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**The Telecommunications Act
1997: Summary of Implications
for New South Wales**

by

Gareth Griffith and Stewart Smith

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EXECUTIVE SUMMARY

On 1 July 1997 the Federal *Telecommunications Act 1997* and the associated legislative package came into effect. Among other things, the legislation establishes a scheme for the regulation of overhead cables and mobile phone towers. As such, it has significant implications for both State and local government and the purpose of this paper is to present a summary of these.

The key provisions of the legislation in this regard are found in Schedule 3 of the *Telecommunications Act 1997*, which sets out the powers and immunities relating to telecommunication carriers. However, it is important to note that the focus of that Schedule is with those matters which remain under Federal jurisdiction, thus leaving it to the States and Territories to expand their own laws to fill whatever legal vacuum that remains.

What has emerged is a complex scheme, involving overlapping Federal and State powers.

The operation of that scheme is set out in diagrammatic form in Appendix A.

1 INTRODUCTION

On 1 July 1997 the Federal *Telecommunications Act 1997* came into effect. The Act has significant implications for both State and local government and the purpose of this paper is to present a summary of these. It should be emphasised, therefore, that this paper does not intend to look at the entire scheme introduced by the Act and its cognate legislation for the regulation of the telecommunication industry. Its focus, rather, is on the potential implications of that scheme for the States and local government, notably in the areas of planning and environmental law.

The key provisions of the legislation in this regard are found in Schedule 3 which sets out the powers and immunities relating to telecommunication carriers. However, it is important to note that the focus of that Schedule is with those matters which remain under Federal jurisdiction, thus leaving it to the States and Territories to expand their own laws to fill whatever legal vacuum that remains.

What has emerged is a complex system, involving overlapping Federal and State powers. Alternative regulatory models were proposed, notably by the Australian Local Government Association (ALGA) which advocated an 'integrated national approvals system', plus a new National Code. In its response to the Telecommunications Bills Package 1996, ALGA claimed that its policy was that the Federal Government should either return 'control over telecommunications facilities fully to State and Local Government, or establish a proper national approvals system administered at the local level by Councils'. Instead, it was submitted, 'the current Bills create an unnecessarily complex two-tier system which apparently satisfies no-one'.¹ In the event, those alternative models were rejected in favour of the scheme under Schedule 3 of the 1997 Act.

The operation of the 1997 telecommunications regulatory scheme is set out in diagrammatic form in Appendix A.

That the scheme is of great community interest is not in doubt. Community concern in this area has concentrated in recent years on the lack of local control over the building of mobile phone towers and the rollout of overhead cables. The controversy surrounding these activities is not likely to decrease in the foreseeable future.

¹ The Parliament of the Commonwealth of Australia, Senate Environment, Recreation, Communications and the Arts Legislation Committee, *telecommunications Bills Package 1996*, 5 March 1997, p 72. (Henceforth, Senate Committee Report 1997). All three telecommunications carriers supported in principle the national scheme proposed by the ALGA. However, concern about the details of that scheme persuaded the carriers that the arrangements set out in Schedule 3 were to be preferred in the final analysis (p 75).

2 THE REGULATION OF TELECOMMUNICATIONS BEFORE JULY 1997

Towards a competitive regime: The scheme in operation before 1 July 1997 was established under the Federal *Telecommunications Act 1991*, which came into effect on 1 July of that year. According to the Senate Environment, Recreation, Communications and the Arts Legislation Committee (the Senate Environment Committee), that scheme commenced at a time when Australia's telecommunications market was dominated by government monopolies and was designed to open up those monopolies to competition in a controlled way. The Committee adds that 'It was always intended as a transitional regime which would be replaced when the market was ready for a more openly competitive regime'.²

This move towards an openly competitive regime has occurred in several phases. Initial reforms in 1988-89 involved separating policy, regulatory and operational functions; corporatising the Government-owned carriers; and reducing the areas reserved exclusively to the carriers. The second stage of reforms focused on the introduction of network competition in the form of a duopoly in which there were two 'general carriers' (Telstra and Optus), and three 'public mobile carriers' (Telstra, Optus and Vodafone).³ The present reforms, the underlying principles of which were first outlined in August 1995 by the then Minister for Communications and the Arts, Mr Michael Lee, are the culminating stage in that process, designed as they are to achieve open competition.⁴

Exemption from State law: Under Part 7 of the *Telecommunications Act 1991* the powers and immunities of carriers were defined in terms excluding the operation of State and Territory law. Thus, section 116 of the Act contemplated the making of regulations providing that 'specified carriers may engage in specified exempt activities despite specified laws of a State or Territory'. Further to this, clause 5 of the Telecommunications (Exempt Activities) Regulation exempted a range of activities, including the construction by a carrier of 'a structure whose principal purpose will be to contain equipment that will be connected to a carrier's telecommunications network', as well as the maintenance, repair, refurbishment, alteration or demolition by the carrier of such a structure. Also exempted under the clause was the installation and maintenance by the carrier of such items as telecommunications switching equipment, a transmitter, a receiver, a power line and an antenna. Clause 6 then spelt out the scheme in more detail, explaining that a carrier could engage in any of the exempt activities under clause 5 despite a law of a State or Territory governing:

- (a) the assessment of the environmental effects of engaging in the exempt activity;

² Senate Committee Report 1997, p 2.

³ A 'general carrier' was defined under the 1991 Act to mean 'the holder of a general communications licence in force under Part 5' of the legislation; a 'mobile carrier' was defined to mean 'the holder of a public mobile licence' under Part 5 of the Act.

⁴ T Shaw, 'A new regulatory framework for Australian telecommunications beyond 1997' (1997) 4 *Telecommunications Law and Policy Review* 27.

- (b) the protection of places or items of significance to Australia's natural or cultural heritage, but not including provisions of the law that provide for the protection of places or items of significance to the cultural heritage of Aboriginal persons or Torres Strait Islanders;
- (c) town planning;
- (d) the planning, design, siting, construction, alteration or removal of a structure;
- (e) the powers and functions of a local government body;
- (f) the use of land;
- (g) tenancy;
- (h) the supply of fuel or power, including the supply and distribution of extra low voltage systems, but not including provisions of the laws that provide for the supply of electricity at a voltage that exceeds that used for ordinary commercial or domestic requirements.

Furthermore, in relation to the exempt activities under clause 5 of the regulation, clause 7 then exempted Telecom and OTC specifically from the operation of State and Territory occupational health and safety laws.

