

Telstra Corporation Ltd. v Hurstville City Council, Optus Vision Pty Limited v Warringah Council - The Decision of the Full Federal Court

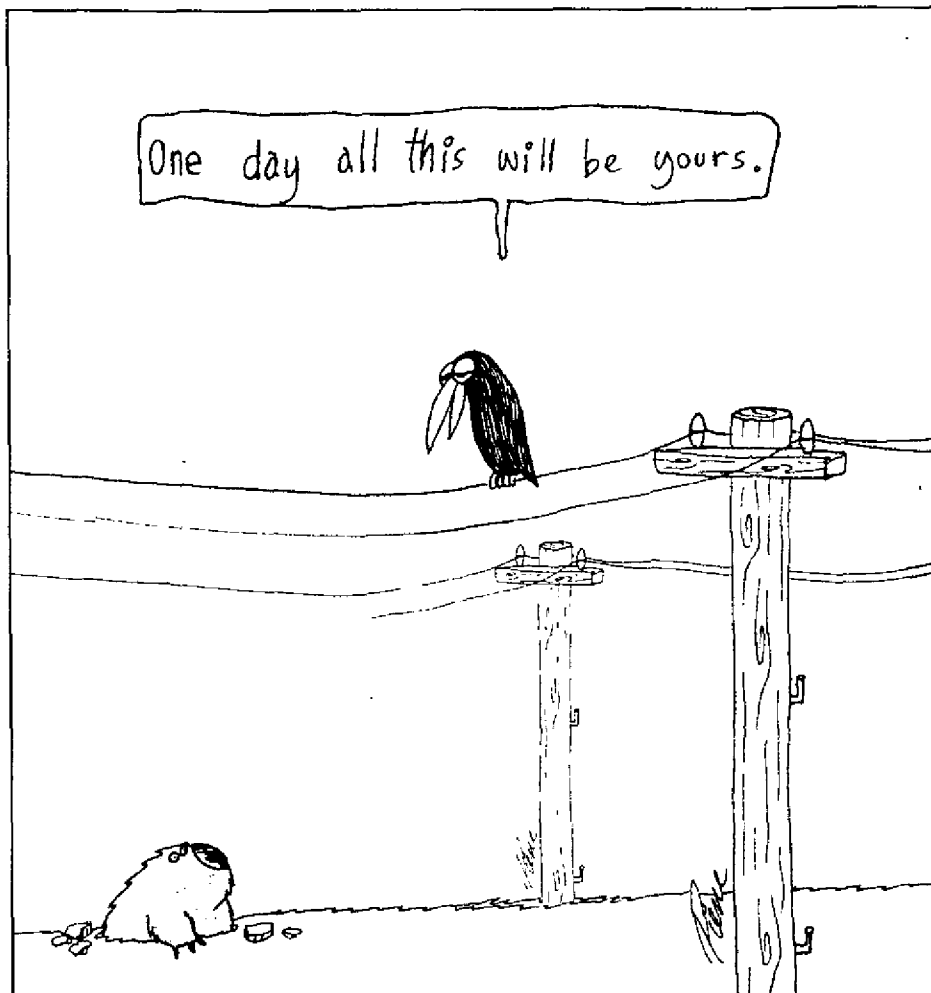
Angela Brewer updates the progress of this watershed case regarding telecommunications infrastructure.

Earlier this year the Full Federal Court delivered its decision in *Telstra Corporation Ltd. v Hurstville City Council; Optus Vision Pty Limited v Warringah Council* [2002] FCA 385 (4 April 2002). This judgment reversed the earlier decision of Justice Wilcox who had found that telecommunications carriers were subject to local government charges under section 611 of the *Local Government Act* 1993 with respect to the telecommunications infrastructure they had installed over and under public land. This judgment was seen as a great success for the Councils in upholding the charges and rates in respect of cables by Councils throughout NSW and Victoria.

