

David v Goliath – The Slingshot is Loaded. Decision of the High Court on the Special Leave Application.

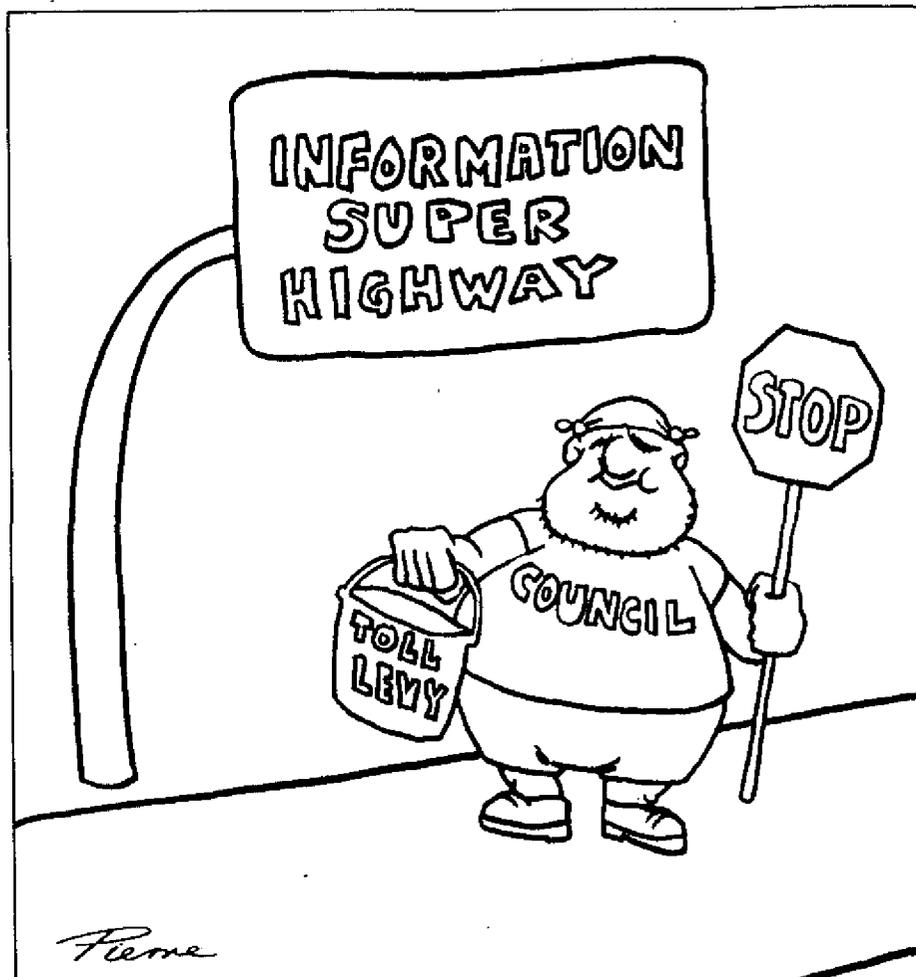
Angela Brewer updates the progress of this watershed case regarding telecommunications infrastructure.

In March 2003, the High Court determined to grant special leave to the New South Wales and Victorian Councils to appeal against the Full Federal Court's finding that section 611 discriminates against telecommunications carriers. The granting of special leave is significant as the case involves issues of public importance including the question of construction of the interrelationship between Commonwealth and State laws, the manner in which section 109 of the Constitution operates, and the use of public lands in New South Wales and Victoria.

In April 2002 the Full Federal Court delivered its decision reversing the earlier decision of Justice Wilcox, who had found that telecommunications carriers were subject to local government charges under Section 611 of the *Local Government Act 1993*, with respect to telecommunications infrastructure they had installed over and under public land. The judgment of Justice Wilcox was seen as a great success for the Councils in upholding charges and rates in respect of cables by Councils throughout New South Wales and Victoria.

The Full Federal Court found in favour of the carriers on only one ground of appeal which relates to clause 44 of Schedule 3 of the *Telecommunications Act 1997*. The Full Federal Court held that Section 611, to the extent that it authorised Councils to levy and recover charges in respect of cables erected or placed on, under or over a public place, was discriminatory and therefore invalid pursuant to Clause 109 of the Constitution. The Court relied upon a dissenting judgment of Justice Stevens in a United States Supreme Court decision of *Department of Revenue of Oregon v ACF Industries* 501US 332 (1994) to support its finding.

The Full Federal Court declined to determine the question of whether



charges under Section 611 were an excise, contrary to Section 90 of the Constitution. In relation to the question of whether the charges were levied by the Councils for an improper or extraneous purpose, the Full Federal Court stated that they agreed with Justice Wilcox, finding that the purposes alleged to be extraneous were not in fact extraneous.

The High Court will now determine whether the Full Federal Court erred in finding that Section 611 of the *Local Government Act 1993* (New South Wales), to the extent that it authorises the councils to levy and recover from the carriers charges in respect of the possession, occupation and enjoyment of telecommunications cables erected on,

under or over a public place, discriminates or has the effect (whether direct or indirect) of discriminating against a carrier or carriers generally, within Clause 44(1) of Schedule 3 to the *Telecommunications Act 1997* (Commonwealth) and is to that extent inconsistent with Clause 44(1) and invalid pursuant to Section 109 of the Constitution.

We anticipate this matter will be determined by the High Court later this year.

Angela Brewer is a Solicitor at the Sydney Office at Deacons who is acting for all the NSW local councils in the proceedings currently before the High Court.