HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

HUTCHISON 3G AUSTRALIA PTY LTD APPELLANT

AND

CITY OF MITCHAM & ORS RESPONDENTS

Hutchison 3G Australia Pty Ltd v City of Mitcham
[2006] HCA 12
6 April 2006
A43/2005

ORDER

1. Appeal allowed.

2. Set aside so much of the order of the Full Court of the Supreme Court of South Australia made on 11 March 2005 as answered the questions set out in the Case Stated filed on 27 January 2004 and, in its place, order that the questions be answered as follows:

(1.1) Q. In the events which have happened except at Clarence Gardens, are the stobie poles erected by ETSA when fitted with the facilities placed upon each by Hutchison, a tower within the meaning of cl 6 of Sched 3 of the Telecommunications Act *1997 (Cth)?*

A. No, because the stobie poles are not and do not become facilities for the purposes of the Telecommunications Act *1997 (Cth) notwithstanding the installation on them of Hutchison's facilities. Therefore, the stobie poles are not and do not become towers within the meaning of cl 6 of Sched 3 of that Act.*

(1.2) Q. In the events which have happened except at Clarence Gardens, has Hutchison erected low-impact facilities within the meaning of the Telecommunications (Low-impact Facilities) Determination 1997 (Cth) having regard to the facts that:

(a) *the new or replaced stobie pole together with the facilities installed by Hutchison constitute more than a 25% increase in the apparent volume of the original stobie pole; or*

(b) *the air conditioning units in the equipment shelters for the facility emit noise; or*

(c) *the distance from the top of the stobie pole to the top of the panel antennae exceeds 3 metres?*

A. Yes, and on the basis that the fact referred to in question 1.2(a) is not relevant to the identification of low-impact facilities in the Telecommunications (Low-impact Facilities) Determination 1997 (Cth).

(1.3) Q. In the events which have happened except at Clarence Gardens, is either or both Hutchison and ETSA required to obtain development approval from the relevant authority pursuant to the Development Act *1993 (SA) for the erection of the stobie poles replaced by ETSA and if so by which party?*

A. No.

(2) Q. In the events which have happened at the Clarence Gardens site, is the downlink facility established by Hutchison a low-impact facility within the meaning of the Telecommunications (Low-impact Facilities) Determination 1997 (Cth) having regard to the facts that:

(a) *the air conditioning units in the equipment shelter for the facility emit noise; or*

(b) *the distance from the top of the stobie pole to the top of the panel antennae exceeds 3 metres?*

A. Yes.

(3) Q. Is the Council entitled to a declaration in respect of each site that the replacement of the stobie poles (save for Clarence Gardens) together with the installation of the telecommunications facilities thereon is development which requires development approval pursuant to the Development Act *1993 (SA)?*

A. No.

3. *Set aside order 1 of the Full Court of the Supreme Court of South Australia made on 11 March 2005 and, in its place, order that the City of Mitcham pay the costs of Hutchison, CKI Utilities Development Ltd, HEI Utilities Development Ltd, CKI Utilities Holdings Ltd, HEI Utilities Holdings Ltd and CKI/HEI Utilities Distribution Ltd of and incidental to the Case Stated.*

4. *The City of Mitcham and the Attorney-General for the State of South Australia pay Hutchison's costs of the appeal to this Court.*

On appeal from the Supreme Court of South Australia

Representation:

R J Whitington QC with S W Henry for the appellant (instructed by Minter Ellison).

B R M Hayes QC with G Manos for the first respondent (instructed by Norman Waterhouse).

Submitting appearance for the second to sixth respondents.

C J Kourakis QC, Solicitor-General for the State of South Australia with C Jacobi for the seventh respondent (instructed by Crown Solicitor's Office South Australia).

CATCHWORDS

HUTCHISON 3G AUSTRALIA PTY LTD v CITY OF MITCHAM

Post and telecommunications – Telephonic and related services – Structures for telecommunications purposes – Appellant was a licensed telecommunications carrier under Div 3 of Pt 3 of the *Telecommunications Act* 1997 (Cth) – Appellant installed certain telecommunications facilities ("downlink sites") upon structures ("stobie poles") erected by second to sixth respondents ("ETSA") – Some stobie poles replaced by ETSA at the cost of the appellant for the purpose of installation of downlink sites – Appellant had notified first respondent of intention to do so without applying for development approval pursuant to the *Development Act* 1993 (SA) – First respondent issued enforcement notices pursuant to s 84 of the *Development Act* – Appellant challenged notices – Whether either or both of the appellant or ETSA were required to obtain development approval – Whether in relation to the replacement of certain stobie poles the appellant undertook "development" within the meaning of the *Development Act* – Whether stobie poles when fitted with downlink sites were "towers" within the meaning of cl 6 of Sched 3 to the *Telecommunications Act* – Whether replacement stobie poles were "towers" – Whether downlink sites were "low-impact facilities" within the meaning of Sched 3 to the *Telecommunications Act* – Whether downlink sites constituted "co-located facilities" for the purposes of Pt 7 of the Schedule to the Telecommunications (Low-impact Facilities) Determination 1997 (Cth) ("the Determination") – Whether noise emitted by an equipment shelter is relevant to "the levels of noise that are likely to result from the operation of the co-located facilities" for the purposes of Item 2 of Pt 7 of the Schedule to the Determination.

Constitutional law (Cth) – Inconsistency of laws – *Telecommunications Act* did not "cover the field" of the regulation of the installation of the appellant's downlink facilities to the exclusion of the *Development Act* – Federal statutory policy included the efficient establishment and maintenance of nationwide and international telecommunications facilities in Australia – Relevance of statutory policy of co-operation between federal and State instrumentalities – Whether necessary to resolve possible constitutional questions of inconsistency of laws.

Words and phrases – "low-impact facility", "tower", "co-located facilities", "facility", "to undertake development".

Judiciary Act 1903 (Cth), ss 78A, 79.
Telecommunications Act 1997 (Cth), s 7, Sched 3.
Crown Proceedings Act 1992 (SA), s 9(2).
Development Act 1993 (SA), ss 4, 32, 33, 49A, Sched 14A.
Electricity Act 1996 (SA), s 23(1)(j).
Constitution, s 109.

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. In their joint reasons in *Bayside City Council v Telstra Corporation Ltd*[1], Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ observed that:

> "[p]rovisions dealing with the application of State laws to the conduct of service providers carrying on activities authorised by the Commonwealth pursuant to s 51(v) [of the Constitution] are familiar."

2 That case concerned the validity of certain provisions enacted by the legislatures of New South Wales and Victoria which empowered local authorities to impose rates and charges on activities relating to, and involving, telecommunications cables. This Court held that s 109 of the Constitution had been enlivened, and the State laws rendered inoperative, by the inclusion in the *Telecommunications Act* 1997 (Cth) ("the Telco Act") of a provision which denied the effect of any State law that discriminated against telecommunications carriers[2].

3 The present litigation concerns interaction between the Telco Act and legislation of South Australia. Whilst s 109 of the Constitution appears to have been invoked in the conduct of the case in the Supreme Court of South Australia, this was not decisive in the result reached there. In this Court, any reliance upon constitutional inconsistency was eschewed by the appellant and the appeal falls to be determined upon issues of construction of concurrently operating federal and State laws. However, the constitutional paramountcy of federal law is a contextual consideration that informs the resolution of the contested issues of interpretation argued in this appeal. Moreover, as will be shown[3], co-operation between the relevant federal and State instrumentalities is a policy mandated by both federal and State law. At the conclusion of these reasons, we will return to this issue of interaction of the two systems of law[4].

4 The appellant ("Hutchison") is a licensed telecommunications carrier under the provisions of Div 3, Pt 3 of the Telco Act. Hutchison denies any application to it, in respect of its erection of certain telecommunications facilities,

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1 (2004) 216 CLR 595 at 618 [11].

2 Sched 3, Pt 1, Div 8, cl 44.

3 See at [42].

4 See at [107]-[110].

of the requirement for development approvals under the provisions of the *Development Act* 1993 (SA) ("the Development Act"). Those facilities are known as "downlink sites" and were installed by Hutchison during 2002 and early in 2003 as part of its mobile telecommunications network. The downlink sites are at five locations in suburban Adelaide which are referred to, for convenience, as the Colonel Light Gardens site, the Bellevue Heights site, the Torrens Park site, the Kingswood site and the Clarence Gardens site.