The position was summed up in the 1996 Annual Report of the Australian Telecommunications Authority (AUSTEL) which noted that the 1991 Act exempted the telecommunications carriers - Telstra, Optus and Vodafone - from complying with the requirements of State and Territory laws when installing facilities and infrastructure. 'Instead', the report explains, 'they must comply with the provisions of the Telecommunications National Code...which has been in operation since 30 June 1994. The Code imposes requirements on telecommunications carriers to consult with relevant authorities when installing telecommunications facilities and infrastructure'.⁵ In addition, the report discussed certain shortcomings of the Code, commenting that in 1995 AUSTEL had recommended a 'shift in the balance of the rights, powers and obligations of carriers and relevant authorities, in the direction of imposing greater obligations upon the carriers'.⁶

Overhead cabling and mobile phone towers - the community debate: In the meantime, telecommunications issues have excited considerable interest in the community in recent years, with these issues including the siting of mobile phone towers close to educational facilities and the use of overhead cabling for pay-TV and other services. As Jane Forster and David Olds have observed, 'The carriers' current roll-out of overhead cable has fired community debate over carrier powers to install such facilities without reference to local planning laws'.⁷

⁵ AUSTEL, *Annual Report*, 1996, p 45.

⁶ *Ibid.*

⁷ J Forster and D Olds, 'Senate amendments to the telecommunications legislation' (1997) 1 *TeleMedia* 9 at 11.

On this question of overhead cabling, the Senate Environment Committee in its 1997 report noted that, under the old regime, clause 10 of the 1996 Telecommunications National Code provided that, unless the carrier has a written agreement to the contrary with the relevant local authority, the carrier must put any broadband aerial cabling underground in certain areas, that is, 'where the only cabling installed or maintained in the area by another carrier, or by a public utility, is underground cabling'.⁸ Further, the Committee acknowledged that the Federal Government is working towards facilitating the development of a long-term strategy to relocate all existing overhead cables underground.⁹

Community concerns about overhead cabling were certainly reflected in the Senate's lengthy debate on the telecommunications package of Bills,¹⁰ as well as in many of the amendments made by the Senate to that package. Moreover, its controversial status finds expression in the Media Release from the Minister for Communication and the Arts on 2 July 1997 headed, 'Overhead cables and mobile phone towers now a matter for the States and territories'. The Media Release went on to say that, under the 1991 Act, State and Territory planning law had no effect and the 'carriers had virtual carte blanche to build any facility they liked, wherever they liked', resulting in a situation where 'people were understandably frustrated when they found out that cables were to be strung outside their home and they had no power to object'.¹¹

3 THE REGULATION OF TELECOMMUNICATIONS AFTER JULY 1997

A complex scheme: One of the themes of this paper is that the regulatory scheme established under the new telecommunications legislative package is very complex, involving as it does overlapping layers of regulation in which certain matters are retained by the Commonwealth and others divested to the States and Territories, but with the proviso that carriers may still appeal to a new Federal body, the Australian Communication Authority (ACA). In Appendix A the operation of the scheme is set out in a diagrammatic form.

The 1997 legislative package: The 1997 telecommunications legislation package comprises the following Acts:

- the *Telecommunications Act 1997*, which repeals the 1991 Act and replaces it with a new regulatory framework (the details are discussed below);

⁸ Senate Committee Report, p 68.

⁹ Ibid. The Minister for Communications and the Arts established a Working Group for this purpose in December 1996, consistent with Recommendation 31 of the Senate Environment Committee's report into the partial privatisation of Telstra - *Telstra: To Sell or Not to Sell?*, September 1996, p 164.

¹⁰ For example see - *Commonwealth Parliamentary Debates (Senate)*, 21 March 1997, pp 2127-2130.

¹¹ Minister for Communications and the Arts, *Media Release*, 'Overhead cables and mobile phone towers now a matter for the States and Territories', 2 July 1997.

- two new Parts are inserted in the *Trade Practices Act 1974*, which set up a scheme for regulating anti-competitive conduct in the telecommunications industry (Part XIB), and establish a telecommunications access regime (Part XIC);
- the *Australian Communications Authority Act 1997*, which establishes the ACA as the regulator (apart from competition matters) for the post-July 1997 regulatory framework. This body will be formed by merging AUSTEL with the former regulator of radiocommunications spectrum, the Spectrum Management Agency. The competition regulation functions of AUSTEL are transferred to the Australian Competition and Consumer Commission;
- the *Radiocommunications Amendment Act 1997* which, among other things, reforms the mechanism for management of the radiofrequency spectrum; and
- the *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* which, as the title suggests, contains transitional provisions and consequential amendments related to the legislative package.

The Telecommunications Act 1997 (the 1997 Act): This Act, which forms the core of the legislative package outlined above, is designed to

- identify carriers and carriage service providers as the participants in the telecommunications industry who are to be subject to regulation and creates the mechanisms to impose any necessary regulation upon them;
- create obligations on carriers and carriage service providers for the benefit of consumers (such as universal service, untimed local calls and the customer service guarantee (CSG));
- create obligations on carriers and carriage service providers for the benefit of the general community (such as provision of emergency call services, protection of the privacy of communications and requirements to co-operate with law enforcement agencies);
- create obligations on carriers and carriage service providers which will promote competition (such as provision of pre-selection and requirements for calling line identification);
- provide for technical regulation and management of numbering; and
- give benefits to carriers in the form of certain powers and immunities which assist them in carrying out the obligations which the legislation places on them.¹²

¹²

Explanatory Memorandum, Telecommunications Bill 1996, vol. 1, p 1..

Carriers' immunities and powers - overview of the major changes: It is this last area which is the key concern for the present, relating as it does to the regulation of carriers' immunities and powers. This aspect of the package is found primarily in Schedule 3 to the 1997 Act. A useful guide to those reforms is found in the report of the Senate Environment Committee on what was then the telecommunications Bills package of 1996. There the Committee set out the major changes proposed to the powers and immunities of telecommunications carriers in these terms:

- the rollout of carriers' infrastructure is generally subject to State or Territory environment and planning laws, as opposed to previous arrangements which exempted rollout activities from such laws;
- limited general exemptions from such laws apply to a smaller number of activities relating to the inspection of land, connecting subscribers to an existing network, the installation of prescribed facilities ('low-impact facilities' and temporary defence facilities)¹³ or the maintenance of facilities;
- a new Commonwealth appeal process is also established whereby carriers can appeal to the Australian Communications Authority (ACA), following a breakdown in negotiations with relevant State or Territory authorities or land owners, for a permit exempting the installation of one or more facilities from State and Territory planning and environment laws, provided the facility(ies) satisfy a number of criteria (including that the advantages to the national economy derived from the operation of the facility as part of a network outweigh any associated degradation of environmental amenity),¹⁴
- however, by way of a qualification to that system of appeal, a carrier will not be permitted to install certain overhead lines (over 13 mm in width) without the approval of each relevant State, Territory or local government administrative authority; and
- conversely, qualifying the scope of State power, carriers will be required to notify the Secretary of the Department responsible for the administration of the *Environment Protection (Impact of Proposals) Act 1974* of activities authorised under State or Territory law that may have an adverse effect on areas (or species of flora or fauna) of environmental or heritage importance.¹⁵

¹³ The term 'temporary defence facility' is defined in the Dictionary to the Telecommunications Code of Practice 1997 to mean 'a temporary facility for use by, or on behalf of, a defence organisation for defence purposes'. In the same Code (Chapter 5, Part 5.2) the term 'temporary defence facility activity' is defined to mean any of the following activities by the carrier - (i) installing a temporary defence facility; or (ii) carrying out an activity for purposes in connection with the installation of a temporary defence facility.

