10 November 2020

Spectrum & Telecommunications Deployment Policy Branch
Department of Infrastructure, Transport, Regional Development and Communications
GPO Box 594
Canberra ACT 2601

By Email: powersandimmunities@communications.gov.au

Commercial in Confidence

Dear Sir / Madam

Departmental Proposal "Improving the Telecommunications Powers & Immunities Framework" ("Proposal")

Introduction:

On behalf of Bachrach Naumburger Group ("BNG"), set out below are our submissions in response to the Departmental Proposal "Improving the Telecommunications Powers & Immunities Framework" issued by the Department of Infrastructure, Transport, Regional Development & Communications dated September 2020 ("the Proposal").

BNG is a privately owned property group that owns and manages Regional Shopping Centres, a number of commercial properties and is a provider of retirement communities. Our property portfolio includes both metropolitan and regional locations throughout New South Wales and Queensland.

As a property group with an ever expanding property portfolio we have been on the receiving end of numerous land access and activity notices ("notice" and/or "LAAN") and the submissions made in this paper are based on our accumulated experiences of dealing with Carriers over time.

The Proposal reads, from our perspective, as being very pro-Carrier, almost to the point of appearing to be focused on enhancing and expanding Carrier's access powers and immunities at the expense of the rights and protections of landowners. Although headed "Improving the Telecommunications Powers & Immunities Framework", dare it be said, may have been called "Improving the Telecommunications Powers & Immunities of Carriers".

We do not deny that telecommunications are an essential service, increasingly moreso in the current environment, however, equally as important are the rights of individuals and business organisations to acquire and protect their property. The "improvement" of the powers and immunities framework should not be at the expense of landowners and other stakeholders including the community and business groups.

In addition to the above, the broad reaching implications of the Proposal are of some concern. The way we interpret the Proposal, although appearing to try to cast itself in the context of the expansion of the 5G network deployment, it actually reads as though it is to apply to the broader telecommunications industry, whether that be mobile, fibre, wireless broadband or other installations and facilities. The additional rights could be utilised by dish link operators not associated with 5G. If, indeed, the rights are required to assist the rollout of 5G, then these rights should be restricted to those with 5G spectrum licences and not available for use by over 300 other entities registered as Carriers in Australia.

Our key areas of concern, in no particular order, are the:

- Grounds for Objection
- Imbalance between Landowner and Carrier rights
- Compensation
- Industry Standards and Good Engineering Practice
- Carrier self-regulation
- Make Good obligations
- TIO Referral process
- Objection process and associated timeframes
- Allowing antenna protrusions to extend to 5metres

Grounds for Objection

It is one thing to provide for landowner objections on receipt of notices, how they operate in reality is entirely another issue.

It has to be said that we have found that notices received do make reference to our rights to object. What they do not however do, is provide any guidance as to the grounds or basis upon which objections can in fact be made. The concern we have, however, that whilst purported grounds exist, our experience has been that we can only effectively raise objections under the broad reason (e) – being *"the Carrier's proposals to minimise detriment and inconvenience, and to do as little damage as practicable, to the objectors land"*. In practice, based on our understanding and upon consulting with both our peers and seeking the advice of consultants is that there is no real clarity as to what, in a practical or operational sense, actually constitutes a valid ground of objection.

If for example, reference is made to the Telecommunications Industry Ombudsman Guidelines ("Guidelines") on the Installation and Maintenance of Low-Impact Facilities and the examples given of the actual grounds on which an objection can be raised, it is clear that there are very, very limited valid grounds. We would even go one step further and suggest that some of the examples given in the Guidelines as to what does not constitute a valid ground are almost counter-intuitive when you consider the rights that would, in any other context, be afforded to a landowner.

A common example of the apparent disconnect between the right of objection and how it operates in practice that we have encountered is that although there is a ground of objection relating to the use of the land and the location of the proposed facility, when we (or other landowners) have sought to claim that a rooftop, for example, is not suitable, this has largely been ignored by the Carriers and Carriers have nonetheless effectively steamrolled their way onto the property.

If landowners are to be given "rights" there must be some clarity and point of reference as to how and in what circumstances those rights may be exercised. Going one step further, those circumstances should be consistent with accepted practice in all contexts, including those outside the realm of dealings with Carriers, which as detailed below, appear to be in a category of their own and treated in a manner that is not replicated in any other sphere.

