New South Wales
Court of Appeal

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| **CITATION:** | **HURSTVILLE CITY COUNCIL v HUTCHISON 3G AUSTRALIA PTY LTD [2003] NSWCA 179** |
| **HEARING DATE(S):** | 28 May 2003 |
| **JUDGMENT DATE:** | 8 July 2003 |
| **JUDGMENT OF:** | Mason P at 1; Handley JA at 73; McColl JA at 74 |
| **DECISION:** | Appeal allowed. See par 72 for orders |
| **CATCHWORDS:** | Statutory Interpretation - Telecommunications Act 1997 (Cth) Sch 3 Pt 1 Div 4 cl 7 - "maintain a facility" - whether Council-owned light pole a "facility" under the Act - whether respondent authorised by the Act to remove and replace light pole. (D) |
| **LEGISLATION CITED:** | Telecommunications Act 1997 (Cth)<br>Hurstville Local Environmental Plan 1994<br>Environmental Planning and Assessment Act 1979 |

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| **CASES CITED:** | Botany Municipal Council v Federal Airports Authority (1992) 175 CLR 453<br>Coco v The Queen (1994) 179 CLR 427<br>Council of the Municipality of Randwick v Rutledge (1959) 102 CLR 54<br>Friends of Pryor Park Inc v Ryde City Council (1996) 91 LGERA 302<br>Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628<br>Hurstville City Council v Hutchison 3G Australia Pty Ltd [2003] NSWLEC 52<br>Saraswati v The Queen (1991) 172 CLR 1<br>The King v Wallis; Ex parte H v Mackay Massey Harris Pty Ltd (1949) 78 CLR 529<br>Victoria v The Commonwealth (1937) 58 CLR 618 |
| **PARTIES:** | HURSTVILLE CITY COUNCIL v HUTCHISON 3G AUSTRALIA PTY LTD |
| **FILE NUMBER(S):** | CA 40207/2003 |
| **COUNSEL:** | Appellant: F M Douglas QC/ K M Connor<br>Respondent: S Gageler/ D Wilson |
| **SOLICITORS:** | Appellant: Deacons<br>Respondent: Truman Hoyle |
| **LOWER COURT JURISDICTION:** | Land & Environment Court |
| **LOWER COURT FILE NUMBER(S):** | LEC 40143/2003 |
| **LOWER COURT JUDICIAL OFFICER:** | Pain J |

**IN THE SUPREME COURT**
**OF NEW SOUTH WALES**
**COURT OF APPEAL**

**CA 40207/2003**
**LEC 40143/2003**

**MASON P**
**HANDLEY JA**
**McCOLL JA**

**Tuesday 8 July 2003**

**HURSTVILLE CITY COUNCIL v HUTCHISON 3G AUSTRALIA PTY LTD**

**FACTS:**

As part of its establishment of a wire-free data communications network, the respondent notified the Council of its intention to establish a "downlink site" in Oatley Park. The respondent proposed that it replace the council-owned light pole illuminating the oval with a new pole of the same height and apparent volume as the original before re-installing the existing lighting equipment. Subject to this taking place, the respondent then proposed to install, maintain and operate a "low-impact facility" consisting of three antennae and a communications dish attached to the pole, an equipment shelter and ancillary infrastructure.

The council opposed this proposed activity and removed the original pole, apparently to frustrate the respondent's endeavours. The respondent claimed authority as a licensed carrier under the ***Telecommunications Act 1997*** to engage in the proposed activities without the Council's consent and began excavating around the footing where the original pole had stood.

The issue on appeal is whether federal law gave the respondent authority to position a "downlink" site in Oatley Park as part of its wire-free data communications network ("3G network"). More specifically, the question is whether the respondent was permitted to remove the existing light pole and replace it with the new pole on the basis that this was the "maintenance" of "a facility" within Sch 3 Pt 1 Div 4 (cl 7) of the **Telecommunications Act 1997 (Cth)**.

