

Our Ref: AM:28694
Your Ref: Derek McKinstry

11 May 2016

The Secretary
Community Association DP No. 270427
c/- Dynamic Property Services Pty Ltd
DX 11643
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By email: DerekM@dynamicproperty.com.au

Dear Derek

RE: ADVICE ON PIVIT PTY LTD AND NATIONAL BROADBAND NETWORK

1. Your Question

I am asked to advise the Community Association on its obligations, and the obligations of Pivit Pty Ltd (**Pivit**), to provide, or allow other telecommunications carriers including internet service providers (**ISP's**) to provide, telecommunications services including pay TV and internet services (**network services**) to residents who live in Prince Henry at Little Bay (**residents**) via the telecommunications infrastructure in Prince Henry that was installed and is managed and operated by Pivit (**network**). I am also asked to explain if it is possible for the Community Association to compel NBN Co Ltd (**NBN Co**) to extend the roll out of the national broadband network (**NBN**) so that it includes Prince Henry at Little Bay.

2. My Answer

- The Community Association is under no obligation to provide, or enter into arrangements for the provision of, network services to residents via Pivit's network or otherwise.
- Pivit must provide all of the services that are necessary to enable the network to be properly managed and operated such as network maintenance and upgrade services.
- Pivit must provide these services in an efficient and professional manner and in accordance with certain minimum service levels which, for example, require Pivit to remedy any critical service problems within the network within six hours and any major service problems in the network within one business day.
- Pivit must also connect residents and other telecommunications carriers including ISP's to the network after being requested to by them, and provide network services to residents via the network in an efficient and professional manner.

- In other words, Pivit must make the network available for use by other telecommunications carriers to enable those carriers to provide network services to residents. Generally, Pivit must connect residents and other telecommunications carriers to the network within 10 days from the time Pivit receives an application for that connection.
- Other telecommunications carriers are entitled to install, maintain and operate their own telecommunications infrastructure in Prince Henry (**alternate network**) without needing to obtain the consent of Pivit provided that their alternate network does not hinder or interfere with the operation of Pivit's network and is installed, maintained and operated in accordance with all applicable laws and the requirements of the Community Association and any relevant subsidiary body.
- The Community Association should write to UrbanGrowth NSW, identify Pivit's breaches of its obligations in relation to the network and network services, and request that UrbanGrowth require Pivit to comply with those obligations.
- The Community Association should also consider requesting UrbanGrowth NSW to transfer its rights and obligations under the Network Management Services Agreement between UrbanGrowth and Pivit (**NMSA**) to the Community Association so that the Community Association itself will be entitled to require Pivit to fulfil its obligations.
- The Community Association is not presently entitled to compel NBN Co to extend the roll out of the NBN to include Prince Henry. Nevertheless, the Community Association should write to NBN Co and the Minister for Communications to formally request that the roll out of the NBN be extended to include Prince Henry at Little Bay.
- This is only a summary of my advice. You will need to read the background and legal analysis which follow to understand how I have arrived at these conclusions.

3. Background

3.1 Installation of Pivit's Network

Prince Henry at Little Bay (**Prince Henry**) is a large community title scheme that was developed by Landcom (which is now known as UrbanGrowth NSW). During the development of Prince Henry, Landcom engaged Pivit to construct, install and commission telecommunications infrastructure including a fibre network, communications room and associated telecommunications facilities in Prince Henry. This network included the telecommunications infrastructure that is intended to allow residents in Prince Henry to obtain a range of network services via the network including telephony, internet, pay TV and video on demand services. Pivit installed and commissioned the network and Pivit owns the network.

3.2 Prince Henry Community Association

On 30 March 2005, Deposited Plan 270427 was registered as a community plan in respect of Prince Henry. On that date, the Community Association came into existence and became the owner of the community property in Prince Henry.

3.3 Network Management Services Agreement

On or about 1 May 2007, Landcom and Pivit entered into the NMSA. The NMSA runs for an initial term of 25 years. Briefly, the NMSA requires Pivit to properly manage and operate the network in accordance with the proper and lawful instructions of Landcom and in accordance with certain minimum service levels, provide other telecommunications carriers with access to the network to enable them to provide network services to residents, and to itself provide network services to residents in an efficient and professional manner. The NMSA remains in force.