5 All five of these locations fall within the area of the first respondent, the City of Mitcham ("the Council"). Pursuant to s 34 of the Development Act, where a proposed development is to be undertaken within the area of the Council, the Council is, for the purposes of Div 1, Pt 4 of that statute, the "relevant authority" and thus empowered by s 33 to assess, and to grant or refuse approval to, the proposed development.

6 The second to sixth respondents entered a submitting appearance to the appeal. They are a group of companies trading together as ETSA Utilities ("ETSA") under the terms of a licence which authorises the operation of an electricity distribution network. The licence was granted by the Essential Services Commission ("the Commission") pursuant to Pt 3 of the *Electricity Act* 1996 (SA) ("the Electricity Act"). As will become apparent, the facilities established by Hutchison were installed upon structures which ETSA either had already erected or replaced in pursuance of an arrangement with, and at the cost of, Hutchison itself.

The litigation

7 Between August 2002 and February 2003, Hutchison notified the Council of its intention to install its downlink facilities by a letter in respect of each of certain locations. However, neither Hutchison nor ETSA applied to the Council for development approval in respect of the downlink sites.

8 In April 2003, pursuant to s 84 of the Development Act[5], the Council issued a series of enforcement notices addressed to Hutchison relating to each

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5 Section 84(2), so far as material, provides:

> "If a relevant authority has reason to believe on reasonable grounds that a person has breached this Act or a repealed Act, the relevant authority may do such of the following as the relevant authority considers necessary or appropriate in the circumstances:

(Footnote continues on next page)

downlink site and requiring Hutchison to cease work that had not been approved by the Council under the provisions of the Development Act.

9 Hutchison challenged the notices by proceedings in the Environment, Resources and Development Court of South Australia ("the Environment Court"). The sole ground of challenge was that the downlink sites were low-impact facilities within the meaning of Sched 3 to the Telco Act, and, as such, did not require development approval under the Development Act.

10 By a separate proceeding instituted in the Supreme Court on 18 December 2003, the Council sought declarations to the effect that each downlink site did require development approval under the provisions of the Development Act. The Council also sought injunctions requiring Hutchison to lodge development applications in respect of those downlink sites and to remove the facilities from the stobie poles on which they had been erected.

11 Subsequently, the Council agreed with Hutchison to suspend the notices and to permit Hutchison to complete the installation of the downlink sites. Those parties also agreed that the proceedings in the Environment Court would be stayed pending the hearing and determination of the action in the Supreme Court.

12 By an order dated 19 January 2004, and with the concurrence of all parties, Debelle J referred to the Full Court of the Supreme Court a case stated pursuant to r 72.01 of the Supreme Court Rules (SA) ("the Case Stated")[6]. In the proceedings before that Court, the Council was plaintiff, and both Hutchison and ETSA were defendants.

13 The Full Court directed that notice of a constitutional matter be given to the Attorneys-General of the Commonwealth and the States pursuant to s 78B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). In response to that notice, the Attorney-General for South Australia intervened in the proceedings before the Full Court in support of the case advanced by the Council. That intervention was

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(a) direct a person to refrain, either for a specified period or until further notice, from the act, or course of action, that constitutes the breach."

6 Rule 72.01 provides:

"The parties to a proceeding may by leave of the Court concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court."

described on the subsequent special leave application to this Court as having been supported by the *Crown Proceedings Act* 1992 (SA)[7] ("the Crown Proceedings Act"). The Supreme Court was exercising federal jurisdiction and a State statute such as the Crown Proceedings Act could not apply of its own force[8]. The Solicitor-General submitted that the Crown Proceedings Act had been "picked up", presumably by s 79 of the Judiciary Act[9], and applied in the exercise of federal jurisdiction by the Full Court.

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7 Section 9(2) of the Crown Proceedings Act reads:

> "The Attorney-General may intervene, on behalf of the Crown, in any proceedings –
>
> *(a)* in which the interpretation or validity of a law of the State or Commonwealth is in question;
>
> *(b)* in which –
>
> (i) legislative or executive powers of the State or Commonwealth, or of an instrumentality or agency of the State or Commonwealth are in question; or
>
> (ii) judicial powers of a court or tribunal established under the law of the State or Commonwealth are in question;
>
> or
>
> *(c)* in which the Court grants leave to intervene on the ground that the proceedings raise issues of public importance,
>
> for the purpose of submitting argument on issues of public importance."

8 *Solomons v District Court (NSW)* (2002) 211 CLR 119.

9 Section 79 provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

14 However, the operation of s 79 is expressed to be subject to "the laws of the Commonwealth". Section 78A(1) of the Judiciary Act is one such law. That provision states:

> "The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation."

Because s 79 requires that recourse be had to s 78A(1) before any attention is given to the Crown Proceedings Act, it would appear that s 78A is the more appropriate basis for intervention by the Attorney-General. It is unnecessary, however, to pursue the point any further, beyond noting that the Attorney-General is a party to the appeal in this Court, as the seventh respondent, and that the Solicitor-General appeared and made submissions in opposition to the appeal and in support of the Council.

15 The questions posed in the Case Stated were in the following terms:

> "1. In the events which have happened except at Clarence Gardens,
>
> 1.1 are the stobie poles erected by ETSA when fitted with the facilities placed upon each by Hutchison, a tower within the meaning of clause 6 of Schedule 3 of [the Telco Act]?
>
> 1.2 has Hutchison erected low-impact facilities within the meaning of the *Telecommunications (Low-Impact Facilities) Determination* 1997 [('the Determination')] having regard to the facts that:
>
> (a) the new or replaced stobie pole together with the facilities installed by Hutchison constitute more than a 25% increase in the apparent volume of the original stobie pole; or
>
> (b) the air conditioning units in the equipment shelters for the facility emit noise; or
>
> (c) the distance from the top of the stobie pole to the top of the panel antennae exceeds 3 metres?

1.3 is either or both Hutchison and ETSA required to obtain development approval from the relevant authority pursuant to [the Development Act] for the erection of the stobie poles replaced by ETSA and if so by which party?

2. In the events which have happened at the Clarence Gardens site, is the downlink facility established by Hutchison a low-impact facility within the meaning of [the Determination] having regard to the facts that:

(a) the air conditioning units in the equipment shelter for the facility emit noise; or

(b) the distance from the top of the stobie pole to the top of the panel antennae exceed[s] 3 metres?

3. Is the Council entitled to a declaration in respect of each site that the replacement of the stobie poles (save for Clarence Gardens) together with the installation of the telecommunications facilities thereon is development which requires development approval pursuant to [the Development Act]?"

16 By an order made on 11 March 2005, the Full Court answered these questions as follows:

1.1 Yes.

1.2 Unnecessary to answer.

1.3 Either of them is required to obtain development approval.

2 It is not a low-impact facility, by reason of the emission of noise.

3 Not answered. The entitlement, if any, to a declaration is a matter for the trial judge.

17 The effect of the answers given by the Full Court[10] (Perry and Gray JJ; Bleby J dissenting) to the questions posed in the Case Stated is that either one of Hutchison or ETSA was required to obtain development approvals from the

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10 *City of Mitcham v Hutchison 3G Australia Ltd* (2005) 91 SASR 111.

Council in respect of the establishment of the downlink sites. Hutchison now appeals to this Court, arguing that none of the federal or State legislation constrained its activities or those of ETSA in the present case. The appeal should be allowed.

18 It should also be noted that the Council has not filed a notice of contention seeking to recontest the issues covered in question 1.2 or in par (b) of question 2. In particular, it made no submissions challenging the correctness of the Full Court's rejection of its contention that the downlink sites were not low-impact facilities because the distance from the top of each stobie pole to the top of the panel antennae installed upon it exceeded 3 metres. Nor did it seek to re-open the issue of the increase in volume caused by the replacement of the stobie poles at each of the locations other than the Clarence Gardens site. That issue had not been decided by the Full Court.

19 Consequently, the issues to be decided in this appeal may be confined to questions 1.1, 1.2(b), 1.3, 2(a) and 3 in the Case Stated.

20 Before turning to consider the circumstances surrounding the installation of the downlink sites further, something should be said of the legislative provisions upon which the litigation turns.

The Telco Act

21 The joint reasons in *Bayside* remarked that the Telco Act provides for[11]:

> "a regulatory framework which was intended to promote the development of an efficient and competitive telecommunications industry, including the supply of carriage services[12] to the public, and to ensure that such services are reasonably accessible, and are supplied efficiently and economically to meet the social and business needs of the Australian community (s 3)".

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11 (2004) 216 CLR 595 at 616 [7].

12 The term "carriage service" is defined in s 7 of the Telco Act to mean "a service for carrying communications by means of guided and/or unguided electromagnetic energy".