**HELD** per Mason P, allowing the appeal (Handley JA and McColl JA agreeing):

1) The respondent was not authorised by the **Telecommunications Act 1997 (Cth)** to carry out the works as proposed in its notice to the council. **[72]**

(a) A literal approach to cl 7(1) based on an expansive reading of the Act's definition of "facility" in s7 is not appropriate. **[59-67]**

(i) In the circumstances, Sch3 Pt1 Div4 cl 7(1) of the **Telecommunications Act 1997 (Cth)** 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: ***Coco v The Queen*** (1994) 179 CLR 427 at 436. **[59-61]**

(ii) Statutory definitions do not operate other than as an aid to the construction of relevant substantive provisions: ***Council of the Municipality of Randwick v Rutledge*** (1959) 102 CLR 54 at 69; ***Gibb v Federal Commissioner of Taxation*** (1966) 118 CLR 628 at 635. **[63-66]**

(iii) Part (b) of the definition of "facility" should be construed as being confined to any line, equipment or thing that is purpose built or dedicated by its inherent nature for use in or in connection with a telecommunications network. 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. **[67]**

(iv) It is appropriate that Division 4 be read down so as not to frustrate the provisions in Division 3: ***The King v Wallis; Ex parte H v Mackay Massey Harris Pty Ltd*** (1949) 78 CLR 529 at 550; ***Saraswati v The Queen*** (1991) 172 CLR 1 at 23-4. **[69]**

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**HURSTVILLE CITY COUNCIL v HUTCHISON 3G AUSTRALIA PTY LTD**

1 **MASON P:** The respondent is establishing its H3GA third generation wire-free data communications network (the 3G network) in the Sydney region. It involves 540 facility installation sites comprising 81 "transmission hubs" and 459 "downlink sites". One of the downlink sites has been put into Oatley Park in the teeth of opposition by the Hurstville City Council. These proceedings do not involve the environmental and public health concerns raised by residents or the engineering and logistical issues that have prompted the respondent to choose the particular site. The only issue is whether federal law armed the respondent with authority to carry out its wishes.

**OVERVIEW OF LEGAL RIGHTS IN ISSUE**

2 Oatley Park was dedicated as a park in 1888. It covers 45 hectares and is used for a variety of recreational activities. Some of it is natural bush land. Some of it adjacent to a residential area is used for sporting activities, including an oval surrounded by timber barriers.

3 Two light poles stand roughly opposite each other on the boundary of the oval. This appeal relates to the western pole and its replacement.

4 The original pole was 18 metres high and appears to have been made of wood. Two floodlights were fixed to it near the top. The original pole belonged to the respondent Council and it was used solely for illuminating the oval.

5 Oatley Park is zoned 6(a) (OPEN SPACE ZONE) under the **Hurstville Local Environmental Plan 1994**. Development is prohibited for any purpose other than a limited list of activities none of which is presently relevant. Accordingly, State law prohibited the carrying out of the work proposed and done by the respondent as well as use of the park for the purpose of a downlink site (**Environmental Planning and Assessment Act 1979**, s76B).

6 It is unnecessary to explore whether the development is also prohibited because it offends the dedication of the park as a public reserve (cf ***Friends of Pryor Park Inc v Ryde City Council*** (1996) 91 LGERA 302).

7 The council's ownership of the original pole also armed it with the right to prevent interference with it, by virtue of the common law of trespass.

8 On 29 November 2002 the respondent formally notified the Council of its intention to carry out certain activities in relation to the park, the pole in particular. In brief, the respondent proposed the replacement of the pole with a new H3GA monopole of the same height and apparent volume as the original. The existing lighting equipment was to be re-installed once the "swap-out" had occurred. Subject to this activity taking place, the respondent proposed to install, maintain and operate a "low-impact facility" consisting of three antennae 2.8m long attached to the top of the pole, a nearby 300mm diameter radio communications dish also attached to the pole, a 2.8m high equipment shelter with a base of 7.5 square metres to house equipment for the facility together with ancillary infrastructure, cables, conduits, draw pits etc.

9 The respondent invoked rights under the **Telecommunications Act 1997 (Cth)** (the Act). It claimed authority to engage in the proposed activities regardless of the Council's consent, derived from Divisions 3 and 4 of Schedule 3 of the Act. If it was correct in this claim, the common law rights of the Council were necessarily displaced. The respondent would also be immune from the relevant prohibitions under the statute law of New South Wales because of the exemption conferred by cl 37 of Schedule 3 of the Act (see generally ***Botany Municipal Council v Federal Airports Authority*** (1992) 175 CLR 453 at 464-5). In all likelihood, it probably also follows that if the respondent had by the Notice duly embarked on the activities formally notified to the Council, the Council was not entitled to attempt to defeat or frustrate its endeavours by pulling down the original pole - as it did on 30 January 2003 (see ***Victoria v The Commonwealth*** (1937) 58 CLR 618 at 631).

**THE PROCEEDINGS TO DATE**

10 Public meetings and private discussions failed to resolve the impasse between the parties over the planned installation in Oatley park. The Council resolved to oppose the activity by whatever legal means were available. The respondent resolved to press on.

