
The Challenges Posed to State and Territory Planning Courts and Tribunals by the Federal Telecommunications Regime

The Honourable Justice Nicola Pain
Judge of the Land and Environment Court of NSW
and
Kirstie Richards
Tipstaff to Her Honour Justice Pain

Introduction

It is now accepted that reliable telecommunications are a necessity for modern life. Every time we make a phone call, use an ATM, email or use the internet we use telecommunications and the trend is for our use of telecommunications to increase. For example, the number of mobile phones in operation in Australia in 2003 increased by 12.6% from 2002.¹

“Telecommunications represents the new urban infrastructure. What water, roads and rail have represented as primary networks to previous economic eras, telecommunications now represents to the information economy of advanced societies.”² However, this ‘new urban infrastructure’ comes at a price and there is, in effect, a “...trade off between encouraging the construction of telecommunications networks for the benefit of consumers and the broader economy, and accommodating [the] aesthetic and environmental concerns of the community.”³

Historically, in Australia the provision of telecommunication infrastructure was dealt with entirely at a Commonwealth level. Telecom, then a governmental body with a monopoly over

¹ *Telecommunications Performance Report 2002-2003*, Australian Communications Authority at p 3.

² “The new urban infrastructure - telecommunications and the urban economy” by Peter Newton, *Urban Futures (Canberra)*, special issue No.5, February 1990, pp 54-75 at p 54.

³ “About Mobile Phone Networks”, Fact Sheet – EME Series No. 6 published by the Australian Radiation Protection and Nuclear Safety Agency at http://www.arpana.gov.au/eme_pubs.htm

telecommunications, was granted universal exemptions from state and territory planning and environmental laws so that these facilities could be provided. Government policy changed and in 1991 Optus entered the field having been granted the right to provide telecommunication services alongside the “new look” Telstra. The *Telecommunications Act 1991 (Cth)* (now repealed) was intended to ensure that Optus and Telstra’s “facilities [were] constructed without the interference of any State Legislation relating to environmental issues ...”⁴ At the time, the fact that broad brush exemptions from state planning and environmental law was being granted to a private corporation did not appear to create any great concern in the community because it was anticipated that future telecommunications would be based around wireless technology rather than cable based technology.⁵ However, subsequent to the passing of the *Telecommunications Act 1991 (Cth)* both Optus and Telstra realised that cable technology, whilst more expensive to install, offered a number of advantages over wireless.⁶ Whilst Telstra had much of its cable in place, Optus relied on the exemptions to state planning and environmental law contained in the *Telecommunications Act 1991 (Cth)* and proceeded to roll out its cable network. The result was that Optus “incurred the wrath of the community for the environmental effects of its rollout and for perceptions that [the rollout was] proceeding apace despite community protestations.”⁷

In 1996 the Federal Government continued its program to increase competition in the telecommunications industry by passing the *Telecommunications Act 1997 (Cth)* (“the 1997 Act”) which repealed the *Telecommunications Act 1991 (Cth)* and removed the barriers to entry into the telecommunications industry. In an effort to “strike the right balance between encouraging investment in infrastructure to meet the growing demand for new telecommunication services and facilitating further competition while also addressing the legitimate concerns of local communities about the effect of the roll-out of telecommunications infrastructure in their local environment”⁸ the 1997 Act:

- (1) establishes a general rule that state and territory planning laws will apply to telecommunications; and

⁴ *Ashfield Council v Vodafone Pty Limited* (1997) 96 LGERA 241 per Justice Cowdroy at paragraph 21.

⁵ “Developing Australia’s Telecommunications Infrastructure” by Sue Ferguson, *Communications Law Bulletin* vol 15(3) pp 19-23 at p 22.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Second Reading Speech given by Warwick Smith in relation to the *Telecommunications Bill 1996*. Hansard, Tuesday 5 December 1996, p 7799.

- (2) requires the co-location of mobile phone facilities unless it is not technically feasible to do so.

The balance struck by the 1997 Act is not always regarded as a happy one. Carriers have faced and continue to face:

- (1) the opposition of local consent authorities seeking to restrict their ability to install new telecommunications infrastructure without a development consent granted in accordance with state and territory legislation; and
- (2) the “...fundamental difficulty ... that while they are encouraged to co-locate their facilities on other telecommunications or public utility infrastructure (or otherwise attach their facilities to existing buildings in a manner prescribed...) public utilities, particularly local councils, and other land owners have aggressively sought to repel the carrier’s efforts to do the same.”⁹

Since the 1997 Act came into effect, state and territory courts and tribunals have been required to grapple with the planning issues associated with the installation of telecommunication facilities.

This paper attempts to provide an overview of how state and territory planning courts and tribunals have:

- (1) interpreted the exemptions granted by the 1997 Act from the need to obtain development consent when installing and maintaining telecommunications infrastructure (Part 1); and
- (2) dealt with the environmental planning issues which arise in relation to the installation and maintenance of telecommunications infrastructure when development consent of one type or another is required (Part 2).

