

The NSW Telecommunications Act 1991

Michael Carr reviews some of the issues raised by the enactment of this legislation

On 2 March 1992 the New South Wales Government *Telecommunications Act 1991* ("the NSW Act") was proclaimed, and represents the first occasion on which a State Government has legislated in the telecommunications field. The NSW Act has been the focus of a debate concerning a number of legal issues, not the least of which is the constitutional authority of a State Government in the telecommunications field.

A major issue concerns the authority of the New South Wales Government to legislate for the vesting of "designated land" surrounding the infrastructure of the Government Telecommunications Network ("the Network") in the New South Wales Government Telecommunications Authority ("Telco") pursuant to the NSW Act. The NSW Act, through the concept of "designated" land is a skilful attempt to establish a private network within which persons other than carriers licensed under the Commonwealth *Telecommunications Act 1991* ("the Commonwealth Act") may install and maintain line links between the properties forming part of the Network.

This article briefly reviews the relevant provisions of the Commonwealth Act, as this legislation establishes and governs the legal environment of the NSW Act and also to assess the consistency or otherwise of the provisions of the NSW Act with the Commonwealth Act. This assessment is crucial in considering the issue of the constitutional validity of the NSW Act, which is considered later in this article.

Relevant provisions of the Commonwealth Act

The Commonwealth Act replaced the *Telecommunications Act 1989* and introduces a new regime governing the provision of telecommunications services in Australia. The Commonwealth Act creates the basis for network competition through a statutory scheme for licensing "general carriers" who are to be the primary suppliers of Australia's telecommunications network and services. The Commonwealth Act also gives certain reserved rights to each class of carrier,

subject to certain exceptions. The carriers' reservation is in terms of the provision of cable or wire infrastructure — "the line links" which connect one "distinct place" with another, and the provision of defined "Basic Carriage Services" (section 174 of the Commonwealth Act).

The concept of "distinct places"

Division 3 of Part 2 establishes rules for interpreting the circumstances where places are "distinct". The concept of "distinct places" is of central importance to the reservation to the general carriers of the right to install and maintain line links in Section 90. Subject to some exceptions (noted below) only the general carriers can install and maintain line links between distinct places. Within distinct places, the installation of telecommunications facilities is open to competition.

Section 12 sets out the basic rules for determining what are distinct places. In essence, places are distinct unless they are in:

1. the same property;
2. contiguous properties for which either:
 - the same person or persons are the user; or
 - there is a ministerial determination in force;
3. the same prescribed external territory.

Under section 12(3) places are in the same area if they are situated in properties forming part of a combined area (as defined by section 14) and either the same person or persons are the principal user (see section 15) of all the properties or the combined area is within a ministerial determination under section 16.

Section 14 establishes rules for interpreting when properties form part of a combined area for the purposes of the rule in section 12(3). Section 14(1) provides that two contiguous properties (ie. they touch along a common boundary or at a common point) form a combined area. Section 14(2) provides that where a property is contiguous with another property which is part of a combined area the first property and the combined area together form a combined area. Section 14(3) makes it clear that section 14(2) is recursive and can apply through repeated applications of the clause.

Reserved rights

Part 6, Division 2 of the Commonwealth Act creates the reserved rights of the general carriers and the mobile carriers. Section 90 reserves to the general carriers the right to install and maintain line links between distinct places within Australia.

The reservation takes the form of a prohibition on a person installing or maintaining reserved line links (section 90(1)) and a provision enabling a carrier to install or maintain such line links (section 90(2)).

"Reserved Line Link" is defined in section 24 as a line link between distinct places within Australia or a line link between a place within Australia and a place outside Australia.

This reservation to the general carriers of the right to install and maintain line links is the fundamental reservation in the Commonwealth Act.

The reservation is created purely in "facilities" terms. The line links reservation is intended to provide a necessary and sufficient basis to provide a workable facilities reservation. As already noted above, however, there is no reservation to the general carriers of the right to install line links that are within the one distinct place. A privately owned and operated network connecting the individual properties in the common area can be installed.

Reserved rights exceptions

Part 6, Division 3 of the Commonwealth Act sets out a general exception to the reserved rights of the general carriers and mobile carriers. In particular, section 98 enables the various State and Territory transport authorities to install and maintain reserved line links for the purposes of carrying communications necessary or desirable for train services, bus or other road services or tram services for which the transport authority is responsible.

