

Small Noise, Big Trouble

Shane Barber examines the recent decision in *City of Mitcham v Hutchison 3G Australia Pty Ltd* and examines its potential impact on the government's telecommunications network policies

A recent decision of the Supreme Court of South Australia ("Court") in relation to the manner in which telecommunications carriers rollout their networks is, on first blush, a victory for opponents of those networks in the community, but on closer analysis is potentially a significant self inflicted wound for those groups.

The Court's decision may inadvertently have limited the powers and immunities enjoyed by carriers in rolling out their telecommunications network by removing the option open to carriers of co-locating their infrastructure on existing facilities and poles. Perversely, this may lead to a wider proliferation of stand alone mobile telecommunications infrastructure if the decision is not overturned by the High Court of Australia.

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In July 2005, the High Court granted Hutchison 3G Australia Pty Limited ("H3GA"), the relevant carrier, special leave to appeal the decision. No doubt, the Commonwealth Government will be eagerly watching the decision of the High Court to consider the considerable impact the case may have on the Government's long standing policy of encouraging co-location of infrastructure and avoiding the proliferation of a stand alone infrastructure.

Background

On 11 March 2005, the Court delivered its judgment in *City of Mitcham v Hutchison 3G Australia Pty Limited and Ors [2005] SASC 78* ("Mitcham Case"). The bench in the Mitcham Case comprised their Honours Perry J and Gray J, forming the majority, and Bleby J.

The Mitcham Case concerned matters arising from the installation by H3GA of certain telecommunications facilities on and adjacent to "stobie poles" owned and operated by the public utility ETSA at five locations

within the City of Mitcham in South Australia. The installations were undertaken as part of H3GA's third generation mobile telecommunications network rollout. While their Honours found in relation to a number of matters, the majority made determinations regarding the impact of noise from an element of those installations, being domestic style air-conditioning units on the equipment shelters installed by H3GA adjacent to those stobie poles. As discussed in this article, the Court's decision appears to be at odds with the Commonwealth Government policy which encourages carriers to co-locate their facilities with other carriers or public utilities.

Relevant Regulation

Pursuant to clause 6 of Schedule 3 of the *Telecommunications Act 1997* ("Act") a carrier may undertake the installation of a facility if, among other things, the facility is a "low impact" facility. The Mitcham Case principally concerned whether H3GA's installation was a low impact facility.

Pursuant to clause 37 of Schedule 3 of the Act, a carrier may undertake the installation of a low impact facility pursuant to clause 6 of Schedule 3 of the Act despite a law of a State or Territory regarding a number of matters, including:

- the assessment of the environmental effects of engaging in the activity;
- town planning;
- the planning, design, siting, construction, alteration or removal of a structure;
- the powers and functions of a local government body; and
- the use of land.

The *Telecommunications (Low Impact Facility) Determination, 1997* ("Determination") establishes the types of installations which may be considered "low impact" for the purposes of clause 6 of Schedule 3 to the Act.

Item 2 of Part 7 of the Schedule to the Determination provides that, *prima facie*, certain facilities of a type commonly installed by mobile carriers will only be considered low impact in residential and commercial areas in circumstances where they are co-located on or within an "original facility" or "public utility structure" where, among other things,

- (f) *the levels of noise that are likely to result from the operation of the co-located facilities are less than or equal to the levels of noise that resulted from operation of the original facility or the public utility structure.*

Importantly, this noise qualification does not apply if those low impact facilities are not being co-located, but otherwise installed in residential and commercial areas.

For the purpose of the Determination, an "original facility" means an original structure that is currently used, or intended to be used, for connection to a telecommunications network where the original structure was in place on 17 August 1999, or installed after that date by means other than in accordance with Item 7 of the Schedule to the Determination.

A "public utility structure" means a structure used, or for use, by a public utility for the provision to the public of:

- reticulated products or services, such as electricity, gas, water, sewerage or drainage; or
- carriage services (other than carriage services supplied by a carriage service provider); or
- transport services; or
- a product or service of a similar kind.