11 On 30 January 2003 the Council removed the original pole, intending to replace it with shorter wooden poles. This was apparently done with intent to frustrate the respondent's endeavours and to pre-empt the possibility that the respondent might adopt the original pole as an alternative (albeit as yet unnotified) means of achieving its long-term aim of locating the downlink site at this location.

12 On 10 February 2003 the respondent started excavating around the footing where the original pole had stood. A stop work order from the Council was ignored. The Council commenced proceedings that day in the Land and Environment Court seeking to restrain the respondent from carrying out the proposed activities. In effect, the Council invoked the

Court's jurisdiction to restrain a threatened breach of the prohibition in the local environmental plan.

13 The parties were able to agree on an interlocutory regime pending the determination of proceedings in the Land and Environment Court.

14 On 18 March 2003 the proceedings were dismissed and the parties were released from cross-undertakings that had been given to the Court on 10 February 2003 (***Hurstville City Council v Hutchison 3G Australia Pty Ltd*** [2003] NSWLEC 52).

15 An expedited appeal was launched in this Court. The Council sought interlocutory relief to restrain the work in the meantime. This was refused by Stein JA having regard to the respondent's undertaking that it would remove the facility and its associated works and reinstate the park to its former position if the Council's appeal succeeded.

16 Subsequently the work was completed.

**THE 3G NETWORK AND THE SELECTION OF THE OATLEY PARK SITE**

17 The respondent is one of a group of companies involved in the deployment and operation of the 3G network in Australia. The network will be a high-speed, wire-free data network in and around Sydney, Melbourne, Brisbane, Adelaide and Perth. It utilises spectrum licences costing in excess of $196 million. After deployment and implementation, the 3G network will enable customers to communicate and work on-line while mobile.

18 The respondent holds a carrier licence under the Act.

19 The 3G network will comprise approximately 2000 facility installations sites throughout 5 licence areas in Australia. 540 of these sites are located in New South Wales. As indicated previously, they are comprised of "transmission hubs" and "downlink sites". The transmission hubs feed

data to a group of downlink sites, which then on-transmit the data to consumers. A downlink site is a standard site that provides network coverage to its immediate 2-3 km area and links in with the adjacent sites in its cluster.

20 The majority of the downlink sites require a "low-impact facility" installation, as defined in the **Telecommunications (Low-Impact Facilities) Determination 1997**. If and to the extent that the facility is a low-impact facility it can be installed by carriers despite certain State and Territory laws (see cll 6 and 37 of Schedule 3) and regardless of the Council's consent.

21 In June 2002 the respondent selected the original pole and surrounding area for use as a downlink site. According to the respondent's project manager:

> *Within Oatley Park, the only locations available for use as a facility that utilized existing infrastructure, and provided acceptable coverage for a facility, were the existing light poles that were located around the circumference of the park. The Existing Light Pole was selected as the most appropriate location for the Oatley Park Site for mainly aesthetic reasons, as the equipment shelter (which would form part of the facility) could be substantially hidden from view. The fact that the Existing Light Pole was slightly further from the school and residences was also taken into account.*

(The "Existing Light Pole" is the one that I have referred to as the original pole.)

22 On 29 November 2002, pursuant to the statutory notice procedure in cl 17 of Schedule 3, the respondent notified its intentions to the Council as occupier of the park. (The registered owner was the Department of Land and Water Conservation and it too was formally notified.)

## THE FEDERAL STATUTORY FRAMEWORK

23 This appeal relates to a licensed carrier's powers to install and maintain "facilities" as conferred by the Act.

24 Section 7 of the Act provides that, unless the contrary intention appears:

> ***facility*** *means:*
> *(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.*

25 This definition discloses that the facility is either part of the infrastructure of a telecommunications network or something used, or for use, in or in connection with a telecommunications network. A telecommunications network is a system, or a series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy (s7).

26 Carriers' powers and immunities are addressed in Schedule 3 (see s484). A simplified outline of the general provisions to be found in Part 1 of that Schedule is set out in cl 1:

> ***1 Simplified outline***
>
> *The following is a simplified outline of this Part:*
>
> - *A carrier may enter on land and exercise any of the following powers:*
>  *(a) the power to inspect the land to determine whether the land is suitable for the carrier's purposes;*
>  *(b) the power to install a facility on the land;*
>  *(c) the power to maintain a facility that is situated on the land.*
>
> - *The power to install a facility may only be exercised if:*
>  *(a) the carrier holds a facility installation permit; or*
>  *(b) the facility is a low-impact facility; or*

(c) *the facility is a temporary facility for use by, or on behalf of, a defence organisation for defence purposes; or*

(d) *the installation is carried out before 1 July 2000 for the sole purpose of connecting a building to a network that was in existence on 30 June 1997.*