¹⁴ Clause 27 (1) (g) of Schedule 3.

¹⁵ Clause 55 of Schedule 3.

Thus, relevant State or Territory authorities will for the first time administer the primary approval process for most facilities (excluding the exemptions mentioned above). They will also administer in all cases the mandatory approval process for facilities involving the installation of designated overhead lines.

The Senate Environment Committee went on to note that, in a similar manner to the current arrangements in relation to the Telecommunications National Code, clause 15 of Schedule 3 to the 1997 Act proposes that 'generally exempt' activities are undertaken by carriers in accordance with a Ministerial Code of Practice. However, unlike the Telecommunications National Code which applies to all exempt activities, the Code of Practice only applies to activities relating to: the inspection of land; subscriber connection activities; installation of 'low-impact facilities'; temporary defence facilities; and the maintenance of facilities. A Telecommunications Code of Practice 1997 was released by the relevant Minister for this purpose on 29 June 1997.

On the same day the Minister released the Telecommunications (Low-impact Facilities) Determination 1997. The details of that determination are discussed later in this paper. Its broad significance is that 'low-impact facilities' continue to be exempt from State and Territory law, therefore remaining in the Federal domain. Clearly, deciding what constitutes a 'low-impact facility' for the purposes of this scheme is an issue of critical importance and one that the Senate debated at some length.

The Senate's amendments: The Senate passed several amendments effectively limiting the powers and immunities of telecommunication carriers. In their discussion of these, Jane Forster and David Olds comment on the following amendments:¹⁶

- under section 3(2)(i) it is now an object of the Act 'To promote the placement of lines underground, taking into account economic and technical issues, where placing such lines underground is supported by the affected community';
- under clause 49 of Schedule 3 to the 1997 Act the Minister is required to conduct a review before 1 July 1998 of 'the options for placing facilities underground', including a possible co-ordinated program of placing other infrastructures underground, such as electricity transmission;
- in the meantime, under clause 51 of Schedule 3 to the 1997 Act, carriers who have co-located their lines with existing infrastructure must remove their overhead cable within 6 months of any removal of the co-located cable, unless they are otherwise authorised by a local authority (be it a local government body or a prescribed administrative authority for the State or Territory) to retain the cable;
- as noted, the installation of low-impact facilities will remain a matter for determination by the Federal Minister (clause 6(3) of Schedule 3). However, under

¹⁶ J Forster and D Olds, 'Senate amendments to the telecommunications legislation' (1997) 1 *TeleMedia* 9 at 11.

the Senate amendments, clauses 6 (4)-(7) of the Schedule prevent the Minister from declaring by regulation that certain facilities are of low impact, namely: overhead cable over 13 mm in width; freestanding towers; towers attached to buildings and more than five metres high (not including the antenna); an extension to a tower that has previously been extended; and an extension to a tower, if the extension is more than 5 metres high.

A further amendment can be noted, namely, the insertion of clause 9 into Schedule 3. Its effect is to ensure that, where a carrier enters upon land to carry out an authorised activity, once the work is completed the carrier must take all reasonable steps to restore the land to a condition that is similar to its prior condition.

Schedule 3 - outline and main provisions: As noted the core of the regulatory regime is found in Schedule 3 to the 1997 Act. Basically, that Schedule sets up a regime founded on State and Territory law. However, it achieves this primarily by discussing the exceptions to that rule, thereby formulating those matters (or authorised activities) which will remain under Federal jurisdiction. Its main purpose, therefore, is to flesh out the continuing Federal powers in the area, leaving the scope of State and Territory law to be determined by the appropriate authorities.

Using the 'simplified outline' found in clause 1 as a guide, details of the regulatory scheme established under Schedule 3 can be reconstructed thus:

- **authorised activities:** subject to various conditions which are discussed below, the Schedule authorises carriers to enter on land and exercise any of the following powers: (a) the power to inspect the land to determine whether the land is suitable for the carrier's purpose; (b) the power to install a facility on the land; and (c) the power to maintain a facility that is situated on the land. Of these, the power to install a facility is the most contentious and, therefore, it will be discussed in the most detail.

One general point to make is that, in all these circumstances, the carrier does not require the approval of an administrative authority (for example, a local government authority) under a relevant State or Territory law. These are, therefore, general exemptions to the administrative arrangements contemplated under such laws. However, it should be explained that the power to permit these authorised activities under Schedule 3 is not intended to operate so as to allow carriers to do things which would be inconsistent with State or Territory law.¹⁷ Notwithstanding that intention, it is explained below that the potential for conflict between State and Federal law does exist in this context.

- **installation of facilities:** under Division 3 to the Schedule a carrier may install a facility if: (i) the carrier holds a facility installation permit granted by the ACA; (ii)

¹⁷ Clause 36. The relationship between State and Federal law in this context is discussed later in more detail.

the facility is a low-impact facility; (iii) the facility is a temporary facility for use by, or on behalf of, a defence organisation for defence purposes; or (iv) the installation is carried out before 1 July 2000 for the sole purpose of connecting a building to a network that was in existence on 30 June 1997.

- ***facility installation permits:*** the fact that a carrier may be granted a facility installation permit by a Federal body, the ACA, would seem to suggest that the potential for exemption is very wide indeed. However, this provision needs to be read in the context of the scheme as a whole. In particular, the granting of a facility installation permit by the ACA can only occur as a consequence of its appellate jurisdiction (see page 9) and this is subject to certain conditions. The ACA's powers in this regard are set out under Division 6. A permit may only be granted after a public inquiry has been held. Also, a carrier may only apply for such a permit after the breakdown of reasonable negotiations with a relevant State, Territory or local government authority or the owner or occupier of the land.

Under clause 27 of Division 6 a facility installation permit will only be granted by the ACA if: the carrier has made reasonable efforts to negotiate in good faith with the relevant proprietors and administrative authorities; and, in a case where the facility is a designated overhead line (over 13 mm in width), each relevant administrative authority has approved the installation of the line; and the telecommunications network to which the facility relates is or will be of a national significance; and the facility is an important part of the telecommunications network to which the facility relates; and either the greater part of the infrastructure of the telecommunications network to which the facility relates has already been installed or relevant administrative authorities are reasonably likely to approve the installation of the greater part of the infrastructure of the telecommunications network to which the facility relates; and the advantages that are likely to be derived from the operation of the facility in the context of the telecommunications network to which the facility relates outweigh any form of degradation of the environment that is likely to result from the installation of the facility.

Guidance is given by the Schedule for the purpose of deciding, for instance, if a network is of national significance and when the advantages of a facility outweigh the degradation of the environment.¹⁸ Also, the environmental impact of the facility must be considered by the ACA.¹⁹ Before issuing a permit that would harm the environment in various ways, the ACA must consult the Director of National Parks and Wildlife.²⁰

¹⁸ Clause 27 (3) - (6) of Schedule 3.

