

**SUBMISSION TO**

**THE SENATE INQUIRY**

**INTO**

**THE POWERS OF**

**AUSTRALIA'S**

**COMMUNICATIONS**

**REGULATORS**

**January 2005**

Tower Sanity Alliance  
Convenor: Anne Wagstaff  
Email: [towersanity@yahoo.com.au](mailto:towersanity@yahoo.com.au)  
Website: [www.towersanity.org](http://www.towersanity.org)

## Introduction

Tower Sanity Alliance has written this reply to the inquiry. Tower Sanity Alliance, a national community-based non-profit organisation, was borne out of the frustration and anger experienced by communities and councils over carrier practices across Australia. Residents and councillors from over 50 communities in Perth, Adelaide, Melbourne, Sydney, regional NSW, Brisbane and regional Qld all have similar tales of dissatisfaction with carriers behaviour in the siting of their wireless facilities - the carriers are ignoring community concerns, and authorities such as the Australian Communications Authority (and the Department of Communications and ARPANSA) are not addressing community issues.

Tower Sanity's response is compiled from sections of a briefing paper recently given to Senator Coonan's office for comment. Attached here is the section of the briefing paper<sup>1</sup> that deals with the lack of regulation and enforcement, and the behaviour of carriers.

It may appear that some of the issues have little to do directly with the Australian Communications Authority (ACA). However there are important considerations to be taken into account on the scope of the regulator. What are highlighted are holes in the current system that are working to damage community interests.

---

<sup>1</sup> See appendix

## Community Concerns

### Key questions for any new regulator:

The carriers are rolling out their wireless networks without regard to community concerns and without regard to the precautionary principle. – communities all around Australia are outraged – and no one in authority, not even the ACA is listening . So will a new and bigger authority listen and how will it do that?

The ACA is a watchdog without effective enforcement powers. Will a merger of the ACA with the ABA have teeth?

The public want a system wherein the commercial interests of the carriers will not continue to override those of communities and councils.

### Background

It is Federal legislation that allows certain telecommunications facilities to be installed without a development application (DA) yet there is no Federal authority that will take responsibility for regulating/vetting/auditing/checking/monitoring/overseeing the installation of such facilities.

If a carrier identifies its facility as 'low-impact' it does not have to seek council approval. Please note that the term 'low-impact' does NOT refer to the level of electromagnetic radiation. It refers solely to the visual impact. A low-impact facility must comply with the supposed strict guidelines regarding type, size, colour and location set out in the *Telecommunications ("Low-impact Facilities") Determination 1997* (the Determination). By identifying its facility as 'low-impact' the carrier avoids, even flouts, all local and state planning laws that might otherwise prevent the installation.

### ACA's role is not clear

Schedule 3 of the *Telecommunications Act 1997* gives the carriers these wide powers and immunities to install such telecommunications facilities ("low-impact") without having to lodge a DA. One of the main functions of the ACA, according to their own website [http://internet.aca.gov.au/ACAINTER.1442104:STANDARD:977168279:pp=DIR1\\_4.pc=PC\\_6](http://internet.aca.gov.au/ACAINTER.1442104:STANDARD:977168279:pp=DIR1_4.pc=PC_6) is to "Administer legislative provisions relating to **powers and immunities** of carriers in constructing telecommunications facilities".

So it appears that the ACA **does** have the power to address the issue of the installation of "low-impact" telecommunications facilities. But the ACA refuses to do so. The ACA's Senior Policy Analyst, Andrew Westmorland, wrote "the ACA does not have a role in authorising carriers' actions to inspect land, install low-impact facilities or to maintain a facility. Nor does it determine whether a facility is a low-impact facility."<sup>2</sup>

Surely "construct" (as in "constructing") and "install" (as in "installation") have similar meanings?

At the very least, clarification of this particular function of the ACA is needed. What power does the ACA actually have with regards to the installation of mobile phone facilities that do not require DA's?

---

<sup>2</sup> Correspondence from Andrew Westmorland, ACA to Anne Wagstaff (appendix)

The majority of all telecommunications facilities in cities these days are installed as 'low-impact' i.e. without a DA, as long as the antennas are attached to an existing structure such as a building or light pole, and the facility complies with the Determination.