Both of these issues are complex and neither has yet been fully resolved. As the Deputy President of the Victorian Civil and Administrative Tribunal observed in *Hutchinson 3G Australia Pty Limited v Monash City Council* [2003] VCAT 508:

*Planning law ... can be very complex... When Commonwealth telecommunications law intrudes upon the decision making, the process becomes more complex still.*¹⁰

⁹ “Telecommunications Networks – Carrier Powers Confirmed” by Shane Barber, *Communications Law Bulletin*, Vol. 22(1), 2003, pp 19-22 at p 19.

¹⁰ Per M.F. Macnamara at para 1.

Given the breadth of these issues, this paper cannot hope to be comprehensive and instead merely attempts to highlight general principals and issues and to illustrate these by reference to recent case law. In this regard, it is important to note that ‘merit’ decisions involving telecommunications facilities are not always reported and it is difficult to obtain copies of the unreported judgements. Accordingly, this paper may have been prepared without the benefit of some relevant unreported decisions of state and territory courts and tribunals in relation to telecommunications facilities.

Part 1 - Interpretation of the Exemptions from State Law in the Telecommunications Act 1997

The Commonwealth regime governing telecommunications is complex. The 1997 Act, in conjunction with the Trade Practices Act 1974 (Cth) regulates the telecommunications industry in Australia whilst the Radiocommunications Act 1992 (Cth) regulates the use of the radiofrequency spectrum by the telecommunications industry.

The 1997 Act draws a distinction between “carriers”, who must be licensed under the 1997 Act¹¹ as responsible for telecommunications network infrastructure, and “service providers” who use this infrastructure. A carrier under the 1997 Act must also be licensed under the Radiocommunications Act 1992 (Cth) before they can utilise the radiofrequency spectrum to provide services. This paper is solely concerned with “carriers” and the extent of the exemptions from compliance with state and territory planning and environmental laws granted to them.

The 1997 Act contains a general rule to the effect that it does not “operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory”.¹² However this general rule is subject to a number of specific exemptions contained in Schedule 3 of the 1997 Act.¹³ Where these exemptions apply, “carriers” are exempted from the need to comply with state and territory planning laws. The extent to which these exemptions operate to oust the application of state and

¹¹ Telecommunications Act 1997 (Cth) s42.

¹² Telecommunications Act 1997 (Cth) c36(1) of Schedule 3.

¹³ Section 484 of the Telecommunications Act 1997 (Cth).

territory environmental and planning laws is an issue which has been the subject of increasing judicial attention.

Division 7 of Schedule 3 is concerned with the application of state and territory laws to activities carried out by carriers pursuant to Divisions 2, 3 and 4 of Schedule 3. Division 7 of Schedule 3 relevantly provides as follows:

36 Activities not generally exempt from State and Territory laws

- (1) *Divisions 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.*
- (2) *The rule set out in subclause (1) has effect subject to any exemptions that are applicable under clause 37.*

37 Exemption from State and Territory laws

- (1) *This clause applies to an activity carried on by a carrier if the activity is authorised by Division 2, 3 or 4.*
- (2) *The carrier may engage in the activity despite a law of a State or Territory about:*
 - (a) *the assessment of the environmental effects of engaging in the activity; or*
 - (b) *the protection of places or items of significance to Australia's natural or cultural heritage; or*
 - (c) *town planning; or*
 - (d) *the planning, design, siting, construction, alteration or removal of a structure; or*
 - (e) *the powers and functions of a local government body; or*
 - (f) *the use of land; or*

...

38 Concurrent operation of State and Territory laws

It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.

The effect of these provisions is that, where an activity is authorised under Divisions 2, 3 or 4 of Schedule 3 to the 1997 Act, state and territory planning laws will not apply.

Divisions 2, 3 and 4 of Schedule 3 of the 1997 Act gives carriers very broad powers, subject to certain conditions being met,¹⁴ in relation to:

- (1) the inspection of land, including:
 - (a) the power to enter on and inspect land and to do anything on the land that is necessary or desirable for the purpose of determining whether any land is suitable for its purposes;¹⁵ and
 - (b) the power, if the carrier is of the opinion that the land may be suitable for the carrier's purposes, to enter the land and do anything necessary or desirable for the purpose of surveying or obtaining information in relation to the land;¹⁶
- (2) the installation of facilities connected with the supply of a carriage service where:
 - (a) the carrier is authorised to do so by a facility installation permit;¹⁷ or
 - (b) the facility is a 'low impact facility'¹⁸ as determined by the Minister;¹⁹ or
 - (c) the facility is a temporary facility for use for defence purposes;²⁰ or
 - (d) the facility is one of a class of installations carried out before 1 July 2000 for the purpose of connecting buildings etc to a telecommunication network which was in existence at the end of 30 June 1997;²¹including the power to enter on and occupy any land and "do anything necessary or desirable" for the purpose of installing a facility authorised under the 1997 Act;²² and
- (3) the 'maintenance' of facilities including the power to "do anything necessary or desirable" in connection with the maintenance of facilities.²³

As Division 2 of Schedule 3 to the 1997 Act does not authorise carriers to do any thing which could possibly require development consent under State and Territory legislation the exemptions granted by this Division are not considered further in this paper.