An associated point to the grounds of objection is ensuring that protections are in place whereby notices issued to landowners not only include plain English explanations of the proposed activity and equipment to be installed but also provide full and complete details of the Carrier's proposal so that the landowner is in a position to make an informed assessment of the proposal at hand. The explanation should be accompanied by technical drawings and diagrammatic representations that clearly, accurately and fully depict proposed works and where relevant, also capture all of a Carrier's installation within the building. Our experience has been that trying to extract all relevant information from Carriers is often a drawn out and cumbersome process and when it comes to capturing all installations within the building, Carriers often refuse on the basis that they do not hold such consolidated information. Carrier's use of multiple different consultants or contractors also seems to result in a situation where there is no single repository of information regarding the infrastructure any given Carrier has installed within the building.

Imbalance between Carriers and Landowners

The current governing legislation was introduced decades ago and, so far as we are concerned, has not evolved with and adapted to the ever increasingly complex environment in which it operates. When the legislation was introduced there were a handful of Carriers in the market and the technologies involved were light-years away from where they are now. We would suggest that the legislation needs to be reviewed afresh with the view of also scrutinising the extent to which the legislation accurately addresses and adequately accommodates the changing market and industry, the number of players involved and the differing and evolving technologies.

A constant theme in discussions amongst our peers regarding Carriers is the increasingly aggressive tactics Carriers are employing and the pressure being exerted upon landowners to succumb to the demands of Carriers. Bolstered by the knowledge that to a large extent, the rights of Carriers will be upheld and trounce those of the landowners, Carriers appear to almost rely on the fact that landowners will not have the knowledge, determination, fortitude and more importantly the financial (and legal) resources to challenge a Carrier's assertion of rights. It is almost a given that particularly in the case of individual landowners, that their legal and financial backing would pale into insignificance when opposed to, say Telstra, TPG / Vodafone or Optus, for example. The imbalance of power between Carriers and landowners needs to be addressed rather than the gap

between them being broadened and supported by the legislation which clearly appears to be backing the Carriers.

Compensation

As a property group, deriving income from our property portfolio is fundamental to our business. In all our property dealings, whether that be in the case of private individuals, commercial or residential tenants, there is a clear distinction between the rights afforded to the landowner and the rights afforded to another party seeking to use or occupy the land. In the case of Carrier dealings however, that distinction is not as clear and commonly accepted principles and rights normally associated with an owner of land are sometimes blurred to the point where one needs to question, who has the greater right, the landowner or the Carrier? The payment of compensation, or more importantly, the lack thereof, is the most outstanding example of this.

In our portfolio and fundamental to our business model (and success) is the concept that there is a direct correlation between the area/space to be occupied by a 'tenant' and the compensation (whether than be rent, licence fee or otherwise) that they pay to us in return for the benefit of being able to occupy (part of) our property. This applies in every scenario, except in the case of Carriers. When it comes to Carriers, for reasons beyond my comprehension, they are given the right to occupy land without having to pay any compensation to a landowner for the benefit of doing so. We are at a loss to understand how this came about and more importantly how it can be permitted to exist. What happened to the fundamental principle in law of **Equity**? This situation is not even contemplated in any other scenario or context either in Australia or elsewhere around the world. How can we continue to allow this to be further entrenched?

It is simply not acceptable to promote the concept that in order to recover 'compensation' a landowner must do away with the notion that the use of their land is in return for payment of a fee and 'compensation' can only be claimed where the owner has suffered a loss or incurred financial expenses, the most common example being account of electricity costs. Furthermore, the onus of proving the loss or expense is incumbent on the landowner.

We therefore call for a reconsideration of the premise upon which compensation claims are founded and for greater clarity in respect of the basis upon which compensation may be claimed. It should not be for a landowner to have to pursue matters through the legal system in order to recover compensation. How can it be that a Carrier can occupy our land for the purposes of providing a service for which they generate revenue when we, as the landowner cannot derive any income from that occupation? Carriers are effectively enabled to 'acquire' property at no cost and make money from it.

In our case, let alone in the average 'Mum and Dad' owner scenario, we clearly are not in a position to take on the behemoths that are the Carriers, particularly, the Telstra's and Optus' in the market. We simply do not have the resources (financial and otherwise) to seek redress and re-direct the balance between landowners and Carriers. Even if parts of our properties were being compulsorily acquired by the Government, the concept of due compensation being paid to us would be accepted. Yet surprisingly, Carriers are being permitted, through legislation, to 'acquire' interests in land (that, by the way we cannot thereafter forcibly vacate them from) without having to pay us anything. Is it not a fundamental Constitutional right to own and protect your property and,

where you choose to do so, impose conditions (including the payment of compensation) where third parties seek to use or occupy that land?