To that end, the Telco Act contemplates a system of telecommunications under which carriage services are provided to the public by the owners of network units, subject to their holding carrier licences which are granted by the Australian Communications and Media Authority (ss 42 and 56).

22 Part 2 of the Telco Act defines the term "network unit". In so doing, it gives recognition to four types of network unit, these being single line links, multiple line links, designated radiocommunications facilities and facilities specified in a Ministerial determination. The word "facility" is defined in s 7 to mean:

> "(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".

The expression "telecommunications network" is in turn defined to mean "a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy".

23 The focus of this litigation is Sched 3 to the Telco Act. This is headed "Carriers' powers and immunities" and contains two Parts. Part 2 deals with transitional arrangements. Part 1 is headed "General provisions" and contains 55 clauses spread across eight Divisions. Division 2 (cl 5) empowers a carrier, among other things, to enter on and inspect land for the purposes of determining whether that land is suitable for its purposes. Division 3 (cl 6) is headed "Installation of facilities". Pursuant to cl 6(1):

> "[a] carrier may, for purposes connected with the supply of a carriage service, carry out the installation of a facility if:
>
> ...
>
> (b) the facility is a low-impact facility (as defined by subclause (3))".

24 Clause 6(3) provides in turn that:

> "[t]he Minister may, by written instrument, determine that a specified facility is a low-impact facility for the purposes of this clause. The determination has effect accordingly."

25 However, the Minister's power thus to determine is, to a significant degree, circumscribed by cl 6(5), (6) and (7). Those provisions are in the following terms:

> "(5) A tower must not be specified in an instrument under subclause (3) unless:
>
> (a) the tower is attached to a building; and
>
> (b) the height of the tower does not exceed 5 metres.
>
> (6) To avoid doubt, a reference in subclause (5) to a ***tower*** does not include a reference to an antenna.
>
> (7) An extension to a tower must not be specified in an instrument under subclause (3) unless:
>
> (a) the height of the extension does not exceed 5 metres; and
>
> (b) there have been no previous extensions to the tower.
>
> For this purpose, ***tower*** has the same meaning as in clause 4."

26 The term "tower" is defined in cl 4 of Sched 3 to mean "a tower, pole or mast". The effect of the provisions set out above is that any tower or extension to a tower that does not satisfy the requirements stipulated therein is necessarily excluded from the ambit of the expression "low-impact facility".

27 Division 7 (cll 36-39) is headed "Exemptions from State and Territory laws" and, in particular, cl 37 is of great importance. Clause 37 applies to an activity carried on by a carrier if the activity is authorised by Div 3[13]. Clause 37(2) relevantly provides that the carrier in question may engage in that activity:

> "despite a law of a State or Territory about:
>
> ...
>
> (c) town planning; or

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13 Or by Div 2 or Div 4; the latter Division deals with maintenance of facilities.

(d) the planning, design, siting, construction, alteration or removal of a structure".

28 The installation of a low-impact facility by a telecommunications carrier thus attracts an exemption from the State laws identified in cl 37. The submissions advanced by Hutchison proceeded from the premise that cl 37 applies in the present case. It was Hutchison's contention that the downlink sites installed by it were all low-impact facilities within the meaning of cl 6(3) of Sched 3, and therefore that the operation of Div 1, Pt 4 of the Development Act was excluded in so far as it imposed a requirement of approval by the Council for the erection of those facilities.

29 Whether this syllogism holds true is dependent upon the content to be given to the concept of a "low-impact facility". For that reason, detailed reference must be made to the Determination. That instrument was made pursuant to cl 6(3) of Sched 3.

The Determination

30 The Determination provides for seven categories of low-impact facility, each of which is described at some length in each of the seven Parts in the Schedule to the Determination. One of the criteria by which it is determined in the Schedule that a facility erected by a telecommunications carrier is a low-impact facility is the nature of the area in which it is installed (cl 3.1(1)). Column 2 of the Schedule sets out the specifications of each facility determined to be a low-impact facility, and column 3 identifies the areas in which such a facility may permissibly be installed.

31 Clause 2.3(1) of the Determination provides that "[a]n area is a residential area if its principal designated use is for residential purposes". As was indicated in the Case Stated, all five locations at which Hutchison installed its downlink sites are in residential areas within the meaning of the Determination.

32 Relevantly for this appeal, Pt 1 of the Schedule to the Determination is headed "Radio facilities" and Pt 7 "Co-located facilities". Clause 1.3 defines the expression "co-located facilities" to mean:

"one or more facilities installed on or within:

(a) an original facility[14]; or

(b) a public utility structure".

Included within the definition of "public utility structure" is 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". The term "public utility" is in turn defined to have the same meaning as in Sched 3 to the Telco Act. Clause 2 of that Schedule defines "public utility" to mean, among other things, a body that provides to the public "reticulated products or services, such as electricity, gas, water, sewerage or drainage". It is not disputed that ETSA is, for the purposes of both Sched 3 to the Telco Act and the Determination, a public utility.

33 Mention has already been made of the circumstance that Pt 1 of the Schedule to the Determination deals with radio facilities. Item 3 of Pt 1 describes as a low-impact facility, if installed in a residential area, any:

"[p]anel, yagi or other like antenna:

(a) not more than 2.8 metres long; and

(b) if the antenna is attached to a structure – protruding from the structure by not more than 3 metres; and

(c) either:

(i) colour-matched to its background; or

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14 The term "original facility" is defined in cl 1.3 of the Determination to mean:

"the original structure that is currently used, or intended to be used, for connection to a telecommunications network where the original structure was:

(a) in place on the date on which the *Telecommunications (Low-impact Facilities) Determination 1997 (Amendment No 1 of 1999)* took effect; or

(b) installed after that date by means other than in accordance with Part 7 of the Schedule."

(ii) in a colour agreed in writing between the carrier and the relevant local authority".

34 Item 2 of Pt 7 of the Schedule, which is concerned with co-located facilities, recognises as a low-impact facility, if installed within a residential area, any:

"[f]acility mentioned in:

(a) Part 1, 5 or 6; or

(b) item 3 of Part 4;

installed on or within:

(c) an original facility; or

(d) a public utility structure;

where:

(e) the total volume of the co-located facilities is no more than 25 per cent greater than the volume of the original facility or the original infrastructure; and

(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 the operation of the original facility or the public utility structure."

35 In this Court, as in the Full Court, Hutchison submitted that its downlink sites fell within the terms of the items set out above. Something further will be said in these reasons by way of description of these facilities. Presently, it is necessary to consider the steps by which ETSA became involved in the matters the subject of this litigation and the consequences which may be thought to flow from them.

ETSA's relationship with Hutchison

36 The Telco Act[15] confers upon the Minister the power, by written instrument, to make a Code of Practice setting out conditions that are to be complied with by carriers in relation to any or all of the activities covered by Div 2, 3 or 4 of Pt 1 of the Schedule. As has already been indicated, those activities include the installation of a low-impact facility.

37 The Telecommunications Code of Practice 1997 ("the Code of Practice") was made under this authority. Clause 4.13 of that instrument provides:

> "(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 the land for a public purpose.
>
> (2) The carrier must take all reasonable steps to use existing facilities for the activity."

Significantly, "public utility" is defined in the Code of Practice to include a body that provides to the public "reticulated products or services, such as electricity, gas, water, sewerage or drainage".

38 The circumstance that ETSA holds a licence under Pt 3 of the Electricity Act has previously been adverted to in these reasons. It will be necessary later to consider the relationship between the provisions of the Electricity Act and those of the Development Act. Clause 20 of ETSA's licence under the Electricity Act provides that:

> "[t]he ***Licensee*** must comply with the requirements of the ***Electricity Transmission Code*** relating to:

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15 Sched 3, cl 15.

(a) other bodies having access to the ***Licensee's distribution network*** for telecommunications purposes; and

(b) concerning the resolution of disputes relating to the access and use of the ***Licensee's distribution network*** referred to in paragraph (a)."

39 The Electricity Transmission Code ("the Transmission Code") was made by the Commission pursuant to s 23(1)(j) of the Electricity Act[16]. Clause 12 of that instrument obliges a transmission entity and distributor to make, on reasonable commercial terms, an offer to a person who requests rights to use or have access to its transmission system or distribution system (as the case may be) for telecommunications purposes, having regard to various enumerated matters.