- *A facility installation permit will only be issued in relation to a facility if:*

(a) *the carrier has made reasonable efforts to negotiate in good faith with the relevant proprietors and administrative authorities; and*

(b) *in a case where the facility is a designated overhead line---each relevant administrative authority has approved the installation of the line; and*

(c) *the telecommunications network to which the facility relates is or will be of national significance; and*

(d) *the facility is an important part of the telecommunications network to which the facility relates; and*

(e) *either the greater part of the infrastructure of the telecommunications network to which the facility relates has already been installed or relevant administrative authorities are reasonably likely to approve the installation of the greater part of the infrastructure of the telecommunications network to which the facility relates; and*

(f) *the advantages that are likely to be derived from the operation of the facility in the context of the telecommunications network to which the facility relates outweigh any form of degradation of the environment that is likely to result from the installation of the facility.*

- *In exercising powers under this Part, a carrier must comply with certain conditions, including:*

(a) *doing as little damage as practicable;*

(b) *acting in accordance with good engineering practice;*

(c) *complying with recognised industry standards;*

(d) *complying with conditions specified in the regulations;*

(e) *complying with conditions specified in a Ministerial Code of Practice;*

(f) *complying with conditions specified in a facility installation permit;*

*(g) giving notice to the owner of land.*

27 The key Divisions in Part 1 of Schedule 3 are Divisions 2 (Inspection of land), 3 (Installation of facilities) and 4 (Maintenance of facilities). Division 5 (Conditions relating to the carrying out of authorised activities) regulates generally the way in which these authorised activities must be carried out, for example by requiring damage to be minimised, good practice to be followed, industry standards, international agreements, regulations and a Ministerial Code of Practice to be complied with, and due notice to be given to affected stakeholders. Division 8 (Miscellaneous) includes a provision (cl 42) requiring the carrier to compensate for financial loss or damage stemming from anything done under Divisions 2, 3, or 4.

28 Division 2(cl 5) confers rights to enter and inspect land to determine its suitability. The context and terms make it clear that those rights are exercisable with or without the consent of the landowner, subject to the restraints in Division 5.

29 Division 3(cl 6) empowers a carrier, for purposes connected with the supply of a carriage service, to carry out the installation of a facility and to do ancillary work. "Installation" is defined in cl 2 to include:

> *(a) the construction of the facility on, over or under any land; and*
> *(b) the attachment of the facility to any building or other structure; and*
> *(c) any activity that is ancillary or incidental to the installation of the facility (for this purpose, **"installation"** includes an activity covered by paragraph (a) or (b)).*

30 The power to install a facility is only available if one of four conditions found in cl 6(1) are met, namely:

(a) the carrier is authorised to do so by a facility installation permit; or

(b) the facility is a low-impact facility; or

(c) the facility is a temporary facility for defence purposes; or

(d) the installation occurred before 1 July 2000 and other conditions are met.

31 Options (c) and (d) are of no present relevance.

32 The requisites for obtaining a facility installation permit are set out in Division 6(cll21-35). Before a permit can be granted by the Australian Communications Authority there must be a public inquiry (cl 25) and detailed criteria set out in clause 27 must be satisfied. These involve complex environmental and other criteria, including obligations to negotiate in good faith with affected stakeholders. The appellant Council submits that in the present circumstances it was obligatory for the respondent to have obtained a facility installation permit before it could have constructed the tower it erected in March-April 2003 as an essential component in its downlink site at Oatley Park.

33 A low-impact facility is defined in cl 6(3). It is a "specified facility" determined by the Minister to be a low-impact facility for the purposes of that clause.

34 A tower (defined to mean a tower, pole or mast) cannot be a low-impact facility unless it is attached to a building and its height does not exceed 5m (cl 6(5)). Nor may an extension to a tower be specified as a low-impact facility unless the height of the extension does not exceed 5m and there have been no previous extensions to the tower. It follows that the erection by the respondent in 2003 of its H3GA monopole could not have qualified as an authorised installation of a low-impact facility.

35 The **Telecommunications (Low-Impact Facilities) Determination 1997** (the Determination) is the instrument whereby the Minister has purported to exercise the power delegated by cl 6(3). The **Determination** identifies areas in which a facility may be installed, by reference to zoning

arrangements under State and Territory planning laws; and it identifies the particular types of low-impact facilities that may be installed in the designated areas.

36 It is now common ground that the three panel antennae, the radiocommunications dish, the equipment shelter, underground cabling, conduits and draw pits that were proposed for installation in the respondent's Notice and subsequently erected were of a type, size and location that complied with the Determination. Accordingly, their installation standing alone would have complied with cl 6(1). The exemption from State planning and other laws conferred by cl 37 was broad enough to authorise the respondent to act in the teeth of the Council's opposition as regards those components.