The Minister for Communications, Information Technology and the Arts ("Minister") has previously made the *Telecommunications Code of Practice, 1997* ("Code") which provides further rights and obligations of carriers in relation to the exercise of their powers and immunities pursuant to Schedule 3 of the Act. Relevantly, the Minister has expressed Commonwealth Government policy at clause 4.13 of the Code as follows:

- "4.13 (1) Before engaging in a low impact facility activity, a carrier*

must take all reasonable steps to find out whether any of the following things (existing facilities) is available for the activity:

a) cabling, conduits or other facilities of the carrier or another carrier; or

(b) a facility of a public utility; or

(c) an easement attaching to land for a public purpose.

(2) A carrier must take all reasonable steps to use the existing facility for the activity."

Correspondingly, in Schedule 1 to the Act, the Commonwealth Government has further expressed its policy intention in relation to co-location by requiring that incumbent carriers:

- must provide other carriers with access to facilities for the purpose of enabling the other carriers to provide competitive facilities and competitive carriage services or to establish their own facilities; and
- must provide other carriers with access to:
 - telecommunications transmission towers;
 - the sites of telecommunications transmission towers; and
 - underground facilities that are designed to hold lines.

In accordance with Commonwealth Government policy, mobile telecommunications carriers have co-located a significant proportion of their mobile facilities on "original facilities" or "public utility structures" using the powers granted to them pursuant to the regime described above. Many of these have been located in residential or commercial areas and will therefore be directly impacted by the decision in the Mitcham Case.

Facts

In the circumstances the subject of the Mitcham Case, H3GA endeavoured to co-locate its facilities on ETSAs stobie poles throughout the City of Mitcham pursuant to the regime described above. For the purposes of Item 2 of Part 7 of the Schedule to the Determination, it was accepted that the antennas and dishes attached to the stobie poles were facilities mentioned in Part 1 of the Schedule and that the stobie poles were a public utility structure, prima facie satisfying the requirements of the co-location regime. There was also no evidence that the antennas and dishes located on the stobie poles emitted any noise.

However, in relation to H3GA's installation at one site within the City of Mitcham Council



argued that the level of noise emitted from a domestic style air-conditioning unit installed in an equipment shelter which is part of H3GA's installation at that site leads to the conclusion that H3GA's entire installation at that site fails to satisfy the requirements of paragraph (f) of Item 2 of Part 7 of the Schedule to the Determination, in that the level of noise emitted is not "less than or equal to the level of noise that resulted from the operation of the ... public utility structure." Council argued that the entire installation could not be considered low-impact and H3GA was therefore required to obtain relevant State or local government development consent before proceeding.

Regulatory Issues Arising

In his judgment in the Mitcham Case, Perry J (with whom Gray J concurred) relevantly held two matters:

- First, His Honour held that the Determination should be construed such that each element which is separately listed in the Schedule to the Determination and which was installed by H3GA at the co-located site may not be considered separately, but rather all of the elements together must be considered as the one facility when applying the provisions of Item 2 of Part 7 of the Schedule to the Determination.

- Second, His Honour held that, if all of the elements of the installation are considered as the one facility, then even though only one of those elements is actually co-located on ETSAs pole (the antennas), for the purpose of applying Item 2 of Part 7 the level of noise emanating from the air-conditioning unit on the equipment shelter located separately to those co-located elements should be considered when determining the level of noise arising from the facility. Any noise, no matter how minor, emanating from that domestic style air-conditioning unit must necessarily be in addition to whatever noise previously resulted from the operation of the public utility structure, with the result that H3GA does not meet the requirements of Item 2 of Part 7 of the Schedule to the Determination.

Impact on Mobile Telecommunications Carriers and Consumers

In the event that the majority judgment in the Mitcham Case is not overturned, there are a number of impacts on mobile telecommunications carriers, communities and consumers as follows:

- To the extent that the equipment shelters of mobile telecommunications carriers are required to have air-conditioning for the purposes of protecting the equipment contained within those shelters (which is the case for all but infrequently used microcell transceivers and repeaters), perversely carriers will be able to use their powers and immunities to install such facilities (if they are otherwise low-impact) in non co-location sites in residential, commercial, industrial and rural areas but not co-location sites in residential and commercial areas. For all such co-location sites development consent from the relevant State or local authority is likely to be required. This is hardly an ideal outcome for the community or the carrier.
- Carriers are then encouraged, due to the efficiencies created by the use of their powers and immunities contained in Schedule 3 to the Act, to actively pursue a proliferation of stand-alone sites in residential and commercial areas rather than co-location sites. In this regard, the planned deployment of new mobile facilities is heavily weighted to low impact facilities, including co-location in residential and commercial

potential for those delays to be considerable given that substantial negotiations with both local councils and land owners and occupiers may be required. These delays could be expected across all mobile networks in relation to affected sites. In addition, the cost to the industry would be considerable.