Consequently most telecommunications facilities are now being installed in our suburbs, on our local shops and clubs, in our local parks, on our community ovals, close to our homes and schools without any Federal authority regulating their installation.

### **The ACA does not effectively penalize carriers for breaches.**

#### **The ACA's powers under the Telecommunications Act 1997**

According to ACA's Andrew Westmorland,<sup>3</sup> "The ACA has specific powers under the Telecommunications Act to investigate complaints that a carrier has not complied with the Telecommunications Act or the *Telecommunications Code of Practice 1997* (the Telecommunications Code of Practice) and various Industry Codes registered under the Telecommunications Act. A breach of the Telecommunications Act, the Telecommunications Code of Practice or an Industry Code may be a breach of a carrier's licence."

#### **Breaches of the Telecommunications Act 1997**

Hutchison breached Schedule 3 of the Telecommunications Act 1997 (the Act) when installing its 3G facility in Oatley Park in 2003. The NSW Supreme Court of Appeal's ruling that Hutchison was not allowed to use the 'maintenance' clause (in Schedule 3) to remove the existing pole and replace it with one of its own, was upheld by the High Court. Hutchison was forced to remove its illegal facility but Hutchison was not penalised otherwise.

#### **Breaches of the Telecommunications Code of Practice 1997**

According to **Part 4 —Nature Conservation Director, Heritage Chairperson and Environment Secretary**, carriers are obliged to notify certain persons before the start of any land entry activity. In the case of Colonel Light Gardens in SA, Hutchison did not notify the Heritage Chairperson before activity.<sup>4</sup> Hutchison also failed to notify the Environment Secretary before any activity in Oatley Park.<sup>5</sup> Hutchison's initial (but late) Flora and Fauna Assessment (FFA) proved to be flawed and the carrier was forced to halt installation of its equipment shed till a botanist took a soil sample – from the very site that was already denuded of any flora and fauna in preparation of the installation! Following the new report that there was nothing of environmental significance, Hutchison was allowed to resume its activity. Hutchison was never penalised for its behaviour.

Despite numerous complaints from Oatley residents to the ACA<sup>6</sup> about Hutchison's possible breach of the Telecommunications Code of Practice and its FFA, it appears that the ACA has not investigated the community's claims, despite the ACA having the power to do so.

---

<sup>3</sup> Correspondence from Andrew Westmorland, ACA to Anne Wagstaff (appendix)

<sup>4</sup> Correspondence from Philip Knight, Colonel Light Gardens Historical Society to Minister Kemp, Minister for Environment and Heritage ([www.towersanity.org](http://www.towersanity.org) Useful Links page under the heading **People who care Colonel Light Gardens Historical Society Inc (Adelaide)**)

<sup>5</sup> Information received following a FOI application from Department of Environment and Heritage to confirm Oatley residents' claims is most unsatisfactory

<sup>6</sup> Kerrie Adra and Anne Wagstaff

The four mobile carriers, Hutchison, Optus, Telstra and Vodafone are obliged to abide by the ACIF Code. Carriers that do not comply with the code may face a direction from the ACA to comply and face fines of up to \$250,000 for not complying. Despite the ACA actually receiving valid complaints about Hutchison, Telstra and Optus at 9 sites, the ACA issued only a warning to 2 of them.<sup>7</sup>

**So despite breaches of the Act<sup>8</sup> and the ACIF Code<sup>9</sup> and possible breaches of the Telecommunications Code of Practice 1997<sup>10</sup>, a carrier is yet to be penalised.**

The ACA does have some power – but it chooses not to use it. And it is particularly unhelpful to individuals affected by mobile phone tower proposals.

**ACA does not engage effectively with the public**

Unbeknown to the general public, the Projects Team of the Standards and Compliance Group in the ACA will apparently deal with breaches of an industry code, the ACIF Code – Deployment of Radiocommunications Infrastructure (ACIF Code). As generally there is no mention of the ACA or this ACIF Code in carriers' notifications to residents, most residents are not even aware of the existence of the ACA, let alone the existence of this code. It is understood that some of those lucky enough to discover the existence of this team in the ACA have been sent on a wild goose chase, e.g. to contact their own council, the Telecommunications Industry Ombudsman or even another contact in the ACA, the latter two of which do not even deal directly with the issue.