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16 Section 23(1) of the Electricity Act provides:

> "The Commission must make a licence authorising the operation of a transmission or distribution network subject to conditions determined by the Commission –
>
> ...
>
> (j) requiring the electricity entity to comply with code provisions as in force from time to time (which the Commission must make under the *Essential Services Commission Act 2002*) establishing a scheme –
>
> (i) for other bodies to use or have access to the entity's transmission or distribution network for telecommunications purposes (subject to requirements as to technical feasibility and preservation of visual amenity); and
>
> (ii) for the resolution of disputes in relation to such use or access by a person other than the Commission who is appointed by the Commission."

The Commission is empowered by s 28(1) of the *Essential Services Commission Act* 2002 (SA) ("the Commission Act") to "make codes or rules relating to the conduct or operations of a regulated industry or regulated entities". Under s 14D of the Electricity Act, the "electricity supply industry", which is defined in that statute to mean "the industry involved in the generation, transmission, distribution, supply or sale of electricity or other operations of a kind prescribed by regulation", is declared to be a regulated industry for the purposes of the Commission Act.

40 Under cl 13 of the Transmission Code, recourse may be had to arbitration if a dispute arises under or in connection with the granting of access contemplated by cl 12 or the terms on which such access is offered. An alternative method of dispute resolution is available under Div 5, Pt 5, Ch 4 of the Code of Practice, which provides for the referral to the Telecommunications Industry Ombudsman ("the Ombudsman") of any dispute between a telecommunications carrier and the owner or occupier of land on which a low-impact facility is sought to be installed.

41 In describing the effect of these provisions, Bleby J in his dissenting reasons said[17]:

> "[A]s a licensed distribution network operator, ETSA cannot refuse an approach of a telecommunications carrier requesting use of a particular part of its distribution system for the installation of telecommunications facilities. It is required to make its system available for a carrier to exercise its powers under the Telco Act. It is required to make an offer setting out the terms on which access is to be granted, and there are provisions for resolving disputes about that. But there is nothing that ETSA can do to prevent a carrier from making use of that part of its distribution system."

42 To that it may be added that both the federal scheme, evidenced by the Code of Practice, and the State scheme, evidenced by the Transmission Code, postulated co-operation between parties in the position of Hutchison and ETSA. That is an important consideration for the issues of statutory construction upon which the appeal turns. Co-operation is what occurred. ETSA and Hutchison entered in April 2001 into what is called the Facilities Access Agreement ("the Agreement"). The Agreement provides for a procedure by which Hutchison may seek of ETSA consent to its having access to ETSA's facilities for the purpose of erecting telecommunications equipment.

43 Pursuant to cl 2.1 of the Agreement, Hutchison may at any time apply in writing to ETSA for access to any one of its facilities, by which is meant "poles, structures, buildings, towers and land owned or leased by ETSA", in order to fulfil that purpose. The application must specify what, if any, "Make Ready Work" is required for the installation to be effected and must contain an offer to carry out that work. The term "Make Ready Work" is defined in the Agreement

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17 (2005) 91 SASR 111 at 139.

to mean any work that is reasonably necessary to be undertaken to allow Hutchison's equipment to be installed on ETSA's facilities.

44 Clause 2.4 provides that ETSA may either accept, or reject in "exceptional circumstances", an application from Hutchison. If it does reject an application, ETSA must specify reasons for so doing and, where reasonably possible, offer an alternative facility for Hutchison's equipment (cl 2.4.2). If, on the other hand, ETSA accepts the application, it is obliged to grant to Hutchison a site licence or site licences for the period or periods over which Hutchison is to have access to the facility in question (cl 2.6).

45 Where the application specifies any Make Ready Work necessary for the installation of Hutchison's equipment, the Agreement requires that ETSA either accept the offer to carry out that work at a cost which is either specified in the application or negotiated between the parties, or advise Hutchison that it does not intend to carry it out (cl 2.5). In the event that ETSA so advises, Hutchison itself may have that work performed.

46 Bleby J described the effect of the Agreement as being "to do no more than implement a statutory scheme by taking a commercially realistic approach"[18], bearing in mind the cost and time involved in the parties availing themselves of the dispute resolution mechanisms offered by both the Transmission Code and the Code of Practice. His Honour said[19]:

> "The fact that the extent and cost of the make-ready work may be agreed, by a process involved in the application for and grant of a site licence under the Agreement, does not signify agreement to a joint venture. Again it provides a commercial resolution to what might well otherwise have been determined in the same way by either [the Ombudsman] or an arbitrator acting under the provisions of [the Transmission Code]."

The downlink sites

47 Both the terms of the Agreement and the statutory framework in which it was intended to operate informed the procedure by which Hutchison selected the

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18 (2005) 91 SASR 111 at 141.

19 (2005) 91 SASR 111 at 141.

locations for its downlink sites. That procedure was described in the Case Stated as follows:

> "Hutchison has a procedure for identifying locations for its downlink sites with a view to co-locating with other carriers and/or existing public utility infrastructure. Shortly stated, that procedure is that its marketing personnel identify areas for coverage by the network; its radio frequency engineers then nominate sub-areas within the area of the coverage to be served by downlink sites; potential locations are then identified for the downlink sites; Hutchison then prepares plans for the site and negotiates with the owner for the installation of the facility.
>
> [In this case] Hutchison identified four stobie poles and a landing arrangement erected by ETSA within the area of the Council for the purpose of installing each of its downlink sites."

The landing arrangement consisted of two landing poles, both 9 metres in height, erected at ETSA's Colonel Light Gardens substation. What was done both by Hutchison and ETSA at each of the five locations is described in the paragraphs that follow.

48 As was required by the Agreement, Hutchison applied in writing to ETSA for permission to use the stobie poles it had identified. The respective heights of the stobie poles located at the Bellevue Heights site, the Kingswood site, the Torrens Park site and the Clarence Gardens site were 14.25 metres, 20.13 metres, 19.7 metres and 17.92 metres. ETSA undertook a structural analysis of these stobie poles in order to determine whether they were suitable for the purposes of both ETSA and Hutchison. The result of that analysis was that each stobie pole, with the sole exception of that which was located at the Clarence Gardens site, was determined to have been in need of replacement in order for the installation by Hutchison of its equipment to proceed. Those poles were replaced at the cost of Hutchison. The stobie pole at the Clarence Gardens site had previously been replaced by ETSA as part of an upgrade program and was determined to be structurally adequate to accommodate the downlink site.

49 Following the replacements, the heights of the stobie poles located at the Bellevue Heights site, the Kingswood site and the Torrens Park site were 14.9 metres, 20.1 metres and 19.4 metres respectively. It was contended by the Council that these replacement poles were facilities within the meaning of the Telco Act, as they had been erected by ETSA with the purposes of Hutchison in mind. More specifically, it was submitted that the poles and those at the Colonel Light Gardens site were towers for the purposes of Div 3, Pt 1 of Sched 3, and

because they were neither attached to a building nor of a height less than 3 metres each, they were not low-impact facilities.

50 Something should be said at this point about the components of each downlink site. Panel antennae are erected at the top of each stobie pole. This is effected by attaching the panel antennae to a mounting pole which, in turn, is attached to the stobie pole, with the result that part of the mounting pole and the whole of the panel antennae protrude above the top of the stobie pole. It is agreed between the parties that the distance from the top of each stobie pole to the top of the panel antennae erected on that pole is greater than 3 metres. However, the distance from the top of the stobie pole to the base of the antennae is less than 3 metres. The relevance of this lies in the circumstance that, as has already been stated in these reasons, Pt 1 of the Schedule to the Determination provides that an antenna attached to a structure cannot be a low-impact facility unless it protrudes from that structure by not more than 3 metres.

51 Each downlink site also comprises an equipment shelter. The shelter is located on ground level and contains electrical equipment necessary for the operation of the downlink site. Because a constant temperature must be maintained within an equipment shelter, each shelter is equipped with two air conditioning units, both of which emit noise.

52 The equipment shelters for the Clarence Gardens site and the Kingswood site are located within existing ETSA substations, whereas the stobie poles are located on the adjacent road reserves. In contrast, the equipment shelters for the Bellevue Heights site and the Torrens Park site are located on land owned by Australian Rail Track Corporation Ltd and TransAdelaide respectively. However, as with the Clarence Garden and Kingswood sites, the stobie poles at these locations are situated on adjacent road reserves. The entire Colonel Light Gardens downlink site is located within an ETSA substation.

53 In respect of those sites where the stobie poles had been replaced, the total apparent volume of the facilities installed by Hutchison on the replaced pole constitutes no more than a 25 per cent increase in the apparent volume of the new pole. However, the combined volume of those facilities and the new pole does constitute an increase in the apparent volume of the original stobie pole of more than 25 per cent. The Case Stated indicates that in respect of the Clarence Gardens site, where the stobie pole in question was not replaced, the total apparent volume of the co-located facilities constitutes no more than a 25 per cent increase in the apparent volume of the stobie pole.