¹⁴ A discussion of these conditions is beyond the scope of this paper. The relevant conditions are set out in Schedule 3 to the Telecommunications Act 1997 (Cth).

¹⁵ Telecommunications Act 1997 (Cth) c5(1) of Schedule 3.

¹⁶ Telecommunications Act 1997 (Cth) c5(2) of Schedule 3.

¹⁷ Telecommunications Act 1997 (Cth) c6(1)(a) of Schedule 3.

¹⁸ Telecommunications Act 1997 (Cth) c6(1)(b) of Schedule 3.

¹⁹ Clause 6(3) of Schedule 3 to the Telecommunications Act 1997 (Cth) provides that: "The Minister may, by written instrument, determine that a specified facility is a low impact facility for the purposes of this clause. The determination has effect accordingly."

²⁰ Telecommunications Act 1997 (Cth) c6(1)(c) of Schedule 3.

²¹ Telecommunications Act 1997 (Cth) c6(1)(d) of Schedule 3.

²² Telecommunications Act 1997 (Cth) c6(2) of Schedule 3.

²³ Telecommunications Act 1997 (Cth) c7(1) and (2) of Schedule 3.

The “low impact facility” exemption and the “maintenance” exemption have proved to be the most significant. The other exemptions are either narrow (in the case of the defence exemption and the pre 30 June 1997 exemption) or the processes required in order to obtain the exemption are too onerous for it to have ever been used in practice (in the case of the facility installation permit exemption).

Low Impact Facilities

Both the ‘low impact facility’ exemption and the ‘maintenance’ exemption turn on the definition given to a ‘facility’ by the 1997 Act. The Act defines a ‘facility’ to be:

- (a) any part of the infrastructure of a telecommunications network; or
- (b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.²⁴

The Act gives the Minister the power to declare that certain specified facilities, are low impact facilities.²⁵ The power of the Minister to make declarations that certain types of facilities are low impact facilities does not extend to facilities which are designated overhead powerlines or certain types of towers and extensions to towers.²⁶ Pursuant to the power granted by the 1997 Act the Minister has published the *Telecommunications (Low-impact Facilities) Determination 1997* (as amended by *Amendment No. 1 of 1999*) (“the Determination”) which identifies, in detail and by reference to:

1. a description of the relevant facility,
2. the allowable dimensions of the facility, and
3. a description of the zone in which the facility is to be located,

the types of facilities which are low impact facilities. For example, a radio-communications dish of not more than 1.2 m in diameter will be a low impact facility providing it is colour matched to its background and is located in areas zoned residential, industrial, commercial or rural. An examination of the types of facilities covered by the Determination is beyond the scope of this paper. Rather, this paper is concerned with the manner in which the exemptions granted by the 1997 Act have been interpreted and been applied by the courts and tribunals.

²⁴ Telecommunications Act 1997 (Cth) s 7.

²⁵ Telecommunications Act 1997 (Cth) c6(3) of Schedule 3.

²⁶ Telecommunications Act 1997 (Cth) c6(4)-(7) of Schedule 3.

In *Telstra Corporation Limited v City of Marion*²⁷ the Environmental Resources and Development Court of South Australia was asked to consider whether a mobile phone base station consisting of a pole, antennae, equipment hut and a fence was a low impact facility covered by the Determination. It was accepted by the parties that the antennas and equipment hut were low impact facilities and that no development consent was required to erect the fence. However, under the terms of the Determination, it was clear that the pole was not, by itself, a low impact facility. Telstra argued that no development consent was required for the pole whilst the council argued that development consent was required. The Court noted that:

*It seems to me that the appropriate course is to proceed to deal with the proposed development as if one were considering an application under the Development Act, taking care, at each stage, to assess whether the Telecommunications Act provisions override the Development Act. Adopting this course, the Court should determine the nature of what is proposed. Is it merely the construction or installation of a number of items, namely the pole, the antennae, the equipment hut and the fence? Alternatively, is it the construction and operation of a telecommunications network station, or as Mr Manos for the Council would have it, a transmitting station?*²⁸

The Court held that:

...one has to look at the purpose of the building work to determine the nature of what is proposed It is my concluded view that what is proposed by Telstra is not to be considered as a collection of components or separate items. The development will involve building works for the establishment of a telecommunications network station. Unless all components are low-impact facilities within the meaning of the 1997 Determination, the proposed use of the site on which the building work is to occur cannot be overlooked, given the provisions of the *Development Act*.