3.4 National Broadband Network

On 9 April 2009, NBN Co was established to design, build and operate Australia's new broadband network known as the NBN. Since then, the NBN has been progressively rolled out across various parts of the country. On 27 April 2012, the then Minister for Communications released a policy paper titled "*Adequately Served: Criteria and Assessment Process to Facilitate the Roll Out of the National Broadband Network (NBN)*" (**NBN policy**). The NBN policy is designed to prevent unnecessary duplication of fibre-to-the-premises networks existing in residential communities as at 1 January 2012 that are already serviced by networks that can deliver telecommunications services that meet the government's NBN objectives. Under the NBN policy, NBN Co will not roll out the NBN in residential areas that already contain networks that are assessed by the Minister for Communications as meeting the "adequately served" criteria, except where that will have a significant impact on NBN Co's ability to efficiently roll out the NBN. In other words, the roll out of the NBN will not extend to include residential areas that are already serviced by adequate fibre-to-the-premises networks.

3.5 Pivit Declaration

In 2013, Pivit applied to the Minister for Communications to have a number of its networks assessed under the NBN policy. In that year the Minister issued a document entitled "*Carrier Licence Conditions (Pivit) Declaration 2013*" (**Pivit declaration**). Relevantly, in the Pivit declaration, the Minister determined that Pivit's network in Prince Henry adequately served the Prince Henry community as a result of which NBN Co was directed not to extend the roll out of the NBN to include Prince Henry. As a result of that determination, the Minister imposed a condition on Pivit's telecommunication carrier's licence to require Pivit to connect premises in Prince Henry to its network to enable other telecommunications carriers including ISP's to supply network services such as a standard telephone service and a broadband internet service to any resident on the reasonable request of the resident or by another telecommunications carrier on the resident's behalf. In other words, the Pivit declaration requires Pivit to make available its network to enable other telecommunications carriers to provide network services to residents.

3.6 Problems with Pivit

A number of residents in Prince Henry have expressed dissatisfaction with the network services provided by, and the performance of, Pivit. For example, Pivit recently informed residents that it would cease to offer email services (but, subsequently, reversed its decision after the advertised termination date for all Pivit email addresses). By way of further example, Pivit, for the first time, recently slowed (by use of "speed shaping") the broadband internet connection of several residents who had apparently exceeded their monthly data allocation via the network which resulted in some of those residents upgrading their internet plan with Pivit to increase their data allowance at additional cost. Further, many residents feel that Pivit has a monopoly on the provision of network

services to residents because other telecommunications carriers, such as Optus, have been unable or unwilling to connect to the network or provide network services to residents at a reasonable cost or at all.

3.7 Residents' Desires

For these reasons, many residents have expressed a desire for the roll out of the NBN to include Prince Henry and for residents to be given a greater choice as to the telecommunications carriers such as ISP's they are able to select to provide network services to them via the network. As a consequence, the Community Association requires advice on its obligations, and the obligations of Pivit, to provide network services to residents via the network. And the Community Association also wants to know if it is able to compel the NBN Co to extend the roll out of the NBN to include Prince Henry.

4. Legal Analysis

4.1. Community Association's Obligations

The Community Association does not have any obligation to provide, or enter into arrangements for the provision of, network services to residents via the network. This is because no such obligation is imposed on the Community Association under the community schemes legislation or the Community Management Statement for Prince Henry.

The community schemes legislation requires the Community Association to, for example, maintain in good condition the community property in Prince Henry, insure any buildings that are situated on the community property and provide proper means for the receipt of its mail. And the Community Management Statement makes the Community Association responsible for the maintenance of certain services in Prince Henry which are not maintained by service providers (such as telephone services that are maintained by Telstra) but this, relevantly, only includes underground telecommunications cabling and related infrastructure if and when installed and owned by the Community Association or for which the Community Association assumes responsibility.

But there is nothing in the community schemes legislation or the Community Management Statement that imposes on the Community Association an obligation to provide, or enter into arrangements for the provision of, network services to residents via the network.

4.2. Pivit's Obligations

Pivit has fairly extensive obligations in relation to the network and the provision of network services to residents. These obligations arise under the NMSA and the Pivit declaration.

4.2.1 Network Management Services

Clause 4.1 of the NMSA requires Pivit to provide "network management services" for its network for the 25 year duration of the NMSA. Clause 1.1 of the NMSA defines the "network management services" that Pivit must provide to mean "all those services as are necessary for the proper management, operation and conduct of [Pivit's] network" and any physical connection between that network and the optical network termination node located on a dwelling in Prince Henry occupied by a resident.

Clause 4.2 of the NMSA requires Pivit to perform these network management services in a proper, business-like and efficient manner to at least the same standard as that of a competent and skilful provider of similar services, and to exercise reasonable care, diligence and skill in providing those services.

Clause 4.3 requires Pivit to perform those network management services in accordance with all proper and lawful instructions and directions of UrbanGrowth NSW in relation to the network. And clause 4.4 requires Pivit to provide those network management services in accordance with certain minimum service levels that are prescribed in Schedule 9 to the NMSA.