The Development Act

54 We now turn to the State planning law which the appellant invoked in this case. Section 4 of the Development Act defines the term "development" to include, among other things, "building work" or "a change in the use of land". The phrase "building work" is defined to include "the construction, demolition or removal of a building", where the word "building" is given an extended definition to mean:

> "a building or structure or a portion of a building or structure (including any fixtures or fittings which are subject to the provisions of the *Building Code of Australia*), whether temporary or permanent, moveable or immovable".

This appeal was argued on the basis that the stobie poles erected by ETSA were structures, thus engaging the definition of "development" in the Development Act. Relevantly, by s 4, the expression "to undertake development" is to mean the following:

> "to commence or proceed with development or to cause, suffer or permit development to be commenced or to proceed".

55 Section 32 provides generally that only an approved development may be undertaken. The concept of an "approved development" is given content in s 33. That section provides that a development is an approved development "if, and only if, a relevant authority has assessed the development against, and granted a consent in respect of, each of" certain enumerated matters.

56 As has previously been mentioned in these reasons, the Council had contended before the Full Court, and contends now, that either one of Hutchison or ETSA was required to seek development approval from the Council in respect of the work done in installing the downlink facilities. In so far as this contention touches upon what was or was not done exclusively by ETSA, it depends, not upon the interaction of federal and State laws, but rather upon the provisions of both the Development Act and the Development Regulations (SA) ("the Development Regulations"). In particular, it depends upon the immunities and exceptions conferred by both pieces of legislation upon what is referred to in the statute as a "prescribed person"[20].

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20 Pt 11, reg 68(1) of the Development Regulations provides:

(Footnote continues on next page)

57 It is indicated in the Case Stated that ETSA is a "prescribed person" for the purposes of s 49A of the Development Act. That section relevantly states:

> "(1) Subject to this section, if a prescribed person proposes to undertake development for the purposes of the provision of electricity infrastructure (within the meaning of [the Electricity Act]), not being development of a kind referred to in section 49(2) or (3), the person must –
>
> (a) lodge an application for approval containing prescribed particulars with the Development Assessment Commission for assessment by the Development Assessment Commission; and
>
> (b) if the land in relation to which the development is proposed is within the area of a council – give notice containing prescribed particulars of the proposal to that council in accordance with the regulations.

> "For the purposes of section 49A of [the Development Act], the following are prescribed persons:
>
> (a) the holder of a licence under [the Electricity Act] issued in accordance with an order of the Minister under Part 5 of the *Electricity Corporations (Restructuring and Disposal) Act 1999* [(SA)] authorising the operation of a distribution network or some other licence under [the Electricity Act] authorising the operation of all or part of that distribution network;
>
> (b) the holder of a licence under [the Electricity Act] issued in accordance with an order of the Minister under Part 5 of the *Electricity Corporations (Restructuring and Disposal) Act 1999* authorising the generation of electricity or some other licence under [the Electricity Act] authorising the generation of electricity by means of an electricity generating plant previously operated pursuant to the licence issued in accordance with the order of the Minister;
>
> (c) the holder of a licence under [the Electricity Act] issued in accordance with an order of the Minister under Part 5 of the *Electricity Corporations (Restructuring and Disposal) Act 1999* authorising the operation of a transmission network or some other licence under [the Electricity Act] authorising the operation of all or part of that transmission network."

...

(3) No application for approval is required (either under this section or any other provision of this Act), and no notice to a council is required under subsection (1), if the development is of a kind excluded from the provisions of this section by regulation."

58 Sub-section (3) set out above directs attention to Pt 11, reg 69(1) of the Development Regulations, which provides:

"Pursuant to section 49A(3) of [the Development Act] (but subject to this regulation) the various forms of development specified in Schedule 14A, when carried on by a prescribed person, are excluded from the provisions of section 49A of [the Development Act]."

Schedule 14A to the Development Regulations, to which reference is thus made, relevantly stated as follows at the time of the events which gave rise to this litigation:

"The following forms of development, other than in relation to a State heritage place, are excluded from the provisions of section 49A of [the Development Act]:

(a) if the work is certified by a private certifier, or by some person nominated by the Minister for the purposes of this provision, as complying with the Building Rules (or the Building Rules to the extent that is appropriate in the circumstances after taking into account the requirements of the Building Rules and, insofar as may be relevant, the matters prescribed under regulation 70 for the purposes of section 49A of [the Development Act] –

...

(ii) the construction, reconstruction or alteration of a building or equipment used for or associated with the supply, conversion, transformation or control of electricity (other than an electricity generating station or an electricity substation);

...

(f) the construction, reconstruction or alteration of an electricity power line, other than a transmission line of 33 000 volts or more."

59 The Council submitted that the erection of the replacement stobie poles at the sites named above did not fall within the exemption from the development approval process provided for by both the Development Act and the Development Regulations. This was on the textual basis that, because the new poles had been erected by ETSA with Hutchison's purposes in mind, those poles could not be said to be "equipment used for or associated with the supply, conversion, transformation or control of electricity".

The noise at the Clarence Gardens site

60 It is convenient now to deal as the first issue with the noise said to be generated by the downlink facility established at the Clarence Gardens site, specifically by the air conditioning units in the equipment shelter. In this Court, as in the Full Court, the Council submitted that the level of noise thus produced was sufficient to take that facility beyond the ambit of the expression "low-impact facility". This submission proceeded from the premise that, for the purposes of the Determination, the panel antennae, the mounting pole, the existing stobie pole and the equipment shelter located at the Clarence Gardens site were together co-located facilities.

61 The reason for adopting this premise may be understood by reference to Pt 3 of the Schedule to the Determination. Items 3 and 4 of that Part provide for the requirements which must be satisfied if an equipment shelter is to be treated as a low-impact facility. Neither item sets down a requirement as to the maximum level of noise which may permissibly be emitted by an equipment shelter installed in a residential area. Consequently, the only way in which the Council could have employed the noise generated by the equipment shelter at the Clarence Gardens site as a basis upon which to argue for the applicability of the Development Act was to rely upon the requirements, contained in Pt 7 of the Schedule to the Determination, respecting the emission of noise from co-located facilities in a residential or commercial area.

62 That reliance met with success in the Full Court. Hutchison had submitted that the equipment shelter installed at the Clarence Gardens site did not fall within the definition of "co-located facilities" in cl 1.3 of the Determination. This was because it was not installed on or within either an original facility or a public utility structure. Perry J, who delivered the reasons of the majority in the Full Court, rejected this submission, saying[21]:

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21 (2005) 91 SASR 111 at 133.

> "I do not think that that argument can prevail. It involves the notion that Hutchison's facility may be segregated into different components.
>
> Hutchison's facility at Clarence Gardens is a combination of the elements mounted on the stobie pole and the equipment shelter containing associated electrical equipment, with whatever interconnection there is between those two elements."

The position thus expressed by his Honour found reflection in the Council's submission in this Court that "[Hutchison's] facility at Clarence Gardens is a combination of all of the elements necessary for the operation of the equipment and that included the equipment shelter".

63 When read in the light of this last proposition, the reasoning which was accepted by the Full Court discloses an assumption that the application of Item 2 in Pt 7 of the Schedule to the Determination involves the following three steps: first, the identification of a "facility" as consisting of all those elements necessary for the operation of telecommunications equipment installed at a particular site; secondly, a determination as to whether any one of those elements has been installed on or within either an original facility or a public utility structure; and, thirdly, if so, the extension of the requirements set down in Item 2 to cover all of the elements identified in the first step as being part of a "facility", notwithstanding the possibility that they may be free-standing.

64 However, to reason in this manner applies the definition of "co-located facilities" without regard to the definition, provided for in the Telco Act, of the term "facility". That definition is imported into the Determination by reason of cl 6(3), Pt 1 of Sched 3 to the Telco Act, which provides that only a "facility" may be determined by the Minister to be a low-impact facility. Significantly, there is nothing in the definition to suggest that necessity for the operation of telecommunications equipment at a particular site is a criterion for determining what collectively may constitute a "facility" for the purposes of either the Telco Act or the Determination.

65 On the contrary, the definition indicates that several things or structures capable of having little independent function beyond supporting the operation of telecommunications facilities at a given site are themselves to be treated as facilities, and not parts of facilities. These include masts, holes, pits and poles.