It follows that the proposed telecommunications network station was, at the relevant time, "development" within the meaning of the *Development Act*, notwithstanding that the "pole" forming part of the proposal was to have a height of less than ten metres. Therefore, the works commenced by Telstra, required development authorisation under the *Development Act*.²⁹

Accordingly, under this approach:

1. the proposed telecommunications facility is considered as a whole for the purpose of determining whether it is a form of development which requires consent under the relevant state or territory planning regime; and

²⁷ *Telstra Corporation Limited v City of Marion* [2000] SAERDC 70 (6 October 2000).

²⁸ *Telstra Corporation Limited v City of Marion* [2000] SAERDC 70 (6 October 2000). Per Justice Trenorden at para 17.

²⁹ *Telstra Corporation Limited v City of Marion* [2000] SAERDC 70 (6 October 2000). Per Justice Trenorden at para 18-21.

2. each element of the proposed telecommunications facility is considered separately in determining whether or not the low impact facility exemption applies.

The approach taken by the Environmental Resources and Development Court of South Australia in *Telstra Corporation Limited v City of Marion* has been applied in New South Wales.³⁰

A different approach was taken by Justice Balmford of the Victorian Supreme Court in *Director of Housing v Hutchison 3G Australia Pty Limited*.³¹ This case concerned an appeal against a decision of the Victorian Civil and Administrative Tribunal to the effect that a telecommunications facility sought to be installed by Hutchinson was a low impact facility within the meaning of the Determination. The Court noted that the purpose of both the 1997 Act and the Determination was to "... reconcile the need for an efficient roll-out of telecommunications facilities with the community concern for the impact of the installation of those facilities..."³² The Court noted that the definition of "facility" contained in the 1997 Act was, at first glance, "extremely wide ...[extending beyond] the natural and ordinary meaning..."³³ and that given that the definition was "not unmistakable or unambiguous"³⁴ it was appropriate to interpret the definition "narrowly rather than widely given that its interpretation is related to the power of a carrier to invade the property of another for the installation of a 'facility'."³⁵ Given this, the Court held that it was appropriate that:

...where, as here, the evidence is such that a group of ... objects are installed together, in one place, physically connected to each other ... in order to carry out a single purpose [the 1997 Act is not] intended to have the effect that each of those objects is considered separately in order to ascertain whether it is a 'low impact facility'. The conclusion to be drawn from the evidence ... is that what has been installed on the building is one facility, namely a base station with antennas, with one purpose, namely to fill the 'hole' in the radio signal coverage for Hutchison's networks.

If the facility is considered as one 'facility', it is apparent that it does not fall within any of the relevant items of "low impact facility" appearing in the Schedule to the Determination. There is no item consisting of a "base station with antennas."³⁶

³⁰ The issue was not directly raised in *Hurstville City Council v Hutchinson 3G Australia Pty Limited* [2003] NSWLEC 52, however, I applied a similar approach to that taken in *Telstra Corporation Limited v City of Marion* in determining whether certain elements of a proposed telecommunications facility were themselves "low impact facilities".

³¹ [2003] VSC 310 (27 August 2003).

³² *Director of Housing v Hutchison 3G Australia Pty Limited* [2003] VSC 310 (27 August 2003) at paras 6-10.

³³ *Ibid.* At para 24.

³⁴ *Ibid.* At para 28.

³⁵ *Ibid.* At para 28.

³⁶ *Ibid.* At paras 29-32.

The Court did, however, show some uncertainty in reaching this conclusion as it was prepared to address the arguments raised by the parties on the basis that the issue of whether the proposed development was a ‘low impact facility’ should be assessed in relation to each separate item included in the development in case its decision that the development constitutes one facility which is not a low impact facility should be wrong.³⁷ I understand that an appeal has been lodged with the Full Court in relation to this decision.

The effect of these decisions is that the manner in which the low impact exemption will be applied in Victoria may be different to the manner in which the exemption will be applied in South Australia.

Maintenance exemption

In *Hurstville City Council v Hutchinson 3G Australia Ltd*³⁸ the New South Wales Court of Appeal considered the scope of the ‘maintenance’ exemption. This case concerned an appeal brought by Hurstville City Council against a decision of mine to the effect that a light pole owned by the Council became a ‘facility’ within the meaning of the 1997 Act once Hutchison had determined, as evidenced by its giving notice, in accordance with the 1997 Act, to the council of its intention to carry out maintenance works in relation to the pole, that the pole was ‘for use’ in Hutchison’s telecommunication network.³⁹ The Court of Appeal held that, because such an interpretation of ‘facility’ within the context of the “maintenance” exemption would permit carriers to carry out ‘maintenance’ on objects such as buildings which did not belong to them merely because they intended to place a telecommunications facility on the building, the ‘maintenance’ exemption should “in the circumstances, be construed as operating only in situations where the carrier’s maintenance of an original facility would not constitute a trespass or other wrong.”⁴⁰ Accordingly, the Court held that the meaning of the term ‘facility’ as used in Schedule 3 to the 1997 Act should be:

...confined to any line, equipment etc or thing that is purpose built or dedicated by its inherent nature for use in or in connection with a telecommunications network or which is actually used accordingly. It

³⁷ Ibid. At para 37.

