Deacons

July 2003

legal update

# Win for Councils on telco towers

A landmark decision in the Court of Appeal on 8 July 2003 has undermined telecommunications carriers' powers to enter onto land and install telecommunications facilities. The Court of Appeal has found Hutchison breached the State's planning laws in February this year in Oatley Park and was not authorised by the Telecommunications Act 1997 (Cth) to carry out the work of erecting a tower.

The Court of Appeal's decision means that carriers cannot simply adopt a council pole or tower which was not used in connection with a telecommunications network.

### Why the decision is important

- The case was important as it means that carriers cannot simply adopt a council facility which has not been used in connection with a telecommunications network.
- It means that carriers will not be able to subvert the legislative scheme by reliance upon the purported maintenance power to replace council poles or towers. As a result, a number of existing telecommunications towers may now be subject to challenges.
- Councils should put telecommunications facilities in their own localities under the microscope as there may be a number of parks in New South Wales with similar zoning and this decision could be applicable to other towers where an existing structure has been removed and a tower built despite Council opposition.

### History of events

In November 2002, Hutchison served a Notice under the *Telecommunications Act* 1997 (Cth) on the Council proposing to replace the existing light pole in Oatley Park, which was owned by Council, with a new G3GA monopole. Hutchison then proposed to install a low impact telecommunications facility on top of the new pole. In February 2003 Hurstville City Council commenced proceedings in the Land and Environment Court seeking to restrain Hutchison from removing the Council's light pole and erecting a G3GA monopole under the guise of 'maintenance'. Council argued successfully before the Court of Appeal that

this was tantamount to installing a telecommunications tower, under the guise of the maintenance powers set out in the *Telecommunications Act* 1997.

The Council sought to restrain Hutchison from replacing its property with a new light pole which would be owned by Hutchison. The Council successfully argued that Hutchison could not erect the new pole without obtaining development consent from the Council pursuant to the *Environmental Planning and Assessment Act* 1979 (NSW).

### Why Hurstville Council Won

The Court of Appeal rejected the Hutchison argument that Council's pole in Oatley Park could be 'adopted' using the so-called 'maintenance' power under the Telecommunications Act.

- The Court found that there was not an original facility which the carrier was entitled to maintain. In other words, the light pole was not a "facility" which was available for maintenance.
- The legislation should be construed as operating only in situations where the carrier's maintenance of an original facility would not constitute a trespass or other wrong.
- The carriers had no right to avoid the need to obtain a facility installations permit by use of the maintenance power.
- Accordingly, the *Telecommunications Act* 1997 (Cth) did not authorise the work proposed by the Notice of 29 November 2001 which was prohibited by the Hurstville Local Environmental Plan 1994 and the *Environmental Planning and Assessment Act* 1979.

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LU-PEP-S-0703