37 But these low-impact facilities were not proposed by the Notice to stand alone. The respondent always intended to locate the antennae and dish upon its specially designated H3GA monopole which it intended to erect in place of the original light pole after the "swap-out" of the new pole for the existing one.

38 The respondent's case, accepted by Pain J, is that Division 4 (cl 7) authorised it to remove the existing light pole and replace it with the H3GA monopole, thereby avoiding the detailed obligations that would have been involved in obtaining a facility installation permit to erect a new pole simpliciter. The question is whether Division 4 permitted the respondent to do this on the basis that it was the "maintenance" of "a facility" within cl 7.

**THE "MAINTENANCE ACTIVITY" NOTIFIED AND CARRIED OUT**

39 The Notice of 29 November 2002 described itself as a **Combined Notice under Clause 17 Schedule 3 of the Telecommunications Act 1997 (Cth) and Chapters 4 and 6 of the Telecommunications Code of Practice 1997.**

40 The validity of the Notice was challenged in the court below. The various challenges were rejected by Pain J. Only one remains, namely that relating to "the maintenance activity". The Council submits that what purports to be a "maintenance activity" authorised by Division 4 did not fall within that Division, is otherwise unauthorised by federal law and is therefore in breach of the zoning prohibition based upon State law.

41 The Notice described the "maintenance activity" in the following terms:

> *As part of the operation of H3GA's facilities, H3GA proposes to conduct a maintenance activity (and ancillary activities necessary or desirable relating to those maintenance activities) to a pole which has been identified for use in H3GA's telecommunications network after a detailed review of other site options. H3GA proposes to replace the existing light pole at Oatley Park, Oatley Park Avenue, Oatley Park NSW 2223 Lot 13 DP752056 Crown Land (and as further identified in the attached diagrams) (**"the land"**) to ensure proper functioning of its telecommunications facility. This replacement activity is authorised by, and will be conducted in accordance with, the Telecommunications Act 1997 (Cth) (**"the Act"**) and the Telecommunications Code of Practice 1997 (**"the Code"**).*

Under the heading ***Details of the Maintenance Activity*** the Notice stated:

> *H3GA proposes to replace the existing light pole, which is owned by Council, with a new H3GA monopole. The new monopole will have the same height and same apparent volume as the existing Council pole. H3GA will also replace by way of re-installation the lighting equipment which is currently on the pole once this swap-out has occurred.*
>
> *This maintenance activity will take place at the original location of the subject pole on the land as indicated on the attached plan.*

42 Under the heading **The Installation Activity** the Notice stated:

> *Once the maintenance activity has taken place and the new H3GA pole has been erected, H3GA proposes to install, maintain and operate the H3GA equipment referred to paragraph 2.2 below (**"the facility"**) on the land.*

43 The Notice informed the Council of its rights to objection and compensation and otherwise complied with the formal requirements of cl 17.

44 The portion of the Notice dealing with the "installation activity" gave details of the work proposed to be done by way of installation of those items of equipment constituting components of a low-impact facility. As previously indicated, it is now common ground that the nature, size and location of these items were in accordance with the **Determination**.

45 Division 4 of Schedule 3 contains one clause:

> ***7. Maintenance of facilities***
>
> ***(1)*** *A carrier may, at any time, maintain a facility.*
>
> ***(2)*** *A carrier may do anything necessary or desirable for the purpose of exercising powers under subclause (1), including (but not limited to):*
> *(a) entering on, and occupying, land; and*
> *(b) removing, or erecting a gate in, any fence.*
>
> ***(3)*** *A reference in this clause to the* ***"maintenance"*** *of a facility (the* **original facility***) includes a reference to:*
> *(a) the alteration, removal or repair of the original facility; and*
> *(b) the provisioning of the original facility with material or with information (whether in electronic form or otherwise); and*
> *(c) ensuring the proper functioning of the original facility; and*
> *(d) the replacement of the whole or a part of the original facility in its original location, where the conditions specified in subclause (5) are satisfied; and*
> *(e) the installation of an additional facility in the same location as the original facility, where the conditions specified in subclause (6) are satisfied; and*
> *(f) in a case where any tree, undergrowth or vegetation obstructs, or is likely to obstruct, the operation of the original facility---the cutting down or lopping of the tree, or the clearing or*

*removal of the undergrowth or vegetation, as the case requires.*

***(4)*** *A reference in this clause to the* ***"maintenance"*** *of a facility does not include a reference to the extension of a tower. For this purpose,* ***"tower"*** *has the same meaning as in clause 4.*

