion of privacy that related to the workplace in some way, and took no steps to prevent it would risk incurring liability in negligence, as well as under equal opportunity and occupational health and safety legislation.

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1 16 June 2003
2 [2003] QDC 151
3 (2001) 208 CLR 199

Telecommunications Networks – Carriers' Powers Again Under Review

Shane Barber reviews the results of a recent appeal brought by Hurstville City Council against the Land and Environment Court of NSW's confirmation of telecommunications carriers' powers

In the previous edition of this bulletin, we examined a recent decision of the New South Wales Land and Environment Court in the case of *Hurstville City Council v Hutchison 3G Australia Pty Limited* [2003] NSWLEC 52. In that case, the Land and Environment Court confirmed the powers of telecommunications carriers to maintain and install their networks using certain powers and immunities in Schedule 3 of the *Telecommunications Act 1997* (**Act**).

Hurstville City Council (**Council**) has since brought an appeal in the New South Wales Court of Appeal against the judgment of the Land and Environment Court. On 8 July 2003, the Court of Appeal delivered a judgment which effectively reversed the decision of the Land and Environment Court.[1]

The issue of telecommunications carriers' powers to maintain and install networks has been the subject of much recent contention. In order to clarify these powers, Hutchison 3G Australia Pty Limited (**H3GA**) has applied to the High Court of Australia for special leave to appeal. The High Court has granted expedition to consider this application in early October 2003.

BACKGROUND

As noted in the previous edition of this bulletin, telecommunications carriers are granted certain powers and immunities under:

- Schedule 3 of the Act; and
- the associated *Telecommunications Code of Practice 1997* (**Code**); and
- the *Telecommunications (Low-Impact Facilities) Determination 1997* (**Determination**).

The combined effect of the Act, Code and Determination is to give telecommunications carriers certain powers to:

- inspect land;
- install certain facilities; and
- maintain certain facilities.

The expression "facilities" is defined in section 7 of the Act to mean:

> *"(a) any part of the infrastructure of a telecommunications network; or*
>
> *(b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network."*

Provided that the strict requirements of the Act, Code and Determination are complied with by carriers, clause 37 of Schedule 3 of the Act will serve to exempt them from complying with many State and Territory laws when rolling out their networks.

In the present case, H3GA had examined several sites in the Oatley area of NSW for a suitable location to install infrastructure to be used as a part of its proposed 3G network. H3GA determined that a sports light pole located in Oatley Park would be the most appropriate location for some panel antennas and a parabolic dish to be placed atop the pole. This pole was owned by the Council.

Using the powers and immunities granted under Schedule 3 of the Act, H3GA proposed to carry out two activities. The first was to "maintain" the existing pole in the Park by making it strong enough to support the infrastructure at the top of the pole. This involved removing the existing pole and replacing it with one that was of the same height and apparent volume. That pole would remain owned by the Council. H3GA was of the view that this "maintenance activity" complied with clause 7 of Schedule 3 of the Act, which expressly permits the removal and replacement of a pole in certain circumstances.

The second activity, which was not in contention in the Court of Appeal, was the installation of "low impact facilities" (as defined in the Determination) at the top of the pole, in addition to a low impact equipment shelter in close proximity to the pole.

Council did not lodge any formal objection, as provided for by the Code, to the statutory notice issued by H3GA to Council regarding these activities. Instead, Council removed the pole in what the Court of Appeal considered as an attempt to frustrate H3GA's ability to undertake the maintenance activity.

H3GA continued with the activity and undertook to replace the pole anyway. This prompted the Council to bring an action in the New South Wales Land and Environment Court in order to prevent the activity being completed.

SUMMARY OF LAND AND ENVIRONMENT COURT DECISION

Pain J in the New South Wales Land and Environment Court essentially made four findings being:

- Clause 37 of Schedule 3 of the Act was wide enough to ensure that any local environment plan of the Council that sought to regulate the activities of H3GA would not be effective. Rather, the activities of H3GA will be regulated by the Commonwealth regime set out in the Act, Code and the Determination.
- The notice given by H3GA to Council complied in all respects with the requirements of the Act, Code and the Determination, contrary to the assertions of Council that it contained inadequacies as to the level of detail. This issue was not further contested by the Council in the Court of Appeal.
- When applying the maintenance power found in clause 7 of Schedule 3 of the Act, the Court found that the first pre-requisite, that the pole had to be a "facility" for the purposes of the Act, was met. Importantly, the Court found that the pole was a pole "for use" (albeit not "used") in or in connection with the telecommunications network. H3GA argued that it had, after detailed analysis, chosen the pole as the platform for the installation of its low impact facilities, and as a result it had became "for use". The Court held that H3GA's interpretation of the expression "for use" was preferred as a wide range of structures or things 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 that are not already used by carriers. Carriers would therefore need to maintain those existing structures before they can undertake some of their installation works. When H3GA provided the notices required by the Act and the Code to the Council, it manifested its intention to use Council's existing pole in its telecommunications network and therefore satisfied the requirements of the definition of "facility" in the Act.
- Finally, in another issue which was not pursued by the Council in the Court of Appeal, the Court confirmed that the low impact installations to be placed on top of the pole met the requirements of the Determination, particularly in relation to the extent of protrusion from the existing pole.