³⁸ [2003] NSWCA 179 (8 July 2003).

³⁹ *Hurstville City Council v Hutchinson 3G Australia Pty Limited* [2003] NSWLEC 52.

⁴⁰ *Hurstville City Council v Hutchinson 3G Australia Ltd* [2003] NSWCA 179 (8 July 2003). Per Mason P at para 59, Handley JA and McColl JA agreeing.

is not necessary to treat an existing (non purpose built) pole, structure or thing upon which a “facility” is placed as the facility itself.⁴¹

Part 2 - Planning Issues Arising in relation to Telecommunication Facilities

General

In circumstances where the exemptions granted by the Telecommunications Act are not available it will be necessary for those seeking to carry out works in relation to telecommunications facilities to comply with state and territory planning and environmental legislation.

A number of decisions have considered the planning issues which arise in relation to telecommunications facilities. As different planning regimes apply throughout Australia this paper does not (and indeed could not) attempt to grapple with the often difficult question of whether development relating to telecommunications facilities is permissible with development consent within each and every planning regime. Rather, this paper seeks to review the general planning issues which have been raised in merits appeals concerning telecommunications facilities and assumes that telecommunications facilities are permissible with development consent under the applicable planning regime.

The planning issues which are generally raised in merits appeals concerning telecommunications facilities fall into the following broad classes:

1. the need for the telecommunications facility;
2. the visual amenity of the proposed telecommunications facility;
3. the siting of the proposed telecommunications facility;
4. the health impacts of the proposed telecommunications facility; and, linked to the above
5. the types of conditions which can be imposed in relation to telecommunications facilities, particularly in relation to co-location.

⁴¹ Ibid at para 67.

A consideration of these issues gives rise to fundamental issues concerning the extent to which the federal telecommunications regime limits the powers of state and territory planning courts and tribunals in relation to telecommunications facilities in circumstances where the proposed development is not exempted by the 1997 Act from the need to obtain development consent.

Need for the Facility

Proponents for telecommunication facilities have, on occasion, sought to argue that in circumstances where it is established that the proposed telecommunications facility will result in adverse impacts, the need for telecommunications outweighs any such adverse impacts. The courts and tribunals appear to have given some weight to these arguments. For example, in *Hutchinson 3G Australia Pty Limited v City of Casey, K Carlyon and Ors*⁴² the Victorian Civil and Administrative Tribunal stated that:

*We recognise the need for telecommunications facilities in the business, family and recreational lives of many people. Ongoing demand for improved levels of service, a desire by operators to improve the quality of existing service, and, as is the case here, a desire to expand the range of services available to consumers can be expected. We give weight to the need to find suitable sites for these facilities, being mindful that they can not be screened in their entirety if they are to be functional and efficient.*⁴³

However, in the circumstances, the tribunal was “unable to reach a conclusion that those considerations outweigh our concerns about the inappropriate siting and unreasonable visual impact of the proposed tower.”⁴⁴

Similarly, in *O’Hagan v Yarra Ranges Shire Council*⁴⁵ a member of the Victorian Civil and Administrative Tribunal was prepared to concede that, given that the planning regime specifically recognised the importance of telecommunications and evidence had been adduced to show the need for the facility “...had I found a minor adverse impact on the environment as a consequence of this facility, the need for the facility would have caused me to grant a permit.”⁴⁶

⁴² [2002] VCAT 247 (5 April 2002).

⁴³ *Hutchinson 3G Australia Pty Limited v City of Casey, K Carlyon and Ors* [2002] VCAT 247 (5 April 2002) at [38].

⁴⁴ *Ibid* at [39].

⁴⁵ [2003] VCAT 583 (23 May 2003) at para 71.

⁴⁶ *O’Hagan v Yarra Ranges Shire Council* [2003] VCAT 583 (23 May 2003) at para 71.

Visual Amenity

That visual amenity is almost invariably raised in relation to telecommunications facilities should come as no particular surprise. As Commissioner Hodgson observed in *Optus Mobile Pty Limited v Norwood Payneham and Ors*:⁴⁷

By their very nature, telecommunications towers and antennae tend to be taller than, or visible above, buildings or structures within their locality, this being necessary to avoid such buildings or structures interfering with transmissions.

The extent to which a proposed telecommunications facility will impact on visual amenity necessitates a consideration of the visual impact of the proposed telecommunications facility on the area surrounding the development. In assessing the visual impact of telecommunications facilities the courts and tribunals have stressed that:

*Visibility cannot be equated to adverse visual impact. Although works may be visible and result in change, it should not be presumed that change is negative. It is the extent to which a development is compatible with the particular location and how policies seek to guide that change, that are most relevant.*⁴⁸

Whilst visual impact is always a function of the particular characteristics of the proposed development, a review of the decisions regarding the visual impacts of telecommunications facilities reveals some reluctance on the part of the courts and tribunals to refuse consent as a result of the visual impacts of telecommunications facilities. In practice, visual amenity has only proved a bar to the grant of consent in circumstances where telecommunications towers are sought to be located:

1. within a relatively consistent residential setting of predominately single story dwellings;⁴⁹
2. along main highways where the scale of the tower is considered to be unreasonably dominating in the context of the applicable planning regime which imposes high standards of visual amenity;⁵⁰ or
3. in an area so close to existing telecommunications facilities as to create a visually undesirable proliferation of such facilities.⁵¹

⁴⁷ [2000] SAERDC 22 at [26].