***(5)*** *For the purposes of paragraph (3)(d), the following conditions are specified:*

*(a)* *the levels of noise that are likely to result from the operation of the replacement facility are less than or equal to the levels of noise that resulted from the operation of the original facility;*

*(b)* *in a case where the original facility is a tower:*

*(i)* *the height of the replacement facility does not exceed the height of the original facility; and*

*(ii)* *the volume of the replacement facility does not exceed the volume of the original facility;*

*(c)* *in a case where the facility is not a tower:*

*(i)* *the volume of the replacement facility does not exceed the volume of the original facility; or*

*(ii)* *the replacement facility is located inside a fully-enclosed building, the original facility was located inside the building and the building is not modified externally as a result of the replacement of the original facility; or*

*(iii)* *the replacement facility is located inside a duct, pit, hole, tunnel or underground conduit;*

*(d)* *such other conditions (if any) as are specified in the regulations.*

***(6)*** *For the purposes of paragraph (3)(e), the following conditions are specified:*

*(a)* *the combined levels of noise that are likely to result from the operation of the additional facility and the original facility are less than or equal to the levels of noise that resulted from the operation of the original facility;*

*(b)* *either:*

*(i)* *the additional facility is located inside a fully-enclosed building, the original facility is located inside the building and the building is not modified externally as*

*a result of the installation of the additional facility; or*

*(ii) the additional facility is located inside a duct, pit, hole, tunnel or underground conduit;*

*(c) such other conditions (if any) as are specified in the regulations.*

***(7)*** *For the purposes of paragraphs (5)(a), (b) and (c) and (6)(a), (b) and (c), trivial variations are to be disregarded.*

***(8)*** *For the purposes of subclauses (5) and (6):*

*(a) the measurement of the height of a tower is not to include any antenna extending from the top of the tower; and*

*(b) the volume of a facility is the apparent volume of the materials that:*

*(i) constitute the facility; and*

*(ii) are visible from a point outside the facility; and*

*(c) a structure that makes a facility inside the structure unable to be seen from any point outside the structure is to be treated as if it were a fully-enclosed building.*

***(9)*** *A reference in this Part to engaging in activities under this Division includes a reference to exercising powers under this Division.*

***(10)*** *In this clause (other than subclause (4)):*

***"tower"*** *means a tower, pole or mast.*

**THE TRIAL JUDGE'S REASONS**

46 Pain J held that the original light pole became a "facility" as defined in s7 when the carrier determined that it was "for use" in or in connection with its telecommunications network. This occurred by the time of the Notice at the latest.

47 The crux of her Honour's reasoning appears in pars 80-87.

48 As I read her Honour's reasons, the existing pole became a "facility" subject to the "maintenance" power conferred by cl 7, when and because

the carrier notified its intention to use it as part of its 3G network. It did not matter that the original pole had not been installed by the carrier (pursuant to cl 6 or otherwise) or that the carrier did not own it or have any independent right to possess it or interfere with it. It was sufficient that the carrier notified its intention to use the existing pole, albeit for the limited purpose of "maintenance" by removal and replacement (cf cl 7(3)(a) and (d)). Such intention was manifested in the Notice. It followed, in her Honour's view (at [84]), that *"when the Notice was issued the pole became a facility for the purposes of s7 of the Act, the consequence being that the maintenance powers in relation to original facilities under cl 7 of Sch 3 to the Act applied. These powers allow a carrier to remove and replace an original facility, in this case, the pole"*.

49 Pain J also held that the removal of the existing pole by its owner (ie the Council) after it had thus become a "facility" did not mean that the respondent's "maintenance" powers were thereby frustrated. This conclusion is not challenged in the appeal and I am content to proceed on the basis that it is correct (see ***Victoria v The Commonwealth***). It is unnecessary for me to reach a concluded view on the matter. The situation may have been different if the existing pole had been lawfully removed by the Council before the respondent by Notice purported to exercise rights said to stem from the Act.

**THE RESPONDENT'S SUBMISSIONS**

50 The respondent supported the reasoning of Pain J while also advancing a variant of that reasoning.

51 The variant was to the effect that the asserted right of maintenance could rest upon the objective nature of the existing light pole as a structure suitable *"for use"* in the network. This alternative did not rest solely upon the subjective appropriation of the pole by the respondent *"for use"* in the network, although the respondent would not be likely to seek to maintain something essentially useless as a "facility". Naturally, the power of "maintenance" could not be invoked by a carrier unless and until it had

decided to treat a particular thing as a facility in its telecommunications network. This could not occur after a formal Notice was given pursuant to cl 17, because the power to issue such a Notice presupposes an existing "facility". As the argument went, appropriation occurred automatically on service of the Notice notifying the carrier's intention to carry out "maintenance". Alternatively, it was submitted that this carrier had sufficiently indicated its intention in relation to the existing pole before the Notice was served.