¹⁹ Clause 27 (7) of Schedule 3.

²⁰ Clause 28 of Schedule 3.

Note that where the ACA refuses to grant a permit without conducting a public inquiry into the application, the decision may be reviewed by the Administrative Appeals Tribunal.²¹ Note, too, that in issuing or refusing to issue a facility installation permit the ACA must consult the Australian Competition and Consumer Commission.²²

- ***installing a low-impact facility:*** as noted, one of the amendments passed by the Senate curtails the powers of the relevant Federal Minister to declare that certain facilities are of low impact, namely: overhead cable over 13 mm in width; freestanding towers; towers attached to buildings and more than five metres high (not including the antenna); an extension to a tower that has previously been extended; and an extension to a tower, if the extension is more than 5 metres high.

Adding further detail to the scheme, the Minister has released the Telecommunications (Low Impact Facilities) Determination 1997 which states that a facility cannot be a low-impact facility unless it is specified in the determination. As overhead cabling and new mobile telecommunications towers are not specified in this way, they are not low-impact facilities. Another feature of the scheme is that a low-impact facility can only be installed in certain areas designated under State or Territory zoning laws. The order of priority, from high to low, in terms of this zoning scheme is as follows: area of environmental significance; residential areas; commercial areas; industrial areas; and rural areas. One effect of this is that a low-impact facility cannot be installed in what the determination defines to be an area of environmental significance, which includes areas registered under State laws relating to heritage conservation or protecting an area from 'significant environmental disturbance'. For the other zones, the schedule to the determination sets out those low-impact facilities which are permitted in particular areas. For example, 'equipment installed inside a structure, including an antenna concealed in an existing structure' is permitted in commercial, industrial and rural (but not residential) areas. Whereas a 'manhole with surface area of not more than 2 square metres' is permitted in all four zones.

Moreover, authorised activities under Schedule 3, including low-impact facilities, are subject to the conditions of the Telecommunications Code of Practice 1997. For example, under Part 5 of Chapter 4 of the Code: a carrier must notify owners and occupiers about low-impact facility activities; an owner or occupier has an opportunity to object to the activity; the carrier must try to resolve the objection by agreement; if there is no agreement, the objection can be referred to the Telecommunications Industry Ombudsman; and the carrier must comply with the Ombudsman's directive.

²¹ Clause 35 of Schedule 3.

²² Clause 29 of Schedule 3.

- ***installations before 1 July 2000:*** a carrier may install a facility if the installation is carried out before 1 July 2000 for the sole purpose of connecting a building to a network that was in existence on 30 June 1997. The scope of this exemption remains to be determined. Much may depend on the definition of 'network' in this context.
- ***conditions relating to authorised activities generally:*** In exercising powers relating to any of the authorised activities under the Schedule, a carrier must comply with certain conditions, including: (a) doing as little damage as practicable; (b) acting in accordance with good engineering practice; (c) complying with recognised industry standards; (d) complying with conditions specified in the regulations; (e) complying with conditions specified in a Ministerial Code of Practice; (f) complying with conditions specified in a facility installation permit; and (g) giving notice to the owner of land.

As noted, a Telecommunications Code of Practice 1997 was released on 29 June. It only applies to the following authorised activities: the inspection of land; subscriber connection activities; installation of 'low-impact facilities'; temporary defence facilities; and the maintenance of facilities. An example of the sort of notification procedures required under the Code was discussed above in relation to low-impact facilities (page 13). One point to emphasise is that unresolved disputes are to be dealt with by the Telecommunications Industry Ombudsman.²³

- ***the relationship between State and Federal law:*** It has been explained that the power to permit certain authorised activities under Schedule 3 is not intended to operate so as to allow carriers to do things which would be inconsistent with State or Territory law. A further point to make, therefore, is that the exemption regime under the Schedule is not intended as a mechanism for the flouting of State law, in particular the planning and environmental standards established under those laws. However, by way of qualification, it must be added that, under clause 37, certain State and Territory laws do not apply to a carrier engaging in any of the authorised activities discussed here. This exemption is expressed in wide terms based on clause 6 of the former Telecommunications (Exempt Activities) Regulation. It includes State or Territory laws about: the assessment of the environmental effects of engaging in the activity; town planning; the powers and functions of a local government body, tenancy and the use of land.

It has been said that the scheme established under Schedule 3 is complex. It can be added at this stage that, with respect to the above provisions, there is a sense in which the Federal government is giving to the States with one hand while taking (or retaining) ultimate power with the other. That certain overhead cables are an exception has been noted, but otherwise the ACA is akin to an ultimate arbiter in the new scheme which, in this regard at least, bears most of the hallmarks of the

²³

The Telecommunications Ombudsman Scheme is set out in Part 10 of the *Telecommunications Act 1997*. Note that the ACA may exempt a carrier from the scheme (section 247).

1991 regime. These new legislative arrangements, as they relate to the Commonwealth and the States, are set out in diagrammatic form in Figures 1 and 1a respectively at Appendix A.

Under clause 37 it is acknowledged that inconsistency may arise between State and Federal laws. However, clause 38 then provides for these laws to operate concurrently, thereby preventing such inconsistency from invalidating the relevant State law under section 109 of the Commonwealth Constitution.

- ***the relationship between State and Federal law where special Commonwealth environmental or heritage concerns are at issue:*** another qualification to the scope of State legislative and administrative power is found in clause 55. This relates to facilities installed under State or Territory law before 1 January 1999. It does not, therefore, refer to installations authorised under clause 6 of Schedule 3. The gist of clause 55 is that, where an installation in a location of special Commonwealth environmental or heritage concern is authorised under State law and it has been approved by the relevant consenting authority, then, in addition to that approval, the carrier must notify the Environmental Secretary. Specifically, this must occur where the proposed installation gives rise to any of the environmental or heritage concerns specified in clause 55(2), which includes the situation where the installation ‘could threaten with extinction, or significantly impede the recovery of, a threatened species’.

The Explanatory Memorandum explains that where the Environment Secretary makes a recommendation to the ACA, the ACA, after consulting with the Director of National Parks and Wildlife or (where appropriate) the Australian Heritage Commission ‘may give the carrier a written direction relating to the installation’. The carrier must comply with such a direction, but may apply to the ACA for reconsideration of its direction (including where a direction is varied or revoked). Beyond that, a further avenue of review is available to the Administrative Appeals Tribunal.²⁴

- ***application of State law to existing buildings, structures and facilities:*** clause 60 of Schedule 3 ensures that future State laws will not apply to any building etc constructed, altered or demolished under the authority of those Commonwealth laws in place before 1 July 1997. Thus, State laws cannot now be used to turn back the clock on existing developments in this area by, for example, establishing a regime of retrospective review of such developments.
- ***discriminatory State laws:*** clause 44 to Schedule 3 provides that a State or Territory law has no effect to the extent that it discriminates (directly or indirectly) against a carrier, or a user or potential user of a carrier’s services. However, a Government amendment modified the provision by permitting the Minister to authorise by written instrument an exemption to the clause. Any such exemption will

²⁴

Telecommunications Bill 1996, *Explanatory Memorandum*, Volume 3, p 29.

be a disallowable instrument. According to the Explanatory Memorandum, 'It is not the Government's intention that it would give an exemption from a State or Territory law which imposed a discriminatory tax on telecommunications carriers'.²⁵ In light of this, the Minister was asked to give an example of what the Government had in mind for the making of an exemption. The Minister's reply was in these terms: 'An example would be, if the state government had laws in relation to towers in general, you may want to provide specifically for telecommunications towers. So you would be distinguishing between different categories of towers and, therefore, it is a discrimination on the face of it, but it would be one that the Commonwealth would say was justified in the circumstances'.²⁶ How the provision will operate in practice remains to be seen.