Based on broader discussions within our industry, we are increasingly concerned that Carriers are seeing that they are held to a different standard and are increasingly seeking to push the boundaries of the rights and powers afforded to them under the legislation. For example, even where they may previously have occupied a property under tenure arrangements, they claim that they have statutory rights to cease any prior commercial arrangements and remain under the powers and immunities of the legislation. Is this not somewhat comparable to a commercial tenant suddenly deciding that they would no longer pay rent or occupy under the terms of their commercial lease, but would nonetheless remain (and continue to conduct their business from) a property? This situation whilst analogous to what Carriers are being 'authorised' to do simply would not be accepted in any other situation.

Industry Standards and Good Engineering Practice

Without question, the Proposal makes repeated reference to 'best safety and engineering practices', Carriers 'complying with good engineering practice' and 'the need for Carriers to comply with standards, including industry standards and codes'. Our concern is that the principles whilst commonly espoused, are not supported with any clear reference points as to what constitutes compliance with 'best practice' and 'industry standard'. Furthermore, it largely appears to fall upon the Carrier's self-regulating to determine what the 'standard' (starting from, what has to be said, a very low benchmark) to be applied is. Where a key driver for Carriers (as in any industry) is to drive down costs, it is not surprising that what Carriers will regard as 'industry standard' does not accord with the standard a landowner would look to impose in protecting their property and its occupants.

A move away from industry self-regulation and compliance with voluntary codes (for example, ACIF Code G571) would go some way to addressing our concerns. It goes without saying that where given the option, Carriers are likely to choose the cheapest, quickest service solution over a more involved and costly one of a higher standard.

Another associated and not dissimilar issue is that raised in the Proposal with regard to engineering certificates. The Proposal refers to these certificates being provided, if requested, as soon as possible after installation and being a non-regulatory approach. BNG has significant infrastructure on our sites, one in particular, where a failure of the steelwork could cause significant risk to occupants and pedestrians in the immediate area. In our view, it is not unreasonable to require that Carriers provide certification **prior** to construction as a means of satisfying our risk profile.

Make Good Obligations

As with industry standards and best industry standards, we are of the view that what constitutes make good and the circumstances that would trigger a make good are largely determined by the Carriers themselves. As we understand it, even where a Carrier's tenure term has expired but they remain in occupation but are failing to make any payments to the landowner, a landowner has no

rights to take action to have the Carrier's equipment removed. With Carrier's commonly claiming that they may utilise infrastructure for 'potential' future property occupants it appears Carrier infrastructure never, in the eyes of Carriers, becomes redundant. A landowner cannot, for fear of breaching criminal codes, cannot however take any action to remove any redundant or disused telecommunications equipment or, in the rare instances where they are able to proceed with removal, the landowner has to bear the financial costs of the removal.

TIO Referrals

The Proposal notes:

"*Carriers are seeking a regulatory change that would allow carriers to refer objections to the TIO for resolution without waiting for a landowner to request the objection be referred. Such referrals would occur in cases where carriers consider it is unlikely to resolve matters directly with the landowner or occupier who are objecting to the proposed activity …. this proposal was endorsed by the Powers and Immunities Reference Group which noted that the cost to resolve disputes via the TIO are borne by the carrier, regardless of who refers the dispute, so there would remain an incentive for carriers to attempt to resolve disputes within the existing objections process*."

To us, to move towards this position, would effectively enable a Carrier to unilaterally decide "it is unlikely to resolve matters directly with the landowner" and refer a matter to the TIO, without given the landowner sufficient time to adequately and fully investigate and assess a Carrier's proposal. This appears to be a move to justify Carriers not engaging with landowners and bolsters their ability to 'steamroll' their way onto a property. In our view to move to such a state would effectively remove any (albeit currently very little) incentive for Carriers to act as one would expect in commercial dealings, namely with good faith and with the view of using reasonable endeavours to resolve objections. Surely a reasonable period of time needs to be afforded to both parties before one of them can unilaterally decide a resolution is unlikely.