52 The respondent accepted that it was a necessary part of its argument that the statutory right of "maintenance" could be exercised in relation to a structure or thing that it did not own and over which it had no contractual or other rights. It was also accepted that the right asserted could be used for "maintenance" by removal of a structure that was never intended to be used otherwise than as a stepping stone towards the installation by way of "replacement" of the new structure.

53 In argument, Mr Gageler SC for the respondent was pressed with hypothetical examples indicative of the breadth and consequences of the respondent's submission. He accepted that many things could become "facilities" available for "maintenance" either because they happened to be used as such or because they were suitable for use according to the more objective variant of her Honour's reasons than was promoted in this Court. Examples falling within such categories of "facility" could include a bridge, a steeple, a building or possibly even a tree. If any of these structures or things was already being used to support a facility, even a low-impact facility, or if any of these structures or things was appropriate for such use then, according to the respondent, these structures or things were themselves to be treated as "facilities" capable of appropriation for the type of "maintenance" involved in the present case.

54 The various examples treated a structure or thing on which equipment was erected as thereby becoming part of the network as one of its "facilities".

55 These hypotheticals suggest difficulties with the respondent's position, given that its interpretation of Division 4 included the power to maintain an original "facility" by removal and replacement regardless of its existing linkage with any telecommunications network (let alone the respondent's network) and regardless of whether the respondent had any proprietary or other rights over the "original facility".

56 Senior counsel advanced two main lines of defence. First, he submitted that the Court should not determine a difficult question of statutory interpretation by conjuring up extreme and far-fetched hypotheticals. The "life of the law" has always shrunk from taking propositions to absurd yet logical extremes. Nevertheless, it remains that the respondent could not point to any criterion for drawing the line which in point of logic and principle had to be drawn somewhere in order to permit the activity at Oatley Park but not authorise such horrendous consequences as the forceful removal and replacement of an existing bridge or steeple.

57 The second line of defence was on firmer ground, although it did not answer all of the problems posed by the hypotheticals. The respondent took the Court to the safeguards, checks and balances surrounding the exercise of the powers conferred by Divisions 2, 3 and 4 of Schedule 3. In the main these are spelt out in Division 5. These are backed up by effective enforcement powers (ss 61, 68, 564, 570). We were also reminded of the obligation to compensate for financial loss or damage (cl 42).

**DECISION**

58 In my view, these defensive arguments do not adequately address the difficulties presented by the hypotheticals or the concerns which lie behind them.

59 *"Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language"* (***Coco v The Queen*** (1994) 179 CLR 427 at 436). Clause 7 does not do

this, as regards the core right to "at any time, maintain a facility". I assume for the moment the correctness of the respondent's broad interpretation of the definition of **facility** as including the structure on which it rests. On that assumption, the right conferred by cl 7(1) has significant and sufficient content in relation to facilities which are already owned by the carrier concerned (cf cl 47) or over which the carrier has existing rights sufficient to ground the right of maintenance of what cl 7(3) calls the **original facility**. In other words, cl 7(1) can and in the circumstances 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. To construe cl 7(1) as going beyond this necessarily conjures up the vexing hypothetical situations of a carrier descending upon a publicly or privately owned bridge, steeple or other structure and removing it for the purpose of "repair" or "installation of an additional facility" (cf cl 7(3)(e)).

60 Such a gross intrusion upon existing rights is not compelled by the language of cl 7(1) which can readily be construed as introductory to the admittedly more intrusive (but necessarily limited) powers conferred by cl 7(2). The shorthand expression **original facility** which cl 7(3) adopts reinforces this conclusion. So too does the reference in the Explanatory Memorandum to cl 6 authorising a Council to maintain an **existing** facility (emphasis added).

61 In Division 3 explicit power to commit what would otherwise be a trespass is conferred by cl 6(2). If anything, this reinforces my interpretation of Division 4. It certainly means that my approach to Division 4 does not curtail the effectiveness of Division 4. Cf also cl 5(1) in Division 2.

62 The respondent's interpretation would also create problems if two or more licensed carriers squabbled over the same structure in purported exercise of conflicting "maintenance" projects. (We were told that there are over 100 licensed carriers at present and I would infer that some are licensed to operate over common areas.)