In fact the Australian Democrats seem to have suggested the deletion of clause 44, thus allowing local councils to apply their own levies. This was said to be an option under consideration in NSW and South Australia. The proposal does not appear to have been introduced formally and therefore put to the vote.²⁷

- **transitional provisions:** these include an arrangement whereby, in relation to exempt activities,²⁸ the pre-1997 regulatory scheme is to continue in force till a defined date where certain conditions are met. This is where the activity was notified before 1 July 1997 and work started before 30 June 1997. With regard to designated overhead cables, this provisional regime expires on 30 September 1997; for other exempt activities it expires on 31 December 1997.²⁹ Corresponding exemptions apply to the land access powers under the pre-July 1997 scheme.³⁰

As noted, these new legislative arrangements, as they relate to the Commonwealth and the States, are set out in diagrammatic form in Figures 1 and 1a respectively at Appendix A. Further, in an attempt to present a practical overview of the new scheme as it exists to date, the key procedures to be followed by carriers, on one side, and owners and occupiers, on the other, are also set out in diagrammatic form at Appendix A.

²⁵ Telecommunications Bill 1997, *Supplementary Explanatory Memorandum*, pp 87-88.

²⁶ *Commonwealth Parliamentary Debates (Senate)*, 21 March 1997, p 2166.

²⁷ *Ibid.* The suggestion was in fact made by Senator Schacht who said the Democrats had indicated their intention to introduce an amendment to this effect.

²⁸ That is, the activities are exempted from compliance with State and Territory laws as specified in the *Telecommunications (Exempt Activity) Regulations* subject to the requirement to comply with the Telecommunications National Code.

²⁹ Clause 56 of Schedule 3.

³⁰ Clause 57 of Schedule 3. The land access powers were found in Division 3 of Part 7 of the *Telecommunications Act 1991*. Under clauses 58 and 59 of Schedule 3 special transitional rules apply to where a carrier was prevented from carrying out relevant work because of an injunction or similar order of a court granted on or after 5 December 1996 (the date of the introduction of the telecommunications Bills package).

4. IMPLICATIONS FOR THE STATES

The way to read Schedule 3, from a State perspective, is that everything which it does not place under Federal jurisdiction is to be under the control of State or Territory law. In a sense it is a matter of expanding State or Territory law so that it fills the gaps left by Schedule 3. As the Minister for Communications and the Arts said in his Media Release of 2 July 1997:

The new Act gives the states and territories planning power over many types of facilities - including overhead cables and mobile phone towers. The states and territories can, if they choose, legislate to apply their normal planning processes to these facilities - including the right for affected persons to lodge objections.³¹

The potential for State (and by implication local government) involvement, therefore, is very considerable. For example, it has been said that, with respect to access powers, State and Territory governments will need to decide whether to confer carriers with: access to land; the ability to attach facilities to land; and the ability to do things on land.³² The extent to which such matters can be dealt with by the adoption or modification of existing planning and environment laws remains to be seen. For instance, the Minister for Urban Affairs and Planning may issue a State Environmental Planning Policy (SEPP) on telecommunication facilities. This SEPP may outline the procedures to be followed in the application and approval processes for these facilities for the whole State, or parts thereof. The Department of Urban Affairs and Planning may also issue a Circular to councils, incorporating 'best practice' guidelines in regards to administering telecommunication facilities. Alternatively, local councils may adjust Local Environment Plans to regulate the installation of telecommunication facilities, or develop a council policy to regulate these matters.

Another option would be to regulate telecommunications carriers by means of a new and separate legislative package. Inevitably, a related issue in all this must be the question of national standards and the need for some sort of unified approach across the various Australian jurisdictions.

That the regulatory model adopted under the *Telecommunications Act 1997* may, potentially, involve jurisdictional conflicts between the States and the Federal government must be contemplated. Certainly, the model has its complexities. Basically, it establishes a two-tier system in which the Federal Australian Communications Authority operates as something of an arbiter between carriers and State authorities where these are unable to arrive at an agreement by negotiation. It is said that the facility installation permits which the ACA may grant under this model are not intended to be inconsistent with State law

³¹ Minister for Communications and the Arts, *Media Release*, 'Overhead cables and mobile phone towers now a matter for the states and territories', 2 July 1997.

³² Attachment to letter from the Minister for Communications and the Arts cited in the Senate debate - *Commonwealth Parliamentary Debates (Senate)*, 21 March 1997, p 2137.

generally. However, it remains the case that these facility installation permits (along with the other authorised activities under Schedule 3 of the 1997 Act) may be exempted from key areas of State legislation dealing with planning and environmental issues. As noted, this exemption regime is expressed in wide terms, based on clause 6 of the former Telecommunications (Exempt Activities) Regulation, and includes State or Territory laws about: the assessment of the environmental effects of engaging in the activity; town planning; the powers and functions of a local government body, tenancy and the use of land. It was said earlier that there is a sense in which the Federal government is giving to the States with one hand while taking (or retaining) ultimate power with the other. Clearly, where the potential for jurisdictional conflict is concerned, much will depend on the way in which the ACA carries out its statutory duties.

Again, it is worth emphasising that the installation of designated overhead cables (over 13 mm in width) must be approved by the relevant administrative authority, be it a State authority or local government body.