⁴⁸ *Hutchinson 3G Australia Pty Limited v City of Casey, K Carlyon and Ors* [2002] VCAT 247 (5 April 2002) at [40].

⁴⁹ *Lucent Technologies v Maribyrnong CC, Laffey and Ors* [2001] VCAT 1955 (27 September 2001).

⁵⁰ *Hutchinson 3G Australia Pty Limited v City of Casey, K Carlyon and Ors* [2002] VCAT 247 (5 April 2002).

⁵¹ *United Energy Limited v City of Stonnington* [2001] VCAT 338 (28 February 2001).

Visual amenity is unlikely to prove a bar to the grant of consent where telecommunications facilities:

1. are sought to be located in industrial areas;⁵²
2. are designed and situated so as to avoid constituting a dominant structure in the landscape;⁵³ or
3. will be landscaped so as to, over time, render the visual impact acceptable.⁵⁴

The Site of the Proposed Telecommunications Facility

Opponents to the grant of development consent for telecommunications have argued in a number of cases that consent should be refused on the grounds that alternative sites exist which, if selected by the proponent, would have resulted in considerably less adverse impacts than the site selected by the proponent. The courts and tribunals have uniformly refused to entertain this argument stressing that it is the merits of the proposal currently being considered which must be determined and not those relating to alternative sites.⁵⁵

The issue of alternative sites may only be raised in circumstances where the relevant planning regime required proponents to examine alternative location options and the identification of optimum siting.⁵⁶ In *O'Hagan v Yarra Ranges Shire Council* the Tribunal was satisfied that alternative sites, including the possibility of co-location, had been considered and that the alternative sites did not provide the same level of coverage which could be achieved from the preferred site.

⁵² In *Hutchison Telecommunications (Australia) Limited Trading as Orange v Wyndham City Council* [2001] VCAT 2425 (22 November 2001) Member Quirk observed at paragraphs 13 and 14 that: "If these facilities are not placed in industrial type areas then where can they logically seem acceptable? ... I do not think a thin monopole is necessarily an unattractive structure in an industrial or business area."

⁵³ *LaTrobe City council v Telstra Corporation Limited* [2000] VCAT 2488 (30 November 2000).

⁵⁴ *Edwards and Ors v City of Onkaparinga and Or* [2002] SAERDE 115 (13 December 2002).

⁵⁵ *Cable Wireless Optus Limited v Knox County Council* [2000] VCAT 900 (30 April 2000) at [28]. *Lucent Technologies v Maribyrnong CC, Laffey and Ors* [2001] VCAT 1955 (27 September 2001) at [42-44].

⁵⁶ *O'Hagan v Yarra Ranges Shire Council* [2003] VCAT 583 (23 May 2003).

The Health Impacts of Telecommunications Facilities

Of all the planning issues which may arise in relation to telecommunications facilities it is undoubtedly the potential health impacts of telecommunications facilities which causes the most concern to residents and councils.

Telecommunications facilities such as mobile phone towers emit low level radio frequency radiation (“RF Radiation”).⁵⁷ RF Radiation is a type of electromagnetic energy which is known to affect biological material by causing the molecules within it to vibrate and, at high enough levels, thereby generate heat.⁵⁸ The scientific community has not unanimously decided whether RF Radiation poses any health risks other than these heating effects.

The Australian Radiation Protection and Nuclear Safety Agency (“ARPNSA”), the Australian agency charged with protecting humans and the environment from the effects of radiation, accepts that the levels of RF Radiation emitted from telecommunications facilities such as mobile phone towers are fairly low in that the levels will not cause heating effects and that, in general, the levels of RF Radiation decrease as distance from the telecommunications facility increases.⁵⁹ ARPNSA states that: “The weight of national and international scientific opinion is that there is no substantiated evidence associated with living near a mobile phone base station or telecommunications tower poses a health risk.”⁶⁰ However, the Commonwealth Government continues to fund research into RF radiation⁶¹ and ARPNSA has made the *Radiation Protection Standard – Maximum exposure levels to radiofrequency fields – 3kHz to 300GHz* (“The ARPNSA Standard”).

As discussed above, carriers must be appropriately licensed under both the 1997 Act and the Radiocommunications Act 1992 (Cth) before they can utilise the radio spectrum to provide telecommunications services. The Australian Communications Authority (“the ACA”), the

⁵⁷ Australian Radiation Protection and Nuclear Safety Agency, “Fact Sheet – EME Series No. 1 – Electromagnetic Energy and its Effects.” http://www.arpana.gov.au/eme_pubs.htm.