66 In *Hutchison 3G Australia Pty Ltd v Director of Housing*[22], a decision of the Court of Appeal of Victoria, Morris AJA suggested that he had found the definition of "facility" in the Telco Act to be of little assistance in applying Pt 7 of the Schedule to the Determination. This was because that definition was itself:

> "capable of being considered at different levels of abstraction: starting at individual elements such as a pole or a line, moving to elements that form a component (such as an antenna), moving to a collection of elements that form a component of the network on a local basis (such as a base station), to part of a network as such (for example, the Melbourne metropolitan network) and, possibly, even extending to the *whole* of the telecommunications network" (original emphasis).

However, it is one thing to point to the variability in the levels of abstraction contemplated by that definition; it is another to say that the definition itself provides support for the criterion of necessity for which the Council contends, when in fact it tends towards the opposite conclusion.

67 In any event, Morris AJA observed that, if a combination of facilities consisting of an antenna and other equipment, housed either above or below ground and installed for the purpose of processing the signals received or sent by the antenna, "was to be characterised at a higher level of abstraction, this could defeat the intention of [the Schedule to the Determination] that the facilities be regarded as low-impact facilities"[23].

68 Consideration should also be given to the text of cl 3.1(1) of the Determination. That provision states:

> "A facility described in column 2 of an item in the Schedule is a low-impact facility only if it is installed, or to be installed, in an area mentioned in column 3 of the item."

Column 2 of Items 3 and 4 in Pt 3 of the Schedule deals with equipment shelters. Such shelters are therefore recognised as facilities, as distinct from parts of facilities, in the provisions of the Determination.

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22 [2004] VSCA 99 at [39].

23 [2004] VSCA 99 at [40].

69 It should also be borne in mind that Item 2 in Pt 7 of the Schedule does not merely address the situation of co-located facilities per se. Rather, it is concerned with facilities mentioned in Pt 1, 5 or 6 or in Item 3 of Pt 4 of the Schedule, where those facilities have been installed on or within either an original facility or a public utility structure. It is the specific reference to such facilities, rather than the general definition in cl 1.3 of the Determination, which gives content to the phrase "co-located facilities", as it appears in Item 2. That phrase is prefixed by the definite article, implying a degree of specificity which corresponds with that with which the facilities enumerated in Item 2 by reference to other provisions in the Schedule are identified.

70 Accordingly, the reference in Item 2 to "the levels of noise that are likely to result from the operation of the co-located facilities" must be taken to be a reference to the levels of noise that are likely to result from the combined operation of (a) a facility mentioned in Pt 1, 5 or 6 or in Item 3 of Pt 4 of the Schedule; and (b) any original facility or public utility structure on which it is installed. This would necessarily exclude any noise emitted by an equipment shelter, regardless of whether or not it is part of a co-located facility. Such noise would therefore not prevent a co-located facility from being a low-impact facility for the purposes of the Determination.

71 The result is that question 2 in the Case Stated was answered incorrectly by the Full Court. That question should have been answered in the affirmative. The reasons for so answering, as stated above, lead also to the conclusion that question 1.2 should have been answered to like effect. As at the Clarence Gardens site, the equipment shelters situated in the locations covered by question 1.2 were not installed on or within an original facility or a public utility structure. Those shelters were not part of the co-located facilities formed by the installation of panel antennae upon stobie poles at each of the locations in question.

72 It remains then to consider the consequences attendant upon the replacement by ETSA of its poles at the Colonel Light Gardens site, the Bellevue Heights site, the Torrens Park site and the Kingswood site and the installation of downlink facilities thereon.

"To undertake development"

73 As has previously been noted in these reasons, the Council advanced the proposition that the replacement poles located at those sites were "towers"[24]. The

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24 Within the meaning of cl 6(5) in Div 3, Pt 1 of Sched 3 to the Telco Act.

Council also submitted that, because those poles were not attached to any buildings, they could not be taken, for the purposes of either the Telco Act or the Determination, to be low-impact facilities. As a consequence, the Telco Act[25] did not exempt Hutchison from the application of those provisions in the Development Act respecting the approval of proposed developments by relevant authorities.

74 However, in his dissenting reasons, Bleby J correctly observed that the question whether each of the replacement poles erected by ETSA can itself be characterised as a facility, specifically a tower, as those terms are defined in the Telco Act, has a bearing upon the resolution of this litigation only if, but for the exemption conferred by cl 37, Hutchison would have been obliged under Div 1, Pt 4 of the Development Act to seek development approvals in respect of the poles[26]. Such obligation could only have attached to Hutchison if, in respect of each of those poles, it had, within the meaning of the Development Act, undertaken development. In other words, it must be shown that Hutchison either commenced or proceeded with development or caused, suffered or permitted development to be commenced or to proceed.

75 On this point, Perry J's findings were as follows[27]:

> "Even although ETSA was physically responsible for [the replacement of the poles], it occurred at the behest of Hutchison and at the expense of Hutchison. *ETSA and Hutchison jointly carried out the development*.
>
> To the extent that it was undertaken by ETSA, ETSA did so solely because Hutchison sought to utilise the infrastructure used by ETSA to transmit power, for Hutchison's own purposes.
>
> ...
>
> In those circumstances, Hutchison must be regarded, for the purposes of [the Development Act], as undertaking development either in the direct sense by commencing or proceeding with development within

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25 Sched 3, Pt 1, Div 7, cl 37.

26 (2005) 91 SASR 111 at 143-144.

27 (2005) 91 SASR 111 at 127.

> the meaning of the phrase 'to undertake development', or by causing ETSA to commence or proceed with the development." (emphasis added)

It is apparent, from the emphasised portion of the passage just quoted, that his Honour's conclusion that Hutchison had directly undertaken a development within the meaning of the Development Act was premised upon an assumption that Hutchison and ETSA were engaged in a form of joint venture.

76 In *United Dominions Corporation Ltd v Brian Pty Ltd*, Mason, Brennan and Deane JJ said of the term "joint venture" that[28]:

> "[a]s a matter of ordinary language, it connotes an association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually (but not necessarily) contributing money, property or skill. ... The borderline between what can properly be described as a 'joint venture' and what should more properly be seen as no more than a simple contractual relationship may on occasion be blurred."

77 The point made in the last sentence of this passage may be accepted. However, the Agreement between Hutchison and ETSA was not entered into for the purposes of a particular trading, commercial, mining or financial undertaking or endeavour with a view to either mutual profit or mutual commercial gain. It was instead a commercial arrangement designed to facilitate, and to minimise the costs and the risk of disputes attendant upon, compliance by Hutchison and ETSA with their obligations under the Code of Practice and the Transmission Code.

78 That Hutchison bore the cost of replacing the stobie poles does not indicate that the task of making those replacements was a joint commercial enterprise. Rather, it was an incident of a pre-agreed set of terms upon which ETSA would offer to Hutchison access to its facilities for telecommunications purposes, where those terms had been settled within the Agreement in order to obviate the possibility that a dispute would arise on each occasion on which Hutchison sought to access those facilities. It cannot then be said that Hutchison had commenced or proceeded with a development within the meaning of the Development Act.

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28 (1985) 157 CLR 1 at 10.

79 Nor can it be said that Hutchison caused or permitted a development to be commenced or to proceed. In *R v Hindmarsh Corporation*[29], the Supreme Court of South Australia (King CJ, Millhouse and Prior JJ) considered the definition of the phrase "to undertake" development, as it appeared in s 4 of the *Planning Act* 1982 (SA). That definition was in terms similar to that which now appears in the Development Act. Though he was the dissentient in the outcome of the decision in *Hindmarsh*, King CJ attracted the agreement of Prior J to the proposition that the content of the word "cause" in the definition was best understood by reference to what was said by this Court (in a different context) in *O'Sullivan v Truth and Sportsman Ltd*[30]. In that case, Dixon CJ, Williams, Webb and Fullagar JJ said[31]:

> "No doubt before [an] end may be said to be 'caused' within the meaning of s 35(1) [of the *Police Offences Act* 1953 (SA)], it must appear that it was contemplated or desired. But preliminary or antecedent acts done in such contemplation or out of such a desire do not necessarily amount to a 'causing'. ... [The provision] should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other."

Kitto J spoke to similar effect. His Honour said[32]:

> "[O]ne person cannot be said to cause another's act unless not only does the former express it as his will that the act shall be done by the latter but the latter's decision to do it is a submission to the former's will, that is to say a decision to make himself the instrument of the former for the effectuation of his will."

80 It is important to recall, for present purposes, that, under the terms of the Agreement, ETSA is not obliged to carry out any Make Ready Work where such work is specified in an application by Hutchison for access to ETSA's facilities.