The Network comprises, in part, what the New South Wales State Government refers to as "State Owned Infrastructure"

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("SOI"). The SOI includes basic telecommunication systems currently owned by the New South Wales Government, including microwave, coaxial cable and fibre optic systems. Some of these systems provide telecommunication services to agencies under an exemption of the *Telecommunications Act 1989*. The 1989 Act exemption has been renewed in section 98, noted above.

A crucial issue for the future management and development of the Network is the extent to which the facilities and services to be developed, maintained and operated will be able to utilise the existing SOI, which is in turn dependent on the maintenance of the section 98 exemption noted above.

The attitude and response of the Commonwealth Government to the creation of the largest private network in Australia will determine whether the section 98 exemption will be maintained in NSW.

The NSW Act

The NSW Act represents the first significant attempt to regulate the telecommunications network of an Australian State Government and its agencies, and to provide for common carriage of the communications of these agencies.

The NSW Act establishes Telco and vests the integrated Network and its control and management of Telco as agent for the New South Wales Government. The NSW Act directly challenges the reach of the Commonwealth Act in one crucial area, namely, the purported establishment of the Network boundary by use of the concept of "designated land".

The concept of "designated land"

Division 2 of the NSW Act provides for the vesting of "designated land" surrounding the infrastructure of the Network in Telco. The Division provides for a single parcel of freehold land in which the infrastructure of the Network is contained.

Section 13 defines "designated land" as the space occupied by the lines and equipment connection lines (and their coverings) of the infrastructure, together with an additional surrounding space of 300mm (or other distance not exceeding 1 metre as specified). Section 14 vests the designated land in Telco and constitutes a single freehold title to the land. Section 15 provides that the vested land may

change as the position of the lines change. Section 18 provides that the vesting of the designated land is not affected by (and does not affect) the change in ownership of the surrounding land. In particular, the vendor in any conveyance is not required to disclose the existence of designated land.

Clearly, when these provisions are read in the context of the Commonwealth Act's concept of "distinct place", the NSW Act represents an attempt to establish, using the definition of combined area (see section 14 of the Commonwealth Act), a single "distinct place" for the entire Network. Accordingly, the carriers under the Commonwealth Act would not have exclusive rights with respect to installing and maintaining line links within "the distinct place" of the Network.

The concept of "designated land" thus represents a direct challenge to reserved rights of the carriers under sections 90 and 92 of the Commonwealth Act, while at the same time purporting to operate within the network boundary framework of the Commonwealth Act.

In fact, Section 6(2) of the NSW Act provides that: "the boundaries of a telecommunications network are to be determined in accordance with Division 2 of Part 2 of the *Telecommunications Act 1991* of the Commonwealth".

Commonwealth constitutional powers

A major question to be considered with respect to the NSW Act, is whether or not the New South Wales Government has the relevant constitutional authority to enact the NSW Act with respect to a subject which to date has been governed solely by the provisions of Commonwealth legislation pursuant to the *Commonwealth Constitution*.

Section 51(v) of the *Commonwealth Constitution* ("the Constitution") gives the Commonwealth Parliament power to pass laws with respect to:

"postal, telegraphic, telephonic, and other like services"

It has been suggested that the Commonwealth has "covered the field" of telecommunications and any State laws on the same topic would be invalid. However, such a wide ranging statement may not be fully justified when regard is had to section 107 of the Constitution which provides:

"Every power of the Parliament of a Colony which has become or becomes a State, shall unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the

Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be"

Section 51(v) powers were not expressly exclusively vested in the Commonwealth and therefore I suggest that State legislation in this area would not be automatically invalid. Accordingly, any perceived conflict between State and Commonwealth legislation purporting to regulate the same area is governed by Section 109 of the Constitution which provides that:

"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

However, powers found in a Commonwealth and State law do not necessarily spell inconsistency. For example, Federal and State law are both concerned with licensing systems for air navigation, but the Commonwealth law is directed to safety, regularity and efficiency, while the State law is directed to public transport needs.

A full analysis of the constitutional issues arising from this issue is beyond the scope of this article. However, my preliminary view is that the NSW Act is not prima facie inconsistent with the Commonwealth Act. The NSW Act purports to manage and regulate the Network, being a private network within which the reserved right of the carriers under the Commonwealth Act are excluded. This exclusion however is carefully drafted by reference to the boundary definitions of the Commonwealth Act. Even if this is so, it would be open to the Commonwealth Government to enact legislation to render the NSW Act inoperative. The telecommunications industry should be aware of this possibility, and the attendant constitutional and political issues.

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