- During these periods, services for the benefit of the public generally, such as emergency services and disaster relief co-ordination, will be directly impacted.
- Potentially a carrier's use of its powers and immunities provided under Schedule 3 to the Act may be different in each State and Territory depending on the application in that State or Territory of the principles in either the Mitcham Case or the diametrically opposite outcome in *Hutchison 3G Australia Pty Ltd v Director of Housing and City of Port Phillip [2004] VSCA 99* ("**Director of Housing Case**"). While the decision in the Mitcham Case is only binding on other courts in South Australia, it is currently "persuasive authority" in other jurisdictions (with the possible exception of Victoria).
- Commonwealth Government policy will

Appealing the Decision

In July 2005, the High Court of Australia granted H3GA special leave to appeal the decision in the Mitcham Case.

No doubt, any appeal will focus on issues such as the following:

- The noise limitation in Part 7 of the Schedule to the Determination only applies to "the co-located facilities". As the air-conditioning unit is on the equipment shelter, which is not "installed on or within an original facility or a public utility structure", but rather located adjacent to it, any noise from the air-conditioning unit should be disregarded;
- The decision of the majority in the Mitcham Case is reminiscent of the decision of Balmford J in the Victorian Supreme Court of Appeal's decision in the court below in the Director of Housing Case. That lower court among other things determined that, when considering whether a facility is low impact for the purposes of the Determination, consideration must be given to the installation as a whole, not its constituent parts. The Victorian Court of Appeal did not favour that approach, rather it preferred the view that each element of an installation should be looked at in isolation in determining whether it was low impact for the purposes of the Determination. That approach is consistent with the argument referred to immediately above; and
- Clause 3.1(3) of the Part 3 of the Determination provides that trivial variations for a facility mentioned in the Schedule to the Determination should be disregarded. Arguably the noise from a domestic style air-conditioning unit is a good example of a "trivial variation".

There will be considerable interest amongst the mobile carriers in the High Court's determination. No doubt, community groups which take an interest in the rollout of telecommunications infrastructure will also be interested in the outcome of the case and, given the decision's potential impact on the incentive on telecommunications carriers to co-locate their infrastructure, will be hoping that it is not a case of winning the battle but losing the war.

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areas, to reduce the proliferation of new towers and poles. The 3G strategies now adopted by mobile carriers, for instance, require a significant proportion of new installations to be co-located on two existing networks.

- Carriers may still need to consider their obligations in clause 4.13 of the Code and, in the event that they determine there are available existing facilities of other carriers and public utilities for their use, the carriers will need to determine what constitutes a "reasonable step" to use the existing facility for their activities. For instance, is it reasonable for a carrier to consider but dismiss all co-location possibilities in residential and commercial areas as it is not reasonable for a carrier to be required to pursue a development consent and obtain tenure for a particular installation when it could install a substantially similar but non co-located facility using its powers and immunities under Schedule 3 to the Act?
- Mobile telecommunications consumers will be directly impacted by delays in obtaining service or removal of service arising as a consequence. There is a

not be implemented to the detriment not only of carriers and consumers but the public generally.

- As the rollout of radio facilities in residential and commercial areas will likely be more expensive, time consuming and resource intensive, efficiency and international competitiveness of the Australian telecommunications industry may be undermined. In this regard, one of the main objects of the Act is to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community.
- The network architecture for 3G mobile telecommunications networks are particularly sensitive to non-optimum variations in site locations for each cell. To maintain network coverage and capacity, an inability to obtain the desired co-located location in one area may result in the requirement for multiple, smaller low impact sites in less technically suitable locations spread across the surrounding residential and commercial area.