COURT OF APPEAL DECISION

(a) Effect of Council's Removal of the Pole

The Court of Appeal agreed with the New South Wales Land and Environment Court that Council's removal of the pole did not have any impact per se on H3GA's maintenance activities. Indeed the Court noted:

> *"In all likelihood, it probably also follows that, if the respondent* [H3GA] *had by the notice duly embarked on the activities formally notified to the Council, the Council was not entitled to defeat or frustrate its endeavours by pulling down the original pole – as it did on 30 January 2003... "*

(b) The "for use" Argument

The Court noted that H3GA's "maintenance" power could not be invoked unless and until the carrier had decided to treat a particular thing, in this case Council's existing pole, as a facility in its telecommunications networks. H3GA contended that the notice they had issued to the Council demonstrated their intention in relation to the existing pole. It was also argued that H3GA had sufficiently indicated its intention in relation to the existing pole before the notice was served. As a result, H3GA argued it was clear that the pole was "for use" in relation to a telecommunications network.

It was argued that it did not matter that H3GA did not own the pole or have any contractual or other rights in relation to it. Indeed, this may well be a key reason why the legislature gave telecommunications carriers this maintenance power: to ensure the integrity of telecommunications network where the owner of relevant supporting infrastructure did not provide its consent to such maintenance.

The Court of Appeal rejected the appropriation argument. In doing so, the Court expressed the view that deeming a supporting structure that holds up the actual telecommunications transmission equipment to be a "facility" for the purposes of the Act was not necessary. If this was permitted, it would be possible for telecommunications carriers to "*appropriate" items such as "a bridge, a steeple, building or possibly even a tree"*. This concern appears to have been a significant motivation behind that Court's decision to overturn the decision of the Land and Environment Court.

It appears that in reaching their conclusion, the Court has not invoked the *ejusdem generis* rules to interpret the statutory powers. That is, the Court did not look at the characteristics of the other items listed in the definition of "facility" in section 7 of the Act. None of the other items reflect the extreme examples that were of concern to the Court.

Similarly, the Court of Appeal appeared unconvinced by H3GA's argument that Schedule 3 of the Act contained a number of safeguards, checks and balances that would serve to limit a carrier's powers to remove and replace certain things such as the Sydney Harbour Bridge. An example of this was the obligation of a carrier to pay compensation for financial loss or damage in relation to its maintenance activities.

(c) Tortious Act

In examining the maintenance power contained in clause 7 of Schedule 3 of the Act more closely, the Court noted that carriers were given the core right to "*at any time maintain a facility"*. The Court observed that this right should only be construed as operating in situations where the carrier's maintenance of the original facility would not constitute a trespass or other wrong. This was because it could not find a clearly expressed authority in unmistakable or unambiguous language to engage in what would otherwise be a tortious conduct.

A problem that arises from this aspect of the decision is that the Court pointed to the installation power of carriers contained in clause 6 of Schedule 3 of the Act and contended that that clause did contained explicit powers to commit what would otherwise be a trespass. However, the relevant wording of clauses 6 and 7 is essentially the same and it is difficult to determine exactly why the Court came to this conclusion.

(d) Ambiguity of the Definition of Facility

The Court noted that H3GA was relying on part b of the definition of "facility" which states that a facility means any:

> *"pole or other structure or thing used, or for use, in or in connection with a telecommunications network."*