⁵⁸ http://www.arpana.gov.au/is_antenn.htm.

⁵⁹ Ibid.

⁶⁰ Australian Radiation Protection and Nuclear Safety Agency, “Fact Sheet – EME Series No. 9 – What About Base Stations and Telecommunications Towers – Are There Any Health Effects.” http://www.arpana.gov.au/eme_pubs.htm

⁶¹ Australian Radiation Protection and Nuclear Safety Agency, “Fact Sheet – EME Series No. 3 – Australian Research Into EME.” http://www.arpana.gov.au/eme_pubs.htm

Commonwealth government body which is responsible for administering these Acts, has made the Radiocommunications (Apparatus Licence) Determination 2003 (“the Radiocommunications Determination”) under the Radiocommunications Act 1992 (Cth)⁶². The Radiocommunications Determination stipulates additional conditions relating to exposure to electromagnetic radiation which apply to spectrum licences and stipulates that, in areas where the public have access, the level of emissions must not exceed those contained in the ARPNSA Standard.

State courts and tribunals have dealt with health concerns on numerous occasions. In *Vertical Telecoms Pty Limited v Hornsby Shire Council*⁶³ the New South Wales Land and Environment Court was asked to refuse development consent to a communications tower on the grounds that such a refusal was necessitated by the precautionary principle as there remains some doubt about the alleged health risks of exposure to RF radiation. In this case the evidence led by the proponent established the proposed development did not pose any health risk. Justice Sheahan held that, given that:

The antennas proposed in this DA will cause an imperceptible increase in electromagnetic energy, but no safety or health risk outside the rim of the dishes themselves, access to which will be ... seriously restricted ...

*In these circumstances the court is not constrained to apply the precautionary principle and withhold consent.*⁶⁴

In determining whether development consent should be granted state and territory courts and tribunals have, to date, refused to impose stricter standards than those required by the Radiocommunications Determination. In *R. Hyett v Shire of Corangamite* the Victorian Civil and Administrative Tribunal held that “...the Tribunal is obliged to apply the relevant regulatory standards as it finds them and not to pioneer standards of its own. The creation of new standards is a matter for other authorities.”⁶⁵

Similarly, the courts and tribunals have declined to entertain arguments to the effect that development consent for telecommunications facilities should be refused on the grounds of

⁶² Section 73 of the Radiocommunications Act 1992 (Cth) gives the ACA the power to vary the conditions applying to spectrum licences.

⁶³ [2000] NSWLEC 172 (10 August 2000).

⁶⁴ [2000] NSWLEC 172 (10 August 2000) at para 67-68.

⁶⁵ *R. Hyett v Shire of Corangamite and Ors* [1999] VCAT 794 (30 April 1999).

the perceived loss of amenity arising as a result of the sincerely held view amongst certain members of the community that the proposed facility will pose a risk to health even though it complies with the relevant standards. In *Optus Communications Pty Limited v the Corporation of the City of Kensington and Norwood And Ors*⁶⁶ the South Australian Environment Resources and Development Court held that:

*We acknowledge the desirability of adopting a precautionary approach to the assessment of risk to humans of new land uses, but we are satisfied that the Australian and New Zealand Standard referred to above embraces the precautionary approach and that RFR levels likely to be emitted by the proposed telecommunications base station are well within that standard. Thus we do not accept that it is reasonable for the residents to perceive that the amenity of the locality would be affected by the proposed development.*⁶⁷

Whilst courts and tribunals have been reluctant to refuse development consent because of the possibility of health impacts, the positions adopted by courts and tribunals in relation to the consent conditions relating to RF radiation varies. This is not surprising given that parties are very likely to present issues differently across the country and the relevant planning regimes also vary.

The Resource Management and Planning Tribunal of Tasmania has held that it was “inappropriate” to impose a condition requiring the applicant to provide an independent assessment of the levels of RF radiation emitted by a telecommunications facility.⁶⁸ The Tribunal noted that: “in the case of a nation-wide system such as the system of cellular mobile telephone stations, where Australian Standards exist, the appropriate protection to the public is to be gained from those standards, and not from individual planning initiatives.”⁶⁹

In contrast to this, the Land and Environment Court of New South Wales has imposed a condition requiring the monitoring of RF radiation levels from a television tower in circumstances where the parties did not dispute that such a condition was appropriate.⁷⁰

⁶⁶ [1998] SARDC 480 (29 May 1998).

⁶⁷ [1998] SARDC 480 (29 May 1998).

⁶⁸ *A Lovibond v Devonport City Council* [1999] TASRMPAT 251 (20 December 1999).

⁶⁹ *A Lovibond v Devonport City Council* [1999] TASRMPAT 251 (20 December 1999) at para 12.

⁷⁰ *NTL Australia Limited v Willoughby Council* [2000] NSWLEC 244 (27 November 2000).

