

Co-existing with telecommunication carriers

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ABSTRACT: There are documented horror stories when the balance between the burden of Telco infrastructure on water assets and the LWU's need to manage its water supply integrity favour the Telcos. Perhaps our water industry has unknowingly made things too easy for Telcos by simply (albeit sometimes grudgingly) allowing them to dictate how they install and operate their communication equipment on water assets. Or perhaps our State legislation associated with planning approvals, public health, water quality and workers' safety has become incompatible with current telecommunication legislation. Whatever the case may be, there is now a stronger need for LWUs to understand and exercise their legislative rights in order to meet water supply and governance requirements, reduce their business costs imposed by Telco facilities, and to highlight any legislative deficiencies so things can be fixed. This need is further compounded by TPG Telecom's announcement (April 2017) to become Australia's fourth Carrier operator, and the Australian Government releasing its strategy (October 17), to support the timely rollout of 5G in Australia including "...streamlining arrangements to allow mobile carriers to deploy infrastructure more quickly..."¹. It is hoped that the information contained in the NSW Water Directorate's "Third Party Infrastructure on Water Supply Reservoirs Guidelines, Parts 1 & 2" will empower and motivate LWUs to protect our obligations to water quality, workforce safety, minimising capital and operational costs, as well as establishing a better a balance between LWU's and telecommunication needs.

KEYWORDS: infrastructure, telecommunications, water, reservoirs

1 Introduction

In June-July 2017, the Australian Government (through the Department of Communication and the Arts) sought submission responses on the 'Possible amendments to the telecommunications carrier powers and immunities' legislation. Many stakeholders (such as water industry associations, water utilities, local governments, and various State government agencies) were unaware of this consultation process as they had not been directly notified of the proposed amendments by the Australia Government, though some still managed to submit their concerns at the last minute.

At the similar time, the Qld and NSW Water Directorates recognised the risks of telecommunication facilities on water supply reservoirs to water quality, worker's safety, water supply operations and asset management and were developing the following guidelines:

1. Third Party Infrastructure on Water Supply Reservoirs Guidelines –

Volume 1 Engineering Aspects
(September 2017 – available)

2. Third Party Infrastructure on Water Supply Reservoirs Guidelines – Volume 2 Legislative Framework (to be released)

What was apparent after follow up consultation meetings with Department of Communication and the Arts regarding their proposed legislative amendments, was that there was little available data highlighting the impacts of telecommunication facilities on reservoirs that have been referred to the Telecommunications Industry Ombudsman (TIO) for action. This is despite various organisations, LWUs and water authorities who have/are experiencing issues jeopardising their operations, worker's safety and public health.

Unfortunately, one cannot say the "system is broken" to manage Telco's communication facilities on reservoirs unless there's legitimate attempts to use the system. The NSW Water Directorate's *Third Party Infrastructure on Water Supply Reservoirs Guidelines (Parts*

1&2) attempt to educate and promote the various legislative instruments (“the system”) that are currently available for LWUs to use, and to bring balance back for a mutually sustainable arrangement between LWUs infrastructure and Telcos.

2 Legislative Framework

The current Commonwealth telecommunication legislation was introduced when Telstra was privatised in the late 1990s, and when the various state legislation for public health, water quality, workers safety were (perhaps) not as developed as it is now. The *Telecommunication Act 1997 Cth* (Telco Act) provides substantial powers and immunities for Telcos to access, install and operate communication facilities on private property, especially if the facility is categorised as Low Impact under the *Telecommunications (Low-impact Facilities) Determination 1997* (ie. the *Determination*). There are other supporting legislative instruments that Telco’s must adhere to, such as *Telecommunications Code of Practice 1997* (ie. the *Code*), *Telecommunications Regulations 2001*, and various Telco Industry Standards and Industry Codes registered with Australian Communication and Media Authority (ACMA). These are also explained in NSW WD’s guidelines.

If the facility cannot be categorised as Low Impact under the *Determination*, the Telco must obtain development consent through State planning processes (which includes Local Government planning approvals). This gives LWUs opportunity to stipulate consent conditions to ensure the Telco’s facility is compatible with LWU’s essential operations and governance requirements. Consent conditions should address the needs/requirements of the LWU:

1. Site access
2. Installation and maintenance activities
3. Water quality contamination
4. Work health and safety
5. Lease/licence agreements

However, if the facility is categorised as Low Impact under the *Determination*, then there’s no need for the Telco to obtain development consent through State or local government planning processes. This is the area of greatest concern for LWUs, as many of their reservoirs, towers, tanks are considered

candidates to host Low Impact communication facilities.