Relevantly, Schedule 9 requires Pivit to resolve any critical service problem in the network within six hours, any major service problem within one business day, and any minor service problem within four business days (except where the problem is due to faults within the network that Pivit is not permitted to correct). If Pivit fails to comply with these minimum service levels it can be required to pay residents a rebate (see clause 4.3 in Schedule 9 to the NMSA).

4.2.2 Communications Services

Clause 8 of the NMSA requires Pivit to supply “communications services” to residents via the network throughout the duration of the NMSA. Clause 1.1 defines the “communications services” to mean “the range of services to be provided to customers via the network, including (but not limited to) telephony, internet, VOIP services, pay TV, free to air TV, video on demand and security services, as further described in Schedule 3”.

Pivit is required to provide these “communications services” to residents in accordance with the service descriptions and other requirements set out in Schedule 3 to the NMSA. Schedule 3 identifies in more detail the types of services that Pivit is required to provide residents and the standard of those services. For example, broadband internet services must offer speeds up to at least 10Mbps.

Clause 8 allows Pivit to charge residents for providing these communications services in accordance with the charge out rates prescribed in Schedule 4 of the NMSA. Many of these charge out rates have been redacted from the version of the NMSA obtained by the Community Association.

4.2.3 Third Party Services

Clause 6 of the NMSA requires Pivit to provide a fully open network and, in particular, “wholesale access to third party service providers of wholesale customer services”. Clause 1.1 of the NMSA defines “wholesale customer services” to mean “those customer services specified in Part 2 of Schedule 3, such services to be provided by third party service providers”.

Part 2 of Schedule 3 indicates that there are a range of wholesale customer services that are able to be provided by third party providers including broadband, telephony, pay TV, video on demand, satellite TV and international satellite services.

This requirement supplements the condition imposed on Pivit’s telecommunication carrier’s licence by the Minister in the Pivit declaration. That condition requires Pivit to connect premises in Prince Henry to its network to enable other telecommunications carriers to provide any type of network services to residents via that network: see clause 4 of the Pivit declaration. The Pivit declaration requires Pivit to connect premises in Prince Henry to its network upon the reasonable

request of a resident or another telecommunications carrier on behalf of a resident. Pivit does not have to connect premises to its network in accordance with such a request if it would not be appropriate to require Pivit to do so because, for example, connecting the premises to its network would expose Pivit's contractors to a health or safety risk.

In essence, these obligations require Pivit to make its network available to other telecommunications carriers, including ISP's, to enable them to provide network services to residents.

Clause 6 of the NMSA allows Pivit to charge other telecommunications carriers a fee for connecting to and using its network in accordance with Schedule 4 to the NMSA. These fees and charges have been redacted from the version of the NMSA obtained by the Community Association.

4.2.4 Other Obligations

The NMSA imposes various other obligations on Pivit. Most relevantly, clause 12 requires Pivit to market and provide the network services it provides residents fairly and accurately, to conduct its business of selling those network services to residents in accordance with "high ethical commercial standards" and to ensure that residents are fully aware of the range of services that are available including both network services provided by Pivit and those provided by other telecommunications carriers, including ISP's. Further, clause 15.5 requires Pivit to provide quarterly reports to UrbanGrowth NSW for the duration of the NMSA in relation to the matters about which UrbanGrowth requires Pivit to include in its report in relation to the network and network services.

4.3. Can Pivit be Compelled to Perform its Obligations?

The Community Association is not a party to the NMSA. This means that the Community Association is not able to enforce the terms of the NMSA. More specifically, this means that the Community Association cannot compel Pivit to comply with its obligations under the NMSA. However, UrbanGrowth NSW is a party to the NMSA. Therefore, UrbanGrowth is able to compel Pivit to comply with its obligations under the NMSA. For example, clause 32.1 of the NMSA gives UrbanGrowth the right to give Pivit a written notice requiring it to remedy a breach of a material provision of the NMSA and, if that breach is not remedied within 15 days, to terminate the NMSA.

4.4. What Should the Community Association do to compel Pivit to comply with its obligations?

The Community Association should write to UrbanGrowth NSW, identify Pivit's breaches of the NMSA and request that UrbanGrowth require Pivit to remedy its breaches and otherwise comply with the NMSA, whether by issuing a breach notice to Pivit or by other means.

If UrbanGrowth NSW is unable to or unwilling to compel Pivit to comply with its obligations under the NMSA, then the Community Association should consider requesting that UrbanGrowth agree to assign or transfer its rights and obligations under the NMSA to the Community Association.