The Full Federal Court, reduced to a bench of two judges due to illness and comprising Justices Sundberg and Finkelstein, found in favour of the carriers on only one ground of appeal relating to clause 44 of Schedule 3 of the *Telecommunications Act* 1997 ("Act"). The Court declined to determine the question of whether charges under section 611 were an excise, contrary to section 90 of the Constitution. In relation to the question of whether the charges were levied by the councils for an improper or extraneous purpose, the Full Federal Court stated that they agreed with Wilcox J, finding "that the purposes alleged to be extraneous" were not in fact extraneous.

WHETHER SECTION 611 CHARGES ARE DISCRIMINATORY

At first instance, Justice Wilcox left undecided the question of whether the



application of charges under section 611 were discriminatory against carriers having regard to clause 44(1) of Schedule 3 of the Act. On appeal, the Court found in favour of the carriers on this ground.

The Court held that section 611, to the extent that it authorised councils to levy and recover charges in respect of cables erected or placed on, under or over a public place, was discriminatory and therefore invalid pursuant to clause 109 of the Constitution.

The Court relied upon a dissenting judgment of Justice Stevens in a United States Supreme Court decision of *Department of Revenue of Oregon v ACF Industries* 510 U.S. 332 (1994) to support its finding. No further authority was cited in support of the Court's decision.

With the Full Federal Court declining to determine the issue of excise and supporting the finding of Wilcox J in relation to extraneous purpose, the

judgment in favour of Telstra and Optus may not give the carriers the level of comfort they require.

HIGH COURT CHALLENGE – COUNCILS TRIUMPHANT?

The decision of the Full Federal Court did not represent a resounding win for telecommunications carriers. Of the four grounds of appeal raised, the Full Federal Court only determined two issues:

- discrimination, which they based upon the judgment of a single dissenting judge of the United States Supreme Court; and
- extraneous purpose, they formed the view that the purposes alleged to be extraneous were not.

The Councils of NSW and Victoria have filed Applications for Special Leave with the High Court seeking orders that the judgment of the Full Federal Court be set aside on the grounds that the Full Federal Court erred in finding that section 611 discriminates against telecommunications carriers. Additionally, the Councils now seek an order that the Full Federal Court erred in its finding that it was not appropriate to deal with the question of whether section 611 imposed a duty of excise.

With the Application filed, we must now wait to see whether the High Court will grant the Councils leave to challenge the findings of the Full Federal Court. It is anticipated that the special leave application will be heard by the High Court later this year.

The grant of special leave to appeal by the High Court is discretionary. For special leave to be granted, the matter has to be one of either public importance or interests of justice require that leave be granted. Arguably, this case is one such matter of public importance as it involves the question of construction of section 51(v) of the Commonwealth Constitution. The characterisation which has been placed upon that section by the Full Federal Court is one which would significantly broaden Commonwealth power. This case also raises important questions concerning the interrelationship between

Commonwealth and State laws, including the manner in which section 109 of the Constitution operates; and the use of public lands of New South Wales and Victoria, and potentially all other States of Australia.

This is a matter with significant implications for Commonwealth – State relations in Australia. As such it is a matter in which in the writer's view, it would be appropriate for the High Court to grant special leave to the Councils of New South Wales and Victoria.

PUSH TO PLACE CABLES UNDERGROUND

Outside the court room telecommunications cables have again come under the spotlight.

There is current report before the State Government which proposes that all of Sydney's electricity cables be placed underground. The report acknowledges that such a move would cost as much as \$5000 a household and discusses alternative methods of funding the push underground. The report has received wide community and government support.

Local Government has been a continuing advocate of putting cables underground. Councils' stance found its way into the present action where, at first instance, Telstra and Optus sought to argue that the decision of the NSW Councils to make and levy a charge on telecommunications carriers in respect of cables was taken for a purpose extraneous to section 611 of the Local Government Act – namely to penalise the installation of above-ground telecommunications cables and to discourage further installation of any such cables. Evidence showed that many councils levied a higher rate or charge for cables which were above ground compared to the rate charged for cables which were below ground. Although there was a disparity between the charges, Justice Wilcox found against the telecommunications carriers' assertion.

With such a strong push by the State Government to put electricity cables underground, telecommunications carriers must be looking at the road

ahead and asking how long it will be before they too must place their cables underground.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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