Unlike the Carriers, our sole purpose for existence is not the expansion of telecommunications networks. We have other commercial and business demands that require our attention and resources and cannot accept a position where for example, due to time constraints we have been unable to assess a proposal within the Carrier's timeframe and the Carrier takes that as a signal that we are "unlikely to resolve" objections and thereby refers a matter to the TIO.

The TIO or a truly independent umpire / mediatory body is needed to assist in bringing balance and equity to the Telecommunications industry, and a basic first step would be the appointment / inclusion of owners representatives into such a body.

Objection Timeframes

The Proposal seeks submissions on the timeframes provided for in respect of the notice given, and the timeframes within which the parties are to resolve any issues identified by landowners.

In our view, the issue is not whether there is clarity as to the timeframes that apply.

Our issue is, as indicated above, however, that unlike Carriers, our core business and key focus, is not the deployment of Carrier installations. We have a business to run and are not in a position to devote resources to such matters. They are dealt with by individuals without our organisation who have other responsibilities and priorities. Our submission therefore in respect of the timeframes is therefore that greater time should be afforded to landowners to review, assess and respond to Carrier proposals. At present, there is a real pressure felt to effectively need to 'rush' through approvals in order to comply with the statutory timeframes. This pressure would be further increased in the proposals in respect of Carriers being able to refer matters to the TIO were progressed (see details above).

Allow antenna protrusions to extend to a height of 5 metres

The Proposal refers to the maximum protrusion height being extended by 2 metres to 5 metres in total with the increased height of protrusions improving coverage outcomes. In regard to this proposal, our concern would be that the Carriers currently appear to interpret LIFD to allow 3 metres to the bottom of antenna from the fixing point. Typical panel antenna 2.8 metres in length therefore rise to a height of 5.8 metres above the roof. The proposal would allow this to extend by a further two metres, to 7.8 metres to the top of the antenna. Clearly this will create issues regarding, for example, the need for structural bracing to support such higher mounts increasing the area utilised by the Carrier whilst creating significant additional visual intrusion.

Conclusion

Our submission may effectively be summarised by noting that the overwhelming impression upon reading the Proposal is that should the proposals be legislated, Carriers powers and immunities would be substantially improved at the expense of the even further contraction of landowners' rights, powers and immunities. As already detailed above, we already find ourselves in a unique situation which is not replicated elsewhere where a party, namely a Carrier, appears to have rights and powers that usurp those of a landowner.

Another outcome or effect of the proposals would appear to be an even greater contraction of the external scrutiny, accountability or standards which would be applied to Carriers, with Carriers given even greater powers of self-regulation and to determine what constitute the standards to which Carriers are to abide. Diluting landowner rights, restricting the circumstances in which community consultation is required and limiting the voice and input of those outside Carrier organisations will only more prominently shift the balance of power into the Carriers favour.

Yes, telecommunications are vital to the successful conduct of our lives and businesses but the promotion of this should not be at the expense of the rights and powers of individuals to acquire, protect and deal with their land.

The focus ought to be on how to better harmonise the rights and interests of the parties with the view of better promoting positive outcomes for all and to be able to do so in an ever changing and expanding environment. Recognition of fundamental principles (for example, ownership rights) and adaptation to change are key. There must be clarity in the legislation and how it is to operate in a practical and day-to-day sense. Fundamental to this is recognition that rendering landowners

effectively powerless when faced with the ever increasing number of Carriers is not the answer, nor is allowing greater scope for Carrier self-regulation. Dare it be said, the power has gone to Carriers' heads and they already typically approach landowners from the perspective that they, the Carriers will reign supreme. By moving away from Carrier self-regulation to a framework supported by clear, documented and compulsory standards, there will be some restoration of the balance of power. The commercial principles of consultation, negotiation, equity and acting in good faith should not be sacrificed in the name of cost cutting, increased profitability and the 'feasibility' of Carrier installations.

There appears to be little regard for:

- landowners' revenue streams (for example, by limiting compensation);
- the impacts on the value of our properties (by limiting the basis on which 'valid' objection may be raised); and
- acting in the best interests of the Australian population - which requires that the broader voice of all stakeholders – whether they be individuals, businesses, portfolio property owners, industry representatives (eg The Property Council of Australia).

The above interests have been set aside whilst simultaneously advocating and promoting the rights and immunities of Carriers.

Contact Details:

To discuss this submission further, contact details are provided as follows:

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- I am happy for this submission to be made public.

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