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29 (1984) 37 SASR 388.

30 (1957) 96 CLR 220.

31 (1957) 96 CLR 220 at 227-228.

32 (1957) 96 CLR 220 at 231.

ETSA is instead entitled to advise Hutchison that it does not intend to carry out the specified Make Ready Work, thus placing upon Hutchison the responsibility for ensuring that it is done. Moreover, it was ETSA in this case that undertook a structural analysis of the stobie poles to which Hutchison had requested access, and it was ETSA that determined that each stobie pole, with the sole exception of that which was located at the Clarence Gardens site, was required to be replaced in order to meet Hutchison's purposes. The facts placed before this Court thus do not permit the conclusion either that ETSA was controlled by, or acted with the authority of, Hutchison or that ETSA had submitted to Hutchison's will.

81 Hence, even if the exemption provision in the Telco Act[33] had not been enacted by the Federal Parliament, the provisions of State law in the Development Act relating to development approvals would not have required Hutchison to seek such approvals in respect of the replacement of the stobie poles at the Colonel Light Gardens site, the Bellevue Heights site, the Torrens Park site and the Kingswood site. It was ETSA that undertook the developments at those sites.

82 Nonetheless, it was Hutchison's primary submission in this appeal that, in any event, the poles erected by ETSA at those sites were not "facilities" for the purposes of the Telco Act, and therefore were not "towers" within the meaning of Div 3 of Sched 3 to that statute. Indeed, rather than arguing for the correctness of Bleby J's refusal to answer question 1.1, it sought in relation to that question an answer in the negative. For reasons of completeness, then, it is appropriate to consider this issue.

Were the replacement stobie poles "towers"?

83 In this Court, much of the argument directed to answering question 1.1 was focused upon what was said concerning the definition of "facility" in the Telco Act by the New South Wales Court of Appeal in *Hurstville City Council v Hutchison 3G Australia Pty Ltd*[34]. The dispute in that case arose from a proposal by Hutchison to replace a council-owned light pole which served to illuminate a suburban park with a new pole to which antennae and a communications dish would be attached. The Court of Appeal allowed the appeal by Hurstville City

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33 Sched 3, Pt 1, Div 7, cl 37.

34 (2003) 200 ALR 308.

Council. The principal reasons in the Court of Appeal were given by Mason P, who said[35]:

> "The respondent argues that the words [in the definition of 'facility'] 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, for example, cl 2 (definition of 'installation'), cl 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." (emphasis added)

84 In its submissions to this Court, the Council fixed upon the words "an existing (non purpose-built) pole" in the passage just quoted, contending that the replacement poles installed by ETSA were not existing poles, but were instead built with the purposes of Hutchison in mind. The poles were therefore "for use ... in connection with a telecommunications network".

85 However, merely establishing that ETSA erected stobie poles at the relevant sites in order to permit installation by Hutchison of its facilities does not necessarily demonstrate that those poles were intended for such use. This is because the definition of the term "facility" in the Telco Act requires that attention be directed, not to the motive for the installation of a structure or thing, but the function which that structure or thing serves or was designed to serve.

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35 (2003) 200 ALR 308 at 319.

86 The definition of the expression "telecommunications network" has previously been set out in these reasons. That definition contemplates a "system" or a "series of systems" engaged in the carrying of communications by means of guided and/or unguided electromagnetic energy. In attempting to characterise the function which was served or sought to be served by the replacement poles, the question thus arises: were the replacement poles intended for use in connection with a "system"?

87 The Case Stated indicates that the poles were replaced in order to meet the structural demands of carrying such facilities as the three panel antennae, the microwave dish and the mounting pole which together form part of a downlink site. In other words, the replacement poles were designed, in part, to accommodate the physical act of installing telecommunications equipment. However, there is nothing to suggest that, as such, they were intended to satisfy the requirements of a "system" or a "series of systems" of the sort described in the definition of "telecommunications network".

88 The locations of the poles, though conducive to the operation of a telecommunications network and recognised by Hutchison as such when it selected them as sites for the installation of its downlink facilities, were not selected in order to facilitate that operation. Instead, ETSA had erected poles at those locations as part of its electricity distribution business.

89 Moreover, it was not the set of requirements attendant upon the operation of a system which prompted the need for poles of a larger cross-section at the Colonel Light Gardens site, the Bellevue Heights site, the Torrens Park site and the Kingswood site. It was instead the requirements attendant upon the task of installing individual items of equipment on those poles.

90 Accordingly, question 1.1 in the Case Stated should have been answered in the negative. The replacement poles erected by ETSA were not facilities within the meaning of the Telco Act. Because of this, and because of the affirmative answer already given to question 1.2, Hutchison is entitled, in respect of the installation of its downlink sites, to the benefit of an exemption from the operation of the Development Act, as provided for in the Telco Act[36].

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36 Sched 3, Pt 1, Div 7, cl 37.

91 To say this, however, is not to dispose fully of question 1.3 in the Case Stated. We turn now to consider the position of ETSA under the provisions of the Development Act.

The position of ETSA

92 Reference has been made earlier in these reasons to s 32 of the Development Act. This is a general provision, stating:

> "Subject to this Act, no development may be undertaken unless the development is an approved development."

The opening words of s 32 subordinate its prohibition to s 49A. Section 49A(1) imposes a specific requirement for approval of development to provide electricity infrastructure within the meaning of the Electricity Act. However, s 49A(3), operating in conjunction with the Development Regulations[37], confers upon prescribed persons (of whom ETSA is one), in respect of certain forms of development, an exemption from a requirement under any provision of the Development Act for development approval by the Development Assessment Commission.

93 One form of development identified as attracting the exemption thus conferred is "the construction, reconstruction or alteration of a building or equipment used for or associated with the supply, conversion, transformation or control of electricity". Those words are to be found in par (a)(ii) of Sched 14A to the Development Regulations. In so far as it touches upon ETSA's obligations under the Development Act, question 1.3 in the Case Stated turns upon the issue whether the replacement poles erected by ETSA can be said to satisfy the statutory description of such development.

94 In his reasons for judgment, Perry J, who determined that issue in the negative, described the purposes served by the replacement stobie poles as follows[38]:

> "The object of the development was to replace the existing installation, which served ETSA's purposes only, with a different kind of installation

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37 Pt 11, reg 69; Sched 14A.

38 (2005) 91 SASR 111 at 128.

which was capable of serving the requirements of both ETSA and Hutchison.

Hutchison's purposes were not for the 'supply, conversion, transformation or control of electricity'. It is true that the replacement stobie pole was 'used for or associated with' such a purpose, but only in part. ETSA has undertaken the development for a purpose alien to that identified in the regulation defining the scope of the exclusion provided for in s 49A(3) [of the Development Act].

[Counsel] for ETSA contended that the provision of the pole for the purpose of carrying ETSA's power lines could be regarded separately and distinctly from the utilisation of the pole by Hutchison for its purposes.

But such a separation would fly in the face of the fact that, after the replacement of the pole with another pole fitted with Hutchison's equipment, ETSA was no longer using its pole for purposes limited to the supply of electricity. It was using a new pole for the purpose, albeit in part, of supporting Hutchison's facility, for which ETSA received from Hutchison an annual charge, determined in accordance with the Agreement."

His Honour's conclusions thus flowed from the proposition that, for the purpose of attracting the exemption provided for in s 49A(3) of the Development Act, Sched 14A to the Development Regulations requires that the form of development in question be for the sole purpose of supplying, converting, transforming or controlling electricity. It is that construction of Sched 14A for which the Council and the Attorney-General now contend in this Court.

95 However, the position thus advanced by these respondents runs into an immediate difficulty. The apparent width of the phrase "used for or associated with" in par (a)(ii) of Sched 14A suggests a nexus between a proposed development and the purpose of supplying, converting, transforming or controlling electricity which is not so stringent as to require that that purpose be the sole purpose of the proposed development. The requirement of sole purpose for which the respondents contend must therefore find support, not in the text of Sched 14A, but in the legislative context in which the Development Regulations were promulgated and the purpose for which s 49A of the Development Act was enacted.

96 One reason for returning to consider s 49A at this point is that the Attorney-General submitted in this Court that the requirement of sole purpose has its basis, not in the wording of Sched 14A to the Development Regulations,

but in the phrase "development for the purposes of the provision of electricity infrastructure", as it appears in s 49A(1). That phrase, it was said, "means that all of the purposes of [a] development must relate to the provision of electricity infrastructure". Where a proposed development serves multiple purposes, any one of which is unrelated to the provision of such infrastructure, it falls beyond the reach of s 49A(1), and therefore is not entitled to the benefit of the exemption conferred by s 49A(3). As is the case with the argument that seeks to ground the requirement of sole purpose in Sched 14A to the Development Regulations, there is nothing in the text of s 49A(1) to recommend the adoption of such a construction.