Figure 1: Example of a Low Impact Facility posing risks to water supply operations and public health

3 What are Low Impact Facilities?

Low impact Facilities are facilities which are considered to have a low visual impact because of their size and location. At the time the Telco Act was drafted, they were considered to be less likely to raise significant planning, heritage, or environmental concerns. The NSW Water Directorate guidelines - *“Third Party Infrastructure on Water Supply Reservoirs Guidelines, Part 2”* help to explain what is or not a Low Impact facility under the *Determination*. In particular, “public utility structure” is specifically mentioned in Part 7 of the Schedule of the *Determination* with only limited conditions relating to noise and percentage volume of space being utilised. In other words, water supply reservoirs may be considered as a Low Impact facility more often than not.

There are stringent procedural requirements for:

1. Telcos to access and install communication equipment on Low Impact facilities sites in the legislation,
2. Strict timeframes for Land owners to object and negotiate with Telco, and refer matters to the Telecommunication Industry Ombudsman (TIO). The process often begins with the Telco issuing a Land Access and Activity Notice (LAAN).

It’s very important for LWUs to immediately review a Telco’s proposal to establish a Low Impact facility under the *Determination*, and to be prepared to lodge an objection on legitimate grounds and within certain timeframes. The onus is on the LWU to identify noncompliance

and lodge an objection, and failure to do this is interpreted as accepting the Telco's proposal on prima facie. This enabling the Telco to carry out activities stipulated in the LAAN. This is explained further below.

4 Land Access and Activity Notice and Objection Processes for Low Impact Facilities

Schedule 3 of the *Telecommunications Act 1997* (the *Telco Act*) and the *Telecommunications Code of Practice 1997* (the *Telco Code*) set out a process (the "Land Access Process") that allows the Telco to install Low-Impact Facilities without the consent of the Land owner and without obtaining State, Territory or local government approvals.

The objection process may not be successful in stopping the Telco's proposed activity, but is an effective mechanism to have constructive dialogue with the Telco to attempt to address issues and concerns of both parties to sustainably co-exist. It also provides the mechanism for the Telco to make reasonable efforts to enter into an agreement with LWUs if a Telco's activities are likely to effect the operations of a public utility.

The *Telco Code* (Clause 4.24) outlines the Land Access and Activity and Objection process for new facilities, and similar processes are outlined for Inspection of Land (clause 2.31) and Maintenance of Facilities (clause 6.23) with different timeframes. The process for new installations² is outlined below:

1. Typically, Telcos will issue a LAAN at least 10 business days before commencing works. In order to raise/discuss any concerns/issues with the Telco, the Land Owner is expected to lodge an objection at least 5 business days before commencing works.
2. Both Land owner and Telco have 20 business days (ie. Consultation period) commencing when the Telco receives the Objection to resolve the Objection. During this period, the Telco must make "reasonable efforts" to resolve the Objection commencing within the first 5 business days of the Consultation period.
3. If the Land Owner and Telco cannot resolve the Land Owner's objection by

agreement by the end of the Consultation Period, the Telco must issue a "End of Consultation Notice" within 5 business days from the end of the Consultation Period to the Land Owner indicating whether the Telco is making any changes to the original LAAN to address the Land Owner's objection.

4. If the Land Owner is not satisfied with End of Consultation Notice, the Land Owner can write to the Telco and ask the Telco for refer the matter to the Telecommunications Industry Ombudsman (TIO) within 5 business days after receiving the End of Consultation Notice. If this step is not carried out, the Telco will be able to carry out the activity stipulated in the LAAN.

5 Referral to the TIO

If the Telco wishes to proceed with their activity after receiving the TIO referral request from the Land Owner, they are required to prepare a referral brief and send it to the TIO as soon as practical. Unfortunately, the *Code* does not specify a timeframe for the Telco to refer the Objection to the TIO, however, if the Telco wishes to proceed with the proposed activities despite the Objection, the referral should occur promptly and preferably within 20 business days from when the Telco received the Land owner's request to refer².

If the objection complies with the relevant clauses of the *Telco Code*, a Telco is only able to engage in the land entry activity in the following situations.

- The objection is resolved by an agreement between the Telco and Objector.
- A request to refer the objection to the TIO is not received by with the Telco within 9 business days for the inspection of land, or 5 business days for the installation or maintenance of a Low Impact Facility provided in the *Telco Code*. Accordingly, time periods are critical.
- The TIO deals with the objection without giving any direction to the Telco, and informs the Telco in writing of that outcome.
- The TIO gives a direction to the Telco.