So it's not surprising that the number of complaints about carriers appears to be low<sup>11</sup>.

Even before Tower Sanity was officially formed, I had been helping residents from other communities, sometimes contacting the ACA on their behalf. Having already had face-to face contact with me earlier in the year, the ACA was well aware of my activities i.e. assisting other communities. However they did not support me, informing me that those living close to the facility could only make complaints.<sup>12</sup> This was blatantly false and the ACA later retracted their statement<sup>13</sup> following my query as to why this was so.

Later in the year my request for further information from Hutchison, as directed in a public notice in my local paper, was denied by Hutchison's Community Relations Manager, Jacqueline Crompton. Carriers are required by the ACIF Code (Section 5.6.3) to place a public notice in the local newspaper when proposing to install a telecommunications facility at an existing site (i.e. where there are already antennas) without a DA.

---

<sup>7</sup> ACA's media release ACA04-44, 18 June 2004

<sup>8</sup> Hutchison in Oatley Park

<sup>9</sup> Hutchison in Smithfield NSW, Cherrybrook NSW, Modbury SA, Camberwell Vic; Optus in Palm Beach NSW, Nedlands WA; Telstra in Suffolk Park NSW, South Coogee NSW, Brisbane Qld.

<sup>10</sup> Hutchison in Oatley Park, Hutchison in Colonel Light Gardens

<sup>11</sup> ACA's Annual Report 2003-2004

<sup>12</sup> Email from ACA to Anne Wagstaff, 6 April 2004 (appendix)

<sup>13</sup> Email from ACA to Anne Wagstaff, 20 April 2004 (appendix)

Despite the ACA's previous assertion "As a member of the general public you may submit comments and questions to carriers in response to their notices for proposed mobile phone base station facilities", <sup>14</sup> the ACA refused to support me <sup>15</sup> thereby upholding the wishes of Hutchison.

By being intimidating, unsupportive and unhelpful to individuals, the ACA appears to operate on the side of the carrier.

### **The UK experience – what can be learned from them?**

Apparently UK citizens suffer similar experiences of frustration and even anger with their regulator, OFCOM. According to Chris Maile of Planning Sanity "There are a large number of obligations on OFCOM both to introduce regulations and to monitor levels of emissions and that operators are keeping to the terms of their licences. They have not issued one such regulation outside of issues related to the use of the system by subscribers. They have for instance an obligation to 'Protect the health of the vulnerable', they have an obligation to issue regulations to prevent adverse health effects, they have the power to revoke licences in respect of individual sites or an operators whole network, yet they refuse to even accept complaints. My letter that Yasmin refers to was simply asking OFCOM to set out what the procedures were for making such complaints, when were they going to introduce the Regulations and so forth. I still send a reminder every month or so to OFCOM - I still have had no reply."

---

<sup>14</sup> Email from ACA to Anne Wagstaff, 20 April 2004 (appendix)

<sup>15</sup> Email from ACA to Anne Wagstaff, 19 July 2004 (appendix)

## **Recommendations**

Tower Sanity makes the following recommendations to the Senate Inquiry in regard to future structure, functions and powers of the proposed super-regulator.

- Regardless of whether Schedule 3 of the Act remains or not, charge the regulator with the responsibility for ensuring that a precautionary approach is properly applied in the siting of telecommunications facilities. This would restore public confidence in the process. Abolish the self-regulatory approach adopted to date for the precautionary principle.
- Increase the current fine for breaches of the ACIF Code to \$10M, and make penalties mandatory.
- Establish community-based goals for the regulator and closely scrutinise performance.
- Refocus the regulator on properly regulating the industry and enforcing the legislation. This should be apparent in the structure, resources and metrics used to measure performance of the CEO.
- Expand the regulator's powers, to allow investigation of any complaints referred to it that existing facilities do not comply with the law and to take appropriate punitive action where a breach is found.
- Increase the resources of the regulator to 10 full time staff to investigate carrier behaviour and proactively engage with the public and councils.
- Improve the ACA's approach to public awareness through more pro-active strategies and education on their role and responsibility.

*The Committee determined not to publish the attachments to this submission*