In *Optus Mobile Limited v Whittlesea City Council*⁷¹ the Victorian Civil and Administrative Tribunal would not impose a condition to the effect that the consent granted was temporary and expired in 2017 whereupon the telecommunications facility was to be removed. The council had sought to impose the condition out of concern for the possible health impacts arising should the adjacent land be developed for residential purposes. The Tribunal held that a consent could not be so revoked under the planning regime.⁷² The Tribunal held that even if a consent could be so revoked, the condition was unreasonable and unnecessary given that the proposed development would comply with the relevant standards.⁷³

Whilst state and territory courts and tribunals have, to date, declined to impose conditions of development consent which would require the proposed development to comply with a standard higher than the ARPNSA Standard the basis of this refusal is not yet clear. It remains to be established whether such decisions represent the individual court's recognition of the desirability of uniformity in standards governing telecommunications or whether the state and territory courts and tribunals do not have the power to impose stricter standards than those contained in the relevant Commonwealth standard imposed on carriers in their apparatus licence. In the absence of any other relevant standards which are stricter than the commonwealth standard being presented to a court or tribunal, this question may remain academic.

Other issues

The interaction between the Commonwealth regime and state and territory planning law raises certain specific issues. Amongst these are issues regarding the extent to which state courts and tribunals may:

- (a) impose conditions dealing with co-location; and
- (b) consider the extent to which a telecommunications facility resembles a low impact facility in determining its impact.

Constraining Co-location and Future Developments

⁷¹ [2003] VCAT 968 (16 June 2003).

⁷² Ibid at paras 22-26.

⁷³ Ibid at paras 22-26.

In addition to health impacts, one of the main concerns for those opposing the grant of development consent in relation to telecommunications facilities is the fact that once consent is given any alterations or additions (whether carried out by a current proponent or by another co-locating carrier) are likely to be low impact facilities and exempt from the need to obtain any further development consent under state law. In *Edwards and Ors v City of Onkaparinga and Or*⁷⁴ the South Australian Environment Resources and Development Court made it clear that it was not prepared to refuse consent on the basis of this concern. Similarly, the South Australian Environment Resources and Development Court refused in *Optus Communications Pty Limited v the Corporation of the City of Kensington and Norwood and Or*⁷⁵ to uphold a condition which would limit the number of antennas which could be attached to a mobile phone base station on the grounds that it would not be appropriate to do so if the Telecommunications Act 1997 permitted such antennas to be installed without development consent.

State courts and tribunals have, on occasion, been prepared to impose conditions aimed at encouraging co-location. The Victorian Civil and Administrative Tribunal has upheld a condition of consent which required the removal of an adjoining mobile phone tower and the co-location of the facilities located on that adjoining tower on the new tower the subject of the consent on the grounds that the relevant planning scheme recognised the desirability of co-location and such a condition would reduce the visual impact of the proposed development.⁷⁶ Similarly, the Resource Management and Planning Tribunal of Tasmania has upheld a condition requiring that the telecommunications facility be made available for co-locations on the grounds that the relevant planning scheme encouraged co-location.⁷⁷

Resemblance to Low Impact facility

In relation to telecommunications facilities which only narrowly escape being a low impact facility under the Determination, the issue arises as to the extent, if any, to which courts and tribunals can have regard to this fact in considering the merits of the proposed telecommunications facility. This issue was considered by the South Australian Environment

⁷⁴ [2002] SAERDE 115 (13 December 2002).

⁷⁵ [1998] SARDC 480 (29 May 1998).

⁷⁶ *Herlest Nominees Pty Limited v Monash City Council* [2000] VCAT 730 (31 March 2000).

⁷⁷ *A Lovibond v Devonport City Council* [1999] TASRMPAT 251 (20 December 1999).

Resources and Development Court in *Hutchinson 3G v Adelaide City Council*.⁷⁸ This case concerned a facility which, were it not to be located on a heritage listed building, would have been a low impact facility. The Court was prepared to accept that:

*Having regard to the fact that the proposal could be installed, without planning consent being required, on any other building within the locality ... it seems to me that the impact of the proposal on that locality cannot be considered to be of a kind which would bring it into conflict with the relevant provisions of the Development Plan...*⁷⁹

Conclusion

As this paper attempted to provide an overview of the many issues facing state courts and tribunals in relation to telecommunications infrastructure, I do not intend to provide any overriding conclusion about the individual issues raised. I note that, as the cases discussed in this paper indicate, state and territory courts and tribunals are facing a range of complex issues in reconciling the commonwealth telecommunications regime with state planning regimes. Issues remain about the extent of overlap between the two regimes. Given the complexity of the various regimes, complete reconciliation of these may take some time and there is likely to be further litigation around several of the issues covered in this paper.

⁷⁸ [2002] SAERDC 71.

⁷⁹ *Hutchinson 3G v Adelaide City Council* [2002] SAERDC 71 at paragraph 39.