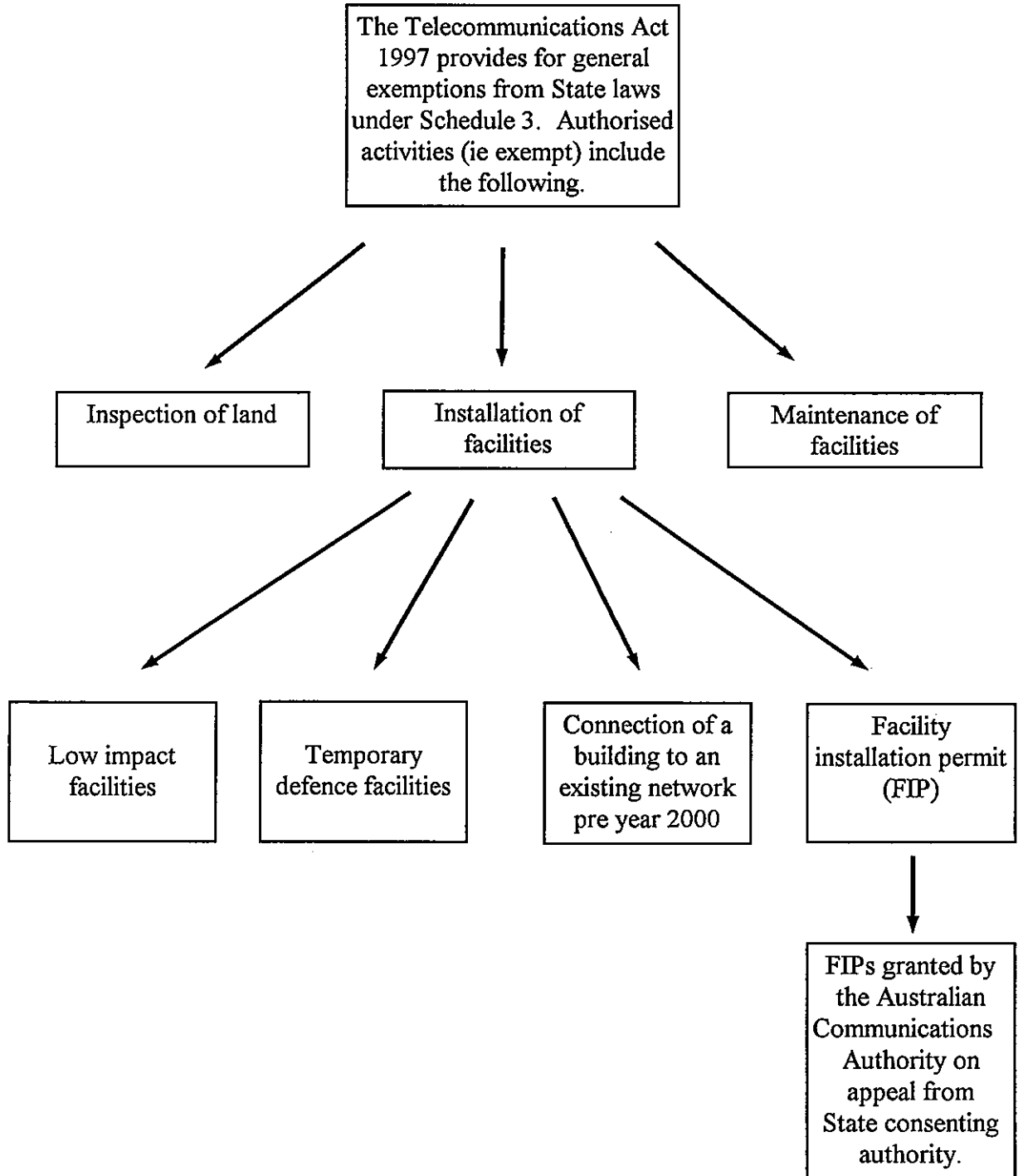
5. CONCLUSIONS

This paper has concentrated on the scheme established under Schedule 3 of the *Telecommunications Act 1997* for the regulation of telecommunication carriers. That State law has a significant part to play in the overall picture is clear. The way the States decide to complete that picture remains to be seen.