97 It is necessary then to turn to the chief contextual consideration proffered by the Attorney-General in support of such adoption. This was the circumstance that:

> "the purpose of the Act is to achieve town planning objectives by subjecting most developments to an assessment and authorisation process. Exemptions should be narrowly construed so that the evident purpose of the legislation is not frustrated."

98 However, s 49A(1) of the Development Act does not confer an exemption from the process of assessment and authorisation of proposed developments. Instead, it provides for the operation of such a process, albeit by means other than those contemplated by the general regime established by Div 1, Pt 4 of the Development Act (ss 32-45A), where the proposed development is sought to be undertaken by a prescribed person for the purposes of the provision of electricity infrastructure. Consequently, to give the phrase "development for the purposes of the provision of electricity infrastructure" a broad construction, specifically one which recognises the possibility of such a development serving multiple purposes, would not in any way frustrate the subjection of a development proposed by a prescribed person to the requirements of an assessment and authorisation process.

99 Furthermore, s 49A(3) of the Development Act confers an exemption from approval, in circumstances where approval would otherwise be required, not merely pursuant to s 49A(1), but under any provision in the Development Act. Section 49A(1) is therefore subject to s 49A(3). It cannot be said to set down a threshold requirement which a development must satisfy before it can receive the benefit of the exemption in s 49A(3). If the notion of sole purpose is to be recognised, it must be on the basis of Sched 14A to the Development Regulations, reference to which is mandated by s 49A(3).

100 However, construction of that Schedule must begin with further consideration of s 49A as a whole. As noted above, that section provides for a process of assessment and approval of development involving electricity infrastructure. The circumstance that such development is subject to an assessment process separate from that outlined in Div 1, Pt 4 of the Development Act is itself indicative of a legislative recognition that the objectives and obligations of those who provide transmission and distribution services are not shared by others in the community and as such need to be accommodated in that process, particularly in certain circumstances through an exemption of the sort conferred in s 43A(3).

101 One of these obligations is imposed by cl 12 of the Transmission Code, to which reference has already been made in these reasons. That provision obliges a transmission entity and distributor to make, on reasonable commercial terms, an offer to a person who requests rights to use or have access to its transmission system or distribution system (as the case may be) for telecommunications purposes. A consequence of cl 12 is that a distributor is required to be mindful of the susceptibility of its infrastructure to use for the purposes of a telecommunications carrier. Indeed, the obligation set down in cl 12 may even encourage distributors to erect infrastructure designed, not merely for the purpose of supplying, converting, transforming or controlling electricity, but also to accommodate those telecommunications purposes.

102 If, as the respondents contend it should be, Sched 14A to the Development Regulations were construed to impose a "sole purpose test" for determining the applicability in any given case of the exemption conferred in s 49A(3) of the Development Act, there would result a tension in the combined operation of the Development Act and the Transmission Code. On the one hand, s 49A is intended to accommodate, through both a separate development assessment regime and an exemption from all such assessment regimes, the obligations and objectives attaching to the supply, conversion, transformation and control of electricity. But, on the other hand, an attempt by a licensed operator of an electricity distribution network to facilitate compliance with its obligations under cl 12 of the Transmission Code by erecting infrastructure which serves a dual purpose would deny that distributor the benefit of the exemption in s 49A(3). In this way, the evident purpose of s 49A would be frustrated.

103 Schedule 14A to the Development Regulations should not be construed to favour persistence of that tension. That item does not impose a sole purpose requirement as a pre-condition to enlivening the exemption conferred by s 49A(3) of the Development Act. Such a construction accords with the natural meaning of the language of the item.

104 One final point should be made concerning the terms in which Sched 14A was drafted. On its face, the item requires that focus be directed to whether the building or equipment sought to be developed will be used for or in association with the supply, conversion, transformation or control of electricity. It is the purpose of the building or equipment developed, and not that of the development, upon which the availability of the exemption provided for in s 49A(3) of the Development Act is dependent. For this reason, the circumstance that the stobie poles were replaced by ETSA only because Hutchison had requested access to them is an irrelevant consideration.

105 It is true that the replacement stobie poles erected by ETSA were designed, among other things, to allow for the installation by Hutchison of its downlink facilities. However, this did not mean that those poles were not "used for or associated with the supply, conversion, transformation or control of electricity". Perry J accepted that the poles were, in part, "used for or associated with" that purpose. That circumstance alone is sufficient to bring those poles within the meaning of Sched 14A to the Development Regulations, thus enlivening the exemption from the development approval process provided for in s 49A(3) of the Development Act.

106 Question 1.3 in the Case Stated should be answered in the negative.

Intersection of federal and State laws

107 We part from this appeal with a final observation. The appeal was argued in this Court on the basis that the provisions of federal law, mentioned in these reasons, did not "cover the whole field"[39] of the regulation of the installation of Hutchison's facility and telecommunications equipment to the exclusion of the Development Act of South Australia. In this sense, the argument followed the conclusion reached in the Supreme Court of South Australia that s 109 of the Constitution did not apply to render invalid the provisions of State law affecting the operations of Hutchison, acting in conjunction with ETSA.

108 From the earliest days of telecommunications law in the Commonwealth, it has been a purpose of federal law to encourage the use for telecommunications of suitable facilities belonging to non-federal bodies, generally subject to

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39 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 488-489; *Ex parte McLean* (1930) 43 CLR 472 at 485.

regulation by State law. Part VII (ss 140-150) of the *Post and Telegraph Act* 1901 (Cth) was headed "Protection of Telegraph Lines from Injurious Affection by Electric Lines or Works" and later was supplemented by the Telegraph Lines Protection Regulations[40].

109 The policy behind such federal provisions includes the efficient establishment and maintenance of nationwide and international telecommunications facilities in Australia as the Constitution envisages in s 51(v); the economic use of existing infrastructure facilities; and, more recently, the minimisation of environmental concerns. To the extent that federal law so provides, State law, including any with respect to town planning, may not validly detract from, or inconsistently burden, the federal regulation[41].

110 We have been content to approach the issues in the present appeal on the basis chosen by both parties. However, in another case, the more fundamental question of constitutional inconsistency may need to be reconsidered, to decide whether it affords a more direct route to the conclusions now reached in this appeal. Assuming, as the parties did, that the federal law and the State Development Act can operate together without direct constitutional collision or incompatibility[42], the answers to the questions in the Case Stated are those now offered. Those answers happen to be consistent with a conclusion that upholds the primacy of the federal law and avoids any conflict with its provisions caused by the operation of the South Australian Development Act. It is therefore unnecessary to consider the deeper constitutional questions that might otherwise have arisen. They can be put aside to another day. This Court normally approaches such questions only when other solutions, based on the elucidation of statutory language, do not yield answers as they do, adequately, in this case[43].

Orders

111 The appeal should be allowed. The orders of the Full Court of the Supreme Court of South Australia dated 11 March 2005 and answering the

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40 SR No 246/1920.

41 Constitution, s 109.

42 cf *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 335-337 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

43 cf *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

questions in the Case Stated should be set aside and the questions asked in the Case Stated should be answered as follows:

(1.1) No, because the stobie poles are not and do not become facilities for purposes of the *Telecommunications Act* 1997 (Cth) notwithstanding the installation on them of Hutchison's facilities. Therefore, the stobie poles are not and do not become towers within the meaning of cl 6 of Sched 3 to that Act.

(1.2) Yes, and on the basis that the fact referred to in question 1.2(a) is not relevant to the identification of low-impact facilities in the Telecommunications (Low-impact Facilities) Determination 1997 (Cth).

(1.3) No.

(2) Yes.

(3) No.

112 The Council and the Attorney-General should pay the costs of Hutchison in this appeal. The Attorney-General took an active role in supporting and developing the Council's arguments in opposition to the appeal. No special provision should be made protecting him from the outcome in this Court.

113 Orders numbered 1 and 2 in the Full Court orders dealt with costs. Order 1 should be set aside and in place thereof the Council should be ordered to pay the costs of Hutchison and ETSA of and incidental to the Case Stated. Order 2, dealing with the position of the Attorney-General, should not be displaced. It is sufficient in that regard to make the above provision for costs against the Attorney-General in this Court.