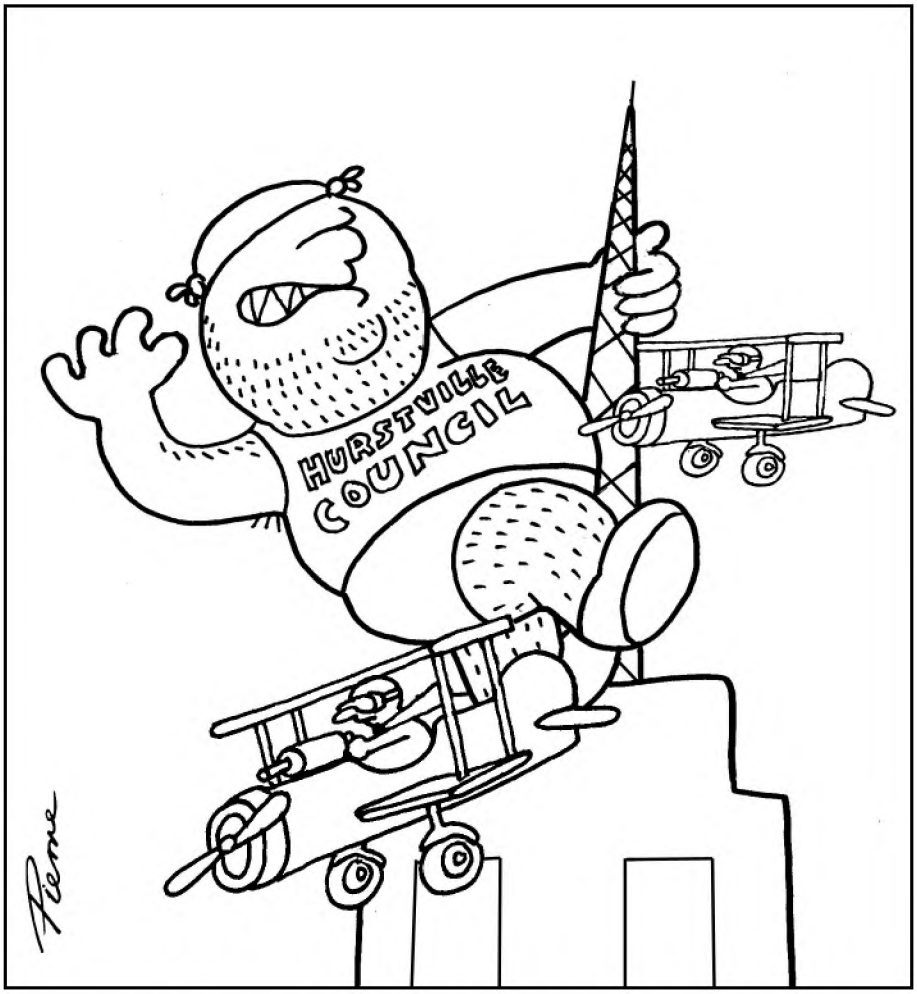
It was held by the Court of Appeal that the wording of the definition did not evidence any contrary intention of the legislature to this expansive view, nor was there any real argument to read down the definition itself. However, the Court maintained that when applying the definition to clause 7 of Schedule 3 of the Act, clause 7 should be read down. The crux of the Court's decision was:

> *It makes perfect sense to say that the Harbour Bridge remains a bridge and does not itself become a facility even though facilities, low impact or otherwise, might be installed upon or affixed to it. Likewise with existing buildings erected as residences etc. but which have facilities attached to their rooftop. The definition of "facility" can operate to its full literal extent in such situations without turning the bridge or building into part of the facility itself. Part b of the definition makes perfect sense if construed as being confined to any line, equipment etc. or thing that is purpose built or dedicated by its inherent nature for use in or in connection with a telecommunications network or which is actually used accordingly. It is not necessary to treat an existing (non-purpose built) pole, structure or thing upon which a "facility" is placed as the facility itself."*

In the Court's opinion, to do so would allow a carrier to, by indirect means, achieve something that it couldn't achieve under the installation power contained in clause 6 of Schedule 3 of the Act, given that installation of towers and poles were expressly prohibited by that clause.

ISSUES ARISING FROM THE COURT OF APPEAL'S DECISION

The Court of Appeal's decision is subject to an expedited application for special leave to appeal which will be heard by the High Court of Australia in early October 2003.



The concerns raised by carriers regarding the decision of the Court of Appeal have attracted considerable media coverage and can be summarised as follows:

- The Court does not appear to have considered *ejusdem generis* arguments when considering extreme hypothetical examples of infrastructure which may be removed and replaced by carriers under the maintenance power.
- The Court does not appear to have taken into account the need for carriers, once infrastructure has (in accordance with the legislature's policy contained in the Act) being located on the infrastructure of others, to be able to maintain that infrastructure sometimes without the consent of the owner of that infrastructure.
- The Court does not appear to have placed weight on the fact that the legislature expressly provided for the removal and replacement of a pole as a maintenance activity, whatever the colloquial understanding of the word "maintenance". As a result, the Court of Appeal was unnecessarily concerned that if installation of a new tower is not permitted then removal and replacement as a maintenance activity should not also be permitted.
- The Court has not given any weight to the legislature's significant endeavours to create its own limitations on the powers and immunities of carriers contained in Schedule 3 of the Act and has sought to create additional limitations of its own.

The outcome in the High Court is keenly awaited by all of the stakeholders in this issue.

Shane Barber is a partner in the Sydney office of corporate and communications law firm, Truman Hoyle. Truman Hoyle acts for a number of telecommunications carriers, including Hutchison 3G Australia Pty Limited in relation to this issue.

1 *Hurstville City Council v Hutchison 3G Australia Pty Ltd [2003] NSWCA 179*