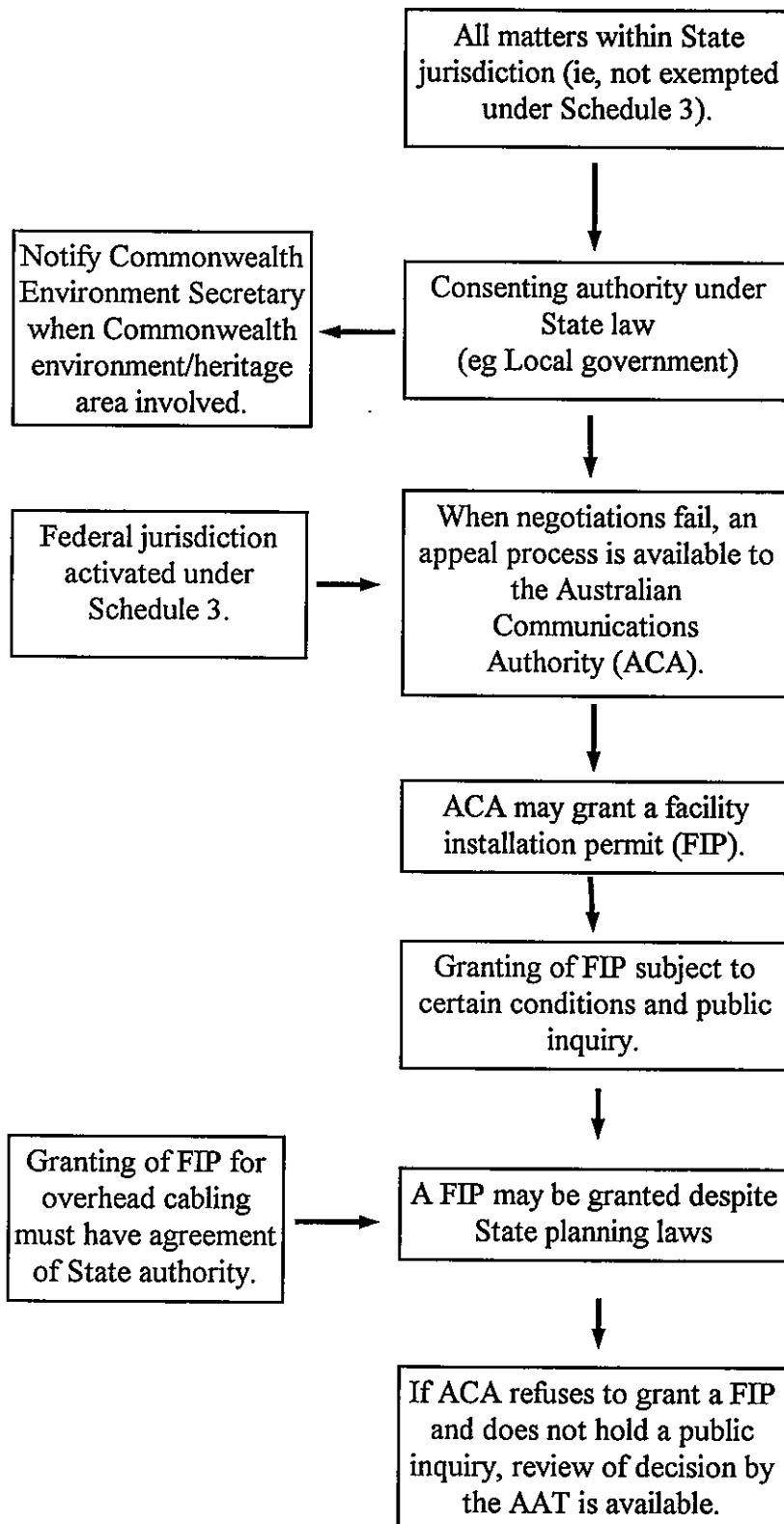
APPENDIX A

The 1997 Telecommunications Regulatory Regime in diagrammatic form

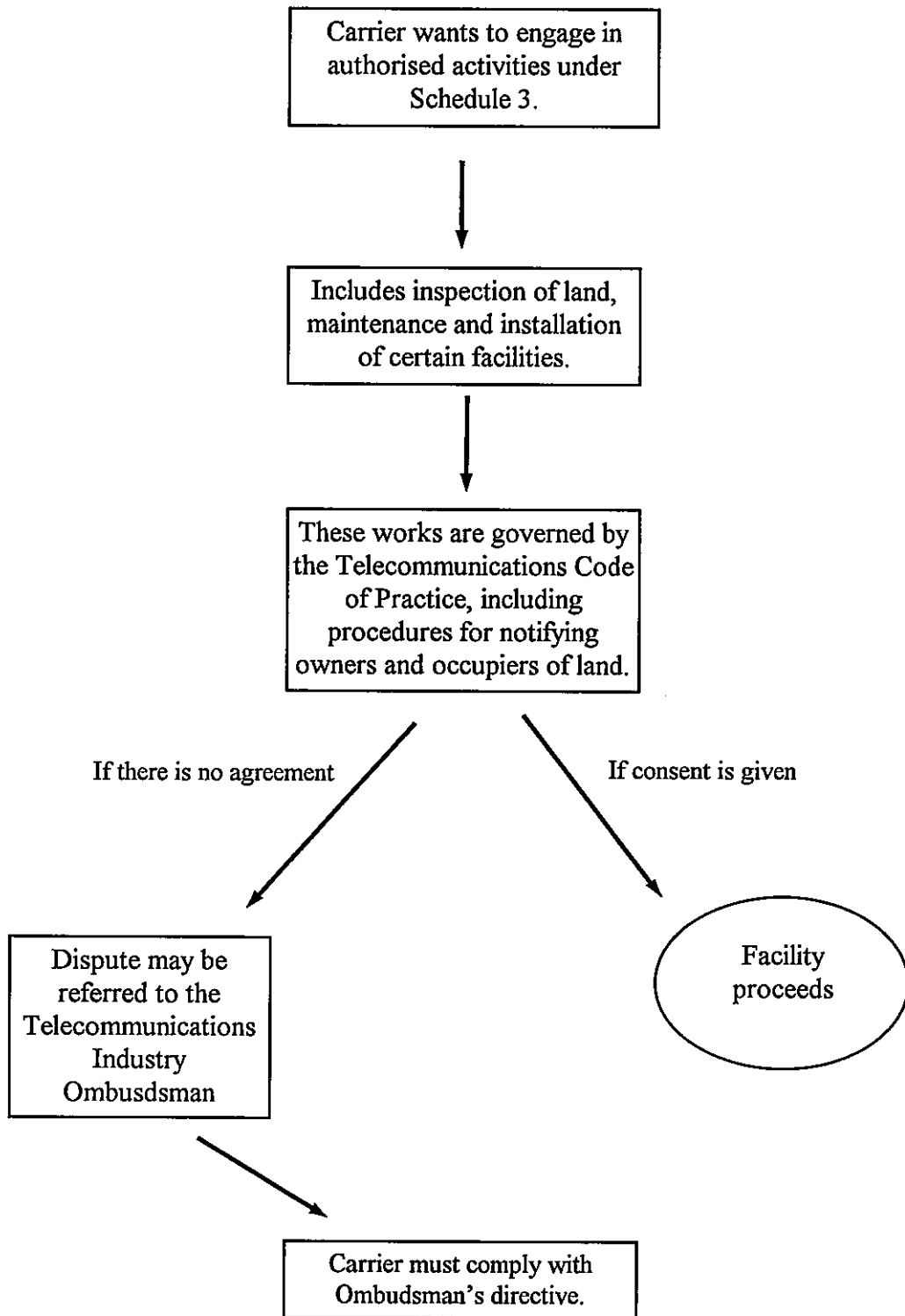
**Figure 1: The 1997 Telecommunications Scheme
A Legislative Overview - Federal Jurisdiction**



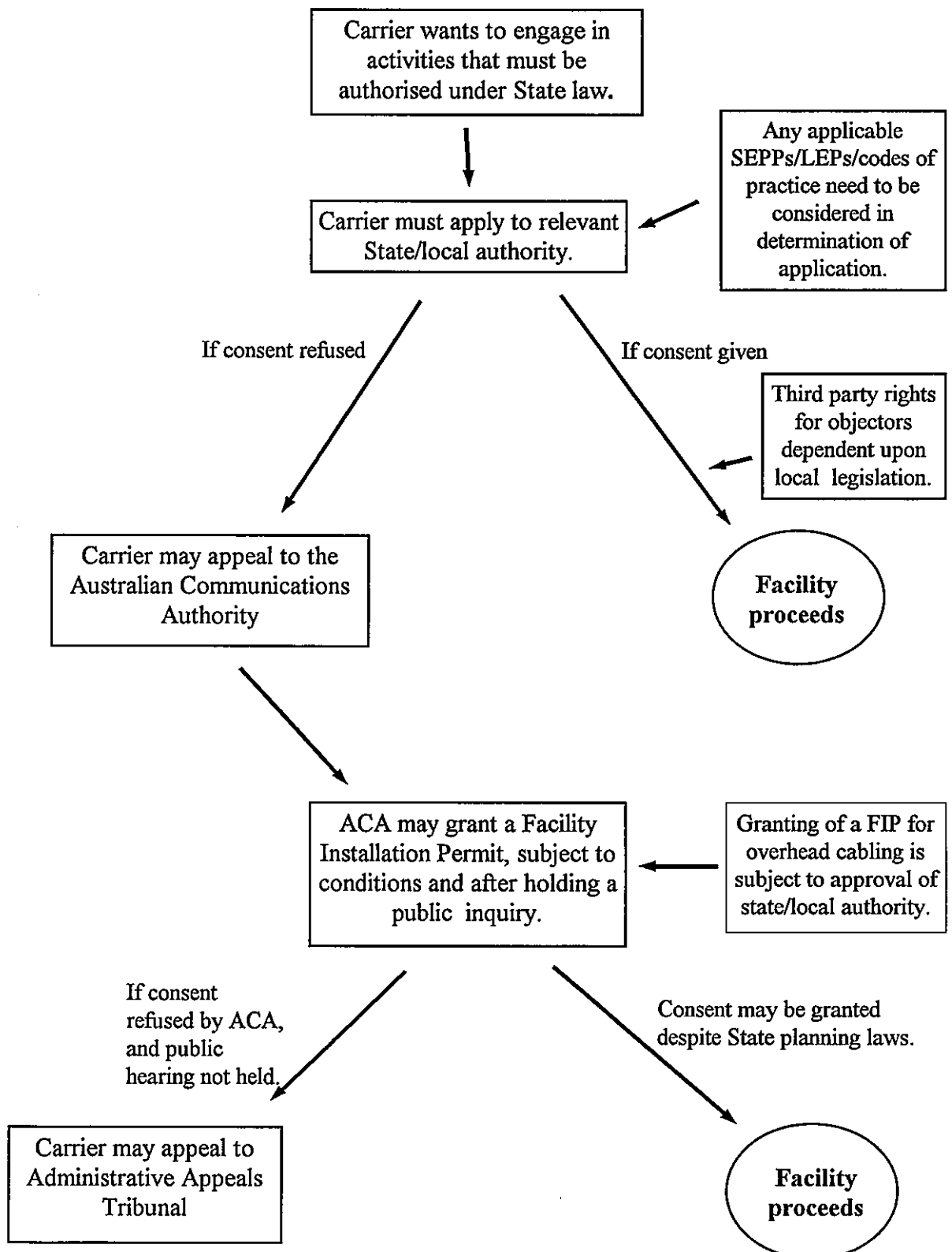
**Figure 1a: The 1997 Telecommunications Scheme
A Legislative Overview - State Jurisdiction**