Clause 35.8(b) of the NMSA allows UrbanGrowth to, at any time without the consent of Pivit, sign, novate or otherwise transfer its rights and obligations under the NMSA to the Community Association. If that occurs, then the Community Association would essentially become a party to

the NMSA, replace UrbanGrowth as the “principal” under the NMSA and, more or less, stand in the shoes of UrbanGrowth under the NMSA. That would enable the Community Association to enforce the NMSA against Pivit and to require Pivit to comply with its obligations under the NMSA.

The Community Association would need to carefully consider the pros and cons of accepting an assignment of UrbanGrowth’s rights and obligations under the NMSA before doing so. My preliminary view is that the pros of taking an assignment of the NMSA from UrbanGrowth outweigh the cons.

Further, the condition imposed on the telecommunication carrier’s licence of Pivit by the Pivit declaration is enforceable against Pivit. Under the telecommunications legislation, the Australian Communications and Media Authority (ACMA) is able to give a carrier such as Pivit a written direction requiring the carrier to take specified action to ensure that the carrier does not contravene a condition of its licence in the future. That carrier must not contravene a direction given by the ACMA: see sections 69 and 69AA of the *Telecommunications Act 1997* (Cth). If the ACMA issues a remedial direction to Pivit which is ignored, that can result in the ACMA issuing a formal warning to Pivit and imposing monetary penalties on it.

4.5. Can other Telecommunications Carriers install Alternate Networks in Prince Henry?

The NMSA does not grant Pivit the exclusive right to manage and operate the sole telecommunications network in Prince Henry. This means that there is, at law, little to prevent other telecommunications carriers from installing alternate networks in Prince Henry provided that those alternate networks do not hinder or interfere with Pivit’s network or Pivit’s operation and use of its network. In other words, other telecommunications carriers would generally not need to obtain the consent of Pivit to install alternate networks in Prince Henry although, most likely, they would need to obtain the consent of the Community Association and any relevant subsidiary body in order to do so. Of course, other telecommunications carriers will not incur considerable expenditure installing and operating alternate networks in Prince Henry unless it is commercially viable for them to do so.

4.6. Can the NBN roll out be extended to include Prince Henry?

The Pivit declaration has the force of law by operation of the telecommunications legislation. In the Pivit declaration, the then Minister for Communications determined that Pivit’s network adequately served Prince Henry as a result of which NBN Co’s roll out of the NBN would not extend to include Prince Henry. Therefore, presently, the Community Association is not entitled to insist on the roll out of the NBN extending to cover Prince Henry.

However, the Pivit declaration is able to be amended or revoked by the Minister in appropriate circumstances under section 63(5) and (6) of the *Telecommunications Act 1997* (Cth). Therefore, the Community Association could petition the Minister for Communications, and the NBN Co, to vary or revoke the Pivit declaration and to ensure that the roll out of the NBN extended to include Prince Henry. Obviously, the Minister would not vary or revoke the Pivit declaration lightly and there would need to be compelling reasons to do so.

In my view, the most obvious reason for the Minister to vary or revoke the Pivit declaration is if it could be shown that Pivit’s network does not adequately serve Prince Henry. In order to demonstrate this, the Community Association would need to engage a telecommunications expert

to review and provide a report concerning the network. That report would need to demonstrate that the network does not adequately serve Prince Henry and that it is appropriate for the roll out of the NBN to extend to include Prince Henry. Therefore, if the Community Association wants to press for the roll out of the NBN to include Prince Henry, it will need to engage a telecommunications expert to provide such a report at (no doubt) considerable cost.

5. Conclusion

I have concluded that:

- the Community Association is under no obligation to provide, or enter into arrangements for the provision of, network services to residents via Pivit's network or otherwise;
- Pivit has various obligations in relation to the network, making the network available for use by other telecommunications carriers including ISP's, and providing network services to residents via the network;
- presently, the Community Association is generally not in a position to force Pivit to comply with those obligations;
- for that reason, the Community Association should make representations to UrbanGrowth NSW (which is able to compel Pivit to comply with its obligations under the NMSA) to require Pivit to comply with its obligations under the NMSA or for UrbanGrowth to assign its interests in the NMSA to the Community Association;
- the Community Association is not presently able to compel NBN Co to extend the roll out of the NBN to include Prince Henry;
- the Community Association will need to make compelling representations (most likely at considerable cost) to the Minister for Communications and the NBN Co in order for the Minister to vary or revoke the Pivit declaration and extend the roll out of the NBN to include Prince Henry and, even then, those representations may be unsuccessful.

I trust that my advice has clarified the position of the Community Association in relation to Pivit, the provision of network services, access to the network and the roll out of the NBN. I now **attach** my memorandum of fees and invite the executive committee to arrange a meeting with me to discuss my advice and the way forward.

Yours faithfully



J.S. MUELLER & CO

Encl.

Per: Adrian Mueller