The TIO will review the information provided in the Telco's referral brief, and will invite both

parties to provide any other information/documents that may be relevant.

It may be appropriate for the Land owner to seek professional legal assistance to collate and respond to any TIO request for information. There are no provisions in the Land Access Process that allow the Carrier or Land owner to appeal decisions made by the TIO by a Court except in limited circumstances. Again, legal advice should be sought if this is being considered.

6. Valid Grounds for an Objection

Fortunately, Telcos must comply with a number of conditions that are contained within Division 5 of Schedule 3 to the *Telco Act*, and the *Telco Code*. LWUs are able to utilise the objection process as a powerful mechanism to negotiate with Telcos, rather than accepting a notification of their planned installation or maintenance of facilities under the *Telco Act*. NSW Water Directorate's guideline (Part 2)⁴ summarises the legislative requirements that Telcos must comply with. These include:

- Telcos to adopt best practice, often with reference to the various industry codes registered by Australian Communication and Media Authority (ACMA) - Clauses 2.11(1), 4.11(1) and 6.11(1) of the Telco Code
- Telcos to abide by laws governing noise applicable under State laws - Clauses 2.12, 4.12 and 6.12 of the Telco Code
- Telcos must take all reasonable steps to ensure that they cause as little detriment, inconvenience, and as little damage as practicable - Clause 8 of Schedule 3 to the Telco Act
- Telcos must take all reasonable steps to ensure that the land is restored to a condition that is similar to that which existed before the activity began - Clause 9 of Schedule 3 to the Telco Act
- Telcos must take all reasonable steps (under Clause 10 of Schedule 3 to the Telco Act) to:
 - Act in accordance with good engineering practice.
 - To protect the safety of persons and property.
 - Ensure that the activity interferes as little as practicable with:
 - the operations of a public utility;
 - public roads and paths;

- the movement of traffic; and
 - the use of land.
 - Protect the environment.
- Telcos must make reasonable efforts to enter into an agreement with a public utility, where it is to engage in an activity that is likely to affect that public utility's operations. The agreement must provide the manner in which the Carrier will engage in the: inspection or land; or installation of; or maintenance of a facility - Clause 11(1) of Schedule 3 to the Telco Act and clause 2.6, clause 4.6 and clause 6.6 of the Telco Code
- Telcos must give notice to owner of land before engaging in any activities involved with entering land - Clause 17 of Schedule 3 to the Telco. Warning...this clause has many exceptions
- Telcos to give notice to owner of land for any tree lopping - Clause 18 of Schedule 3 to the Telco Act
- Telcos must give 10 days' written notice to road authorities and utility authorities before engaging in any of the following activities (Clause 19(1) of Schedule 3 to the Telco Act. Warning...Telcos can often use the exception to maintain adequate levels of service):
 - Closing, diverting or narrowing a bridge.
 - Installing a facility on, over or under a bridge.
 - Altering the position of a water, sewerage, or gas main or pipe.
 - Altering the position of an electricity cable or wire.
- Telcos must ensure that there is reasonable passage for persons, vehicles and vessels when installing facilities over a road, bridge, path, or navigable water. The Telco must install the facility in such a way that satisfies 'reasonable passage' - Clause 20 of Schedule 3 to the Telco Act

7 Conclusion

It is believed that poor corporate posturing by Telcos (perhaps more so by their contractors and sub-contractors) have enabled them to "work the system" to their advantage to minimise their costs to establish Low Impact facilities on reservoirs. This has caused great concern and expense to LWUs.

As highlighted above, there are substantial grounds for LWUs to hold Telco's (and their agents) to account. Objections raised by

LWUs from a Telco's LAAN are essential to begin dialogue with the Telco about their installation, and to establish a more sustainable approach to both parties' legislative requirements.

It's hope that if the industry is more educated and motivated to exercise their rights under the same telecommunication legislation, the risk to LWU's operations, staff, water quality and public health can be better managed.

NSW Water Directorate is interested to receive information from LWUs so the newly formed working committee comprising of NSW Water Directorate, Qld Water Directorate and WSAA can collate information and highlight any legislative deficiencies to the Department of Communication and the Arts.

References

1. Department of Communication & Arts (Media Release 12 October 2017):
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4. Third Party Infrastructure on Water Supply Reservoirs Guidelines – Volume 2 (to be released), NSW Water Directorate: Obtained via NSW Water Directorate