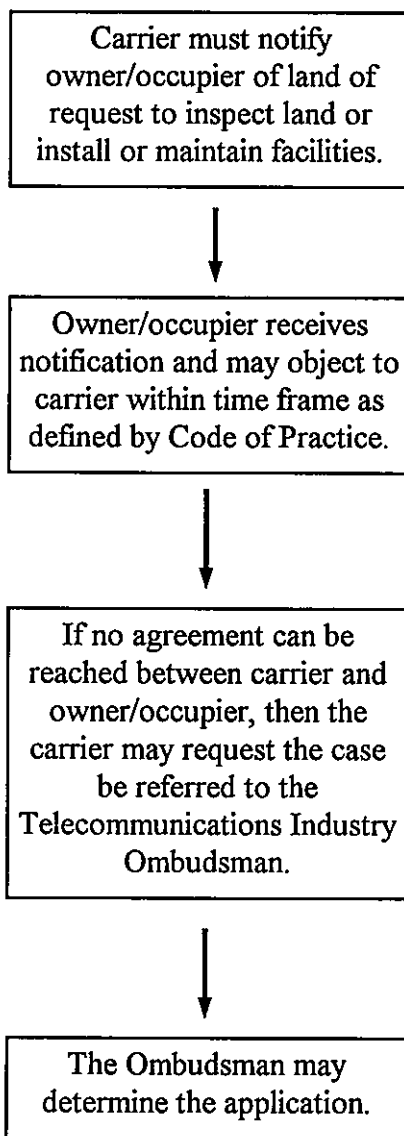
**Figure 2: The 1997 Telecommunications Scheme
Carriers Perspective within the Federal Jurisdiction**



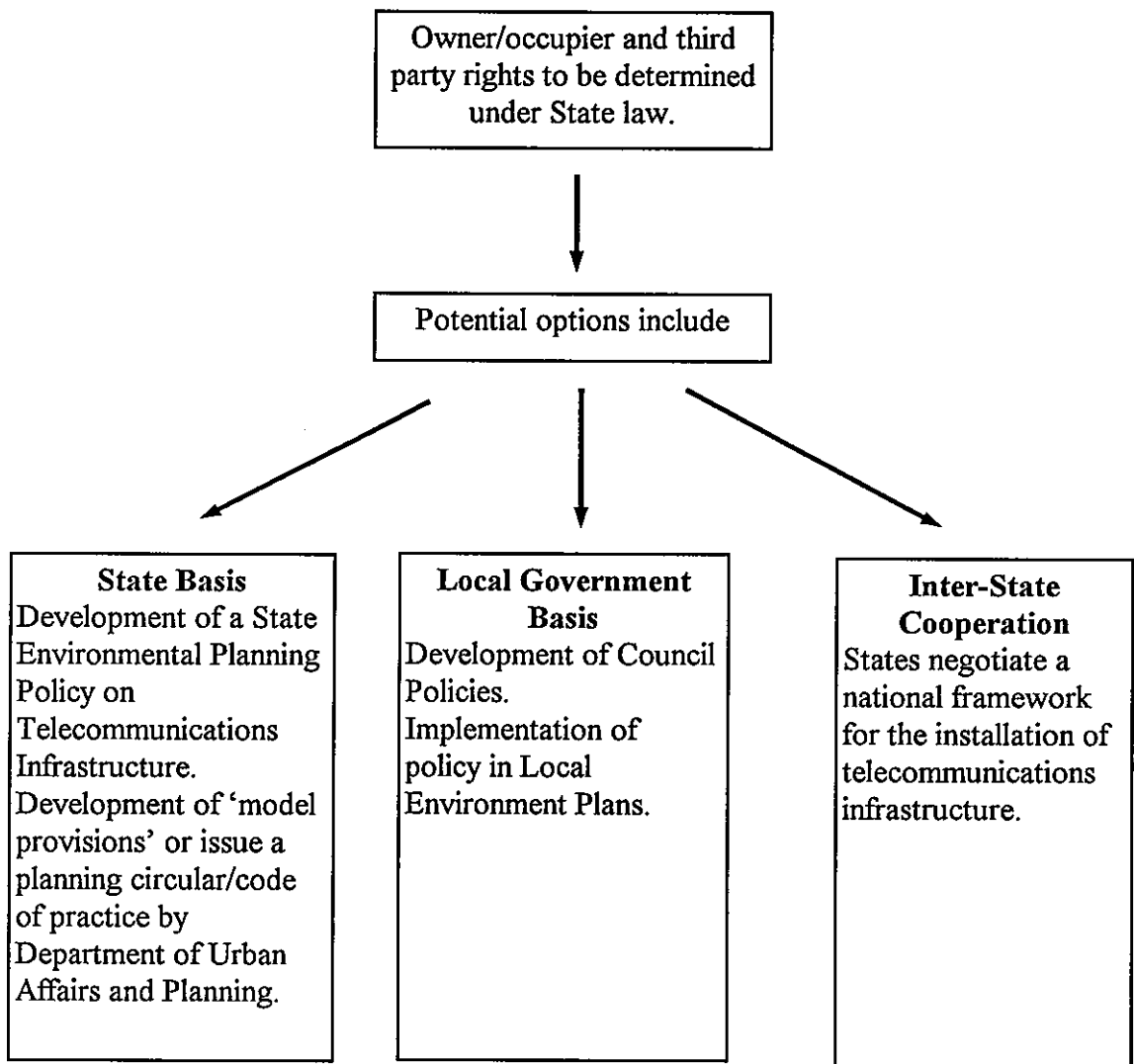
**Figure 2a: The 1997 Telecommunications Scheme
Carriers Perspective within the State Jurisdiction**



**Figure 3: The 1997 Telecommunications Scheme
Owner / Occupier of Land Perspective - Federal Jurisdiction**



**Figure 3a: The 1997 Telecommunications Scheme
Owner Occupier of land Perspective - State Jurisdiction**



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