Why Optus is over us

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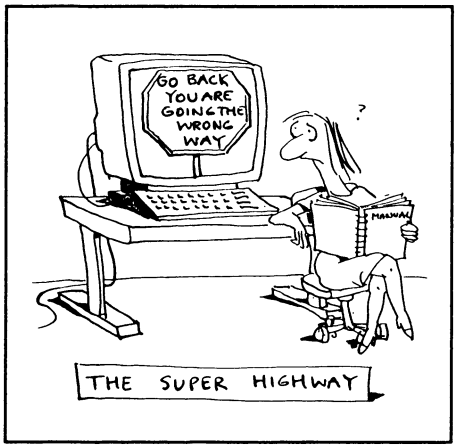
There has been a great deal of press coverage in recent weeks, much of it misleading, about Optus' broadband cable network.

The network is being built under Commonwealth laws, passed with bipartisan support in 1991, which are designed to promote competition in telecommunications services and deliver reduced prices to consumers. For years, Telstra has had the benefit of being a monopolist in an industry which is rapidly growing and extremely lucrative. It has reaped billions of dollars in profits as telecommunications costs have dropped faster than the prices paid by consumers.

However, it is an industry in which a competitor, to be effective, needs to make huge investments in network infrastructure. The *Telecommunications Act 1991* was passed to facilitate the necessary investment by new carriers in modern and innovative telecommunications networks on a basis which would promote effective and sustainable competition. It is delivering the benefits of higher levels of service and lower prices to consumers.

In the new, competitive, telecommunications environment, carriers have been given a number of important rights, powers and immunities. Carriers have the right to install telecommunications networks. Complementing this is the power to enter land for the purpose of installing network facilities, and an immunity from planning and environmental laws. These powers and immunities are similar to, although not as broad as, those which Telstra possessed prior to de-regulation. They are seen as essential if effective competition between carriers on a national basis is to be achieved. Clearly enough, the design of a national network in competition with Telstra's network cannot practically be achieved if local government bodies around the country have the power to reject network designs of Telstra's competitors.

The validity of this immunity has been under intense scrutiny and challenge by a number of local councils.



In December 1995 Boroondara Council, in suburban Melbourne, made an application to the Supreme Court of Victoria for an interim injunction restraining Optus from installing its broadband network in Boroondara.

Although the Council's real concern was that Optus' network was proposed to be deployed overhead, rather than underground, the legal challenge attacked the very validity of carriers' immunity from planning laws. Justice Beach found there was a 'serious question' about the validity of the immunity, and granted the interim injunction. If he was right, then every item of network infrastructure built since 1992, whether overhead or underground and whether built by Optus, Telstra or Vodafone, was tainted.

As a result of the Boroondara injunction, a spate of other councils instituted similar legal proceedings. The first of these was brought by Stonnington Council, also in suburban Melbourne. Largely in reliance on the findings of Justice Beach, an interim injunction was made by Judge Fagan restraining Optus from installing the network in Stonnington.

Optus immediately appealed against the Stonnington decision. The Victorian Court of Appeal was not convinced that there was a serious question to be tried and found that, even if there was, the 'balance of convenience' overwhelmingly favoured not granting the injunction. The Court found that the network posed no significant risk to trees or other permanent environmental damage, and dissolved the injunction.

The next application for an interim injunction was made in the NSW Land & Environment Court by Lane Cove Council in March 1996. Justice Bannon found that there was no serious question about the validity of the exemption from planning and environmental laws. The exemption was clearly valid, and the Land and Environment Court had no jurisdiction to deal with the matter.

The most recent decision was made in April 1996 by Justice Dunford in the Supreme Court of NSW in an application brought by Concord, Manly, North Sydney and Woollahra Councils. Justice Dunford agreed with Justice Bannon that the exemption from state laws is valid. Carriers do not need to obtain consent from councils to build network infrastructure. For the time being, therefore, it seems that questions about the validity of this immunity have disappeared.

Justice Dunford also considered Optus' compliance with the National Code, a regulation under the Telecommunications Act designed to impose environmental assessment

processes on carriers. The Code requires carriers to notify and consult with councils before installing network infrastructure. Optus had engaged in a process of lengthy consultation with the councils at an early stage in its design process, so that any comments or suggestions they made could be taken into account in finalising network designs. Justice Dunford held, however, that the consultation process should not have begun until after the design was finalised. He said that until the council was in receipt of final designs, it was not in a position to make informed comments. Further, Justice Dunford held that that formal, written consultation is required by the Code, and Optus' less formal approach, by way of meetings and presentations, was insufficient.

The judgment gives rise to a difficult situation for both carriers and councils. Carriers will now be forced to change their design and environmental impact assessment processes so that these are finalised before consultation commences. For councils, on the other hand, their input into and influence over network design is reduced, because their opportunity to comment does not arise until after the design is complete. The judgment will challenge the negotiation skills of carriers and councils as they try to deal with this difficult legal dichotomy.

One final legal challenge remains. Seven Victorian councils have sought to re-open the question of whether the exemption from planning and environmental laws is valid. They have commenced proceedings in the High Court alleging that the exemption is unconstitutional. A hearing date has not yet been fixed. If the councils succeed, an important aspect of the scheme of telecommunications deregulation could still be at risk. ❑

Steven Glass is a Solicitor at Gilbert & Tobin. Gilbert & Tobin acted for Optus in each of the disputes with local councils.

What the Minister says...

In his address to the ATUG Conference on 30 April, the Minister for Communications and the Arts, **Senator Richard Alston**, had this to say about overhead cabling

'One of the most significant developments in the industry in recent times has been the construction of competing broadband cable networks by Telstra, Optus and their joint venture partners. It has certainly attracted the most comment.

Recent public comment has focussed on the vexed question of overhead cabling, which figures in the plans of both carriers but principally Optus.

It needs to be recognised that the carriers have been proceeding apace with their rollouts in line with business plans, cash flow predictions and equipment supply contracts based on a regime introduced by the previous government more than five years ago. Indeed it was a former communications minister and now the leader of the opposition who inserted the current carriers' powers and immunities into the Telecommunications Act.

The cable rollout has now progressed to a considerable extent and the bulk of the $7 billion devoted to the competitive rollout has already been spent.

In these circumstances it would be like moving the goal posts at three quarter time (or twenty minutes into the second half if you don't speak my language), to now unilaterally intervene and require the carriers to dramatically reconfigure their network rollouts.

Australia will be a major beneficiary of a world class mix of telephony broadband interactive and pay television services and there is no doubt that the consumer takeup for these services will be in line with Australia's long standing record of early enthusiasm for colour television, VCRs, faxes and mobile phones.

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But whilst we are firmly committed to a competitive rollout we must also continue to explore the possibilities for minimising duplications of ducting facilities particularly in non metropolitan areas where the possibility of installing single facilities on an open access basis or a competitive tender basis must be very seriously examined.

In metropolitan areas the recent report by Austel [at the time of publication, this report had not been made public] makes it clear that there are major logistical difficulties and commercial imperatives which militate against compulsory undergrounding. We will introduce a new Telecommunications National Code from 1 July 1996, which will hopefully endure well beyond 1997. We are committed to ongoing consultation with local government associations in or-