63 The respondent's approach to cl 7 applies it literally to any and every "facility" falling within the definition of **facility** in s7. This literal approach is permissible *"unless the contrary intention appears"* (s7) and so long as it is remembered that statutory definitions do not operate other than as an aid to the construction of relevant substantive provisions (***Council of the Municipality of Randwick v Rutledge*** (1959) 102 CLR 54 at 69, ***Gibb v Federal Commissioner of Taxation*** (1966) 118 CLR 628 at 635).

64 In the upshot, the respondent's case is not significantly advanced by this literal approach to the issue at hand, for two reasons. First, the question whether cl 7(1) authorises otherwise tortious "maintenance" activities remains. Second, the definition itself is ambiguous, at least in its application to the case at hand.

65 This second point requires elaboration. The respondent relies upon that portion of part (b) of the definition which states that **facility** means any *"pole or other structure or thing used, or for use, in or in connection with a telecommunications network"*. The respondent contends that these words extend to buildings, poles, steeples or other things, so long as they are *"used, or for use in or in connection with a telecommunications network"*. If this expansive view of "facility" is applied literally to cl 7, the hypotheticals suggest that something is amiss. This in turn invites (i) the rejection of the extended definition on the basis that *"the contrary intention appears"* and/or (ii) the reading down of cl 7(1) in the manner already suggested, and/or (iii) the reading down of the definition itself.

66 To my mind, alternative (i) should be rejected, because the application of at least some of the definition to Division 4 seems feasible, because there seems no principled basis for excising part only of the definition, and because alternatives (ii) and (iii) are available.

67 Alternative (iii) invites examination of the scope of the latter portion of part (b) of the definition of **facility**. The respondent argues that the words should be construed and applied literally, so that any conceivable structure

or thing is a facility so long as it is used or for use, in or in connection with a telecommunications network. At this point, an alternative reading of the definition offers itself. Schedule 3 elsewhere distinguishes between "facilities" and the land or structures to which they are fixed (see eg cl 2 (definition of **installation**), 47). 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 rooftops. 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.

68 There are additional difficulties with the respondent's expansive appeal to the maintenance power.

69 It enables the respondent by indirect means to achieve something directly addressed and prohibited by Division 3, ie the installation of a tower without passing through any of the gateways offered by cl 6(1). As to the general principle, see ***The King v Wallis; Ex parte H v Mackay Massey Harris Pty Ltd*** (1949) 78 CLR 529 at 550, ***Saraswati v The Queen*** (1991) 172 CLR 1 at 23-4. The respondent submits that this argument is circular. But it is not, if by examination of Divisions 3 and 4 together it emerges that Division 4 can be read down so as to avoid driving a horse and cart through the closely controlled gateways in Division 3, as fleshed out by Division 8 with reference to facility installation permits. In my view the argument is not circular.

70 There is also the problem about the ownership of the new pole. Clause 47 provides:

> *Unless the circumstances indicate otherwise, a facility, or a part of a facility, that is supplied, installed, maintained or operated by a carrier remains the property of its owner:*
>
> *(a) in any case ... whether or not it has become (either in whole or in part), a fixture; and*
>
> *(b) in the case of a network unit ... whether or not a nominated carrier declaration is in force in relation to the network unit.*

71 If the respondent is correct in its approach about "maintenance", cl 47 vests ownership of the new or replacement pole in the respondent. Yet the respondent says in argument that the Council can have ownership of the new pole, thereby lessening the impact of the appropriation of the old pole had it not been removed by the Council in any event. By what process would ownership pass to the Council despite cl 47? And what if the Council does not want the responsibilities that ownership of the respondent's "facility" (*ex hypothesi*) would bring? These problems are ultimately peripheral, but they do not assist the respondent's case.

72 I propose the following orders:

1. Appeal allowed.

2. Set aside the dismissal of the Applicant's Class 4 application and any ensuing costs order.

3. In lieu thereof, declare that the respondent was not authorised by the **Telecommunications Act 1997 (Cth)** to carry out the works proposed in its Notice dated 29 November 2001 and that the respondent was prohibited by s 76B of the **Environmental**

**Planning and Assessment Act 1979 (NSW)** and the **Hurstville Local Environmental Plan 1994** from carrying out the said works.

4. Respondent to pay appellant's costs of the appeal and of the proceedings in the Land and Environment Court.

73 **HANDLEY JA:** I agree with Mason P.

74 **McCOLL JA:** I agree with Mason P.

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I hereby certify that this and the preceding 21 pages are a true copy of the reasons for judgment herein of his Honour Justice Mason and of the Court.

8/7/2003 Associate.
Date